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CR 2008/7 (translation)

CR 2008/7 (traduction)

Tuesday 29 January 2008 at 3 p.m.

Mardi 29 janvier 2008 à 15 heures

8 The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the second round of oral argument of the French Republic. France will have the floor this afternoon until 6 p.m. I now give the floor to Professor Pellet.

Mr. PELLET: Thank you, Madam President.

THE JURISDICTION OF THE COURT AND THE APPLICANT'S SUBMISSIONS

1. Madam President, Members of the Court, it falls to me to open France's second round of oral argument by presenting a number of comments on the jurisdiction of the Court and on the claims in Djibouti's final submissions. With your permission, Madam President, Professor Ascensio will follow me to discuss the arguments of the other Party on what represents the heart of this case and its only subject, namely France's refusal to execute the international letter rogatory issued by the investigating judge at the Djibouti *Tribunal de grande instance* on 3 November 2004. I shall then take the floor again to deal with the question of the immunities of certain Djiboutian officials, supposedly violated by the Respondent, after which the Agent of the French Republic will present some brief remarks and then read out our final submissions.

I. The jurisdiction of the Court

2.Madam President, Professor Condorelli spent a good deal of time yesterday morning going back over the question of the jurisdiction of the Court[1]. I have no quarrel with him as regards the points of agreement between the Parties which he listed[2]. However, I would point out that, while I certainly agree in principle on the fact that the interpretation of the unilateral declarations on each side cannot be "purely grammatical" — even if I did not say that, although my opponent attributes it to me in quotation marks[3] — it must nevertheless be borne in mind that:

> "A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the
9 obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be

[1]CR 2008/6, pp. 8-17 (Condorelli).

[2]*Ibid.*, pp. 8-9, paras. 2-5.

[3]*Ibid.*, p. 9, para. 4.

given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."[4]

3. This, Madam President, is the seventh of the ILC's Guiding Principles applicable to unilateral declarations of States likely to create legal obligations, which relies carefully (and almost exclusively) upon the Court's jurisprudence on the subject, and in particular on its Judgments in the *Nuclear Tests* cases, in which you held that "when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 44; and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 47). And the Commission thus concludes: "the interpreter must therefore proceed with great caution in determining the legal effects of unilateral declarations . . ."[5].

4. The bold interpretation which Professor Condorelli is asking you to make of the letter from the French Minister for Foreign Affairs of 25 July 2006[6] cannot be described as displaying "great caution". It was by this letter that France consented to your jurisdiction in the present case. However, it is apparently not superfluous to point out that it is this letter which constitutes the basis of the Court's jurisdiction — not Djibouti's Application, which, in itself, was not capable of producing any effect, as the Applicant specifically recognized: "the Republic of Djibouti seeks to found the jurisdiction of the Court under Article 38, paragraph 5, of the Rules of Court and is confident that the French Republic will consent to the jurisdiction of the Court to settle the present dispute"[7].

5. As you know, Madam President, France responded to this confidence. But it did so, as it was entitled to do, by carefully circumscribing its consent to the "dispute forming the subject of the Application *and* strictly within the limits of the claims formulated by the Republic of Djibouti". It

10 thus made its consent subject to a twofold condition: the Court has jurisdiction *only* to rule on the subject of the Application — *and*, for it is "and" and not "or", not "the subject of the Application as

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[4]International Law Commission, *Report on the work of its fifty-eighth session*, A/61/10, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, 7th Guiding Principle, p. 377.

[5]*Ibid.*, p. 377, para. (2) of the commentary on the 7th Guiding Principle.

[6]MD, Ann. 2.

[7]AD, p. 16, para. 20.

defined by the claims" — but "on the subject of the Application and strictly within the limits of the claims" thus circumscribed: in other words, those corresponding to the subject of the Application.

6. In this connection, it is strange that the Applicant accuses us of basing ourselves on the definition of the subject of the dispute, as *it* described it in paragraph 2 of its Application, and that it wishes to treat it on a par with the claims also, but incidentally, contained in the Application, whereas it quotes both Article 40, paragraph 1, of the Statute of the Court, which refers only to the "subject of the dispute", and Article 38 of the Rules, which lays down that the author of an application to the Court must indicate "the subject of the dispute" — this is paragraph 1 — and "the precise nature of the claim" — which is paragraph 2. And the simple fact that these requirements are included in separate provisions shows that they cannot be lumped together into an amorphous mass[8].

7. So I do not see why Professor Condorelli felt able to latch onto an alleged "admission . . . one absolutely clear and unreserved"[9] which allegedly stems from the point made by the Agent of France that "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"[10]. To be sure, some of the Applicant's claims relate to this point but, as they do not fall within the subject of the dispute with which the Application is concerned — as, once again, the Application itself expressly defined it — they do not fall within the jurisdiction of the Court as consented to by the French Republic. And, moreover, this is precisely what Ms Belliard said in the passage immediately after the one I have just read out — which is all that is quoted by my opponent; in fact, she immediately added that these claims relating to immunities "are manifestly devoid of any link with the subject of the dispute"; and, she concluded, this is not "what the French Republic consented to"[11].

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[8]CR 2008/6, p. 11, para. 8 (Condorelli).

[9]CR 2008/6, p. 13, para. 11 (Condorelli).

[10]CR 2008/4, p. 20, para. 37 (Belliard).

[11]*Ibid.*

11 8. Although the jurisdiction is defined by the "interface" between the Application and the consent given by the Respondent under Article 38, paragraph 5, of the Rules, once again, it is the latter, the Respondent, who *in fine* fixes the scope of your jurisdiction.

9. Although he pays tribute (which I appreciate) to the "brilliant exercise in semantic and lexicological gymnastics", on which I supposedly embarked on the surreptitious (but patent) alteration of the subject of the dispute between the Application and the Memorial[12], Professor Condorelli for once refrains from trying to outdo me in grandiloquence on this point — though where grandiloquence is concerned, he has no equal. He confines himself to asserting that I had "forgotten to take two crucial factors into account"; an applicant, he said, is always at liberty "to explain and supplement its Application" and, moreover, in this case it is a matter of mere explanations and supplements[13]. These terse observations call for three remarks.

10. Firstly, it seems to me impossible to accept that a State which has introduced an application on the basis (insufficient by itself) of Article 38, paragraph 5, of the Rules, can "reserve the right" to add to it subsequently — and above all after the Respondent's acceptance has been explicitly given "for in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein". In a case of this kind, the subject of the application and the claims corresponding to that subject formulated in the application constitute the "[strict] limits" of the jurisdiction of the Court and no modification, in any case no broadening of either of them can be accepted.

11. Secondly, I note that Mr. Condorelli was careful to remain silent on the alteration in the definition of the subject of the dispute between the Application and the Memorial. On this point, may I refer you, Members of the Court, not to the exercise in "gymnastics" (an activity I detest!), but, to borrow an expression my opponent used about himself, to an exercise in "analysis in fine detail"[14] (which I have been working at) of the semantic shift made by Djibouti between one of

12 these documents and the other[15]: claiming that the subject of the dispute is now not the refusal to

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[12]CR 2008/6, p. 15, para. 16 (Condorelli).

[13]*Ibid*.

[14]CR 2008/6, p. 33, para. 14 (Condorelli).

[15]CR 2008/4, pp. 30-32, paras. 14-17 (Pellet).

execute the international letter rogatory in breach of a number of France's international obligations — which was stated in the Application, but the breach, in the Memorial this time, of the refusal to execute the letter rogatory, *AND* the "related [breach]" of *other* international obligations incumbent on France, the Republic of Djibouti does not say the same thing in two different ways, it says something else — and, in so doing, is clearly seeking to extend the jurisdiction of the Court beyond the consent given by France.

12. Third and last, the position of the Permanent Court in the *Phosphates in Morocco* relied upon by Professor Condorelli[16] is of no help to the opposing Party: if a State which seises the Court is obviously always at liberty to clarify its position (in the two senses of the term: either because it explains the meaning of it, or because it limits the subject of its claims), the fact remains that, in the case before us, as I have shown, we find ourselves in neither of these scenarios: notwithstanding the strict limitations France has placed on its consent to the jurisdiction of your distinguished Court, Djibouti has indeed proceeded to broaden that jurisdiction in its Memorial then in the oral pleadings.

13. This conclusion clearly also applies *a fortiori* to Djibouti's claims relating to facts subsequent to the Application. Those claims do not concern and cannot concern "matters arising directly out of the question which is the subject-matter of the Application", to borrow a quotation Mr. Condorelli is fond of[17], but precisely, questions which lie outside this subject matter. On the other hand, here too, the Judgment of the Permanent Court in 1936 is utterly relevant: it shows, beyond any doubt, that when a State seeks to limit the jurisdiction of the Court *ratione temporis* (and the limitation resulting from the letter from the Minister for Foreign Affairs of 25 July 2006 is a general one: *materiae* as well as *temporis*), such a limitation must be made to produce all its effects. It is perhaps not superfluous to add that it was also in this 1938 Judgment that the Permanent Court considered that, in cases of doubt about the extension of the consent given to its jurisdiction, one should "resort to a restrictive interpretation" (*Phosphates in Morocco, Judgment,*

[16]CR 2008/6, p. 15, para. 16 (Condorelli, quoting *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 21).

[17]CR 2008/1, p. 32, para. 25; or CR 2008/6, p. 16, para. 19 (Condorelli, quoting *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974,* p. 203, para. 72).

1938, P.C.I.J., Series A/B, No. 74, p. 32; see also *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 32).

14. In the event, you probably do not need to follow this recommendation, Members of the Court: there is no need for you to interpret (restrictively) the acceptance of your jurisdiction, all you have to do is read the letter of 25 July 2006: indisputably, you have jurisdiction to pass judgment on Djibouti's Application, but you only have jurisdiction "for the dispute forming the subject of the Application", (and not as more extensively defined in the Memorial) *and* "strictly within the limits of the claims formulated therein" — and not in the Memorial, or at the close of the oral pleadings. And this brings me, Madam President, to examine those submissions, not in the light of your jurisdiction in the narrow sense, but of what might be termed your "capacity" to uphold Djibouti's final claims in their most recent formulation.

II. The Applicant's submissions

15. While the Court cannot uphold its jurisdiction with respect to the latter claims, it indisputably has jurisdiction to rule on the non-execution by the French governmental and judicial authorities of the international letter rogatory issued by the investigating judge of the Djibouti *Tribunal de grande instance* on 3 November 2004. According to the Application, this constitutes the very subject of the dispute put before the Court.

16. Madam President, it is clear from what I have just said that Djibouti was entitled to "explain" the scope of the claims presented in its Application and falling within its subject-matter, either to clarify them or to limit them. Precisely the opposite has occurred: its new submissions are particularly complicated (and, it must be acknowledged, not very clear) and they are based on an undeniable extension of the Court's jurisdiction, as compared with the subject of the Application to which France gave its consent. Moreover, certain of the methods of execution of the submissions made by the Applicant cannot be upheld by the Court.

17. To try to find our bearings in the complicated structure of Djibouti's submissions, I will distinguish between those concerning the refusal by France to execute the international letter rogatory of 3 November 2004 and those linked to the alleged attacks on the immunity or dignity of certain Djiboutian officials.

