DJF

CR 2008/4 (translation)

CR 2008/4 (traduction)

Thursday 24 January 2008 at 3 p.m.

Jeudi 24 janvier 2008 à 15 heures

8 The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral pleadings of the French Republic. I now give the floor to the Agent of France, Mrs. Belliard.

Ms BELLIARD:

l. Madam President, Members of the Court, it is a great honour for me to represent my country before your Court today.

2. As I begin the oral pleadings of the French Republic in this case, I wish to emphasize the French Government's confidence in the wisdom of your distinguished Court and in the justice of your decisions, a confidence reflected by acceptance of your jurisdiction in this case. I also thank Professors Hervé Ascensio and Alain Pellet, who, following on from me, will set out the arguments of the French Republic.

3. The Republic of Djibouti may rest assured that the forcefulness with which France aims to set out its arguments and defend the lawfulness of the acts or conduct held against it today — far from impairing the historical friendly links between our two countries — will reflect the mutual respect which has always characterized our bilateral relations. Above all, France nourishes the hope that the present proceedings will help to dissipate some of the misunderstandings which have arisen from time to time. I am convinced that such an aim cannot be better served than by seeking to designate and name, with the greatest possible precision, the disagreements, sometimes tacit ones, which have given rise to misunderstandings. Our joint presence before you will, I feel sure, only fortify and reinforce the friendship which has traditionally presided over relations between our two countries.

4. However, allow me, if you will, Madam President, to make a few brief introductory remarks at the outset on behalf of my delegation. The counsel who will follow me this afternoon in addressing the Court are fully alive to the vital mission conferred upon you by your status as "principal judicial organ of the United Nations". In the exercise of your contentious jurisdiction, and to paraphrase various provisions in Chapter II of the Statute of the Court, you are called upon to decide, in accordance with international law, the disputes of a legal nature submitted to you by

9 States, whose subject is the interpretation of a treaty, any point of international law, the reality of any fact which, if it was proven, would constitute a violation of an international undertaking or the nature or extent of reparations due for the breach of an international undertaking.

5. There is therefore no need for me to explain here that your Court cannot be called upon to establish the truth of facts which are the subject of criminal investigations in States, any more than their incrimination under national criminal law or their individual responsibilities related to such acts. If I recall the well-known characteristics of your Court, it is above all to express our fervent hope, which, I feel sure, is shared by our opponents, that the Court will perform its task dispassionately as regards the legal dispute between our two States.

6. You probably know that the legal investigations relating to the death of Bernard Borrel, and also the many other proceedings added to that first one subsequently, have received very wide media attention both in France and Djibouti. This has sometimes given our opponents cause to complain, and at others has confirmed their criticisms of the French authorities. As the freedom and independence of the press is very dear to me, I do not think that this is the place to comment on the comment.

7. It is also no mystery to anyone in this Court that the progress of justice, sometimes regarded as excessively slow, does not always follow the tempo public opinion would wish or always satisfy the legitimate need for truth of the individuals directly affected quickly enough. So it is particularly important in my view, in such situations, that all concerned take care not to confuse the respective jurisdiction of each institution and that legal rigour always prevails, regardless of the many sometimes contradictory claims expressed in the name of justice.

8. In this connection, it is part of the very idea we have of justice that the investigation into the death of Bernard Borrel should be conducted in full independence, notwithstanding the "questions on mutual assistance in criminal matters" between France and Djibouti, to use the designation so aptly chosen by the Court for these proceedings. But it is also important, for both Parties, for these proceedings to be conducted by reference to the case currently being investigated

10 by the domestic courts only to the extent strictly necessary for the settlement of the claim brought by the Republic of Djibouti against France.

9. It is against this background that it now falls to me to set out the general context in which the present dispute was brought before you and, above all, the precise subject matter of the dispute, defining which, I am firmly convinced, will mark an important step towards its settlement. I will conclude my presentation by recapitulating the various ongoing legal proceedings in France to which the two Parties have referred in the various phases of the proceedings, it being understood, as I have just said, that there is no question of bringing before you cases for which domestic courts have jurisdiction.

France's consent to submit the dispute to the Court

10. Madam President, the Republic of Djibouti submitted the present case to your Court in full awareness that there was no basis of jurisdiction enabling it to bring France before your distinguished Court. In its application dated 9 January 2006, the Republic of Djibouti states that it aims to found the jurisdiction of the Court, in application of Article 38, paragraph 5, of the Rules of Court, on the express consent the French Republic might give to submit the dispute referred to in that application to the judgment of the Court[1].

11. I wish to stress here that France, having considered the Application, decided in its sole discretion to consent to the jurisdiction of the Court in this case "pursuant to and solely on the basis of . . . Article 38, paragraph 5", of the Rules of Court. The French Republic indicated this through the pen of its Minister for Foreign Affairs in a letter addressed to the Registrar of the Court on 25 July 2006.

12. France's action in appearing before you today of its own volition is in many ways exceptional. For the second time, separated by an interval of a few years, France is thus testifying to the esteem in which it holds your distinguished Court. Indeed, the importance attached by my Government to this act must not be measured solely against the yardstick of the sometimes very technical questions relating to criminal judicial co-operation between States, which are at issue in
11 the present case. In agreeing to have these questions settled by the Court, the French Republic naturally wishes to express its full confidence in your distinguished Court to perform its jurisdictional function and thereby arrive at a definitive settlement of the present dispute. But it is

[1]Application dated 9 January 2006, p. 16, para. 20 (hereinafter "Application").

also important to see, in this decision, an expression of my country's devotion to the principles on which the harmonious development of international relations are founded: respect for international law, the performance of international undertakings in good faith and the peaceful settlement of disputes between States through the most appropriate channels.

13. It is therefore in this spirit that France responded positively to Djibouti's request for the matter to be decided by a judgment of your Court. In the view of my Government, the orderly, rigorous and dispassionate debate permitted by your Court, as well as the fully reasoned decision you will reach at the close of these proceedings will make possible a settlement of the dispute between our two countries.

14. I can only endorse the Republic of Djibouti when, in its Memorial, it expresses the need to preserve the ties of co-operation and friendship existing between our two countries[2] , and whose firmness and sincerity the dispute before us was in danger of jeopardizing. However, I would add that, for my country, this objective far exceeds its solemn proclamation in the Treaty of Friendship and Co-operation we concluded in 1977: far more than on a mere legal instrument, our co-operation and friendship are founded on a common history and language, as well as on in-depth exchanges in the most varied fields.

15. However, faithful to these values, France has not come before your Court seeking confirmation that it has scrupulously observed the general requirements of good-faith co-operation between two friendly countries. That, you will readily agree, does not fall within the mission of a Court of Justice, albeit the World Court. The French Republic has come to this Court for an indisputable ruling that none of the specific legal complaints raised against it before you can be upheld.

16. This now brings me, Madam President, to a consideration of the specific subject of the dispute which the French Republic has agreed to submit to your Court.

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The precise definition of the terms of the dispute submitted to the Court

17. Madam President, it would seem to me useful to stress how important, in the eyes of the French Republic, is the precise definition of the dispute submitted to you. To begin with, it

[2]Memorial dated 15 March 2007, p. 12, para. 12 (hereinafter "MD").

concerns the precise scope of your jurisdiction in this case and I know you will take the greatest care, before ruling, to ensure what the precise powers are which have been conferred upon you by the two Parties in this respect. But it also concerns the objective presentation of the concrete facts on which you are asked to rule. I shall start with a few words on the latter point before reverting, very briefly, to the former.

1. The definition of the object of the dispute

18. Defining the dispute, defining its actual subject, does not *a priori* pose any problem if one examines the first written pleading filed by the Republic of Djibouti. On page 4, paragraph 2, of the Application instituting proceedings, the Applicant states, describing it as exactly that — "subject of the dispute" — that it is France's refusal to transmit the record in the *Borrel* case to the Djiboutian authorities.

19. It will be for Professor Hervé Ascensio to show that the alleged violation of the Convention which binds us to Djibouti in the sphere of mutual assistance in criminal matters is anything but proven and that no other international undertaking on the French Republic could have been violated on the occasion of the refusal to transmit the record requested by the Djiboutian judicial authorities. At this stage, I would simply like to point out, as a matter of regret, that the details given of the definition of the dispute, in the first lines of the Application, are then altered in the Memorial filed by Djibouti on 15 March 2007.

20. Indeed, I believe I detect, in the written pleadings of our opponents, certain elements which could distort a proper understanding of the dispute which, Madam President, Members of the Court, has been submitted to you today. To begin with, under cover of a description of "the origins of the dispute between the Republic of Djibouti and the French Republic"[3], what one finds in their written pleadings is a very comprehensive presentation of the legal proceedings since 1995 and relating to the causes of the death of Bernard Borrel. I see no reason, in this connection, to further

13 rehearse the comments I have just made regarding the strict distinction which needs to be made between the proceedings relating to the jurisdiction of domestic courts on the one hand and the proceedings we are currently engaged in before your Court on the other. However, at various

[3]MD, p. 15.

points in the oral pleadings the Applicant has repeatedly and somewhat surprisingly voiced criticisms and made value judgments of the French courts[4] which criticisms we will therefore need to look at again, but which are mostly irrelevant. Indeed, we were surprised to note the comments by counsel of Djibouti disputing the jurisdiction of the French courts in other cases involving Djiboutian nationals[5]. I do not think it necessary to respond to those criticisms at length. On the one hand, the Applicant claims to be aware "that this question does not fall" within your jurisdiction[6]. On the other hand, never, until last Tuesday, did the persons indicted or our opponents see fit to rely on the French court's lack of jurisdiction. Admittedly, such a statement would hardly have had much chance of success: the investigation opened for subornation of perjury does indeed fall within the jurisdiction of the French courts since Mrs. Borrel, a French national, brought a civil action in this case. I would therefore simply point out that those concerned, no doubt aware of how shaky such arguments were, have never disputed the jurisdiction of the French court seised, or, for that matter, asserted that the offences they are accused of could fall within the ambit of their official activities.

21. Moreover, it has not escaped the Court that the Republic of Djibouti has devoted considerable space in its Memorial, and again in the oral pleadings of the last few days, to justifying its "full and wholehearted co-operation, in good-faith" in the execution of various international letters rogatory relating to the *Borrel* case[7]. This presentation is wholly slanted towards the conclusion that, by refusing to execute the international letter rogatory issued by the

14 Djiboutian judicial authority, France somehow failed to meet an obligation of reciprocity[8]. By heaping one proof of its full co-operation on another, the Applicant reckons it can show a lack of co-operation by France and thus charge it with breaching its international undertakings. This

[4]CR 2008/3, pp. 10-12, paras. 12-16, (Mr. Condorelli).

[5]*Ibid.*

[6]*Ibid.*, p. 12, para. 16.

[7]MD, pp. 17-25, paras. 31-56. See also CR 2008/1, p. 16, para. 10, p. 18, para. 13 (Doualeh) and p. 61, para. 24 (Condorelli); CR 2008/2, p. 29, paras. 2-3 (van den Biesen).

[8]MD, pp. 25-30, paras. 57-69.

strategy, which might be likened to "impressionist" painting, in which the feelings of the observer do not result from an exact representation but rather from suggestion, cannot, in my view, convince the Court.

22. As I have already said, I will leave to Mr. Ascensio the task of exhaustively refuting the specifically legal arguments raised by the representatives of Djibouti, and concerning both alleged violations of the Treaty of Friendship and Co-operation concluded in 1977 between our two countries and violations, for which there is no proof either, of the 1986 Convention on Mutual Assistance in Criminal Matters. In so doing, I believe, Madam President, that the sometimes biased presentation of our dispute by the Applicant will not divert the Court from an objective consideration of the general conditions requests for assistance must meet, from the exact procedure which must be followed to act upon them and of the reasons and the forms, under the 1986 Mutual Assistance Convention, permitting a country's authorities to refuse to give effect to it. Such consideration ought not to leave any doubt regarding our full compliance with our obligations as well as our good faith.

23. On 19 October 1995, Bernard Borrel, a French judge seconded as Technical Advisor to the Minister of Justice of the Republic of Djibouti, was found dead not far from the capital, Djibouti. A judicial investigation was then opened, at the request of the Public Prosecutor's Office, at the Toulouse *Tribunal de grande instance*, in which city the Borrel family lives, and obviously no one has ever disputed the jurisdiction of the French courts to entertain the circumstances and causes of the death of a French national. The subject of this legal investigation, originally opened "into the cause of death" was rendered more specific, a year and a half later, when Mrs. Elisabeth Borrel, widow of Bernard Borrel, herself filed a complaint. By that complaint, Mrs. Borrel brought a civil action in the ongoing proceedings on the ground that her husband had been murdered. Consequently, the proceedings became an investigation against an unknown person — commonly termed a procedure "against X" — relating to the murder of Bernard Borrel. This type of proceedings against X is used when the prosecutor, having concluded his own enquiry, has not been able to identify the perpetrators of the crime with sufficient probability.

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24. It is these criminal proceedings, still pending, in connection with which the Republic of Djibouti requested transmission of the file on the basis of the Convention on Mutual Assistance in

Criminal Matters concluded on 27 September 1986 between our two countries. The true "facts" of the present dispute can therefore be resumed very succinctly, starting with the issuing of an international letter rogatory by the investigating judge in the Djibouti *Tribunal de première instance*, on 3 November 2004, followed by the rejection of that request by the investigating judge at the Paris *Tribunal de grande instance*, Mrs. Sophie Clément, on 8 February 2005, then the transmission, on 31 May 2005, to the Djiboutian authorities of the refusal to execute the international letter rogatory. We will revert, this evening and tomorrow, in greater detail to each of these stages having led, to borrow the terms of the Application, to 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'"[9]. That is the subject-matter of the dispute which concerns us.

25. Allow me, if you will, nevertheless, Madam President, to point out straight away that the manner in which the Applicant presents these different stages does not always help proper understanding of their precise legal significance.

26. To begin with, the Applicant appears to confuse various actions taken by the authorities with a view to obtaining transmission of the record of the *Borrel* case with the formal issuing of the international letter rogatory by the Djiboutian investigating judge, which is the only one which may be considered under the 1986 Convention and lead to consideration by the authorities of the requested State of the request for assistance. Yet such an international letter rogatory could be

16 issued — moreover, after information was provided to the Djiboutian authorities for this purpose — only when a judicial investigation had been opened at the *Tribunal de grande instance* in Djibouti. According to the text of the international letter rogatory dated 3 November 2004[10], a judicial investigation was indeed opened in accordance with an application by the State Prosecutor

[9] Application, p. 4, para. 2.

[10] MD, Ann. 20, p. 131.

of the Republic of Djibouti, dated 20 October 2004 with a view not only to opening an investigation against X for the murder of Bernard Borrel, but also, and I quote the Memorial, for "an international letter rogatory [to] be issued for the handing over" of the Borrel record[11].

27. From this first stage, the formal opening of the request for assistance, it seems to me two lessons may be drawn. First, it goes without saying, though it is much better to say it: the request for transmission of the record cannot be regarded as having been validly made before 3 November 2004. Hence, the emphasis by our opponents on the assurances allegedly already given by the French Government that the Borrel record would be transmitted to Djibouti is strictly irrelevant. Unless the procedures for legal assistance laid down by treaty and which must comply with the domestic legislations of each State are simply disregarded, one could hardly expect the record to be transmitted even before the request for it was made.

28. The second point, related to the preceding one, which needs to be stressed here, concerns the attitude of the French authorities prior to the issuing of the international letter rogatory. All the relevant documents for presentation of the request for assistance were provided to the Djiboutian authorities, in the spirit of co-operation which incidentally must always govern our relations, and it seems highly paradoxical to derive an argument from this, as the Republic of Djibouti does in order to hold France responsible for a violation of its international undertakings[12]. In any event, far from showing the "unilateral severing" of co-operation alleged by the Applicant, the following stages of the procedure clearly show, on the contrary, that France complied with its obligations.

17 29. The second stage, decisive as regards the dispute submitted to you, consists of the proceedings having led to the decision by the investigating judge, on 8 February 2005, to reject the request for transmission of the record of the *Borrel* case. Without encroaching on the explanations which will be given to you later by Professor Hervé Ascensio, I would first like to draw the Court's attention to the reasonable period of three months in which the request for assistance was considered by the investigating judge in charge of the *Borrel* case. Also, and regardless of the picture our opponents are seeking to paint, having us believe that the request could have been met immediately, there was no doubt that such a request required action by the investigating judge

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[11] *Ibid.*

[12] MD, Ann. 20, p. 131.

dealing with the case and also could raise difficulties with respect to the essential interests of the nation, bearing in mind the classified documents included in the record of the investigation. The Applicant could not have been unaware of either of these two facts, of which, moreover, it was informed. In any event, there can be no doubt, that in refusing to transmit the record of the *Borrel* case, the French authorities did not commit any breach of the 1986 Convention, which lays down, in Article 2, that (and I quote):

> "Assistance may be refused:
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> . . . . . .
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> *(c)* If the requested State considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests."

30. The right, in certain circumstances, to refuse to transmit the record would therefore clearly appear to be indisputable under the 1986 Convention and the Applicant has not reiterated orally the contrary idea it suggested throughout its written pleadings. By a new argument in relation to the Application and the Memorial, the Applicants now assert, surprisingly, that the letter of 27 January 2005 from the Director of the Private Office of the Minister of Justice in fact constituted the reply — a positive one — to the international letter rogatory. Mr. Hervé Ascensio will deal at greater length with this new argument, explaining to you the internal procedure applicable to consideration of a request for assistance and the crucial role of the investigating judge, in the case which concerns us, in deciding whether or not to transmit the record for which that judge is responsible.

18 31. Nor is the Applicant able to establish a violation by the French authorities at the third stage of the procedure. Here, too, Djibouti's reasoning is not without inaccuracies: the requesting State argues on the one hand that the request for assistance could in no event be refused, while simultaneously alleging that the French authorities violated their obligation to provide reasons for any refusal of legal assistance.

32. There is an abundance of evidence showing how well informed the Djiboutian authorities were of the grounds for that refusal. Formally, in a letter dated 31 May 2005, the Director of Criminal Affairs and Pardons at the French Ministry of Justice informed the Ambassador of Djibouti in France of the decision by the investigating judge, referring among other things to

Article 2 *(c)* of the Convention authorizing refusal of legal assistance. It is true that the Republic of Djibouti now explains that it never received any such letter. However, this assertion comes as something of a surprise when one reads, in the Application of 9 January 2006, that "the transmission of this record is contrary to France's fundamental interests"[13]. This indication alone should be enough to discredit the opposing Party's allegations of ignorance. However, the French Republic will make quite sure, in the following oral pleadings, that it presents to the Court all the evidence showing that the Republic of Djibouti was perfectly well informed of the ground for the rejection of its request for transmission of the record in the *Borrel* case.

33. Madam President, the dispute submitted to you may, in factual terms, be resumed in the three stages I have just referred to. There should therefore be no difficulty in defining its limits. However, the oral arguments of our opponents — as we already said in our written pleadings — largely exceed these limits. This brings me to the second point on which I consider it important to specify the exact subject of the dispute submitted to you, and on which I can be briefer.

19 **2. The limits of the subject of the dispute**

34. In point of fact, the confusion fostered over the specific and clearly circumscribed subject of the dispute between us would be of no consequence if all that was needed was a few further observations and clarifications. It would even be enough to rely on the very clear terms of the Djiboutian Application. Above all, a specifically legal examination of the Applicant's allegations ought to suffice to show its many weaknesses. Yet it was important, in my view, to point out that my government did not agree to submit the entire procedure followed in the *Borrel* case to the Court's evaluation, or a fortiori, other domestic criminal proceedings, which in any event it was not in a position to do in view of the statutory limitations on your jurisdiction and the principle of the independence of the legal authority enshrined in our Constitution. It is true that the Agent of the Republic of Djibouti felt duty bound to ask whether it would be more appropriate to speak of the Borrel "cases" than of "a Borrel case" in the singular.[14] I would point out that, underlying the legal aspects of this case is the murder of a man and the suffering of a family and

[13]Application, p. 10, para. 13.

[14]CR 2008/1, p. 17, para. 12 (Doualeh).

that, before your Court, we should confine ourselves solely to the case concerning that murder: the case investigated at the Paris *Tribunal de grande instance* and whose transmission was requested by the Djiboutian judicial authorities.

35. Regardless of the opposing Party's opinions on the conduct of the criminal investigations, of no relevance here, it would, on the other hand, be contrary to the consent given by my government to unduly broaden the scope by relying on the formulation of requests unrelated to the subject of the dispute, as the Applicant seeks to do. Beyond that, it would not only be the consent given by France in the case that would be at issue but also the attraction of Article 38, paragraph 5, of the rules of Court, which would be questionable if the interpretation of the consent given to the jurisdiction of the Court on the basis of that Article diverged from the actual terms of acceptance.

36. The same applies to the Applicant's conclusions regarding alleged violations by the French authorities of their obligations to prevent attacks on the person, freedom or dignity of an international protected person. These conclusions, hardly supported in the Application by the reference to the summonses served on the Head of State of Djibouti, the Head of National Security
20 and the State Prosecutor of the Republic to be heard before French courts, patently lack any connection with whether the French authorities could, under the rules governing judicial assistance between France and Djibouti, refuse to transmit the record of the judicial investigation in the *Borrel* case[15]. In developing its arguments relating to such conclusions in its Memorial[16] and, even more so, in its oral pleadings[17], the Applicant nevertheless did not succeed in justifying their inclusion in the present dispute.

37. However, on this point, as we had occasion to emphasize in our Counter-Memorial[18], the terms of the letter from the French Minister for Foreign Affairs accepting your jurisdiction, need to be closely examined. The French Minister was careful to add to the fact that the French Republic accepted the jurisdiction of the Court to entertain the application, that such consent is valid only "in

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[15]Application, p. 10, para. 13.

[16]See MD, p. 13, para. 14.

[17]CR 2008/1, p. 30, para. 22 (Condorelli).

[18]CMF, pp. 11-16, paras. 2.13 -2.26.

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"[19]. Although there is no doubt that some of the claims relating to attacks on the immunities of the President of the Republic of Djibouti or other leading figures are included in the Application, they are manifestly devoid of any link with the subject of the dispute, unless, once again, one considers that the Applicant is seeking to cast doubt as a whole on the proceedings relating to the causes of the death of Bernard Borrel and the other related proceedings and that that is the true subject of the dispute — but this is not what emerges either from the description of "the subject of the dispute" by the Application itself, or what the French Republic consented to.

38. Professor Alain Pellet will show, with all the talent of which he is capable, that such an extensive conception of the jurisdiction conferred on your Court in the present case cannot be accepted under the rules and principles governing the jurisdiction of your distinguished Court. However, from a more general standpoint, it is symptomatic that by adding allegations unrelated to the question of assistance which should be the only one of concern to us, the Applicant tends to

21 accredit the idea of a sudden "unilateral severing of mutual trust and co-operation" — those are its terms[20] — attributable to the French authorities. If France obviously deplores the fact that the French State may sometimes have been attributed with the aim of "destabilizing a country", Djibouti in the event[21], as stated in its Application, and that it was possible to think that the trust and co-operation between the French Republic and the Republic of Djibouti were severed, such assertions in no way establish that France refused to execute an international letter rogatory in violation of its international undertakings and, in the first place, of the 1986 Convention on bilateral assistance.

39. However, not wishing to leave any of the Applicant's allegations unanswered, we will take care, in our remaining oral pleadings, to examine the facts which Djibouti has seen fit to bring to the attention of the Court, sometimes even going beyond the limits *ratione temporis* of the consent given by France to the jurisdiction of the Court. We will revert in particular to the various

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[19]MD, Anns. p. 13, Ann. 2; emphasis added.

[20]MD, p. 25.

[21]Application, p. 10, para. 11.

allegations by the Applicant, according to which, on several occasions, we breached or infringed our duty to prevent attacks on the person, freedom or dignity of an internationally protected person. We will thus revert to the various steps taken in the course of the criminal proceedings, such as invitations to testify addressed to the Djiboutian Head of State and the summonses, as legally represented witnesses, of Djiboutian leading figures. We will show that those acts:

— either are not such as to attack the immunities enjoyed — a fact no one disputes —by the President of the Republic of Djibouti,

— or can in any event not constitute the alleged violation of international law, since the persons concerned do not enjoy — a fact which can scarcely be disputed — immunities under international law.

40. It is thus out of a desire to be exhaustive — although sometimes only in the alternative — that all the allegations raised by the Applicant will be precisely refuted during our oral pleadings. Hence, in view of the fact that Djibouti seeks to generalize the dispute to include all
22 the legal proceedings related to the *Borrel* case, it would be helpful, in the interests of clarity as regards the Court, to briefly recapitulate the proceedings which will be mentioned from this point to the end of our first round of oral pleadings.

Summary of the ongoing criminal proceedings

41. Madam President, there is scarcely any need for me to dwell on the only criminal proceedings concerned in the dispute before us. The Applicant has already devoted much space to the conduct of those proceedings in its Memorial[22], including giving to the Court many details on the legal investigations conducted on the substance of this case. The Applicant has also produced, among the additional documents presented on 21 November 2007, certain items of no great use in the dispute before us. In our written pleadings, it scarcely seemed relevant to us to go beyond what was strictly necessary in the chronology of those proceedings. And I will not revert, in the oral pleadings, to the latter; the pertinent elements are included in our Counter-Memorial[23]. A few moments ago, I also explained to you the various stages in the procedure for legal assistance,

[22]MD, pp. 15-25, paras. 20-56.