A. The consequences of the refusal to execute the letter rogatory

18. While the Court cannot uphold its jurisdiction with respect to the latter claims — those concerning immunity — it indisputably has jurisdiction to rule on the non-execution of the international letter rogatory of 3 November 2004. According to the Application, this constitutes the very subject of the dispute and gives rise to the claims indicated in it under the letters (c), (d) and (h)(i); and *mutatis mutandis* these claims are to be found as submissions 1 and 5 in Djibouti's Memorial. And the dim light which emerges from paragraph 1 of the final submissions of the Republic of Djibouti does not actually constitute an obstacle to you ruling on that claim (by which the Applicant requests you to adjudge "that the French Republic has violated its obligations under the 1986 Convention"[18] by not executing the letter rogatory): the amphigoric clarification does not really facilitate an understanding of what Djibouti actually expects from the Court, but concerns the grounds on which, according to the Applicant, your decision could be based and not the operative paragraph itself. Thus, other than the fact that this claim is, of course, in our view unfounded, whatever the grounds relied upon, it does not, at least, raise any problems of the jurisdiction or the "capacity" of the Court to rule on it.

19. The same cannot be said of claim included as paragraph 2 of the final submissions. It takes the form of alternatives, and I believe it is of interest to re-read it:

> "The Republic of Djibouti requests the Court to adjudge and declare:
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> . . . . . .
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> 2. That the French Republic shall immediately after the delivery of the Judgment by the Court:
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> (i) transmit the "Borrel file" in its entirety to the Republic of Djibouti;
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> (ii) in the alternative, transmit the "Borrel file" to the Republic of Djibouti within the terms and conditions determined by the Court"[19].

15 Our objections to these alternative submissions are fairly numerous.

20. First, we do not dispute that the Court can, in certain circumstances, declare that the State responsible must take certain measures in order to fulfil the primary or secondary obligations the Court has found to be violated in its judgment. However, in each of the cases in which it has acted

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[18]CR 2008/6, p. 64, para. 15. 1 (Doualeh).

[19]*Ibid.*, para. 2.

in this way, the Court has refrained from enjoining the States as to the precise manner in which to proceed[20]. And the *Papamichalopoulos* Judgment of the European Court of Human Rights, which Mr. van den Biesen cited as a precedent (the only one, moreover) to the contrary[21] is, in reality, a counter-example; it fully confirms that restrained approach. Contrary to what was suggested by our opponent, the alleged order of restitution addressed to the respondent State in that case was only one of the solutions envisaged by the Strasbourg court, which, moreover, declared that "failing such restitution, the respondent State is to pay the applicants, within six months, 5,551,000,000 (five thousand five hundred and fifty-one million) drachmas in respect of pecuniary damage"[22]. In reality, it goes much further in respecting the State's own capacity to execute the decision of an international court than the *Johnston* Judgment which I cited on Friday[23]. To quote the very clear terms used by the European Court of Human Rights in yet another judgment, which reflects its consistent jurisprudence:

> "Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment"[24].

If the Court were to opt for restitution, it is self-evident, to my mind, that it would have to leave it to the French Republic to decide on the methods, in the same way as the European Court does in

16 what is, however, a particularly interdependent regional context. And I note, in passing, that Mr. van den Biesen indicated the agreement of the applicant State on this point[25].

21. But our very firm conviction is that the Court will not consider itself to be in a position to order such restitution (*restitutio in integrum*), not, I repeat, because, in some abstract and general manner, you would be prevented from indicating that restitution is necessary (providing the method

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[20]See CR 2008/5, pp. 57-58, paras. 11-12 (Pellet).

[21]CR 2008/6, pp. 56-57, para. 8 (van den Biesen).

[22]31 Oct. 1995, *Papamichalopoulos v. Greece*, Rep A330-B, Operative Paragraph 3; see also pp. 58-59, para. 34; available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Papamichalopoulos&sessionid=5014436&skin=hudoc-fr.

[23]See CR 2008/5, pp. 57-58, para. 12 (Pellet citing E.C.H.R., 18 Dec. 1986, Application no. 9697, Series A, no. 112, para. 77; also available on: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Johnston&sessionid=5015581&skin=hudoc-fr).

[24]13 July 2000, *Scozzari and Giunta* v. *Italy*, Applications nos. 39221/98 and 41963/98, Rep. 2000-VIII, par. 249. See also Grand Chamber, 12 May 2005, *Ocalan* v. *Turkey*, Application no. 46221/99, Rep. 2005-IV, or 17 January 2008, *Abbasov* v. *Azerbaijan*, Application no. 24271/05.

[25]CR 2008/6, p. 57, para. 9 (van den Biesen).

was left to the discretion of the State responsible for a violation), but because *in the present instance*, in view of the circumstances of the case, you would be unable to take such a decision in full knowledge of the facts. The Applicant itself has said, Madam President, "the Court is not the French Republic"[26]. That is not contemptuous; it is a statement of fact, but one that is not without legal implications: France (in any case France's judiciary and, more exactly, the investigating judge at the Paris *Tribunal de grande instance*, who for the past five years has been in charge of the investigation opened over eleven years ago) is in possession of all the elements of the Borrel file which, back in 2006, amounted to 35 volumes, probably more since then. And, it was in the light of the whole of that file that Mrs. Clément decided that handing it over to the Djiboutian judicial authorities would be contrary to the essential interests of France and would constitute "an abuse of process aimed solely at ascertaining the contents of a file which includes, amongst other things, documents implicating the Djibouti State Prosecutor in another investigation being conducted at Versailles"[27]. And, Members of the Court, on this point, I take the liberty of referring you to the *Soit Transmis* of 8 February 2006, included in Annex XIII of the short judges' file which we have prepared.

22. The French governmental authorities invoked the first of those reasons; but that does not mean that the second could not equally justify France's refusal of the international letter

17 rogatory — after all, abuse or violation of process is a notion accepted in international law[28] and it is not impossible that other legally valid reasons, both with respect to the 1986 Convention and the general principles of international law, could equally support France's position.

23. Because fundamentally, Madam President, for what does the Applicant really hold the French Republic responsible? It is fairly easy to understand thanks, I admit, to the confusion between the conclusions and the grounds which results from its first submission. First, it holds France responsible for:

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[26] *Ibid*., p. 57, para. 11.

[27] *Soit Transmis*, Order of 8 Feb. 2005, CMF, Ann. XXI.

[28] See, *inter alia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 1996*, p. 622, para. 44 (*a contrario*). See also for example: J.E.S. Fawcett, *Détournement de pouvoir by International Organizations*, *B.Y.B.I.L.*, 1957, pp. 311-317; or C.F. Amerasinghe, *The Law of the International Civil Service (as Applied by International Administrative Tribunals)*, Clarendon Press, Oxford, 1994, 2nd ed., vol. II, p. 31. See also UNAT., Judgment no. 297, *Panis*, 1982; for the ILOAT, Judgments no. 38, *Reynolds* v. *FAO*., no. 248, *Nowakowski* v. *WMO*, no. 447, *Quiñones* v. *PAHO/WHO*.

— "not acting upon its undertaking of 27 January 2005". But that (incidentally, purely fictitious) undertaking was, if it is interpreted as consent to transmit the Borrel file, clearly contrary to the very terms of the Convention, of which Djibouti says that it seeks (and only seeks) the application, as Professor Ascensio will demonstrate shortly. However, even if we were to accept that this letter (whose author declared that the investigating judge responsible for the case "alone" had jurisdiction) expressed an undertaking by France — which it did not, you could "enjoin" France to comply with it, only if there was no legal ground that justified not doing so under international law. It is difficult to see how you could be sure of that in view of the information currently available to you, and when both Parties are, just for once, in complete agreement on one point: the Application which Djibouti submitted to the Court does not concern the *Borrel* case. In that spirit, the Applicant has, moreover, not once requested or suggested that France should hand the relevant file over to the Court (in which regard I venture to note respectfully that it is not the Court's function to consider a criminal case and it is, in any event, probably not very well equipped to examine such a case).

— "In the alternative", the Republic of Djibouti protests, firstly, that France did not perform "its obligation [once again that of executing the letter rogatory of 2004] pursuant to Article 1 of the aforementioned Convention". But Article 1, which refers to all the "provisions of this Convention", is not in itself sufficient, and one can only wonder which article(s) (singular or

18 plural) the Respondent is said by Djibouti to have violated: it may be Article 2 (which allows for the refusal of mutual assistance) or Article 17 (which stipulates that reasons must be given for any refusal). In other words, the violation would concern a failure to notify or to provide reasons. Yet, to the best of my knowledge, there is no legal system in which a failure to notify or to give reasons would lead *ipso facto* to an obligation to perform in such a case.

— The same reasoning applies to the submission in the further alternative: if the refusal to execute the letter rogatory notified by the letter of 31 May 2005 — the refusal itself — was wrongful, it could only be so because the reason provided in the letter was either insufficient or disputable, but the consequence of that could only be the finding that it was wrongful and, possibly, an obligation on France to indicate its reasons in greater conformity with the Convention.

24. Moreover, if the Court were to address an order to France to transmit the Borrel file to the Republic of Djibouti, that would not in any way constitute a return to the *status quo ante*. In this respect, the *Yerodia* case is not a precedent at all. In that case, the Court could order the cancellation of the arrest warrant as, before it was issued — before the warrant was issued — the person concerned had not been exposed to the threat of such a warrant being implemented. In the present case, however, it would imply nothing less than "re-establishing" a situation which had never existed previously: the Republic of Djibouti did not lose possession of the file by the allegedly wrongful conduct of France; it never had the file in its possession. Under cover of restitution, *restitutio in integrum*, the Applicant is not seeking a return to the *status quo ante* at all; it is, I would say, an order of "back to the future" that it would like you to issue. Incidentally, in the *Arrest Warrant* case, all that was at issue was the withdrawal of an existing document, not a active measure, such as the one requested by Djibouti. That does not correspond to the very widely acknowledged definition of restitution in the event of responsibility for an internationally wrongful act, a definition reflected by Article 35 of the ILC's Articles on State Responsibility: "A State

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responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed *before* the wrongful act was committed . . ."[29]

25. Once again, Madam President, the order that the Republic of Djibouti requests you to address to France would not in the slightest way re-establish a situation which existed *before* the refusal of the letter rogatory was decided, but a situation which, according to Djibouti, should exist. Such a request, completely beyond the ordinary boundaries of the law, does not fall within any of the known "headings" of reparation under international law. We do not believe that you can accede to it.

26. And the fact that the Applicant requests you, "in the alternative", to order France to "transmit the 'Borrel file' to the Republic of Djibouti within the terms and conditions determined by the Court[30]" changes nothing whatever.

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[29]Emphasis added.

[30]CR 2008/6, p. 64, Submissions 2. (ii) (Doualeh).

27. I can understand that Judge Bennouna displayed some curiosity in this respect and asked the Applicant for clarification of what it meant by this[31]. I do not know whether he was satisfied with Djibouti's reply[32], but I must say that it did not satisfy us. According to Mr. van den Biesen:

— it could mean that the Court would indicate that France must transmit the "Borrel file" "by means of its own choosing"[33]; but, as we have seen, it could not happen in any other way; that is, if I may say so, the absolute minimum formula in international law when nothing stands in the way of an order, contrary to what is manifestly the case in the present instance;

— the Court could also, Mr. van den Biesen tells us, set a deadline for the handover of the file — with or without a deadline, the problems to which I have just referred remain unresolved; or indeed:

— "la Cour pourrait décider d'exclure les deux pages dont j'ai déjà parlé [à savoir deux pages qui étaient officiellement couvertes par le secret-défense et qui ont été déclassifiées] du dossier que la France serait appelée à transmettre"[34].