[23]CMF, p. 4, paras. 1.3-1.5.

leading to the refusal to transmit the record of this case to the Djiboutian judicial authorities. I need only point out here that the two invitations to testify as a witness (and not as a legally represented witness, as Djibouti finally conceded in the hearing)[24], addressed in 2005 and 2007 to Mr. Ismaël Omar Guelleh, President of the Republic of Djibouti, were from the investigating judge in charge of the *Borrel* case and in connection with his investigation. These two invitations to testify, as we will show, do not form part of the subject of the dispute brought before your Court.

42. Various other judicial investigations opened before French courts must also be mentioned, inasmuch as they will be referred to at a later stage in our oral pleadings. Hence, the summonses to appear as legally represented witnesses, then the arrest warrants issued against the Prosecutor of the Republic and the Head of National Security of Djibouti form part of a separate judicial investigation conducted by an investigating judge at the Versailles *Tribunal de grande instance* for subornation of perjury. The arrest warrants were issued on 27 September 2006 by the

23 *Chambre d'instruction* of the Versailles Court of Appeal, after the two persons concerned failed to answer a first summons as legally represented witnesses in this case. The trial is to open before the Versailles *Tribunal correctionnel* on 13 March next, moreover offering — let me point out in passing — a new possibility for the persons indicted to make full use of the rights of defence granted to them before French courts. But, before your Court, and while we have no doubt that, in the normal exercise of their duties, the persons concerned cannot claim to benefit from any immunities under international law, we will seek above all to emphasize that the arrest warrants complained of by Djibouti exceed the jurisdiction *ratione temporis* of the Court in the present case in that they post-date acceptance of the Application of Djibouti by France. In this connection, we cannot but be concerned at the idea that, in any proceedings closely or loosely linked with the *Borrel* case and casting doubt on the future of Djiboutian nationals, the Republic of Djibouti could see a "receptacle", to quote the Agent of Djibouti[25], for new alleged violations of international law.

43. Furthermore, proceedings, which are now closed following an order not to proceed, were conducted at the Toulouse *Tribunal de grande instance* after a complaint by Mrs. Elisabeth Borrel for public defamation as a result of an article published in the Djiboutian newspaper *La Nation*. It

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[24]CR 2008/1, p. 37, para. 13 (van den Biesen).

[25]CR 2008/1, p. 17. para. 12 (Doualeh).

was during that investigation that the Ambassador of Djibouti in France was invited to testify, on 21 December 2004, as mentioned in the Applicant's Memorial. Although it is not expressly mentioned in the Applicant's submissions, we will briefly comment on that invitation to testify, which was in no wise an attack on the immunities enjoyed by the Ambassador of Djibouti in France.

44. As we stated in our Counter-Memorial, a fourth judicial investigation must also be mentioned. Opened following a complaint by Mrs. Elisabeth Borrell for "statements seeking to exert pressure to influence the decision of a judicial investigating authority or trial court", these proceedings concern a statement by the spokesman of the Ministry for Foreign Affairs dated 29 January 2005 relating to Djibouti's desire to obtain a copy of the record of the investigation into the *Borrel* case. Among other things, these proceedings resulted in the decision by the Versailles
24 Court of Appeal of 19 October 2006 confirming the jurisdiction of the investigating judge to decide whether or not to transmit a record of the investigation in response to an international letter rogatory[26].

45. I should like to make a few brief remarks in conclusion:

— I can only share with the Applicants the assertion that every State, whichever it is, must respect the obligations incumbent upon it under international law, France just like Djibouti and Djibouti just like France. Similarly, every State must have an independent judiciary and this, I believe, is not challenged or cast doubt on by either of the parties before your Court. France, which respects that principle, can obviously not turn it to advantage to exonerate itself of its international obligations, but I cannot believe that the Republic of Djibouti is asking us to nullify such a principle in disregard of our bilateral convention of mutual assistance and in total disregard of the procedures laid down by our national legislation, to which the Convention refers.

— On the other hand, I would point out, to my surprise and regret, that the Agent of the Government of the Republic of Djibouti asserted that the French Republic would not respect the principle of equality between States. I would simply reply that the joint presence of our two States today before your Court provides a perfect refutation of this.

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[26] CMF, Ann. X11.

— Lastly, I would like to note with you the curious attitude of counsel of Djibouti, which consisted, on each of the points they raise, in adopting an argument at odds, to say the least, with the reasoning previously put forward in their Memorial, and this when the Republic of Djibouti was at liberty, having taken note of our Counter-Memorial, to request a second exchange of written pleadings. This attitude, confirmed by the substantial revision of the Applicant's final submissions may be illustrated with the aid of the following three examples:

(1) With respect to the jurisdiction of the Court and even though Djibouti appeared in its Application to be reducing the subject of the dispute to the sole question of the refusal to transmit the record of the *Borrel* case, our opponents scale down this case, potentially

25 submitting to your Court any future discussion of judicial proceedings presenting any link whatever with Djibouti. This, it seems to me, is a curious approach when one initially seeks to base oneself on the narrowly circumscribed procedure of Article 38, paragraph 5, of the Rules of Court.

(2) Subsequently, with respect to the claims manifestly exceeding the jurisdiction of the Court, the Applicant, who is anxious in its Memorial to defend the absolute and personal immunity of the State Prosecutor of the Republic and the Head of National Security, now appears to take refuge behind the immunity of the State.

(3) Lastly, with respect to the core of the dispute we must concern ourselves with, the Republic of Djibouti initially asserted, contrary to all evidence, that France was not entitled to refuse to execute the international letter rogatory issued by the Republic of Djibouti. However, at the end of its first round of oral pleadings, the Applicant, probably not very certain of its rights, now asserts that France agreed to execute the letter rogatory before their backing down. But regardless of the various constantly changing scenarios thus put forward by the Applicant, the procedure for judicial assistance having led to the refusal to transmit the record was fully in conformity with our domestic legislation and the requirements of the 1986 Convention.

46. I will conclude my statement, Madam President, Members of the Court, by thanking you for your kind attention. Taking the floor after me, if you will permit, will be Professor Alain Pellet, who will set out our observations regarding the jurisdiction of the Court and the admissibility of the Application of the Republic of Djibouti in the present case and Professor Hervé Ascensio, who will

deal with the merits of the dispute submitted to your Court. Mr. Pellet will take the floor again tomorrow on the alleged attacks on the immunities of the representatives of Djibouti and also on the claims for reparation made by the Applicant.

47. May I ask you to give the floor to Professor Alain Pellet. Thank you.

26 The PRESIDENT: Thank you Ms Belliard. Professor Pellet, you have the floor.

Mr. PELLET:

CONCERNING SOME ISSUES RELATING TO THE COMPETENCE OF THE COURT AND THE ADMISSIBILITY OF THE APPLICATION

1. Madam President, Members of the Court, even when one has the privilege of appearing regularly before your Court, to plead for one's own country is always a little special, a little more "moving", perhaps "stressful". This is particularly so when the proceedings in question raise important legal and moral issues, as is the case here.

2. It is partly because France did not wish any uncertainty to remain on the real ins and outs of the case — to which Madam Belliard has just referred — that it has agreed, for the second time, to appear before you solely on the basis of Article 38, paragraph 5, of the Rules of Court. In so doing its wish has been to enable you, Madam President, Members of the Court, to hear the case, that case and that case alone, that the Republic of Djibouti has submitted to you by its Application instituting proceedings of 4 January 2006.

3. What concerns us a little is that our opponents, while declaring themselves aware that "the extent of the Court's jurisdiction is strictly limited ratione materiae"[27], are attempting to extend it beyond the consent given by France to the exercise of your jurisdiction. As the Permanent Court has stated, "it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein" (*Prince von Pless Administration, Preliminary Objection, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14); and this applies *a fortiori* to the oral phase. In referring to this jurisprudence[28], the Applicant nonetheless broadens this subject, stealthily but obviously.

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[27]MD, p. 13, para. 18.

[28]See CR 2008/1, p. 24, para. 9 (Condorelli).

27 4. I should like to point out that this emerges from the letter from the French Minister for Foreign Affairs to the Registrar of the Court dated 25 July 2006[29]. This letter is found in the little file that we have prepared, in both English and French, in its English translation, under the heading 'Jurisdiction'. It is expressly stated there:

> "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."[30]

It is difficult to be clearer.

5. Madam President, I do not think that there is any value in my dwelling at length on the fundamental principle that governs the jurisdiction of the Court, which is based on the consent of the States in dispute. As it has repeated over and over again, "the Court can only exercise jurisdiction over a State with its consent"[31] (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France, the United Kingdom and the United States of America), Judgment, I.C.J. Reports 1954,* p. 32). This cardinal rule is obviously of general application, but its strict implementation is all the more urgent because we are dealing with Article 38, paragraph 5, of the Rules. It cannot be said that up to now this provision has found favour with States and a loose interpretation of the principle of consent would be sure to discourage those willing to use it.

6. It goes without saying that Djibouti thought that it could "reserve the right to amend and supplement" its Application — according to a very bad habit adopted by states that have recourse

28 to you — that France must be deemed to have given its consent in advance to an extension of your

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[29]MD, Ann. 2.

[30]Italics and underlining added.

[31]See also, for example, *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A No. 15*, p. 22; *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 15*, p. 22; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 102-103; *Ambatielos (Greece* v. *United Kingdom), Merits, Judgment, I.C.J. Reports 1953*, p. 19; *Continental Shelf (Libyan Arab Jamahiriya* v. *Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 22, para. 34; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1992*, p. 260, para. 53; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 312, para. 79; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Merits, I.C.J. Reports 2003*, p. 183, para. 42; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006*, p. 31-32, paras. 64 and 65, para. 88 and p. 51-52, para. 125.

jurisdiction that would result from stretching the demands of the applicant State. It has given its consent for the case, as submitted in the Application, certainly not as Djibouti would amend it according to the "right" (I put the word in quotation marks) that it has "reserved".

7. There can be no doubt that the final submissions that we were the first to see on Tuesday[32] by courtesy of its Agent stretch the subject-matter of the present case considerably, whatever its shrewd counsel may say. France cannot accept this, for reasons of principle.

8. These attempts at creeping extension of the Court's jurisdiction are or have been about the very basis of its competence and the subject of the dispute, both *ratione materiae* and *ratione temporis*.

9. In the main I will confine myself to an examination of these two points, because last Monday the Republic of Djibouti declared through one of its lawyers, in terms claimed to be clear but which seemed to me to be somewhat tortuous, that it "firmly maintained its view" on the possibility of other grounds of competence of the Court in the present case, while preferring "not to stress this aspect now"[33]. This after Djibouti had stated in paragraph 23 of its Application that it reserved the right — our opponents reserve many rights — "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 of 14 December 1973"; and after in its Memorial Djibouti "wishes to declare formally that . . . it reserves the right [again!] 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"[34], but this time without mentioning the 1973 Convention. This I can understand.

29 10. According to its Article 2, that convention is (exclusively) concerned with intentional acts:

> "*(a)* murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

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[32]CR 2008/3, pp. 36-37 (Doualeh).

[33]CR 2008/1, p. 21, para. 4 (Condorelli); see also p. 29, para. 20.

[34]MD, p. 13, para. 15.

(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 . . ."

and a threat or attempt to commit such attack or participation therein as an accomplice.

11. It is neither "plausible" (see *Ambatielos (Greece* v. *United Kingdom, Merits, Judgment, I.C.J. Reports 1953,* p. 18) nor alleged that an intention to murder a Djiboutian official or an attack endangering a person protected by the Convention is at issue. And it is quite obvious that the facts of the present case do not fall within its "provisions" (see *Oil Platforms (Islamic Republic of Iran* v. *United States of America, Preliminary Objection, Judgment, I.C.J. Reports 1966 (II),* p. 810, para. 16, and p. 820, para. 53; see also the individual opinion by Judge Higgins, *ibid*., 847 *et seq.*). In addition the jurisdiction clause in Article 13 that Djibouti cited in its Application[35] imposes prerequisites to the seisin of the Court which are obviously not met in the present case: negotiations about a dispute between the Parties "concerning the interpretation or application of this Convention" — which has never been raised between France and Djibouti — and the failure of a request for arbitration, which of course the Applicant has never made.

12. As to other hypothetical unnamed treaties that might found the jurisdiction of the Court in the present case there are two possibilities, as France has stated in its Counter-Memorial[36]: either these treaties (still a mystery for the present) add nothing to the competence of this Court and

30 it is difficult to see what Djibouti would gain by invoking them, or they would allow extension of the competence of this distinguished Court and additional submissions on this basis would not be admissible at this stage[37].

13. Mentioning bases of jurisdiction other than the consent given by France in the context of Article 38, paragraph 5 of the Rules is so fanciful that one wonders why Djibouti's counsel have nevertheless felt the need to do so before hinting at back-pedalling at the start of the oral proceedings. The answer is perhaps given by the Applicant's final claims which, whatever it said

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[35]*Ibid*., para. 23.

[36]CMF, p. 10, para. 2.7.

[37]See *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B No. 52*, p. 14; *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 28; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia, Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266-267, paras. 67-70; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 33, para. 49.

in argument, go beyond the demands in its Application in the context of the subject of the dispute, as defined by the Application. It is this attempt to extend the subject of the dispute submitted to the Court that I propose to deal with now, distinguishing, as I have said, between lack of jurisdiction *ratione materiae* and *ratione temporis*. Before that, however, a few words on the principles applicable.

1. The fundamental principle: the applicant State cannot extend the subject of the dispute

14. Whatever the ground of competence invoked by the Applicant, the fundamental principle is clear and firmly established: the applicant State cannot extend the subject of the dispute. In the present case, this subject is described as follows in Djibouti's Application:

> "The subject of the dispute concerns the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the "Case against X for the murder of Bernard Borrel", in violation of the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic, of 27 September 1986, and in breach of other international obligations borne by the French Republic to the Republic of Djibouti."[38]

31 15. In his pleadings last Monday, Professor Condorelli admitted that "Djibouti's Application can doubtless be faulted for the lines under its heading "Subject of the dispute" because these are confined referring to the refusal by the French governmental and judicial authorities to execute a letter rogatory, etc." And he conceded that "it is true that no reference is made to the immunities, privileges and prerogatives of the Djiboutian Head of State and other high-ranking officials of the Applicant"[39].

16. Madam President, contrary to what the other Party takes pains to have us believe, this limitation of the subject of the dispute by the Application to the refusal to execute the international letter rogatory of 3 November 2004 is in no sense a simple blunder arising from an oversight:

— firstly, it would perhaps be possible to accept the blunder argument if it had happened once; but this is not the case: defined, as I have said, in the Application, the subject of the dispute is set out in almost identical terms in the Memorial and quoted again, this time in quotation marks

[38]Application, para. 2.

[39]CR 2008/1, p. 26, para. 15 (Condorelli).

and unchanged, in the introduction by the Agent of Djibouti in that country's pleadings last Monday[40] — *errare humanum est, sed perseverare . . .*; the Republic of Djibouti persists in what its counsel calls a "blunder", although it has clearly noticed it;

— secondly, it persists "almost" but not fully in that it attempts to make up for what it thinks *ex post* was an error in defining the subject of the Application, because its Memorial inserts two new small words into the definition of the subject of the dispute: it is stated there – I am reading the form of words used in the Memorial, but summarizing it insofar as its wording is identical to that in the corresponding passage in the Application, and the two definitions of the subject of the dispute by Djibouti, first in its Application then in its Memorial, are in the Judges' Folder on one page. This will help you, Madam President, Members of the Court, to seek the error more easily:

32 "The subject of the dispute concerns the refusal by the French . . . authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the . . . "Case against X for the murder of Bernard Borrel", in violation of the Convention on Mutual Assistance [. . . of] 1986, and" — and this is where the two new words come in: "*the related breaching* ["the related breaching" instead of "in breach"] of other international obligations borne by the French Republic to the Republic of Djibouti."[41]

17. But meanwhile France had consented to the Court's jurisdiction "in respect of the dispute *forming the subject of the Application*"[42], and the merger of the Application (which defines its subject) with the acceptance of that subject by France ties up the dispute and is both the basis and the limit of the Court's jurisdiction — which moreover the Republic of Djibouti seems to accept[43]. That being the case, The Applicant was not (and is not) free to amend the subject of its Application. The Memorial of Djibouti is clearly endeavouring, though subtly, to enlarge that subject, as defined in paragraph 2, by an extension to breaches other than those that would arise from a refusal to give effect to the letter rogatory of November 2004; and it is now claimed that these breaches are "related" and are "of three types"[44].

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[40]CR 2008/1, p. 10.

[41]Italics added. See CR 2008/3, p. 35, para. 2 (Doualeh).

[42]See letter from the French Minister for Foreign Affairs of 25 July 2006, MD, Ann. 2 — italics and underlining added.

[43]See CR 2008/1, p. 23, para. 8; or pp. 24-25, para. 11 (Condorelli).

[44]See CR 2008/1, p. 19, para. 17 (Mr. Doualeh) and CR 2008/3, 2 p. 36, para. 3 (Doualeh).

18. This international letter rogatory — the refusal of which is the sole subject of the dispute submitted to the Court by Djibouti — gives formal effect to the request to transmit the "contents of the Borrel file under investigation by Vice-President Sophie Clément"[45] submitted by the State Prosecutor of the Republic of Djibouti, very much present in this case, on 17 June 2004. This international letter rogatory was formally delivered (with the assistance of the French authorities) on 3 November 2004[46].

19. So it is the refusal by the authorities of the Republic to give effect to that international letter rogatory (and that refusal only) that forms the *subject* of the dispute, as described by Djibouti in its Application and for which France has accepted the jurisdiction of the Court. This, to adopt
33 the expression in the 1998 judgment in the *Fisheries Jurisdiction* case, is "the specific action that gives rise to the dispute"; it is this which establishes the dispute that the Court is called upon to settle and for which the consent given by France "strictly within the limits of the claims formulated" by Djibouti in its Application establishes its jurisdiction.

20. As the Court has said on several occasions, and this jurisprudence was referred to on Monday by Professor Condorelli, a declaration whereby a State accepts the jurisdiction of the Court "must be interpreted as it stands, having regard to the words actually used" (*Anglo-Iranian Oil Co.* (*United Kingdom* v. *Iran, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p.* 454, para. 47) and applied "as it stands" *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957,* p. 27). What is required is to bring out "agreement on a single and precise subject exactly identifying the area of jurisdiction of your honourable Court"[47], to adopt the formula used by my opponent (with which I am in agreement — on this point). France has accepted your jurisdiction, Madam President, Members of the Court, "in respect of the dispute forming the subject of the Application". The meaning of this acceptance is clear; the words to formulate it are clear; its scope is clear.

21. I must now add two things in reply to what Mr. Condorelli said last Monday.

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[45]MD, Ann. 16; see MD, p. 26, para. 59.

[46]MD, Ann. 20; see Application, para. 12, and MD, p. 28, para. 64.

[47]CR 2008/1, p. 23, para. 8 (Condorelli).

22. Firstly, in the scenario that interests us, i.e. in the context of the application of Article 38, paragraph 5, of the Rules, it is not so much the intention of the applicant State — on which the other Party lays stress almost exclusively — that matters as the consent of the Respondent; it is the latter's acceptance that forms the basis of the Court's jurisdiction and, as Professor Condorelli has observed, this consent may be limited, partial[48]. I do not think that this is the case here; but whether or not this is a limitation of the Court's jurisdiction, the fact is that France has expressly referred to the subject of the Application and has in any event limited its acceptance to that subject.

34 23. Secondly, my opponent is attempting to get round the difficulty by trying to make the claims of the Republic of Djibouti prevail over the subject of the Application as Djibouti has defined it, and which France has accepted for the purpose of the present dispute. Relying on these claims, Professor Condorelli asserts: "In short, the intention in the Application is indisputably to submit to the Court a dispute that breaks down into several claims, and is therefore broader than the sole issue of violation by France of its obligation to afford mutual assistance"[49]. Perhaps this was Djibouti's intention, Madame President, but France's intention was to limit its acceptance of the Court's jurisdiction to the subject of the Application — and it is only to the extent that these two wishes converge that the Court can exercise its jurisdiction.

24. In order to claim the contrary, Mr. Condorelli relies on the end of the sentence by which on 25 July 2006[50] the French Minister for Foreign Affairs consented to the Court's jurisdiction. It states that "[t]he present consent to the Court's jurisdiction is valid only […] in respect of the dispute forming the subject of the Application *and* strictly within the limits of the claims formulated therein by the Republic of Djibouti". Without the necessity for constructing far-reaching theories that means, in accordance with the natural and ordinary meaning of the words — carefully weighed — in the Minister's letter, that France has limited its consent to the Application as it defines its own subject *and* to the claims formulated therein. To these, provided that they come within the subject of the Application; to the subject, insofar as it finds expression in the claims formulated in the Application.

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[48]CR 2008/1, , p. 25, para. 11 (Condorelli).

[49]CR 2008/1, p. 27, para. 16 (Condorelli).

[50]MD, Ann. 2.

2. The limits of the Court's jurisdiction *ratione materiae*

25. So your jurisdiction *ratione materiae*, Madam President, Members of the Court, extends to (but not only to) the French refusal to give effect to the international letter rogatory of November 2004 allegedly in breach of the 1986 Convention, but not to the other allegedly related breaches. There is more than a slight difference here: Djibouti had limited the subject of its Application to the refusal to give effect to the international letter rogatory of November 2004,

35 represented as contrary to the 1986 Convention and to "other international obligations borne by the French Republic" — this was *one* breach — the refusal to transmit the record as part of the execution of the international letter rogatory — of obligations derived from several sources. Now our opponents intend to add new alleged *breaches* (in the plural) to the breach alleged initially and to which they are allegedly related. This is obviously an extension of the subject of the application. We go from one alleged internationally wrongful act consisting of the joint breaching of obligations based on various sources to several internationally wrongful acts, and as Djibouti knows very well that this is something completely different it covers these newly invoked breaches with the handy cloak of "relationship".

26. However, Madam President, it is not enough to postulate the existence of a "relationship", it must be established. And it is certainly not enough for "the Application to have referred to the issue by the French judicial authorities of witness summonses directed to the Head of the Djiboutian State and high-ranking Djiboutian officials" as the Agent of Djibouti has stated[51], for it to be so. The Court cannot be content with simple affirmations in this connection.

27. Of course we do not dispute that some of the submissions in the Memorial meet this condition. This is certainly true of those in paragraphs 1 and 5 of the Djiboutian claims[52], which bear directly on the international letter rogatory. Moreover, it is significant that paragraph 1 — I refer to the Memorial — adopts the wording of the Application: the French refusal to accept the letter rogatory is allegedly contrary to the 1986 Convention, the 1977 Treaty of Friendship and "other rules of international law applicable to the present case"; France has accepted the jurisdiction of the Court for this purpose. But this is not the case with regard to:

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[51]CR 2008/1, p. 10 (Doualeh).

[52]MD, pp. 67-68.

— the second submission, which relates to "summoning as *témoins assistés* [legally represented witnesses] the Djiboutian Head of State and high-ranking figures in Djibouti and issuing international arrest warrants against the latter"; or

36 — the sixth, which asks the Court to decide that "the French Republic shall withdraw and cancel" these summonses to testify in respect of subornation of perjury in the Borrel case; or

— the seventh, which makes a similar claim about the arrest warrants.

28. The same considerations apply with respect to paragraphs 3-8 of the submissions that Ambassador Doualeh read at the end of the first round of pleadings by Djibouti, which do not come within the ambit of the subject of the Application as defined by the Applicant and as accepted by the Respondent.

29. The fact is that neither the summonses (some of which are imaginary — we will return to this point) nor the arrest warrants referred to by these submissions bear any relation to the international letter rogatory of 3 November 2004. The latter is concerned — *exclusively* — with "the record of the investigation in Paris, under investigating judge Sophie Clément, against X for the murder of Bernard Borrel"[53]. As France has explained in its Counter-Memorial[54], and as Madame Belliard has just pointed out, that case is legally and factually distinct

— both from the investigation into subornation of perjury which has been carried out since 2003 by Ms Belin and Mr. Bellancourt, investigating judges at the Versailles *Tribunal de grande instance*,

— and from the proceedings on defamation initially by an investigating judge in Toulouse pursuant to a complaint by Mrs. Borrel in 2002 and transferred the following year to the Paris *tribunal de grande instance* before Mr. Baudouin Thouvenot, who dismissed the case on 16 January 2007, a decision confirmed by the *chambre d'instruction* of the Paris Court of Appeal on 24 January 2007[55].

30. It is in the context of the first of these two cases — the case of subornation of perjury — *not the case investigated by Mrs. Clément* and referred to in the international letter rogatory

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[53]MD, p. 28, para. 64; see also MD, Ann. 20.

[54]CMF, pp. 4-7.

[55]CMF, Ann. X.

of 2004 that the witness summonses and the international arrest warrants affecting MM. Saïd and Souleiman referred to in the Djiboutian submissions were issued. Not being linked to the subject
37 of the Application in respect of which France has accepted the jurisdiction of the Court, these claims, Madam President, Members of the Court, must needs be dismissed *in limine litis* for lack of jurisdiction.