20 28. Professor Ascensio will return shortly to the issue of the declassified documents (which concern a lot more than two pages). But, and I repeat this, there is more to the issue than just that: those documents are merely a part of a whole; and it is the whole of the file that is of a sufficiently sensitive nature for the investigating judge to have decided that handing it over would be contrary to the essential interests of France — if only because it involves the disclosure not just of declassified documents — and declassified does not mean public under French law — but also the disclosure of other documents which are classified as defence secrets. Consequently whether it be as the main claim or as its (still rather obscure) "alternative", the second submission of the Republic of Djibouti cannot be accepted by the Court.

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[31]See CR 2008/5, pp. 63-64.

[32]See CR 2008/6, p. 57, para. 10 (van den Biesen).

[33]*Ibid*.

[34]*Ibid*.

B. The consequences of alleged attacks on the immunity and dignity of certain Djiboutian officials

29. I will address much more rapidly the consequences which Djibouti would like you to draw from the alleged attacks on the immunity and dignity of certain Djiboutian officials — though, fundamentally, the Court lacks the jurisdiction to entertain them.

30. By its third, fourth, sixth and seventh submissions, the Applicant seeks to obtain from the Court a declaratory finding that France violated its obligations in this respect[35]. In principle, nothing stands in the way of the Court acceding to such requests (which does not mean, of course, that we acknowledge their validity). Nevertheless, I cannot resist the temptation, Members of the Court, of drawing your attention, to the, shall we say, disconcerting submission by which Djibouti requests you to establish that France violated its obligations "by attempting to repeat", in 2007, the attack which the 2005 invitation to testify supposedly constituted on the immunities, honour and dignity of President Guelleh[36] . . . I take note of that and will return to it at the end of the afternoon.

31. Without it being necessary to repeat what I have previously said about the limits which must apply to orders which the Court might address to States — which is in part applicable to submissions number 5 and 8 — they warrant a few specific comments.

21 32. In the first of these (the fifth submission), Djibouti requests the Court to adjudge and declare "that the French Republic shall immediately after the delivery of the Judgment by the Court withdraw the witness summons dated 17 May 2005 and declare it null and void"[37]. As I told you last Friday[38], and as I will have the occasion to repeat later on, that "summons" is null and void and has, in any case, been replaced by the invitation to testify of 14 February 2007, whose validity the Applicant does not dispute, and in respect of which it does not claim (except in a rather convoluted manner in its third submission, which I just mentioned) that it caused prejudice to the immunity enjoyed by the Djiboutian Head of State. There is thus no need for the Court to rule on this request, which is completely groundless.

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[35]CR 2008/6, p. 65 (Doualeh).

[36]CR 2008/6, p. 65, submission 3 (ii) (Doualeh).

[37]*Ibid*, submission 5.

[38]CR 2008/4, pp. 36-37, para. 35; p. 61, para. 18.

33. Very much in the alternative, should you, nevertheless, Madam President and Members of the Court, consider that the procedural act of 2005 caused the slightest prejudice to the dignity, honour or dignity of President Guelleh, you would have to find that the clarifications made by several official French authorities[39] constitute appropriate reparation by way of satisfaction. On this point, Mr. van den Biesen feigned to wonder: "Mais dans ce cas, la question se pose de savoir quel besoin il y aurait eu — en février 2007 —, quel besoin il aurait eu, donc, d'un «judge's retraction», et ce que ces excuses auraient eu pour but de réparer ?"[40]. The answer is simple: whereas, according to the French Republic, the "summons" (without the slightest threat of any form of compulsion) could not cause any prejudice to the immunity or dignity of President Guelleh, it was nonetheless contrary to the provisions of Article 656 of the Code of Criminal Procedure. And it was that irregularity which led to the (very formal) retraction in question, which, consequently, also constitutes satisfaction for the Head of State of Djibouti.

34. As for the procedural acts concerning the other Djiboutian officials, which the Applicant has "introduced" into the case — whereas they were in no way "related", Djibouti has also requested their cancellation. They are, as I will show later, perfectly valid and cannot prejudice the immunities which these persons do not possess. But with respect to them, there is more than just
22 the lack of jurisdiction of the Court: until the Application was filed, those acts had not once been challenged in terms of immunities, with the applicant State turning its attention to them only before the Court, even though neither the Applicant nor the officials concerned had ever argued on that basis previously. It must therefore be considered that no dispute exists in this respect — or perhaps that the dispute has yet to come into existence.

35. As for the conclusions regarding the cessation of the allegedly wrongful conduct of the French Republic and the "specific assurances and guarantees of non-repetition" which form the subject of submissions number 10 and 11 of the Republic of Djibouti, I commented on them

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[39]See CMF, Fax message from the East and Central Africa Division to H.E. Mr. Rachad Farah, Ambassador of the Republic of Djibouti to France, 19 May 2005, Ann. XXIX; CMF, Statement of 18 May 2005 by the spokesman of the French Ministry of Foreign Affairs, Ann. XXX.

[40]CR 2008/6, p. 26, para. 25 (van den Biesen).

extensively on Friday[41] and, as the counsel for the Applicant has not returned to the issue, I have nothing to add to (or to retract from, for that matter!) what I said then.

36. Just a brief word to sum up, if you permit, Madam President. Describing the position of the French Republic on the subject of the invitation to testify of 17 May 2005, Mr. van den Biesen characterized it, to quote Shakespeare, as "Much ado about nothing"[42]. I admit that I cannot stop myself from thinking the same thing about most of the claims which the Republic of Djibouti has put to the Court. Originally, Djibouti submitted to the Court the technical question of the refusal to execute the letter rogatory of 3 November 2004. France accepted your jurisdiction for that purpose. Everything else, to use the expression dear to Mr. van den Biesen[43], is just a smokescreen.

37. That, Madam President, concludes my first presentation. I would be grateful if you would kindly give the floor to Professor Ascensio.

Le PRESIDENT : Merci, Monsieur le professeur Pellet ; je donne la parole à M. le professeur Ascensio.

Mr. ASCENSIO:

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

1. Madam President, Members of the Court, today it falls to me to reply to the arguments submitted by the Applicant during its second round of pleadings regarding alleged violations of the Treaty of Friendship and Co-operation of 27 June 1977 and of the Convention on Mutual Assistance in Criminal Matters of 27 September 1986. This being so, most of these pleadings will be devoted to the 1986 Convention, and I will confine myself to a few preliminary comments about the 1977 Treaty.

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[41]CR 2008/5, pp. 59-60, para. 17 (Pellet).

[42]CR 2008/6, p. 24, para. 22 (van den Biesen)..

[43]See CR 2008/1, p. 40, para. 24; p. 42, para. 29 and 30.

2. Counsel for the Republic of Djibouti has again maintained that the French Republic was denying that the Treaty of Friendship and Co-operation of 1977 had any binding force[44]. I therefore have to repeat that the Treaty contains no definite legal obligation *relating to* mutual assistance in criminal matters and that would require the transmission of the Borrel record. As for the rest, the obligations embodied in the Treaty do not affect the present dispute, so it is unnecessary for the Respondent to analyze them before the Court. The French Republic has said nothing either more or less during the first round of pleadings or in the Counter-Memorial.

3. Moreover, at no time has counsel for the Republic of Djibouti gone back over the scope of the 1977 Treaty. The limitation to matters other than those that concern us in the present dispute arises from the preamble and holds good for all its provisions, including Articles 5 and 6. In addition, as regards Article 5, the expression "public national organizations" obviously refers to technical organizations specializing in foreign co-operation; it is not usual to describe the judicial authority as an "organization". As to the role of Article 6, relating to the France-Djibouti Co-operation Commission, it is a modest one, as I pointed out in the first round of pleadings, incompatible with the startling effects that the Applicant intended to extract from it.

4. It is not without interest in this respect to note that the Republic of Djibouti's counsel has not gone further with his theory of an indirect violation of the 1977 Treaty by way of an alleged
24 "serious" violation of the 1986 Convention. It still seems to us that this theory should be rejected by the Court.

5. Now that these comments have been made, we should concentrate on the Convention on Mutual Assistance in Criminal Matters of 27 September 1986. In order to respond to the comments by the Republic of Djibouti I will go back to the pattern adopted for my pleadings in the first round, distinguishing the Applicant's main argument (I) from his subsidiary arguments (II).

I. The Applicant's main argument concerning the alleged violation of the 1986 Convention

6. Madam President, I listened attentively to the Applicant's pleadings on Monday morning and I am very much afraid that I have heard no analysis of Article 3 of the 1986 Convention.

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[44]CR 2008/6, p. 28, para. 3 (Condorelli).

Neither have I heard Professor Condorelli dispute his admission that the procedure followed by the French authorities when the request was made for transmission of the Borrel record was in complete conformity with Article 3 of the Convention[45].

7. On the other hand, Maître van den Biesen did go back over what I said during the first round of pleadings, and even challenged it categorically[46]. He now claims that the words "*this is the reality with which also the Applicant . . . have to live*"[47] do not mean what they say but the exact opposite, namely that the Applicant does not intend to live with this situation in French law. He then embarked upon a quite original critical analysis regarding the application of French law by the French authorities. This compels me to go back briefly over the internal procedure for consideration of the request for transmission of the Borrel record and its importance from the viewpoint of the French Republic's international obligations.

8. According to Maître van den Biesen, the Republic of Djibouti had no way of knowing of the existence or the status of the *Soit Transmis* by Sophie Clément, the investigating judge[48]. He then sought to cast doubt on the situation in French law at the time of the acts, citing the position of

25 the Paris State Prosecutor and certain passages in a circular from the Ministry of Justice of April 2004, as reproduced in a judgment of 19 October 2006 by the *chambre d'instruction* of the *Cour d'appel de Paris*[49]. This judgment concerns the proceedings opened following a complaint by Mrs. Borrel for "statements seeking to exert pressure to influence the decision of a judicial investigating authority or trial court"[50]. These, therefore, are proceedings separate from the consideration of the request for transmission of the Borrel record and separate from the investigation proceedings before Mrs. Clément. This is in addition to an interpretation of Article 694-2 of the Code of Criminal Procedure that suits the Co-Agent of the Applicant[51]. These are the sole arguments by the Applicant concerning French law.

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

[46]CR 2008/6, p. 39, para. 9 (van den Biesen).

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

[48]CR 2008/6, p. 39, para. 10 (van den Biesen).

[49]CMF, Ann. XI.

[50]CR 2008/4, p. 23, para. 44 (Belliard).

[51]CR 2008/6, p. 42, para. 19 (van den Biesen).

9. It must be emphasized above all that according to Article 3, paragraph 1, of the 1986 Convention, international letters rogatory must be executed by the requested State "in accordance with its law". The case-law is also covered by this provision, because it is for the French courts to interpret French legislation.

10. The French Code of Criminal Procedure is perfectly clear as regards the issue that concerns us. I refer here to certain points that also appear in the Counter-Memorial. According to Article 694-2 of the Code of Criminal Procedure, requests for mutual assistance shall be executed by the State Prosecutor except "where they require certain procedural acts which may only be ordered or executed in the course of a preparatory investigation"[52]. This is the case when the State Prosecutor transmits the request to the investigating judge. The latter alone has the jurisdiction to hand over copies of documents from his case file; this jurisdiction is derived from Articles 81, paragraph 2, and 82 of the Code of Criminal Procedure[53]. Article 81, which is the more important one, is Annex XIX in your folder.

11. For this reason the investigating judge is competent to refuse to execute a request for mutual assistance likely to damage the essential interests of France. I remind counsel for the
26 Djiboutian Republic that this is not "my own interpretation" of French law[54], but the position of the French Republic. The judgment by the *Cour d'appel de Paris* of 19 October 2006 annexed by the French Republic to its Counter-Memorial confirms this analysis.

12. What is more, the Republic of Djibouti cannot deny that the letter from M. Le Mesle of 1 October 2004, reproduced in Annex 18 to its Memorial and also in your folder as Annex 17, expressly refers to the investigating judge in proceedings for consideration of requests for mutual assistance. It is stated there in black and white that "the investigating judge responsible for the case" "alone has the jurisdiction to hand over copies of the documents".

13. It is true that Maître van den Biesen attempts to draw a dark veil over this key passage, resorting to a most fallacious argument. It involves linking again, and at the procedural level, the two Djiboutian requests for transmission of the Borrel record. Although he admits that these

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[52]CMF, Ann. XVII.

[53]CMF, Ann. XVIII and Ann. XIX.

[54]CR 2008/6, p. 40, para. 15 (van den Biesen).

requests are separate[55], he explains that nevertheless the second, the international letter rogatory of 3 November 2004, should quite simply benefit from the proceedings when the first request, on 17 June 2004, was examined. He would then have had to do no more than complete the last stage, the final acceptance of the request by the letter of 27 January 2005, obviously interpreted as the Republic of Djibouti would wish[56].

14. Madam President, this is to attach very little importance to French law, and thereby to Article 3 of the 1986 Convention, which refers to it! Faced with such a casual approach, I can only repeat what I had said before about the two requests: what distinguishes them with respect to procedure and what they have in common in terms of the merits must be emphasized[57].

15. Maître van den Biesen has certainly admitted that the two requests were separate from the point of view of procedure[58]. Why then should the internal procedure for the international letter rogatory refrain from following the same stages as for the first Djiboutian request? Why

27 should transmission by the investigating judge on the occasion of the first initiative amount to carte blanche for the second, i.e., consideration of the international letter rogatory? Each request calls for the procedure to be followed in its entirety, with all the stages prescribed by French law. One would be annoyed with oneself for mentioning such obvious facts if not compelled to do so by the Applicant.

16. The connection between the two requests is due solely to similarity as to the merits, i.e., as to the subject of the request. Two successive requests for the same subject, even for the same purpose: this is what is "relevant in assisting us to better understanding the facts of the case", to adopt the phase used by Maître van den Biesen[59].

17. I now continue quickly with my list of the oddities revealed during the second round of pleadings by Maître van den Biesen. He explains referring to conversations at the *Palais de justice* in Paris between the Public Prosecutor of Djibouti and the Paris State Prosecutor in May 2004 as

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[55]CR 2008/6, p. 38, paras. 4-5 (van den Biesen).

[56]CR 2008/6, p. 42-43, paras. 19-21 (van den Biesen).

[57]CR 2008/4, p. 57, para. 45 (Ascensio).

[58]CR 2008/6, p. 38, paras. 4-5 (van den Biesen).

[59]CR 2008/6, p. 38, para. 5 (van den Biesen).

"evidence of a clear intention", although in fact he has not supplied any evidence of the content of these conversations[60].

18. He alleges that Mr. Le Mesle stated in his letter of 1 October 2004 that the role of the investigating judge is always limited to formal checks, although that letter confines itself to saying that *in this case* the first request was rejected because of the applicant State's failure to comply with formal requirements[61]. There is no visible relationship between the fact that the investigating judge alone has the jurisdiction to make a copy of the record, as stated in Article 81, paragraph 2, of the Code of Criminal Procedure, and the fact that he allegedly has to confine himself to formal reviews.

19. He describes Mr. Le Mesle's letter of 27 January 2005 as a "lettre d'engagement"[62], although the content of the letter and its context clearly show that Mr. Le Mesle was at the beginning of the proceedings, when he stated that he had asked "for all steps to be taken" to ensure that a copy of the record of the investigation is transmitted[63].

28 20. Lastly, he mentions the judgment of the Court of 10 October 2002 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* regarding the absence in international law of a general obligation for States to keep themselves informed as to the situation in internal law in other States[64]. But that is not the issue. There is a specific legal obligation in Article 3, paragraph 1, of the 1986 Convention, a provision which the Republic of Djibouti is obviously trying hard to forget. It requires the requested State to act in accordance with its law in executing international letters rogatory. Consequently we cannot see how it can be criticized by the applicant State for so doing.

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[60]CR 2008/6, p. 42, para. 18 (van den Biesen).

[61]CR 2008/6, p. 42, para. 19 (van den Biesen).

[62]CR 2008/6, p. 42-43, para. 20 (van den Biesen).

[63]MD, Ann. 21.

[64]CR 2008/6, p. 43, para. 22 (van den Biesen).

II. The Applicant's subsidiary arguments concerning the alleged violation of the 1986 Convention

21. Madam President, I now come to the Applicant's subsidiary arguments. The legal debate turns on the interpretation and implementation of Articles 2 and 17 of the Convention, namely the grounds for refusing mutual assistance (A) and the obligation to give reasons (B).

A. The grounds for refusing mutual assistance

22. In order to respond to Professor Condorelli's and Maître van den Biesen's arguments concerning the grounds for refusing mutual assistance, I will deal first of all with the general interpretation of Article 2 *(c)* of the 1986 Convention, then with the grounds for refusing to transmit the Borrel record.

1. General analysis of Article 2 *(c)*

23. With regard to Article 2 *(c)* of the 1986 Convention, the Republic of Djibouti's counsel was anxious to tell me that paragraphs 143 to 150 of the Djiboutian Memorial mentioned this Article. I thank him for it, because this is correct. In turn I will only point out to him that this passage dealt with the essential interests of the State as a ground for exoneration of responsibility[65], while the French Republic maintains that it has committed no wrongful act.

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24. But without doubt this is not a fundamental issue: which authority is authorized to define what the essential interests of the State are under Article 2 *(c)* is more important. In this connection the Applicant's counsel still maintains that the interpretation of this Article as it is, i.e., with the expression "the requested State considers", would lead to the 1986 Convention being devoid of all practical effect. This assertion is doubly wrong, *in abstracto* and *in concreto*.

25. *In abstracto,* it is not possible to agree with the analysis submitted by the Applicant's counsel regarding clauses of the type appearing in Article 2 *(c)* of the 1986 Convention. It must be said that Professor Condorelli has a regrettable tendency to put words into my mouth, so as to contradict me. He evokes the "utter arbitrariness" and "unbounded discretion", caricaturing the position of the French Republic[66], including attributing a "discreet approach" to it[67]! When the taunt is exaggerated the reply obviously becomes easier; but it is no longer really a reply.

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[65]MD, p. 53, para. 142, and p. 55, para. 150.

[66]CR 2008/6, p. 32, para. 13 (Condorelli).

26. First of all, the elements that the French Republic considered that it could include in the file submitted to the Court are enough to show that transmission of the Borrel record was likely to prejudice France's essential interests. I will return to these elements in a moment. Taking a stand on clauses of the type in Article 2 *(c)* would be really useful only where these elements would not be enough to show that the French Republic had in no way violated the 1986 Convention.

27. Secondly, it is quite obvious that the provisions of a treaty must be interpreted and implemented in good faith, in accordance with the law of treaties. Where the French interpretation differs from that set out by Professor Condorelli it is about the impression that the Applicant wishes to make of good faith, combined for this occasion with reasonableness.

28. In his oral statement in the first round of pleadings, the Applicant asked the Court for
30 nothing less than to "ascertain that the reasons . . . to justify the refusal really do exist and are serious" and even "*relevant*"[68]. This interpretation is the reason for the claims addressed to the Court by the Republic of Djibouti, according to which it should take the place of the national authorities in order to assess what the essential interests of the State are and to require France to transmit the record. But Professor Pellet has already dealt with this issue, so I will not return to it.

29. On the other hand, I must reply to the comments made yesterday morning about international jurisprudence relating to this issue. The Applicant's counsel again mentioned the Court's judgment in 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Merits)*[69]. All the same his analysis, despite its high quality, failed to demonstrate what is not demonstrable, namely that the Court would treat this kind of provision as if the words "the . . . State considers that" did not appear in it.

30. The Court very clearly contrasts in its *dictum* two types of clause, those that reserve the exclusive right of interpretation to the State concerned and those that do not. As an illustration of the former it takes Article XXI of the General Agreement on Tariffs and Trade. The relevant passage is as follows:

> "That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the

[67]CR 2008/6, p. 32, para. 12 (Condorelli).

[68]CR 2008/2, p. 24, para. 31 (Condorelli); the italics are ours.

[69]CR 2008/6, p. 33, para. 14 (Condorelli).

> text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade." (*I.C.J. Reports 1986*, p. 116, para. 222.)

31. Now an argument *a contrario*, Madam President, Members of the Court, is not exactly the same thing as an argument suggesting a graduation between reviews differing in strictness, which was the position taken by Professor Condorelli. *A contrario*, if the Court has jurisdiction in the one case, it means that it does not have jurisdiction in the other.

32. The Applicant's counsel criticized me again for my presentation on the arbitral award in the case concerning *CMS* v. *Argentina*[70]. Contrary to what he asserts, and in accordance with what I asserted, the *CMS* award can be clearly differentiated from the decision on responsibility adopted on 3 October 2006 by an ICSID arbitral tribunal in the case concerning *LG&E* v. *Argentina* on the

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legal issue before us. In the *LG&E* case, in paragraph 214 of the decision, which was exactly the one cited by Professor Condorelli in the first round of pleadings, the arbitrators considered that a review based on good faith would lead to a form of review indistinguishable in its extent from the one they were carrying out in the present case, i.e., a review focused on a provision not expressly specifying that it was for the State concerned to determine what its essential interests were.

33. On the other hand, in the *CMS* v. *Argentina* award, in paragraph 374, the arbitrators made a clear distinction between two types of situation: those in which it is possible to carry out a review on the merits, which is the case where there is no clause reserving the exclusive right of assessment to the State concerned, and the one in which they would have to content themselves with considering whether the measure had been taken in good faith. Earlier the arbitrators were expressly citing the Court's *dictum* in its *Nicaragua* judgment of 1986, repeated in the case concerning the *Oil Platforms*[71]. Referring to the review on grounds of good faith, Professor Condorelli spoke of a "review, at least in respect of good faith"[72]. But whatever the terms used, this position is quite different from the exhaustive review that the Republic of Djibouti was advocating during the first round of pleadings.

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[70]CR 2008/6, p. 33, para. 15 (Condorelli).

[71]*CMS Gas Transmission Company* v. *Argentine Republic*, Award of 12 May 2005, para. 371 (www.worldbank.org/icsid).

[72]CR 2008/6, p. 33, para. 15 (Condorelli).

34. As to the case concerning the *Norwegian Loans*, it seems to me pointless to repeat my comments in the first round of pleadings[73], which remain perfectly valid, subject to the well-known reservation of abuse of rights. I had restated that reservation in the first round, about lawful grounds for refusal to afford mutual assistance[74].

35. After the approach *in abstracto*, we come to the approach *in concreto* of Article *2 (c)* of the 1986 Convention. *In concreto*, it is obvious that the Convention is very useful even in the case of requests culminating in a refusal. The obligation to give grounds in Article 3 is fully applicable and calls for implementation of internal procedure. By way of illustration, in the case before us the obligation to give grounds has led to a decision by the French legal authority, in this case

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investigating judge Sophie Clément, who knows the case in its entirety. This is an undeniable guarantee for all parties affected by the request for mutual assistance.