31. In an attempt to avoid this result, Djibouti claims that "initiating proceedings for subornation of perjury against high-ranking Djiboutian officials before the court in Versailles . . . had a direct and decisive effect on the decision to execute the letter rogatory" because in the decision of 8 February 2005[56] by "the investigating judge at the Paris *Tribunal de grande instance* in charge of the Borrel case" . . . the presence in the case file of documents relating to the case opened in the Versailles court for subornation of perjury against the State Prosecutor and the Head of National Security in Djibouti[57] is raised as the first reason that would justify the said refusal (it was Mr. Condorelli who said it, and he has more breath than I!). This assertion calls for three brief comments:

— in his order of 8 February 2005 the investigating judge expressly stated that it was "*another investigation* at Versailles";

— besides, in his last pleadings Mr. van den Biesen agreed that the file that concerns us — "*le* dossier", comme il l'appelle, est le "[seul] dossier relatif à la mort de Bernard Borrel, actuellement instruit par le juge Clément"; "la présente affaire ne porte que sur [c]e dossier", alors que les "trois [autres] ne peuvent être considér[és] comme étant rattach[és] à la présente affaire, dont est saisie la Cour"[58] — the other three files, including, therefore, the one relating to the subornation of perjury: and

— even if it is certainly justified, in any event it is not on the ground of abuse of procedure that the investigating judge bases his decision that execution of the request is likely to prejudice the essential interests of the French State pursuant to Article 2, *c*) of the 1986 Convention.

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[56]CMF, Ann. XXI.

[57]CR 2008/1, p. 30, para. 22 and CR 2008/2, p. 57, para. 4 (Condorelli).

[58]CR2008/3, p. 20, para. 12 (van den Biesen).

32. I repeat: it is Djibouti that has defined the subject of the Application, and France has consented to your jurisdiction, Madam President, Members of the Court "within the strict limits" thus defined — these are two intersecting consents, which establish your jurisdiction to the extent that they coincide. Contrary to what the other side implies[59], France obviously does not intend to evade the jurisdiction of the Court *within the strict limits* in which it has accepted it. And it is perfectly confident that the scope of its consent, which nothing compelled it to give, and which it did not wish to give beyond the limits set out in the letter from its Minister for Foreign Affairs of 25 July 2006, will not be abused.

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Madam President, do you wish me to finish or to stop here for a break?

Le PRESIDENT: Il serait sans doute bon que vous terminiez votre partie, ce qui, je suppose, devrait prendre encore 10 minutes. Pensez-vous en avoir pour plus longtemps ?

M. PELLET: Cela devrait prendre 15 minutes. Pour ma part, cela me convient — si ce n'est pas trop pour vous.

Le PRESIDENT: Je crains que ce soit trop. Faisons donc une courte pause maintenant. La séance est levée pour quelques minutes.

The Court adjourned from 4.25 to 4.40 p.m.

The PRESIDENT: Please be seated

Mr. PELLET: Merci beaucoup. So before this sacrosanct break I had elaborated upon the limits of the Court's jurisdiction *ratione materiae*. I am now going to turn to the limits of the Court's jurisdiction *ratione temporis*.

3. The limits of the Court's jurisdiction *ratione temporis*.

33. For good measure, Madam President, I would now like to draw your attention to another aspect of Djibouti's pleadings that raises serious problems of jurisdiction — this time from the *ratione temporis* viewpoint. In its submissions, read last Tuesday by its Agent, the applicant State expressly raises:

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[59]See CR 2008/1, p. 29, para. 20 (Condorelli)

39 — "the summonses as *témoins assistés* [legally represented witnesses] and arrest warrants issued against the State Prosecutor of the Republic of Djibouti and the Head of National Security of the Republic of Djibouti"[60] for subornation of perjury on 27 September 2006[61]; and

— the invitation to testify addressed to the President of the Republic of Djibouti by Judge Clément on 14 February 2007[62].

34. Not only are the arrest warrants of September 2006 linked to the case of subornation of perjury and therefore, as I had demonstrated before the break, unrelated to the international letter rogatory of November 2004, rejection of which by France is the sole subject of the present case. But in addition all these acts subsequent to the Application (which dates from 4 January 2006) are clearly no part of this subject and consequently not covered by the consent given by the French Republic. The Court's lack of jurisdiction to entertain these is equally clear.

35. In this connection I fear that Professor Condorelli has gone astray by not taking his stand on the ground of jurisdiction *ratione temporis* but on the impossibility for a State to transform a dispute brought before the Court by application "by amendments in the submissions into another dispute which is different in character"[63]; this ground is in no sense specific to lack of jurisdiction *ratione temporis*, but in fact refers to lack of jurisdiction *ratione materiae*. I will not return to this.

36. As regards lack of jurisdiction *ratione temporis* in itself, as Ambassador Shabtai Rosenne writes: "[t]ime is a factor that influences the Court's jurisdiction in several ways . . . *Ratione materiae* it is necessary that the events which gave rise to the reference to the Court occurred during the space of time in respect to which jurisdiction has been conferred on the Court"[64].

40 Although up to now the issue has been raised essentially with regard to acts prior to acceptance of the Court's jurisdiction, in this connection we can paraphrase what the Permanent Court said in the *Phosphates in Morocco* case "Situations or facts subsequent to [the expression of consent by

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[60]See CMF, Ann. VII.

[61]See CMF, Ann. VII.

[62]See CR 2008/3, submissions, p. 36, para. 3; see also MD, p. 48, para. 127; p. 49, para. 128 and p. 50, para. 132.

[63]See CR 2008/1, p. 31, para. 24 (Condorelli, citing *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173); see also the jurisprudence cited *supra*, note 14.

[64]*The Law and Practice of the International Court of Justice*, 1920-2005, Nijhoff, Leiden/Boston, 4th edition, 2006, Vol. II, p. 562. See also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Grotius Publications Limited, Cambridge, 1986, Vol. II, p. 435.

France to the jurisdiction of the Court] could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24; see also *Compagnie d'électricité de Sofia et de Bulgarie, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 82). Now obviously the dispute that the Court is called upon to settle today in accordance with the consent given by France did not arise about the arrest warrants or an alleged witness summons, which are subsequent to the filing of the Application.

37. Madam President, Members of the Court, I should like to ask you to reflect upon the consequences of Djibouti's argument if by some remote chance you had to follow it:

— as the Agent of France stated just now, on 13 March next the Versailles *tribunal correctionnel* is going to consider the case of subornation of perjury, in the context of which the State Prosecutor and the Head of National Security of Djibouti have been the subject of arrest warrants; if the judgment given at the conclusion of these hearings does not have the good fortune to please the Republic of Djibouti, is the Court going to accept new submissions by the Applicant on this subject?

— if tomorrow, or in a year, or in ten years, a Djiboutian judge makes a new request for mutual assistance or issues a new letter rogatory linked – more or less closely — to the "Borrel case" and if for some reason France refuses to give effect to it for a reason based on Article 2 of the 1986 Convention (or for some other reason valid in international law) will Djibouti be able to seise the Court again relying on the consent given by France in 2006? Or is this going to stop?

— if in future the investigation by Mrs. Clément leads to an invitation to a witness to testify, legally assisted or not, being a person whom the Djiboutian authorities regard as having acted as an organ of the State as part of his duties, could your Court entertain the case on the basis of the consent by France in 2006? This is simply unreasonable.

41 — more generally, the applicant State's extension of the jurisdiction of the Court, both *ratione materiae* and *ratione temporis*, on the basis of an improbable "relationship" would enable an applicant to procure practically unlimited successive extensions of your jurisdiction "by accretion" obviously incompatible with the principle of consensualism embodied in your settled case law[65].

[65] See *supra*, notes 14 and 44.

38. For all these reasons, Madam President, Members of the Court, without going back, I repeat it even if it is obvious, to its consent to your jurisdiction to entertain the Application by Djibouti, and within the strict limits of its subject and of the claims formulated therein and which come within the subject, the French Republic does not think that you can rule:

— either on the submissions of the applicant State that relate to a subject other than that defined clearly and restrictively in the Application, namely the refusal to give effect to the international letter rogatory of 3 November 2004 (this concerns paragraphs 3-8 of Djibouti's submissions, which its Agent read at the hearing on Tuesday afternoon[66]);

— or the claims directed at acts or conduct by the French Republic subsequent to the filing of the Application, i.e. 4 January 2006 (this concerns in particular the arrest warrants of 20 October 2006 and the invitation to testify addressed to the President of the Republic of Djibouti on 14 February 2007; the Court's lack of jurisdiction both *ratione materiae* and *ratione temporis* is established with regard to these three acts).

39. I have almost finished, Madam President, but with your permission I should like to make a final observation, both general and technical in nature.

40. In the *Phosphates in Morocco* case, the Permanent Court accepted the preliminary objection by France based on *ratione temporis* considerations and therefore decided that "the application submitted … by the Italian government [was] not admissible" With this in mind, France

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asked the Court in the submissions in its Counter-Memorial " to declare inadmissible the claims made by the Republic of Djibouti in its Memorial which go beyond the declared subject of its Application"[67].

Incidentally, one may think that this is as much a case of lack of jurisdiction as of inadmissibility, if not more so; and I agree that even the 1938 precedent is not clear because in the penultimate paragraph of the grounds for its judgment the Permanent Court states that as a result of the soundness of France's preliminary objection *ratione temporis* "it has no *jurisdiction* to adjudicate on this dispute" (*Phosphates in Morocco, Judgment, 1938, PCIJ, Series A/B, No. 74, p.* 29); the italics are ours.

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[66]CR 2008/3, p. 36-37 (Doualeh).

[67]CMF, p. 73.

41. Of course "[w]e know very well" as was recently observed about another case "that issues of jurisdiction, issues of admissibility and issues of substance are not separate hermetically sealed categories" (*Territorial and Maritime Dispute (Nicaragua v, Colombia), Preliminary Objections,* Judgment of 13 December 2007, separate opinion by Mr. Ronny Abraham, para. 6). Also of course, as the author of the same opinion said, the grounds that I have put forward amount to "an issue of lack of jurisdiction . . . or of inadmissibility of the claim . . ., really there is hardly any difference" (*ibid.*, para. 61): in both cases the Court is prevented from ruling on the merits. The fact remains that Frances's 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, referred to in great detail in the case involving the Democratic Republic of the Congo and Rwanda[68], consent governs its jurisdiction, not the admissibility of the application. As the Court declared forcefully in that Judgment:

> "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . . and . . . when that consent is expressed in a compromissory
43 clause in an international agreement [but the same is true *a fortiori* regarding an application "accepted" under Article 38, para. 5], any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application" (*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).

42. Consequently France will 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. We have thought it best to state this now, in fairness to the other side and to enable it to formulate such observations as it thinks fit in this connection.

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[68]Cf. *Mavromattis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* pp. 11-15; *Interpretation of the Statute of the Memel Territory, Merits, Judgment, 1924, P.C.I.J., Series A/B, No. 49,* pp. 327-328; *Electricity Company of Sofia and Bulgaria, Judgment, 1939, PCIJ, Series A/B, No. 77,* pp. 78-80; *South-West Africa (Ethiopia* v. *South Africa); Liberia* v. *South Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 344-346; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* pp. 427-429, paras. 81-83; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras*), *Jurisdiction and Admissibility, I.C.J. Reports 1988,* pp. 88-90, paras. 42-48; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 16, paras. 16-19; p. 24, paras. 39-40; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, , I.C.J. Reports 1998,* pp. 121-122, paras. 15-19; p. 129, paras. 38-39.

43. That point brings to an end my presentation for this afternoon, and I thank you, Madam President and Members of the Court, for listening to me with your usual kind attention; I would now ask you, Madam President, to give the floor to Professor Hervé Ascencio, who will discuss the alleged violations of the 1977 Treaty and the 1986 Convention on Mutual Assistance.

The PRESIDENT: Thank you Professor Pellet. I give the floor to Professor Ascencio.

Mr. ASCENSIO:

THE ALLEGED VIOLATION OF THE TREATY OF FRIENDSHIP AND CO-OPERATION OF 27 JUNE 1977 AND THE CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS OF 27 SEPTEMBER 1986

Madam President, Members of the Court, it is great honour for me to appear before this Court for the first time and, above all, to speak on behalf of the French Republic of which I am myself a citizen.

1. It falls to me to reply to the legal grounds on which the Republic of Djibouti relied to claim that the French Republic was in breach of its international obligations as a result of its refusal to execute an international letter rogatory. The letter rogatory at issue sought the transmission of a copy of the case file concerning the investigation opened at the Paris *Tribunal de grande instance* against X for the murder of Bernard Borrel. For simplicity's sake, I shall refer to that case file in this oral statement as the "Borrel file". However, I must stress, as, indeed, the Republic of Djibouti made very clear in its Memorial[69], and again in its oral arguments, that the dispute of which the Court has been seised relates neither to the substance of that case, nor to the investigation which is under way, but solely to the French authorities' refusal to execute the international letter rogatory in question. That is how the Republic of Djibouti itself defined the subject of the dispute in its Application. Professor Pellet reminded us of that just a moment ago.