36. In addition it is absurd to imply that France was abusing the possibility of exemption offered by Article 2 *(c)*. Refusals of mutual assistance are extremely rare in practice. In 2007, out of a total of nearly a thousand foreign requests for mutual assistance France refused five, on grounds such as those laid down in Article 2 *(c)* of the Convention on Mutual Assistance in Criminal Matters of 27 September 1986. I will return a little later on to the content of the grounds communicated to the applicant State, which will give me the opportunity to answer the Judge Simma's question.

37. Lastly, it must be made clear that requests to send a whole legal case file, as was the situation with the Borrel record, are particularly rare. In the vast majority of cases, requests for mutual assistance in fact relate to the transmission of documents or investigations by the authorities requested duly specified in the request, which has its origins in legal proceedings already well advanced in the requesting State. In this respect, and in strictly statistical terms, the request by the Djiboutian authorities is particularly original.

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[73]CR 2008/5, p. 13, para. 18 (Ascensio).

[74]CR 2008/4, p. 53, para. 33 (Ascensio).

2. The reasons for refusing to transmit the Borrel file

38. Madam President, we should now consider the reasons that led the French Republic to refuse to transmit the Borrel file to the Republic of Djibouti. Those reasons were set out in the Counter-Memorial of the French Republic and during the first round of oral argument. They also appear in the *Soit Transmis* (order) issued by investigating judge Sophie Clément on 8 February 2005, which forms Annex XXI to the French Counter-Memorial. I shall therefore confine myself to refuting the bizarre claims of counsel for the Applicant concerning the declassified notes of the French Secret Services.

39. Mr. van den Biesen first claims that in her *Soit Transmis* of 8 February 2005[75] -- which you will find reproduced in your dossier at Annex XIII -- investigating judge Sophie Clément relied on only the two pages of the declassified note to which he refers[76]. That is quite simply wrong. She explains very precisely that she had, on several "occasions" made a request to the Ministries of the Interior and Defence and obtained the transmission of "documents" -- in the plural -- "classified under defence secrecy".

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40. Mr. van den Biesen then explains that France could not rely on the 25 declassified Notes which he failed to mention in his own first round of oral argument, because the French Counter-Memorial made no reference to them[77]. That too is quite simply wrong. The letter from the Director of Criminal Affairs and Pardons at the French Ministry of Justice to the Paris State Prosecutor referring to those notes was specifically mentioned at paragraph 3.56 of the Counter-Memorial, and the relevant passage was reproduced in full at paragraph 3.57. Furthermore, the whole of the document was reproduced in the Annexes to the Counter-Memorial, and is also included in your dossier at Annex XIV[78].

41. Mr. van den Biesen elaborates further that all of the opinions of the Consultative Commission concerning the various requests for declassification ought to have been included in the Annexes to the French Counter-Memorial[79]. It is hard to see why. Note No. 2005-01 of

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[75]CMF, Ann. XXI.

[76]CR 2008/6, p. 47, para. 34.

[77]*Ibid*.

[78]CMF, Ann. XV.

[79]CR 2008/6, p. 47, para. 34.

27 January 2005 was annexed to the Counter-Memorial to illustrate the French declassification procedure. The other opinions, meantime, were readily accessible: they are published in the *Official Journal* of the French Republic and can also be accessed on the Internet, by consulting the Légifrance site[80].

42. And, indeed, the French Republic is demonstrating this again today, since it has included in the judges' dossier the two opinions of the Commission pertaining to the 25 Notes which the investigating judge responsible for the *Borrel* case had asked to be declassified. You will find these at Annexes XV and XVI of your dossier. The two Notes in question are Opinion No. 2004-02 of 5 February 2004 and Opinion No. 2004-12 of 2 December 2004. The first Opinion
34 is in favour of declassifying ten Notes, totalling 21 pages, but does not express a view on two additional Notes which had not been given a classification marking. The second Opinion approves the declassification of three Notes from the DGSE, totalling four pages, and ten Notes from the DPSD, totalling 26 pages.

43. Mr. van den Biesen, finally, reflects on the effects of declassification, as if declassified material suddenly ceased to pose any problem in regard to the State's essential interests. It must, therefore, be pointed out, that declassification takes place at the request of a French judicial authority; in no circumstances can the request emanate from a foreign authority. Moreover, the scope of the decision to declassify is strictly a matter for the judge who requested declassification and the relevant case file. The information transmitted to the judge is then protected by investigative secrecy

44. It is also important to stress that the nature of the information which those Notes contain obviously does not change just because they have been declassified. Communicating them to a foreign power is just as likely to prejudice the essential interests of the nation as it was before, because it was their content that led to the decision to classify them.

Madam President, I think it is time for the pause.

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[80] www.legifrance.gouv.fr.

The PRESIDENT: Yes, it is a good time for the pause. The sitting is adjourned for a few minutes.

The Court adjourned from 4.25 p.m. to 4.40 p.m.

The PRESIDENT: Please be seated.

Mr. ASCENSIO:

B. The obligation to state the reasons

45. Madam President, it is now time to turn to the obligation to state the reasons for refusing mutual assistance, as set out in Article 17 of the 1986 Convention. I shall begin with a general analysis of Article 17 (1) and then consider its application to this case (2).

35 **1. General analysis of Article 17**

46. Counsel for the Applicant has criticized what he considers to be the excessive importance that France attaches to the position of Article 17 in the scheme of the 1986 Convention[81]. But the only argument he advances concerning the confusion between Articles 2 and 17 consists in citing the context! Therefore, if it is the context that is of interest, the distance that separates the two provisions must be taken into account, since it cannot be a matter of chance. Moreover, the ordinary meaning of the terms used in those articles emphatically contradicts their interpretation by the Republic of Djibouti, as does an analysis of the aim and purpose of the Treaty.

47. Professor Condorelli clearly did not greatly savour certain comments -- although there was nothing untoward about them -- concerning the succinct nature of Article 17, and the fact that it does not go into great detail. Here again, the response was out of all proportion. The best answer is probably to set out calmly for the Court the actual content of some of the refusals France has given to requests for mutual assistance in criminal matters. That brings me to answer Judge Simma's question.

[81] CR 2008/6, p. 35, para. 18.

48. Of the approximately one thousand requests for mutual assistance which it received in 2007, France refused five. Four of the requests that were refused came from the Ivory Coast. Those refusals were notified to the requesting authorities simply by means of the following statement: "[t]he ministry informs the Embassy that, since these requests for mutual assistance are capable of prejudicing the sovereignty and security of France, the French authorities cannot accede to them"[82]. I would add that the Franco-Ivorian Convention of 24 April 1961 includes provisions similar to those laid down by Article 2 *(c)* of the Franco-Djiboutian Convention on Mutual Assistance.

49. The fifth example was the refusal France gave in answer to a Member State of the European Union, in this case the United Kingdom. The legislation applicable in that case provides for the same kind of derogations and the same obligation to give the reasons as appears in Articles 2 and 17 of the Convention of 27 September 1986. The French reply merely states that:

36 "it will not be possible to accede to this request which is capable of prejudicing *ordre public*, as it involves journalists whose statements have already been taken in the course of the French proceedings and transmitted to your services in response to a letter rogatory"[83].

50. In that connection, and seeking to give a further response to Judge Simma's question, it may be pointed out that the refusal was worded in this way, even though the provisions of the Convention of 20 April 1959, of the Joint Action of 29 June 1998 and the relevant provisions of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, concluded on 29 May 2000, were applicable. Bearing in mind the references which the Applicant has made to the Joint Action of 29 June 1998, it must be stressed that, like the Convention of 29 May 2000 and the Convention implementing the Schengen Agreement of 19 June 1990, that Joint Action does not interpret the Convention of 20 April 1959; it supplements it, and does so in the context of the relations between the Member States of the European Union only. It is, in any event, clear that none of these texts may be used to interpret the

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[82]Note Verbale of 16 May 2007 sent by the Ministry for Foreign Affairs, Directorate for French nationals abroad and foreign nationals in France, Department for civil matters and mutual assistance, to the Embassy of the Republic of Ivory Coast in Paris, and Note Verbale of 23 May 2007 sent by the French Embassy in Ivory Coast to the Ivorian Ministry for Foreign Affairs, Protocol Department.

[83]Letter sent on 29 Oct. 2007 by the Deputy-Director for specialist criminal justice, on behalf of the Director of Criminal Affairs and Pardons at the Ministry of Justice to Lord Scott Baker, Royal Coroner.

Franco-Djiboutian Convention of 27 September 1986, since one of the parties to that bilateral convention is not a member of the European Union.

51. Finally, looking at it from the other side, the French authorities have already, in the past, met with refusals based on the essential interests of other States. For instance, to give just one example, Togo responded to France with just such a refusal, asserting that "certain of the communications which you have requested are capable of prejudicing the sovereignty, security or *ordre public* of the Togolese State"[84].

52. All of the documentation which we have cited is, of course, available to the Court. However, the fact that they originate in judicial investigations that are ongoing, and, therefore, are not of a public nature, means that we shall have to render them anonymous before transmitting them. Moreover, if the Court were to accede to the Applicant's request to be able to submit written submissions concerning France's response to Judge Simma's question on completion of the oral procedure, we would wish to see those submissions and to be able to reply, if we consider that appropriate.

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2. The application of Article 17 in connection with the refusal to transmit the Borrel file

53. Following that general analysis of Article 17, I come now to its application in connection with the refusal to transmit the Borrel file. In both its Counter-Memorial and the first round of oral argument, the French Republic produced an initial item of important evidence, namely the letter of 31 May 2005 sent by the Director of Criminal Affairs and Pardons at the French Ministry of Justice to the Ambassador of Djibouti in France[85]. The Director mentioned Article 2 *(c)* of the Convention on Mutual Assistance of 17 September 1986 and the decision of the investigating judge responsible for the matter. Furthermore, and in accordance with the principle that less is more, in order to fulfil the obligation to give the reasons, it is absolutely unnecessary to do more than cite one reason which is in itself sufficient, even though further reasons may exist.

54. Madam President, pointing that out enables me to move on to answer the question which you put to the French Republic at the end of the first round of oral argument.

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[84]Letter sent on 29 Sept. 2003 by the senior investigating judge at the Lomé *Tribunal de grande instance* to Mr. Jacques Gazeaux, investigating judge at the Paris *Tribunal de grande instance*.

[85]CMF, Ann. V.

55. As we stated in our oral pleadings, it is not our practice to send registered letters with acknowledgement of receipt to our foreign counterparts. We are, therefore, unable to provide proof that the Ambassador of Djibouti in France received the letter of 31 May 2005.

56. As soon as we learnt, on 22 November 2007, that the Applicant disputed having received that letter, we looked for evidence confirming its dispatch. Our efforts met with only partial success. We traced a dispatch note, for information, of a copy of that letter to the French Ambassador in Djibouti, which in any event confirms its existence. We have that dispatch note at the Court's disposal. It is possible that the letter of 31 May 2005 was transmitted through political channels.

57. In any event, even if that letter did not reach the addressee, during its oral pleadings, the French Republic cited a wealth of evidence demonstrating that the Republic of Djibouti was perfectly well informed of the reasons for the refusal to transmit the file[86].

38

58. Not only are the answers given by the Republic of Djibouti during the second round of oral argument unconvincing, they bring to light a new fact. In relation to the citation, in the Memorial, of the letter from investigating judge Sophie Clément, counsel for the Republic of Djibouti said: "we were wrong in assuming that there was such a letter"[87].

59. Had we only known sooner! On reading the Application and then the Memorial, the French Republic could only assume, in all good faith, that the Republic of Djibouti was perfectly informed of the reasons for refusing mutual assistance, particularly since it used inverted commas, as if it were actually citing a letter from the investigating judge. That understanding of the Memorial was plainly set out in the French Counter-Memorial, which was submitted in June 2007[88]. But the Republic of Djibouti did not respond, not even when it sent a large bundle of additional documents to the Court's Registry in November 2007. Nor did it utter a word during the first round of oral argument. We only found out during the second round of oral argument, in response to a question by the Court.

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[86]CR 2008/5, pp. 20-21, paras. 51-54 (Ascensio).

[87]CR 2008/6, p. 46, para. 31 (van den Biesen).

[88]CMF, p. 38, para. 3.73.

60. Whatever the circumstances relied on, the conduct of the Republic of Djibouti clearly indicate — or at least gave the French Republic to believe -- that the Djiboutian authorities were apprised of the reason mutual assistance had been refused. The Djiboutian authorities failed to enlighten the French Republic when they had the opportunity to do so. They allowed the dispute to march on, in a manner prejudicial to the French Republic, which was unable to change its legal stance vis-à-vis the Republic of Djibouti.

61. More generally, going back as far as 2005, the Republic of Djibouti has never approached the French authorities for clarification of the reasons for the refusal, clearly proving that it was aware of them.

62. Moreover, during the oral arguments before the Court, the French Republic informed the Republic of Djibouti at length of the reasons why it had refused to transmit the Borrel file, doubtless doing far more than Article 17 of the 1986 Convention on Mutual Assistance requires. Pursuant to the Court's case law in the case of *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment (I.C.J. Reports 1963*, p. 38, para. 58) and the *Nuclear Tests (Australia* v. *France), Judgment (I.C.J. Reports 1974*, p. 271, para. 58), it must be
39 established that, in any event, the dispute is now devoid of purpose in so far as it concerns the obligation to give the reasons for refusing mutual assistance. A ruling on that point is no longer necessary.

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63. Madam President, Members of the Court, I must again conclude by reminding the Court of the main points on which the French Republic has focused all of its pleadings concerning the alleged violations 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:

(i) the French Republic did not violate any legal obligation arising out of the 1977 Treaty of Friendship and Co-operation;

(ii) we cannot accept that the 1977 Treaty of Friendship and Co-operation was violated because of an alleged "serious" breach of the Convention on Mutual Assistance in Criminal Matters of 27 September 1986;

(iii) nor was the 1986 Convention on Mutual Assistance in Criminal Matters violated by the refusal to act upon the alleged undertaking consisting in the letter of 27 January 2005, since the internal procedure was under way at that time;

(iv) the reasons for refusing to transmit to the Republic of Djibouti a copy of the Borrel file were given, in accordance with the provisions of the 1986 Convention on Mutual Assistance in Criminal Matters, and notably Article 2 thereof;

(v) France did not violate the obligation to give the reasons for refusing mutual assistance pursuant to Article 17 of the Convention;

(vi) in the alternative, a violation of the obligation to give the reasons for refusing mutual assistance does not constitute a violation of Article 1 of the Convention;

(vii) in the further alternative, the element of the dispute concerning the obligation to give the reasons for refusing mutual assistance has become devoid of purpose;

40 (viii) finally, as Professor Pellet has demonstrated, a violation of the 1986 Convention, whatever its cause, certainly cannot give rise to an obligation to transmit the file in whole or in part.

Madam President, Members of the Court, I am most grateful for your attention. Madam President, may I ask you to give the floor to Professor Pellet once more.

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

Mr. PELLET:

THE ALLEGED ATTACKS ON THE IMMUNITIES AND DIGNITY OF CERTAIN DJIBOUTIAN OFFICIALS

1. Thank you very much. Madam President, Members of the Court, I now turn to the second aspect of the case pleaded by the Republic of Djibouti — an aspect which is "off the point" or rather "outside the subject", if you will, because, as I showed early this afternoon, the Court does

not have jurisdiction over it — even if the other Party has dwelt at length on it[89]. We will devote less time to it — not only because it obviously lies "outside the subject", which means that we will only deal with it substantively "in the alternative" (I am employing this expression because Mr. van den Biesen criticizes me for not using it enough . . .)[90] — but also because I do not think that much remains to be said about it at this very advanced stage in the proceedings.

2. In accordance with the practice of both Parties, I shall again draw a distinction between the alleged attacks on, first, the immunity, honour and dignity of the Djiboutian Head of State (I) and, second, on the person, freedom and dignity of persons alleged to be internationally protected (II).

41

I. The alleged attacks on the immunity, honour and dignity of the Djiboutian Head of State

3. In respect of the alleged attacks on the immunity of the President of the Republic of Djibouti, I shall, unsurprisingly, in turn address the issues raised by the "witness summons" of 17 May 2005 and those in respect of the invitation to testify dated 14 February 2007.

A. The "witness summons" of 17 May 2005

4. In paragraph 8 of his statement on this part (or "non-part" . . .) of the case, Maître van den Biesen recapitulates the various characteristics of a witness summons under Article 101 of the French Code of Criminal Procedure. At the end of his list — which appears correct, even if exceeding the scope of Article 101 itself, which does not have so much to say[91], my opponent says: «*e)* l'application de la procédure régie par l'article 101 est garantie, aux termes de son paragraphe 3, à peine de recours à la force publique, tel que prévu par l'article 109»[92].

5. But what is truly remarkable is that, once again, he takes absolutely no account of this latter element when, immediately after going through this analysis, he states: «Ces éléments se retrouvent tous dans la convocation à témoin qui a effectivement été envoyée — par télécopie — au président de l'Etat demandeur le 17 mai 2005, ainsi que dans les deux autres convocations

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[89]See CR 2008/6, pp. 18-27 (van den Biesen) and pp. 50-54 (Condorelli).

[90]*Ibid.*, p. 46, para. 30.

[91]See CMF, Ann. XXV.

[92]See CR 2008/6, p. 19, para. 8 (van den Biesen).

versées au dossier de la présente affaire»[93]. That is simply not true, Madam President! The document addressed to President Guelleh makes absolutely no reference to Article 109 — nor, for that matter, does the one sent in 2004 to the Ambassador of Djibouti in Paris —, in striking, glaring contrast to the standard form, which is in universal use (except when the witness being summoned is the victim of an offence). The witness summons addressed to the now famous "Madam Foix" is an example of this and that summons cites both Article 109 of the Code of Criminal Procedure and Article 434-15-1 of the Penal Code. The first of these provisions creates the possibility of compulsion by law enforcement agencies; the second the possibility of a fine.

42 6. It is no doubt true that the investigating judge who drew up this "summons" initially used the "template" for witness summonses[94]. But what is far more important for the matter concerning us is that she took great care to eliminate all references in the form to the possibility of constraint. This is completely different from the witness summons — a true witness summons under Article 101 — sent to Madam Foix.

7. Contrary to the words which the advocate for the Applicant tries at all costs to put in our mouths[95], it does not follow from this that this was an invitation to testify under Article 656 — a provision which, once again, you will find in the brief judges' folder we have prepared. But the care taken by Ms Clément to remove all reference to compulsion does show at least three things:

1. that the investigating judge in no way contemplated resort to constraint;
2. that, therefore, the inviolability and absolute immunity from criminal jurisdiction enjoyed by President Guelleh were not threatened or, *a fortiori*, violated; and
3. that is all that is required by international law, which, as I showed last week[96], without being contradicted, does not prohibit inviting the representative of a foreign Power to testify, as long as he does so freely and voluntarily. Moreover, Maître van den Biesen grudgingly recognizes this, as he believes that it is the link with the use of public force which alone would have amounted to « une atteinte importante à l'immunité, à l'honneur

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[93] *Ibid.* (van den Biesen, citing MD, Ann. 25, and the additional documents of 21 Nov. 2007, Ann. 7).

[94] See CR 2008/6, p. 19, para. 8 (van den Biesen).

[95] See CR 2008/6, p. 20, para. 10 (van den Biesen).

[96] See CR 2008/5, p. 28, para. 15 (Pellet).

et à la dignité du président de Djibouti — une atteinte qui engage la responsabilité internationale de la République française »[97]. No coercion and no threat of coercion, no violation.

8. This is also why we maintain that it was perfectly legitimate[98] for the President of the Republic of Djibouti to refuse to testify as he had been asked to do. And that is true whether in the case of the "witness summons" in 2005 or the invitation to testify in 2007, which, I shall return briefly to this, complied in all respects with the requirements of Article 656 of the Code of Criminal Procedure.

43 9. We willingly admit that that was not the case of the first — save in respect of the crucial issue of the threat of coercion. But it was only under French law that the 2005 summons was defective, not under international law, which alone is in question in this courtroom.

10. Moreover, the defectiveness of the "witness summons" of 17 May 2005 under French law alone is not without impact in our case: for example, as implied in the letter from the Head of Protocol at the Ministry of Foreign Affairs dated 14 January 2005[99], such a summons is null and void under French law as a result of its failure to comply with the only procedure available for obtaining testimony from representatives of foreign Powers, namely that under Article 656 of the Code of Criminal Procedure, and the lawfulness of the procedure is conditioned on compliance with essential formalities. Although I am not aware of any case law bearing directly on the failure to respect the formalities required by either Article 101 or Article 656 of the Code of Criminal Procedure, an analogy comes to mind with the judgment of 16 November 1991 by the Criminal Division of the Court of Cassation confirming that the failure to comply with an essential formality required by the Code of Criminal Procedure (that case involved the failure to swear a witness) was contrary to *ordre public* and vitiated the procedural step in question[100].

11. The disputed summons or invitation — it is merely a choice of words in so far as, in any event, the document was not accompanied with any constraint or threat of constraint — is therefore

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[97]CR 2008/6, p. 22, para. 14.

[98]See CR 2008/6, p. 20, para. 9 (van den Biesen) or p. 21, para. 12.

[99]MD, Ann. 27; see also the statements by the spokesman of the Ministry of Foreign Affairs dated 18 May and 19 May 2005, CMF, Anns. XXIX and XXX.

[100]*Bull. crim.* 1991, No. 400.

null and void under French law and could not have any effect in the internal judicial order or, *a fortiori*, in the international order.

12. But there are also two other reasons why, in any case, the Court cannot uphold Djibouti's submissions concerning this writ. I shall do no more than repeat them because I have already explained them in my first statement:

— first, the authorities of the Republic acknowledged, publicly and repeatedly, the error committed by the investigating judge;

44 — secondly, there is no need to "declare null and void" the invitation — or summons — to testify of 14 May 2005, which at any rate can no longer produce any effect — not only because it indicated a specific date, now long in the past, but also and above all because it was replaced, in 2007, by a perfectly lawful invitation to testify with a similar subject (which, I moreover hasten to point out, is also no longer in force).

B. The invitation to testify of 14 February 2007

13. On the subject of the 2007 invitation, Madam President, I can be very brief:

— the Applicant admits that this document, appearing in Annex XXXII of the Counter-Memorial, meets the requirements of Article 656 of the Code of Criminal Procedure[101] and that the procedure followed in transmitting it to its high-ranking addressee was perfectly lawful[102];

— it also admits, it seems to me, that these — meaning the requirements of Article 656 —, in turn are in full accord with the principles and rules of international law in respect of protecting the immunities, dignity and honour of foreign Heads of State[103].