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2. In both its Memorial and its oral arguments, the Republic of Djibouti has cited two legal grounds in support of its claim that there has been a breach of international law as a result of the refusal to execute that letter rogatory, and two grounds only. It has claimed that France has violated both the general duty to co-operate contained in the Treaty of Friendship and Co-operation

[69]MD, p. 10, para. 5.

between the French Republic and the Government of the Republic of Djibouti of 27 June 1977[70] and, also, the rules and procedures for mutual assistance provided for under the Convention on Mutual Assistance in Criminal Matters between the French Republic and the Government of the Republic of Djibouti of 27 September 1986[71]. Consequently, in order to reply to the arguments which the Republic of Djibouti has advanced, it is necessary to demonstrate that the French Republic has violated neither the 1977 Treaty of Friendship and Co-operation (I) nor the 1986 Convention on Mutual Assistance in Criminal Matters (II).

I. THERE HAS BEEN NO VIOLATION OF THE TREATY OF FRIENDSHIP AND CO-OPERATION OF 27 JUNE 1977

3. Madam President, Members of the Court, the Treaty of Friendship and Co-operation of 27 June 1977 has certainly not been violated as a result of the refusal to transmit the Borrel file to the Djiboutian authorities. For there to have been a violation, France would have had to fail to fulfil a legal obligation that could relate to the execution of international letters rogatory. However, it is impossible to identify an obligation of that nature in the Treaty. Of course, that does not imply that the Treaty contains no legal obligations. If the Republic of Djibouti needs reassurance on that

45 point, it may refer to paragraph 3.7 of France's Counter-Memorial, and let me just quote the first sentence to you: "Legal obligations appear in the Treaty either in certain areas of co-operation having nothing to do with judicial co-operation in criminal matters or in respect of setting up a joint commission."[72]

4. Truth to tell, it is not entirely apparent that the Republic of Djibouti takes a very different view. It too does not identify a specific legal obligation deriving from the actual terms of the Treaty and able to be relied upon in this case. That is why it has been obliged to devise a "general duty to co-operate" with legal effects as wide-ranging as they are vague.

5. That general obligation -- we are told in its Memorial -- is established by reading the preamble to the Convention in conjunction with certain of its articles, in the light of the aim and purpose of the Convention. To reinforce its interpretation, the Republic of Djibouti also refers to

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[70]MD, pp. 38 *et seq*.

[71]MD, pp. 42 *et seq*.

[72]CMF, p. 19, para. 3.7.

certain general principles, applied in relation to the Treaty. In its oral arguments, the methodology is rather different. It involves digging around for expressions here and there in the Treaty and concluding that, if they are all tacked together, an obligation is bound to result.

6. Madam President, Members of the Court, that kind of argument is tantamount to openly admitting that this "general duty to co-operate", with all of the legal effects that the Republic of Djibouti wishes to associate with it, does not exist in the Treaty itself. Consequently, France has not violated the Treaty. In order to persuade you of this, I must describe the content of the 1977 Treaty, before discussing the -- in truth, extremely hypothetical -- effects claimed by the Republic of Djibouti.

A. The content of the Treaty of Friendship and Co-operation

7. The Treaty of Friendship and Co-operation between France and Djibouti was concluded shortly after the Republic of Djibouti became independent. The two States wished to lay down the guiding principles and objectives for their co-operation in the future, "formally", as the Counter-Memorial records[73], as that also is significant. Consequently, we should hardly be surprised at the limited number of obligations that appear in the Treaty or the fact that they are vague.

46 8. In order to establish that a "general duty to co-operate exists", the Republic of Djibouti referred, in its Memorial, to the preamble, as well as Articles 1, 2 and 4 of the Treaty[74]. During the oral arguments, those same articles were cited, as well as Articles 3, 5 and 6[75]. The Republic of Djibouti thus invites us to analyse more all less the whole Treaty -- fortunately, that can be done fairly rapidly.

9. Neither the preamble to the Treaty, nor Articles 1 and 2 contain a legal obligation. They simply lay down guiding principles and express the joint political will to pursue broad objectives. Article 6 of the Treaty confirms that analysis, providing, as it does, for the creation of a Co-operation Commission "to oversee the implementation of the *principles* and the pursuit of the *objectives* defined in the present Treaty"; that says it all.

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[73]CMF, p. 20, para. 3.9.

[74]MD, p. 39, paras. 93-94.

[75]CR 2008/1, p. 55, paras. 8-9; and p. 57, para. 14 (Condorelli).

10. The Court considered the scope of similar terms in the *Oil Platforms* case. The issue in that case was to interpret Article 1 of the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States of America. The Court held that Article 1: "must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied" (*I.C.J. Reports 1996*, p. 814, para. 28). That also applies to the preamble and Articles 1 and 2 of the Treaty of Friendship and Co-operation between France and Djibouti. They simply fix objectives in the light of which the only legal obligations that actually appear in the Treaty must be interpreted and applied.

11. However, the Treaty lays down no legal obligation that would require the execution of an international letter rogatory. Article 3 relates to currency stability and economic development, which have nothing to do with mutual assistance. It is true that Article 4 of the Treaty establishes an obligation to co-operate. But the scope of that co-operation does not extend to judicial co-operation in criminal matters. Only the areas "of culture, science, technology and education" are mentioned. It is not, therefore, applicable to this case.

47 12. As regards Article 5, in its oral arguments, the Republic of Djibouti stressed the use of the future tense[76]. But tense is not everything; you have to look at the verb also! In this case, it is hard to claim that the verbs "foster" and "promote" reflect anything other than a fairly vague obligation to act.

13. Moreover, the co-operation to be fostered is co-operation between "public and private national organizations" and "cultural, social and economic institutions", terms that in no way relate to the judicial authorities. Finally, the scope of Article 5 cannot extend beyond the scope of the Treaty itself. The fact is that the 1977 Treaty of Friendship and Co-operation does not cover judicial co-operation in criminal matters. The preamble refers only to the "political, military, economic, monetary, cultural, social and technological fields", and none of the articles contains a reference to judicial co-operation.

14. In that connection, there is something I should mention in passing. France was anxious to reproduce the whole of the Treaty in Annex XII of its Counter-Memorial -- and you will also

[76]CR 2008/1, p. 55, paras. 8-9 (Condorelli)

find it at Annex 3 in your dossier. The reason for this was that the preamble was not included in the version that the Republic of Djibouti submitted at Annex 1 of its Application. It is thus easy to see in the preamble that the 1977 Treaty is limited to areas that do not encompass judicial co-operation in criminal matters.

15. That the States did not intend to include criminal matters is also confirmed, as far as France is concerned, by the procedure applied for ratification purposes. In his oral argument, Professor Condorelli mentioned the French instrument of ratification[77], which employs a perfectly normal form of words. It is more important to point out that the Treaty was ratified by the President of the French Republic without the need for parliamentary approval. However, had the Treaty involved specific legal obligations in relation to criminal matters, Article 53 of the French Constitution would have required parliamentary approval. According to Article 53, certain types of treaty, particularly those "which amend provisions of a legislative nature" can only be ratified or approved by means of a law. And criminal matters fall within that category, pursuant to Article 34 of the French Constitution. An example of the application of Article 53 of the Constitution is, moreover, provided by the procedure applied for the purposes of ratifying the Convention on Mutual Assistance in Criminal Matters between Djibouti and France of 27 September 1986.

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16. That limitation on the purpose of the 1977 Treaty also applies to Article 6, which, moreover, merely sets in place a Co-operation Commission able to make recommendations to the two Governments. Article 6 therefore has a relatively modest function, but that has not deterred counsel for the Republic of Djibouti from attributing quite extraordinary effects to it, even though, according to the Applicant itself, the Commission has not met for a very long time[78].

17. Article 6 is alleged to demonstrate that the 1977 Treaty "'oversees' all of the other successive bilateral agreements"[79]. This does not correspond to any kind of reality. There is no provision in the 1977 Treaty or the 1986 Convention on Mutual Assistance in Criminal Matters that establishes a legal link between the two instruments. *A fortiori*, then, there is no provision establishing any kind of hierarchy between them.

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[77]CR 2008/1, p. 54, para. 7 (Condorelli).

[78]CR 2008/1, p. 57, para. 15 (Condorelli).

[79]CR 2008/1, p. 57, para. 14 (Condorelli).

18. The Republic of Djibouti's interpretation of the terms of the Treaty is designed primarily to create a general impression, making it possible to suggest that the Treaty may give rise to some effect in this case. That effect is certainly not generated by the violation of a legal obligation which the Treaty is alleged to contain. What is more, the Agent for the Republic of Djibouti acknowledged that -- without actually spelling it out -- when he set out the list of the conclusions and submissions of the Applicant on conclusion of the first round of oral arguments. In relation to the 1977 Treaty, he cites a violation by France of the "spirit and purpose of that Treaty as well as the obligations deriving therefrom"[80]. It remains to be seen how, in the absence of any specific obligation in the Treaty having, allegedly, been violated, the Applicant intends nonetheless to have the 1977 Treaty produce an effect in this case.

B. The effects of the Treaty as claimed by the Applicant

19. Madam President, during the oral arguments, the Applicant maintained that "France is wrong to rely in its Counter-Memorial on your Court's famous *obiter dictum* in the
49 1986 *Nicaragua* judgment"[81]. The reference was to a passage in the judgment according to which there must be a distinction "between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty". As regards the latter, the Court considered that it was necessary to attach them to "specific fields" in order to demonstrate "effective implementation of friendship" and not "friendship in a vague general sense" (*I.C.J. Reports 1986*, p. 137, para. 273). The reference to that judgment was not -- or was no longer -- necessary, since the Republic of Djibouti was in no way suggesting that the legal obligations resulted not from the articles of the Treaty, but from its object and purpose[82].

20. But it seems to me to be very useful to keep in mind the Court's ruling, since the Republic of Djibouti is now seeking to employ the vague and general terms of "friendship and co-operation", and a few others as well, to make the 1977 Treaty produce legal effects that its content certainly does not support.

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[80]CR 2008/3, p. 37, para. 4, point 9 (Doualeh).

[81]CR 2008/1, p. 58, para. 17 (Condorelli).

[82]CR 2008/1, p. 58, para. 17 (Condorelli).

21. Counsel for the Republic of Djibouti refers, for instance, in his oral argument to the hypothesis of "unfriendly conduct" which -- if one follows closely -- allied with the principle of mutual respect between States, could result in a violation of the "obligations of co-operation laid down by the 1977 Treaty"[83]. He goes on to claim that certain violations, described as "serious", of the 1986 Convention on Mutual Assistance could, at the same time, constitute a violation of the 1977 Treaty, whereas that would not apply to a violation "of little importance"[84]. According to him, it is necessary also to take account of a "global context" which is "characterized by profoundly unfriendly acts"[85]. The final element in the mix is, and I quote, "the scope of the reference to the equality and due mutual respect between the Parties during co-operation in all the areas covered by the 1977 Treaty"[86]. All of that represents a "viewpoint [that] can certainly be defended", *in abstracto* he explains, although we do not know what the viewpoint *in concreto* is[87].

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22. The purpose of this succession of muddled expressions is to make it possible to advance one proposition: namely that the 1997 Treaty could have been violated "if the Court defines France's conduct as a serious violation of the 1986 Convention"[88]. That then is the kind of violation of the Treaty of Friendship and Co-operation which the Republic of Djibouti is now alleging.

23. We take the view that the Court should draw on its decision in the *Nicaragua* case and dismiss this kind of attempt to found responsibility on a series of vague and general terms. Furthermore, no provision of the 1977 Treaty and no provision of the 1986 Convention on Mutual Assistance displays the slightest reference to the other. A violation of the latter cannot, therefore, have the slightest effect on the former, particularly since they have different purposes, and the only legal obligations pertaining to mutual assistance in criminal matters appear in the Convention of 27 September 1986.

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[83] *Ibid.*, p. 60, para. 21 (Condorelli).

[84] *Ibid.*, para. 22 (Condorelli).

[85] *Ibid.*, para. 23 (Condorelli).

[86] *Ibid.*, para. 21 (Condorelli).

[87] *Ibid.*, para. 25 (Condorelli).

[88] *Ibid.*, p. 61, para. 21 (Condorelli).

II. THERE HAS BEEN NO VIOLATION OF THE CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS OF 27 SEPTEMBER 1986

24. Madam President, Members of the Court, I must turn now to the second legal ground which the Republic of Djibouti invokes. That ground relates to the implementation of the Convention of 27 September 1986 when the French authorities were considering the international letter rogatory seeking the transmission of a copy of the Borrel file.

25. It has to be said that the presentation of that legal ground by the Applicant has undergone significant change between the written procedure and the oral arguments. That has resulted in a significant change to the submissions, as set out by the Agent for the Republic of Djibouti at the end of the first round of oral arguments by Djibouti. The main legal argument advanced now is that: "the French Republic violated its obligations . . . by not acting upon its undertaking of

51 27 January 2005 to execute the letter rogatory addressed to it by the Republic of Djibouti dated 3 November 2003"[89] -- actually, we are talking about 3 November 2004. The Republic of Djibouti is, therefore, pushing to the forefront the crucial role of a letter from the Principal Private Secretary to the Minister of Justice, a letter that is regarded as marking the final acceptance by France of Djibouti's request for transmission of the Borrel file, in accordance with the provisions of the 1986 Convention and, more particularly, Article 14 thereof.