This means, in plain terms, that it has no complaint against it for anything and that this courteous and deferential invitation cannot engage the Republic's responsibility. I would add that, as can be seen from the letter from the French Minister for Foreign Affairs to his counterpart at the Ministry of Justice dated 20 February 2007, President Guelleh's refusal to respond to this request

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[101] See CR 2008/1, p. 48, paras. 52-53 (van den Biesen), or CR 2008/6, p. 18, para. 5 and pp. 23-24, para. 21 (van den Biesen).

[102] See CR 2008/1, p. 46, para. 43 (van den Biesen).

[103] See CR 2008/6, p. 20, para. 10.

put an end to this "case within the case" — which, and Mr. van den Biesen will not keep me from saying[104] (and thinking) this, is really too artificial to merit much more attention.

14. And just as artificial as the incredible construct cobbled together by my opponent, who asks you to find France responsible for a so-called "attempt to repeat" the attack allegedly made in 2005 on the immunities, honour and dignity of the President of the Republic of Djibouti[105] on the pretext that the press allegedly spoke of a summons sent to the President before the investigating
45 judge signed the invitation to testify — that invitation, by contrast, being quite real and in the file submitted to the Court. This shows only one thing: that the press, which does its investigative work (whether we welcome or deplore this, it is connected with the role of the press . . .), that the press therefore was not well informed of the measure, since it wrongly called it a "witness summons"; but I am not sure that we should make much of this; even for the lawyers we are (and, in my case at least —I say this in all humility, Madam President), the arcana of criminal procedure are not always crystal clear to those not specializing in criminal law; there is hardly any reason why they should be any clearer for the journalists, who no doubt did not have specialized legal training.

15. How, in any case, could France have engaged its responsibility for a writ which never took material form; which nobody ever saw in writing; and which, barring further information, can really only be called a phantom summons — of which the imaginative counsel for Djibouti seems to have had a revelation and which he undoubtedly would have wanted to see in real life but which plainly exists only in his imagination? And I would add a last comment on this point: the 2005 "witness summons" had been the subject of numerous, sharp disavowals on the part of both the Ministry of Justice and the Ministry of Foreign Affairs; and, even if it did not breach any rule of international law, it would nevertheless have required an exceptional lack of awareness (or a great deal of obstinate error) on the part of its author to issue a similar writ again — while the deliberate omission from the 2005 summons of any reference to the possibility of constraint showed that she took care not to attack the immunities of the Djiboutian Head of State.

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[104]See CR 2008/6, p. 23, para. 20 (van den Biesen).

[105]See CR 2008/6, p. 65, para. 3 of the submissions (Doualeh).

16. I cannot even say, Madam President, that I admire the imagination shown by my opponent. I simply think that, having nothing "concrete", nothing "solid" to plead, he went astray into a world cut off from reality. The Court will undoubtedly not let itself be taken there.

II. The alleged attacks on the person, freedom and dignity of allegedly internationally protected persons

17. Madam President, the facts are clearly more solidly established where the second set of allegations by Djibouti regarding immunities is concerned: the summonses as legally represented witnesses were indeed addressed to the State Prosecutor and the Head of National Security of Djibouti in connection with proceedings for subornation of perjury before an investigating judge at the Versailles *Tribunal*[106]; and, as those concerned did not answer that summons, they were issued with arrest warrants by the *Chambre de l'instruction* of the Versailles Court of Appeal[107]. So the facts are not in dispute. The law, however, is.

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18. And I must say at the outset, Madam President, that I am extremely concerned by the actual title Professor Condorelli gives to his oral pleading on this point "The violation by France of the obligation to prevent attacks on the person, freedom and dignity of *internationally protected persons*"[108]. I confess I do not understand: in paragraphs 137 and 138 of its Memorial, the Applicant, having mentioned paragraph 51 of your *Yerodia* Judgment of 2002, relating to "certain holders of high-ranking office in a State", which among other things quotes "a non-exhaustive list of examples" — it is Djibouti who writes this — such as "the Head of State, Head of Government and Minister for Foreign Affairs" (*Arrest Warrant of 11 April 2000, I.C.J. Reports 2002*, pp. 20-21, para. 51), added:

> "*From this standpoint*, the issuing and circulation of arrest warrants by the French judicial authorities against Mr. Djama Souleiman Ali and Mr. Hassan Saïd, respectively the State Prosecutor of the Republic of Djibouti and the Djiboutian Head of National Security, for 'subornation of perjury', are further violations of customary international law"[109].

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[106]See MD, Ann. 30, and additional documents of 21 Nov. 2007, Ann. 11.

[107]See CMF, Ann. VII.

[108]CR 2008/6, 28 Jan. 2008, p. 50 (Condorelli); emphasis added.

[109]MD, p. 52, para. 138; emphasis added.

It was further stated, also in the Memorial, that: "It should be noted once again in this context that the . . . Convention on Special Missions confirms the principle of the personal *inviolability* and immunity from jurisdiction of the members of these missions"[110]. This is what is written in Djibouri's Memorial.

19. In our innocence, we had deduced that the Republic of Djibouti considered that those concerned enjoyed personal immunity by virtue of their functions (comparable to those of Heads of State or Government or Ministers for Foreign Affairs, since the Memorial expressly approached the
47 case "from this standpoint"), as well, moreover, as from that of the law of special missions. Professor Condorelli refuted both these interpretations, taxing the former with "heresy" in his oral pleading of 25 January[111] and acknowledging that the functions of State Prosecutor of the Republic and Head of National Security were "essentially internal"[112]. And, in his statement yesterday, he rejected the help, or partial help, the law of special missions might have provided him with: "The submission . . . of Djibouti . . . is not based on the law . . . of special missions"[113]. So exit personal immunity. But then, Madam President, on what bases does the Respondent seek to enable those concerned to elude ordinary law? On the idea (and on this idea alone) that (it is the Respondent speaking)

> "a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say, in the performance of his duties, as such acts are to be viewed in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as that organ"[114]. [I cannot understand how Mr. Condorelli can read such long sentences.]

This is surely true in part. But not in this absolute form, as that would amount to reinventing the argument of absolute immunity. I am sorry to give an example concerning myself, but Mr. Condorelli will surely forgive this, as it might equally well concern him. If one of us gives a lecture abroad — which is absolutely one of our functions — he would certainly not enjoy any international protection, even if we receive a mission order from our universities, which are public

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[110] *Ibid.*

[111] CR 2008/3, 25 Jan. 2008, p. 15, para. 23 (Condorelli).

[112] *Ibid.*, p. 8, para. 7; and p. 13, para. 19 (Condorelli).

[113] CR 2008/6, 28 Jan. 2008, p. 51, para. 4 (Condorelli).

[114] *Ibid.*, p. 51, para. 5.

bodies. Only conduct directly linked to the performance of a public service mission and accompanied by the exercise of public service prerogatives performed in the name and on behalf of the State, are able to trigger the phenomenon of immunity. This being so, counsel of the Applicant concedes that, in any event, these individuals cannot enjoy absolute immunities[115], which means

48 that one must (and here I am quoting my opponent's actual words): "verify concretely the acts in question, when of course the issue of immunity has been raised"[116].

20. Well and good. But who can assess this? Who can assess whether these nevertheless strict conditions are met? Mr. Condorelli does not put forward the idea that the State "of origin", if I may put it thus, would enjoy this power and, indeed, since it is not a matter of absolute immunity, this could not be the case — unilaterally at least. For my part, I had timidly suggested that this could be the domestic court of the forum State. After denouncing (it is he who says so) "this surprising argument", my opponent becomes more lenient:

> "True" [he avers], "it cannot be denied that it is normally for internal courts to address questions of this type. But when, as in the present instance, this Court has been granted the jurisdiction necessary by the Parties to settle a dispute concerning functional immunities, one cannot see any ground whatever that prevents the Court from addressing it and obliges it to relinquish jurisdiction to a national court"[117].

Apart from the fact that, in this case, France has not consented to the jurisdiction of your distinguished Court at all for settling the dispute relating to the "functional immunities" — I will not go back over that again, as this dispute, where this precise point is concerned, is in any event not connected or linked, as I was saying a moment ago.

21. Professor Condorelli shows he is aware of the problem and tries to defuse it when saying that:

> "it would be absurd to claim that the fact that the two Djiboutian high officials have yet to avail themselves of their immunity within the context of the investigation into subornation of perjury wrongfully initiated against them in France prevents the Republic of Djibouti from asking the Court to adjudge and declare that France is violating to its detriment the principles of international law on immunities"[118].

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[115] *Ibid.*, p. 50, para. 3.

[116] *Ibid.*, p. 52, para. 7.

[117] *Ibid.*, p. 53, para. 8.

[118] *Ibid.*

Presented in this way, it is perhaps absurd — but fundamentally it is not. Since the question has never been raised, there is (on this point . . .) no dispute which the Court could settle. France does not necessarily refuse to consider that those concerned were perhaps acting in the context of their official functions and on a mission with the characteristics I referred to a moment ago, on the occasion of the facts of which they are suspected; it simply notes that neither they, nor Djibouti at
49 the diplomatic level, nor in its Application, nor in its Memorial, have raised this argument and that, if Mr. Condorelli asserted it with his usual conviction (and — supposed — indignation)[119], he did not completely manage to convince me either that the rather special facts of the case could fall within the official functions of an agent of any State, or in any event, that you have sufficient elements to determine whether or not, regardless of the object of their respective missions — for, I repeat, they clearly enjoy the presumption of innocence where the characterization of the facts is concerned — they were or were not acting in the context of their official functions.

22. Moreover, it seems to me, Madam President, that the simple fact that the argument that those concerned enjoyed immunity from jurisdiction by virtue of their functions only appeared in connection with the present proceedings (rather belatedly, moreover) seriously suggests that it was forged *ex post* solely for the purposes of these proceedings. Originally, Djibouti had relied on another, entirely separate one — which resurfaced in a slightly different form in its Application, then in its Memorial.

23. This argument was first put forward by the lawyer of Messrs. Saïd and Souleiman to justify their refusal to answer the summons by the Versailles judge. In a letter dated 11 October 2005 (in which he was clearly also speaking on behalf of the Republic of Djibouti), he wrote:

> "I regret to inform you that these two persons, one an official and the other a judge, cannot comply with that summons.
>
> The authorities of the Republic of Djibouti have always co-operated fully in relation to the death of Judge Borrel and the ensuing judicial procedures.

[119] CR 2008/3, 25 Jan. 2008, p. 12, para. 17, and p. 14, para. 21 (Condorelli).

> French judges and police officers have had full scope to conduct all the enquiries they considered necessary in Djibouti, even within the premises of the Presidency of the Republic.
>
> The Djiboutian authorities have not been able to secure the co-operation of the French judiciary in return.
>
> In such circumstances, the *Republic of Djibouti*, as a sovereign State, cannot accept one-way co-operation of this kind with the former colonial power, and the two individuals summoned *are therefore not authorized to give evidence*"[120].

50 24. Similarly, in is Memorial, Djibouti complains that

> "on the one hand . . . the French authorities have unilaterally blocked judicial co-operation between the [two States] and on the other hand . . . they considered themselves entitled to seek Djibouti's co-operation in that same *Borrel* case by summoning Djiboutian nationals as witnesses"[121].

25. At the risk of repeating myself, I must once again point out that Djibouti's lumping together of the "Borrel case" (in other words, the judicial investigation relating to the death of Bernard Borrel and investigated at the *Tribunal de grande instance* in Paris) and the investigation opened for subornation of perjury at the *Tribunal* in Versailles is not correct. They are two separate cases, only the former being concerned by the refusal to act upon the letter rogatory of November 2004. But that is not all.