26. In the alternative, the Republic of Djibouti claims that France has violated its obligations under Article 1 of the Convention, by unlawfully refusing to transmit the Borrel file, a refusal set out in a letter of 6 June 2005 or, and this is the second submission in the alternative, in a letter of 31 May 2005 -- you will find those letters in your dossier. The refusal is alleged to be unlawful on the ground that the reason for refusing mutual assistance was, and continues to be, inadequately explained.

27. Submissions of that nature clearly depend on how the Republic of Djibouti interprets the 1986 Convention and how it applies its provisions to the request to transmit the Borrel file. Here again, there have been significant developments between the Application and Memorial, on the one hand, and the oral arguments on the other. It is true that, in their oral arguments, the Applicant's representatives tried to identify the points of agreement and the differences between the two States.

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[89] CR 2008/3, p. 36, para. 1 (Doualeh).

This was no doubt an attempt to apply Article 60 of the Rules of the Court, according to which, in their oral statements, the parties must focus on the issues that divide them[90]. Naturally the French Republic too intends to focus on those issues. But the legal analyses that Djibouti's representatives provided were also designed, let us not hide the fact, to present to the Court an almost entirely new legal argument.

28. Consequently, it is essential to clarify the extent to which that argument is compatible with the obligations contained in the 1986 Convention on Mutual Assistance and to consider whether it provides a basis for claiming that France failed to fulfil one of its international obligations when the French authorities considered the letter rogatory seeking the transmission of
52 the Borrel file. I can give the Court the answer to that immediately: none of the arguments which the Applicant is now advancing allows of the finding in law that France has been in breach of the 1986 Convention. That is true of both the arguments on which the Republic of Djibouti bases its principal submission (A) and of those on which its bases its submissions in the alternative (B).

A. The Applicant's principal argument

29. The Applicant's principal argument is founded on the contention that the 1986 Convention was violated as a result of the refusal to act upon the alleged undertaking constituted by the letter of 27 January 2005. But there was no violation of that nature. That is apparent if we just remind ourselves briefly of the relevant provisions of the Convention, and then call to mind the procedure which the French Republic put into effect in response to Djibouti's request that the Borrel file be transmitted.

1. The material provisions of the Convention on Mutual Assistance

30. Madam President, the construction which the Republic of Djibouti is now placing on the provisions of the 1986 Convention has undeniably moved closer to the interpretation that France set out in its Counter-Memorial.

31. The most striking example of this is that Article 2 of the Convention has ceased to be ignored, whereas the Republic of Djibouti did not even mention it in either its Application or its

[90] CR 2008/2, p. 9, para. 3 (Condorelli).

Memorial. That is the Article which permits a State to refuse mutual assistance, and it was specifically pursuant to Article 2 that France refused to execute Djibouti's letter rogatory seeking transmission of the Borrel file. The Republic of Djibouti has thus had to bow to the facts: if Article 1 of the Convention provides that the States are to afford each other "the widest measure" of judicial assistance, that implies that there are, nevertheless, cases in which this is not possible. Those cases are specifically the ones which Article 2 of the Convention distinguishes, and I use the verb "distinguish" *(distinguer)* in one of the meanings attaching to it in the French language, that is to say that Article 2 draws a distinction by listing three cases, reflecting three different -- but all three legitimate -- reasons for refusing mutual assistance.

53 32. The Republic of Djibouti has also conceded that since Article 2 of the Convention falls under the heading of General Provisions in the Convention, it embraces all forms of mutual assistance, including international letters rogatory, which are dealt with more specifically in Articles 3 to 5 of the Convention.

33. It is possible to identify a further point of agreement concerning the refusal of mutual assistance permitted under Article 2. The French Republic in fact takes the view that, subject, of course, to the procedural conditions set out in Article 13 and the cases covered by general international law, such as the abuse of rights or misuse of power, if it is to be compatible with the Convention, a refusal of that nature may only be based on one of the reasons set out in that Article. Contrary to what the Republic of Djibouti maintained in its oral arguments, the Counter-Memorial was totally unambiguous on that point.

34. Finally, the French Republic is entirely in agreement with the view expressed by Professor Condorelli, according to which: "the main provisions of immediate importance for the purposes of the dispute that divides [the two States] are Articles 1(para. 1), 2, 3 (para. 1) and 17"[91]. We should perhaps just add that the Republic of Djibouti also mentioned Article 14 of the Convention and applied it in a way that we shall need to return to a little later in this oral statement.

35. However, these various points of agreement notwithstanding, substantial differences remain. Counsel for the Republic of Djibouti himself listed those differences: namely, "the

[91]CR 2008/2, p. 8, para. 2 (Condorelli).

interpretation of Articles 1, 2 *(c)* and 17 of the Convention and of course the relationship that exists between their relative provisions"[92]. In contrast with the articles that, according to the same counsel, have a direct part to play in these proceedings, just one article has been omitted from the list: Article 3. But it is precisely in relation to Article 3 and its application that a number of points must be made, as a matter of priority. And I say a matter of priority because the interpretation and implementation of that Article are central to the arguments that the Republic of Djibouti is advancing in support of its principal submission. Indeed, the only way it can claim that the letter of

54 27 January 2005 constitutes acceptance, plain and simple, of Djibouti's request is to ignore French internal procedure, and, therefore, to evade Article 3.

36. Article 3, paragraph 1, is the principal provision of the Convention among those specifically concerned with international letters rogatory. It stipulates:

> "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."

37. Article 3 thus expressly refers to the internal procedure for the execution of requests for mutual assistance. In its Memorial, the Republic of Djibouti claimed that the internal procedure was merely a matter of how the execution of such a request was to be processed[93] and that Article 3 of the Convention establishes an "obligation of result"[94]. That would systematically subordinate the procedure to the result. On the contrary, according to the interpretation which France gives to that provision, compliance with the internal procedure is one of the essential elements of the obligation. It is even one of the principal guarantees provided by the Convention. The desired result, the transmission of the documents requested, can occur only as the outcome of the internal procedure. To say that is not evidence of disproportionate formalism but, on the contrary, of due respect for the rule of law which is imperative in application of both Article 3 of the Convention and French criminal procedure.

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[92]CR 2008/2, p. 9, para. 3 (Condorelli).

[93]MD, p. 44, para. 114.

[94]MD, p. 44, para. 113.

38. The object and purpose of the 1986 Convention, moreover, implies that emphasis should be placed on the means used, that is to say on the internal procedures. The object of the treaty is mutual assistance in criminal matters, that is to say a process of co-operation between two States. According to Article 1, this process concerns "*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 French text of this article uses the adjective "judicial" twice, which attests to the significant role to be played by the judicial authorities in that process. As for the purpose of the Convention, it consists, according to the preamble, of "facilitating" the course of mutual judicial assistance proceedings. The verb "facilitate" naturally leads to greater

55 emphasis on the means than on the result, which is not guaranteed in absolute terms. It should, moreover, be recalled that mutual judicial assistance proceedings are traditionally cumbersome and complicated. They involve co-ordinating two separate internal proceedings, those of the requesting State and those of the requested State, and ensuring co-ordination between the judicial authorities of the two States in accordance with their respective fundamental interests. That is precisely the purpose of the 1986 Convention.

39. Without ever saying so very clearly, it would appear that the Republic of Djibouti has abandoned its initial interpretation and now accepts, in theory at least, the French position. Indeed, it has dismissed the idea of an absolute obligation of result. Further, its Counsel has forcefully asserted: "Djibouti has never maintained that the letter rogatory should be executed by the requested State without going through the procedure provided for that purpose by its internal law!"[95]

40. That being so, assuming that Djibouti did not effectively make such a contention, it is exactly what it goes on to do in the rest of its oral presentations. For, and it is important to emphasize it, the whole of Djibouti's argumentation leading up to the main conclusion that the letter of 27 January 2005 constitutes an undertaking to execute the Djiboutian letter rogatory bears a profound contradiction. That letter did not in any manner mark the end of the internal procedure, it merely transmitted information regarding the initial phases of that procedure. Consequently, it is

[95]CR 2008/2, p. 11, para. 7 (Condorelli).

not possible to maintain, as Djibouti does, that France committed itself by that letter and that execution of the request must go through "the procedure provided for that purpose by its internal law" at one and the same time.

41. In order to convince fully the Court, the simplest approach is probably to review the sequence of events concerning the Djiboutian requests for transmission of the Borrel file, as well as the phases of procedure established by French law to respond to such requests. It will then appear clearly that the Republic of Djibouti has no grounds whatever to argue that France violated the 1986 Convention by refusing to fulfil an alleged "undertaking".

56 **(2) Implementation by France of the mutual assistance procedure**

42. In reference to the French procedure, we must first, Madam President, clarify a misunderstanding as to the timeframe of the Djiboutian requests. In its Memorial[96], the Republic of Djibouti consistently spoke of "international letters rogatory" in the plural, as if it had issued a number of such letters rogatory requesting the transmission of the Borrel file. However, strictly speaking, there was only ever one international letter rogatory, the one issued by Judge Leïla Mohamed Ali on 3 November 2004.

43. The oral presentations were more exact on this point, for Mr. van den Biesen used the expression "the international letter rogatory" in reference to that single request[97]. But he also recalled the first approach by the Djiboutian authorities, that taken by the State Prosecutor of the Republic of Djibouti on 17 June 2004. That initial step is said to be part in some manner of a preparatory phase of the international letter rogatory of 3 November 2004. Thus, according to Mr. van den Biesen:

> "le 6 décembre 2004 est la date à laquelle la commission rogatoire internationale, datée du 3 novembre 2004, a été formellement transmise aux autorités françaises. A l'évidence, à cette époque, les autorités françaises savaient depuis plus de six mois que cette demande allait leur parvenir"[98]

44. To be entirely correct, Mr. van den Biesen even traces this preparatory phase back to conversations between the State Prosecutor of Djibouti and the Paris State Prosecutor which

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[96]MD, p. 26, para. 59.

[97]CR 2008/2, p. 32, paras. 12-13, p. 35, para. 24 (van den Biesen).

[98]CR 2008/2, p. 32, para. 13 (van den Biesen).

allegedly occurred on 6 May 2004[99]. However, as the Applicant provides not the slightest shred of evidence about the content of those conversations, it is probably more advisable to confine ourselves to the first document appearing in the folder submitted to the Court requesting the transmission of the Borrel file, namely the letter addressed on 17 June 2004 by the State Prosecutor of the Republic of Djibouti to the State Prosecutor of the Paris *Tribunal de grande instance*.

45. It is true that the subject matter of that first request was the same as that of the international letter rogatory of 3 November 2004, that is the transmission of a full copy of the record of the investigation conducted by the investigating judge Sophie Clément. It is also true that

57 there is a certain continuity in the Applicant's wish to obtain the handover of the Borrel file extending back to the beginning of the second half of 2004. Consequently, it is appropriate to review the way in which the two successive requests were handled, with emphasis on both what distinguishes them with respect to procedure and what they have in common in terms of the merits.

46. First, the initial request, that of 17 June 2004, could not be regarded as an international letter rogatory. It did not in any way fall within the framework of the 1986 Convention on Mutual Assistance, which was not in any case mentioned. The requirements laid down by Article 13 of the Convention on Mutual Assistance were not fulfilled, and for good reason. There were no criminal proceedings regarding the death of Judge Borrel under way in Djibouti at the time. The first proceedings in Djibouti, which had concluded that it was suicide, had been closed on 7 December 2003 and the second proceedings had yet to be initiated. It was not therefore a letter rogatory relating to a "criminal matter" under way in Djibouti, to use the terms of Article 3 of the Convention. There had been no "offence" charged and it was impossible to provide a "summary of the facts" to cite this time the terms of Article 13, paragraph 2, of the Convention.

47. The letter of 17 June 2004, however, left no doubt whatsoever as to the fact that the State Prosecutor of Djibouti had placed himself outside the scope of the treaty. It explained that the transmission of the contents of the Borrel file was not intended to support an ongoing judicial investigation, but to open new judicial proceedings if necessary in Djibouti. Above all, it explained very carefully the reasons for the request, namely the will to react to the implication of the

[99]CR 2008/2, p. 31, para. 11 (van den Biesen).

Djiboutian authorities by the civil party and certain French media. In its Memorial, the Republic of Djibouti is equally explicit, since it presents the request of 17 June 2004 as being "*above all*" prompted by "the steady worsening of relations between the French Republic and the Republic of Djibouti because of the widespread media campaign of denigration, accusation and defamation against the highest Djiboutian authorities"[100]. Thus the request manifestly did not correspond to the purpose of the 1986 Convention, namely the pursuit by means of international mutual
58 assistance of evidence likely to be of benefit to criminal proceedings under way in the requesting State.

48. The State Prosecutor of the French Republic then initiated the internal procedure established for the examination of requests for mutual assistance of this type, a procedure to which I will return a little later, which led him to put the matter to the investigating judge responsible for the first time. As might have been expected, the investigating judge held that this request did not comply with the necessary formal requirements for it to be granted. The executive authorities then provided the Republic of Djibouti with precise legal indications in response to its persistent desire to obtain information within the context of a mutual judicial assistance procedure.

49. Among the information supplied were certain elements of vital importance to the dispute before the Court. I make reference here to an internal document of the French administration which was forwarded to the Prosecutor's Office in Djibouti and which the Republic of Djibouti itself annexed to its Memorial. It is Annex 18. In that document, the Principal Private Secretary to the Minister of Justice explains that "the investigating judge responsible for the case . . . alone has the jurisdiction to hand over copies of the documents". And he adds that the investigating judge had, to be specific, taken the view that the letter was not in the form required to comply with the scope of the 1986 Convention.

50. The Republic of Djibouti did not make any sort of protest because of the rejection of its first approach. On the contrary, it accepted the technical advice of the French authorities and initiated a new procedure in compliance with the requirements of the Convention. Thus, on 30 October 2004, a judicial investigation into the murder of Bernard Borrel was opened in Djibouti

[100]MD, p. 26, para. 60.

and, a few days later, on 3 November 2004, the investigating judge of the Djibouti *Tribunal de première instance* issued an international letter rogatory requesting the transmission of the Borrel file by the French authorities.

51. It is apparent from the above:

— first, that the Republic of Djibouti fully accepted the position of the French authorities;

59 — second, that the Republic of Djibouti was duly informed of the essential role played by the investigating judge in the assessment procedure of requests for mutual assistance.

52. In view of its attitude, the Republic of Djibouti cannot now retract what it clearly indicated to the French authorities, namely that it accepted the validity of their position regarding the measure taken by the State Prosecutor of Djibouti.

53. Following these exchanges, France was presented for the first time, in accordance with the 1986 Convention, with an international letter rogatory requesting the transmission of the Borrel file in the context of judicial proceedings under way in Djibouti. It then fulfilled its obligation under Article 3 of the 1986 Convention by initiating its internal procedure.

54. In its Counter-Memorial, the French Republic explained in detail what the rules of French law were applying to the assessment of international letters rogatory[101] and provided the administrative documents and judicial decisions relating to the examination of the Djiboutian request as annexes[102]. There is doubtless little reason to discuss this again at length, as those items appear to have convinced the Applicant. Indeed, Professor Condorelli, having recalled the French position that "according to French legislation the decision to execute or refuse such a letter rogatory is within the exclusive jurisdiction of the judiciary", concludes his reasoning by declaring "[t]hat is not the issue"[103].

55. The presentation of the Deputy Agent of the Republic of Djibouti, Mr. van den Biesen, is even clearer. After wondering about the legal status of the *Soit Transmis* from the investigating judge Sophie Clément of 8 February 2005 and having recalled that the Paris Court of Appeal had

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[101]CMF, para. 3.56-3.63.

[102]CMF, Anns. XIV, XV, XXI.

[103]CR 2008/2, p. 12, para. 8 (Condorelli).

held, in a 2006 judgment, that the document constituted a judicial decision, he concludes as follows: "[a]ussi surprenant que cela puisse être pour le demandeur, telle est la réalité dont il doit se satisfaire . . .[104]".

60 56. Consequently, it is acknowledged by both Parties to the present dispute that pursuant to the French Code of Criminal Procedure, and more particularly Article 694-2 and Article 81, paragraph 2, the investigating judge responsible for the Borrel file alone had the jurisdiction to proceed with the execution of the request and thus was the only person with the jurisdiction to decide on the refusal of mutual assistance.

57. Incidentally, there is nothing really surprising about all that, contrary to what the Applicant has suggested[105]. There has to be an internal authority which decides in the event of refusals, as indeed in the event of non-refusals. It so happens that French criminal procedure entrusts this task to the investigating judge responsible for investigating the case. It is for France and France alone to organize its own procedures as it sees fit, providing that that organization does not violate any of the provisions of the 1986 Convention. Further, there is nothing arbitrary about conferring the task of issuing final refusals to requests for mutual assistance in criminal matters on the judicial authorities, quite the contrary.

58. Moreover, it must be emphasized that the procedure was conducted with great rapidity, since the letter rogatory issued by the Djiboutian investigating judge was sent to the French Embassy in Djibouti on 22 December 2004 and the investigating judge responsible for the case in France informed the Paris State Prosecutor of her decision on 8 February 2005. That decision dismissed the request on the ground that its execution was likely to prejudice the sovereignty, security, *ordre public* or other essential interests of France[106]. That decision, coming from the judicial authorities, marked the end of the internal procedure.

59. Consequently, we cannot understand how the Republic of Djibouti can claim that the internal procedure ended earlier, on 27 January 2005, almost at the time that it had just started, with the letter from Mr. Le Mesle. In support of its principal argument, the Republic of Djibouti

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[104]CR 2008/2, p. 46, para. 57 (van den Biesen).

[105]*Ibid.*

[106]CMF, Ann. XXL.

completely ignores the procedural context of the various exchanges it had with the French Republic. That leads it to present to the Court the replies given to its various letters and approaches as if they were promises or forms of conduct capable of committing France to the transmission of the Borrel file.

61 60. They were never anything of the sort. The Republic of Djibouti knew very well that the replies by the French executive authorities could only relate to the progress of that procedure and not to its final outcome. That was clearly apparent from the provisions of the 1986 Convention and it had been made plain at the time of the Djiboutian authorities' initial approach.

61. The Republic of Djibouti's understanding of the letter of the 27 January 2005 and its effect is not just surprising, it is also new. In its Memorial, the Republic of Djibouti had indeed made reference to this letter using a large number of expressions such as "undertakings"[107], "assurances"[108], "unilateral undertaking" and even "promise"[109]. But it had not given the slightest notion of the legal effect which it intended to attribute to them.

62. Was the suggestion that this letter constituted a unilateral act of State, that is to say an act giving rise to a new legal obligation, distinct from those contained within the 1986 Convention? The expressions that I have just cited could have given that impression. But we now know that this was not the case. It is true that it would have been highly surprising, not to say comical, in the light of the person who wrote the letter, the terms used and the circumstances.

63. However, the argument developed by the Republic of Djibouti during the first round of its oral presentations is no less strange. It consists of saying that this letter is in fact the execution of the Djiboutian request for mutual assistance, as provided for by Article 14 of the Convention. I refer here to the presentation by Professor Condorelli: "this letter represents the official response by the Minister of Justice of the requested State, France, to the letter rogatory presented by the requesting State, Djibouti, through the official channels prescribed by Article 14 of the 1986 Convention"[110].

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[107]MD, p. 28, para. 65, p. 29, paras. 67 and 69.

[108]MD, p. 45, para. 115.

[109]MD, p. 45, para. 116.

[110]CR 2008/2, p. 16, para. 14 (Condorelli).

64. That is also why the same counsel referred in his presentation to the rules of international law applying to the international responsibility of the State for internationally wrongful acts, *inter alia* the rules of attribution[111]. The letter of 27 January 2005 is thus viewed as an act of the State, more specifically the act of execution of the 1986 Convention, not as an international legal act which would give rise to a new obligation.

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65. Is such an assumption credible? Certainly not. Merely reading the letter in question is enough to convince oneself of the contrary. That being the case, Madam President, I was wondering as it will soon be 6 p.m., it seems that now could be a suitable moment to break off my presentation.

The PRESIDENT: But I have the impression that you have almost finished. You only have some 5 to 7 minutes left. You may continue.

Mr. ASCENSIO: All right. Very well.

I will then continue. Is this assumption credible? Not all, merely reading the letter in question is enough to convince oneself of the contrary. In view of the context, the reply given is free of ambiguity. The Principal Private Secretary to the Minister of Justice, Mr. Le Mesle, explains to the Ambassador of Djibouti in Paris the state of progress of the procedure. He indicates that he has asked "for all steps to be taken" to reply to the request. He thus positioned himself clearly in terms of the initiation of the internal procedure. There is no express acceptance, no positive reply anywhere in the letter, contrary to what the Applicant claims[112]. Similarly, his wish to avoid "unjustified delays" shows his personal commitment to taking the procedure forward as quickly as possible, as far as the part within the remit of the executive authorities was concerned. Moreover, it is clear that he could give no final indication as to the outcome of the procedure, since it was still ongoing at that time and dependent on the assessment that would be made by the judicial authorities.

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[111]CR 2008/2, p. 15, para. 12 (Condorelli).

[112]CR 2008/2, p. 33, para. 14 (van den Biesen).

66. According to the Republic of Djibouti's Memorial, France should have informed it of the fact that in application of its internal legislation mutual assistance could be refused[113]. The same criticism was reiterated by Mr. van den Biesen in his presentation[114]. But since when has it been legally required to notify a State of the fact that a convention will be applied in accordance with the obligations it establishes? Compliance with the internal procedure is explicitly laid down by

63 Article 3 of the Convention and the possibility of a refusal is just as explicitly provided for in Article 2 and Article 17. The Republic of Djibouti cannot, in good faith, maintain that it was not aware of those provisions.

67. The Republic of Djibouti, in its Memorial, went as far in this respect as to speak of "estoppel"[115]. Such a position once again shows a complete lack of the most elementary form of good faith in the execution of treaties. If we address it here, it is only in order to reply in full to the grievances of the Republic of Djibouti; but that reply can be a short one. What France is criticized for is its silence. However, even if that silence were to be proved, it would not demonstrate anything. The Court in its Judgment of 20 July 1989 in the *Elettronica Sicula* case did not rule out that silence could "in certain circumstances" give rise to an estoppel (*Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 44, para. 54). But, more specifically, that Judgment says: "when something ought to have been said". Now, in the dispute between Djibouti and France there was no reason to say anything, as the reference to internal legislation is expressly mentioned in Article 3 of the Convention on Mutual Assistance between the two States.

68. Moreover, the fact that the investigating judge "alone has the jurisdiction to hand over copies of the documents" had been recalled by the very same Principal Private Secretary to the Minister of Justice, Mr. Le Mesle, at the very beginning of the exchanges between the Republic of Djibouti and the French Republic in the letter of 18 October 2004 which appears as an annex to the Memorial of Djibouti[116].

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[113]MD, p. 44, para. 114.

[114]CR 2008/2, p. 37, para. 29 (van den Biesen).

[115]MD, p. 44, para. 115.

[116]MD, Ann. 18.

69. For want of finding sufficiently solid grounds to support its allegations in the letter of 27 January 2005, the Applicant is therefore obliged to seek out other sources. It then tries to draw on a statement made by the spokesman for the Ministry of Foreign Affairs dated 29 January 2005 by claiming that it confirms the letter of 27 January. There again, however, neither the content nor the context of the statement lend support in any way to this argument.

70. The context was that of an ongoing mutual assistance procedure. Consequently, the statement to the press, with respect to the part relating to the procedure, could only bring to public attention information corresponding to the position of the executive authorities. It could not be

64 understood as announcing a final decision, since any such decision was dependent on the assessment of the investigating judge responsible for the case.

71. Further, there is even less reason for that statement to engage France's executive authorities, in that it did not in reality concern the letter rogatory issued by the Djiboutian investigating judge and forwarded to the French Embassy in Djibouti on 22 December 2004. The phrasing of the statement in fact shows that it is not referring to the letter rogatory but to the first Djiboutian approach, that of 17 June 2004. This is apparent from the terms used at the very end of the Statement: "in order to allow the competent authorities of that country to decide whether there are grounds *for opening an investigation* into the matter"[117].

72. The opening of a new judicial investigation was the issue at the centre of the first Djiboutian request. But, for the second, the international letter rogatory, the judicial investigation in question had been opened by the Djiboutian justice system. That demonstrates that the spokesman was unaware of the most recent developments, or did not intend to bring them to the attention of the media. Consequently, there is hardly any need to emphasize that there was no reference to the letter by Mr. Le Mesle of 27 January 2005 in the statement, nor to any other letter or declaration incidentally. It cannot thus be said that the statement by the spokesman for the Ministry of Foreign Affairs lends weight to anything whatsoever. The same is true of any other sources quoting that text.

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[117] MD, Ann. 22; emphasis added.

73. Madam President, Members of the Court, since the letter of 27 January 2005 cannot in any respect be regarded as acceptance of the request for the transmission of the Borrel file, for the simple reason that the internal procedure had only just been initiated, the principal argument of the Republic of Djibouti can only be dismissed.

Madam President, I think that now is the time to interrupt this presentation. Thank you Members of the Court, Madam President, for your attention.

65 The PRESIDENT: Thank you, Professor Ascencio. The Court will meet again tomorrow morning at 10 a.m. to hear the rest of the first round of oral argument of the French Republic. The Court now rises.

The Court rose at 6.05 p.m.