26. As I said a few moments ago, the summonses served on Messrs. Saïd and Souleiman to appear as legally represented witnesses were transmitted to the Djiboutian Ministry of Justice in strict application of the 1986 Convention on Mutual Assistance between the two countries. By refusing to respond to them, the Republic of Djibouti failed in its obligations under the Convention and, in particular, those resulting from paragraphs 1 and 2 of Article 3, which state that:

> "1. *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 . . .
>
> 2. If the requesting State desires witnesses or experts to give evidence on oath, it shall expressly so request, *and the requested State shall comply with the request if its law does not prohibit it*".

27. Djibouti's refusal to respond to the request by the investigating judge in Versailles is not based on this ground, any more than it is on any of the grounds contemplated by Article 2 of the Convention, which Hervé Ascensio discussed at length last week and a few moments ago. What it

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[120]MD, Ann. 31; emphasis added.

[121]MD, p. 32, para. 77.

amounts to is rather a kind of *exception non adimpleti contractu* which does not speak its name. The conditions which might justify these exceptions coming into play are by no means met.

28. For the rules set out in Article 60 of the Vienna Convention on the Law of Treaties, which, at least in broad outline, codify the existing law as regards the termination or suspension of the operation of a treaty as a result of its violation, to be applicable, at least two conditions must be met:

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(1) the alleged violation of the 1986 Convention must be proven — yet as my colleague and friend Hervé Ascensio has shown, this is not the case (and this also applies to an argument which is allegedly founded on the notion of counter-measures); and

(2) that the Republic of Djibouti has relied on "the breach as a ground for terminating the Treaty or suspending its operation in whole or in part"[122] — yet far from relying on the end or suspension of the 1986 Convention, Djibouti relies on this treaty and bases the bulk of its argument on its provisions; as found by the *Chambre de l'instruction* of the Versailles Court of Appeal in its Judgment of 26 September 2006: "the official judicial authorities of Djibouti had not, at any time, expressed the intention of suspending or severing mutual assistance relations with France"[123]; moreover, if there had been any denunciation or suspension, it would have had to be notified at least according to the spirit of the directives of Articles 65 to 67 of the 1969 Convention[124]. By prohibiting the two individuals concerned from responding to the summons by the judge in Versailles, with no legal justification whatever, the Republic of Djibouti clearly acted in breach of the 1986 Convention on Mutual Assistance, by which it claims to set such store.

29. It remains for me to conclude, recapitulating, Madam President, that:

(1) In general, all the issues I have dealt with in this last oral pleading, without exception, do not fall within the jurisdiction of the Court; the following conclusions relating to them are therefore only in the alternative.

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[122]Art. 60, para. 1, of the Vienna Convention of 1969.

[123]CMF, Ann. VII, p. 12.

[124]Cf. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 66, para. 109.

(2) President Guelleh was not subjected to any threat, nor *a fortiori* of course, any compulsion, which would have been an attack on his immunities, his dignity or his honour:

— the "witness summons" of 14 May 2005, although not complying with the requirements of Article 656 of the Code of Criminal Procedure, in no way referred to the possibility of the use of the law enforcement agencies, in striking contrast to the practice usually followed, which, of

52 itself, showed the firm intention of the investigating judge not to adopt the standpoint of ordinary law;

— because, precisely, that summons did not comply with the provisions of Article 656, it was nevertheless null and void; and

— in any event, it was replaced by the — perfectly valid — invitation to testify of 14 February 2007, so that there is anyway no reason to rule on Djibouti's claims relating to it;

— in the alternative, if, however, the Court wished to rule on its merits, it could but find that it — this summons in 2007 — did not breach any principle or rule of international law;

— in the further alternative, if *per impossibile* — to please Maître van den Biesen — the Court were to consider that such was not the case, it would, I am convinced, regard the excuses presented by the French official authorities as constituting sufficient and appropriate reparation;

— as to the invitation to testify of 14 February last, the Applicant does not in fact allege that it was unlawful; hence, it cannot, in any way whatever, engage France's responsibility and, Members of the Court, you could but take note of it.

(3) As regards the alleged attacks on the immunities enjoyed by the State Prosecutor of the Republic and the Head of National Security of Djibouti,

— the summonses to appear as legally represented witnesses served on them were also supplanted by the arrest warrants issued against these two individuals; there is thus no reason for the Court to rule on them;

— as regards the arrest warrants themselves, they do not conflict with any rule of international law and could not have been an attack on the immunities which those persons do not enjoy; and,

— in any event, since — far from relying on such immunities before the French judge — they have based themselves on an alleged breach of the principle of reciprocity — which is not

relevant in this case, the dispute is not about this point — all this quite independently of the
53 Court's manifest lack of jurisdiction to rule on this whole aspect of the case relating to the immunities of the Djiboutian officials now relied on by the Applicant.

30. Members of the Court, this brings my oral argument to a close. I thank you for your attention and would ask you, Madam President, to give the floor to Madam Belliard, Agent of the French Republic.

The PRESIDENT: Thank you, Professor Pellet. I now give the floor to Ms Belliard, Agent of the French Republic.

Ms BELLIARD:

GENERAL CONCLUSION

1. Madam President, Members of the Court, it is now my task to conclude the second round of oral pleadings of the French Republic. I shall be brief, particularly as our opponents have scarcely added anything new during this second round.

2. On the other hand, their main objective has become clearer to see and is easy to summarize. Indeed, and quite simply if I may say so, the Applicant seems to want to make this Court into an appeals chamber against proceedings conducted by the French courts, at their sole discretion and in complete independence, and thus at the risk of transforming the present case into a discussion without any subject on the domestic application of procedures for mutual judicial assistance or on the exact interpretation of our Code of Criminal Procedure. Patently, this is not the role of an international court.

3. This being so, we have never claimed — as I already said in my introductory oral pleading last Thursday — that we could derive any argument from our domestic law to exempt us from our international obligations.

4. On the contrary, France has, after all, presented itself voluntarily before your Court to respond on a specific dispute between it and the Republic of Djibouti and solely involving questions of international law. Basically, and that was the precise limit within which — we hoped — the discussion should to have remained, the Applicant has one grievance against us: that

we did not transmit a copy of a record of an ongoing judicial investigation to it, the record of "the
54 *Borrel* case", which, moreover, it agrees is not at issue as such before you. I will return in a few moments to this grievance. On the other hand, I will not dwell at any length on the scope of the Court's jurisdiction in this case, other than to say:

— on the one hand, that Article 38, paragraph 5, of the Rules of Court makes it a requirement to respect the exact terms of the explicit acceptance of your jurisdiction on the basis of that Article;

— on the other hand, it is hard to see, as amply demonstrated by Professor Alain Pellet, where the jurisdiction of the Court would end if the Applicant's reasoning were to be followed, its argument in this respect being neither reasonable nor practicable.

5. Before coming to the grievance derived from the refusal to communicate the record in the *Borrel* case, I shall nevertheless add a final comment on the alleged attacks on the immunity of Djiboutian officials.

6. While it is clear — happily there is no divergence between us on this point — that customary international law grants an incumbent head of State total inviolability and immunity with respect to criminal jurisdiction, it is no less clear that the Djiboutian claims for immunities to be extended to include official representatives, such as the State Prosecutor of the Republic of Djibouti or the Head of National Security, go far beyond what is required by international law. Nowadays, immunities do not always have a good press in view of the legitimate desire to combat impunity. At a time when a reasonable balance must be achieved between immunities and the risks of impunity they entail on the one hand, and the necessity, thanks to the protection they provide to the most senior representatives of States, to allow relations between States to function harmoniously, it would be paradoxical to say the least, and wholly questionable:

— to deny a State the right to request the head of another State to testify, without, of course, any compulsion;

— to grant every official, even if occupying a very high rank in the administrative hierarchy, a status giving her or him absolute and general immunities from jurisdiction without any regard for the functions he or she performs; and, lastly,

55 — to deny the domestic court jurisdiction to assess whether acts accomplished by persons relying on functional immunities do indeed fall within the context of their professional activities performed on behalf of and in the name of their State.

7. As all these questions manifestly exceed your jurisdiction as accepted by the French Republic on the basis of Article 38, paragraph 5, of the Rules of Court, I would nevertheless like to focus my comments on the only points on which you have to rule. Ultimately, these points may be simply summarized by posing four questions one by one.

First question: Was France entitled, in the execution of an international letter rogatory, to refuse to transmit the record requested by the Djiboutian authorities?

8. There is no doubt that the reply to this question is positive. Before changing its mind, Djibouti certainly first asserted that France could not, in any event, refuse Djibouti's request. At the risk of contradicting itself, it then contended that France had agreed to transmit the record before recanting.

9. The Applicant's contradictory attitude here reveals the problems it was encountering in refuting the clear, unwavering and legally well-founded position of the French Republic: the refusal to respond to a request for judicial assistance is contemplated in Article 2 of the Convention on Mutual Assistance of 27 September 1986 for certain cases which, far from being specific to that Convention, are more or less systematically laid down in similar conventions concluded in this field. Furthermore, that provision forms part of the logical extension of co-operation which, as it is "the widest measure" of it, cannot be absolute, as otherwise, there would inevitably no longer be any question of co-operation but of the simple integration of the judicial orders between two States; we all know that, in the field of judicial co-operation as in the criminal field, we have not yet reached that stage.

Second question: What, substantively, are the exceptions under the Convention?

10. These conditions appear, and are clearly stated, in Article 2 of the Convention. Among the three grounds for refusal provided, we find express mention, and this is the ground of interest to us in the present case, of the situation in which the request is likely to prejudice the essential

56 interests of the requested State. This exception, set out in Article 2 *(c)* of the 1986 Convention, is a

classic clause — I would even say traditional and invariable — in conventions on mutual assistance in criminal matters.

11. Indeed, penal matters, more than others, affect the national sovereignty of States and their security or *ordre public*; no one would dream of denying this. It is therefore highly logical for States, when deciding to negotiate and enter into agreements for mutual assistance in criminal matters, to ensure, by including in those agreements provisions such as those in Article 2 of the Convention which concerns us, that the commitments they assume cannot prejudice their sovereignty, their security, their *ordre public* or other of their essential interests.

12. I want there to be no misunderstanding: this is not to claim that it is by virtue of the penal nature alone of the co-operation that a State may evade its obligation in this area. Obviously, it is when its sovereignty, security, *ordre public* or other of its essential interests might be affected in the context of this co-operation in criminal matters that the State is entitled to avail itself, if it deems necessary, of the exception laid down in the Convention.

13. Members of the Court, I shall not again go over the facts before you, other than to recall that the authorities of my country, like those of the Applicant, were perfectly aware, even before the international letter rogatory was issued, of the difficulties which Djibouti's request would inevitably raise, given the documents protected as "defence secrets" and declassified so they could be included in the "Borrel file". It was however only after the request for mutual assistance had been examined, in the manner required, that the inescapable conclusion had to be drawn that it was impossible to transmit the file to Djibouti. This brings me to the third question you will have to answer:

Third question: who is the judge of whether a request is likely to prejudice the essential interests of the requested State?

14. Here again, the answer is beyond doubt, given the very clear language of Article 2 *(c)* of the Convention: this power is granted to the requested State, and to it alone.

57 15. It is clear that in the mind of the States parties — and the letter of the provisions thus laid down so confirms — the point is for the requested State to retain for itself a wide discretion in measuring, by itself, the risk of prejudice to its essential interests. In granting each other this right, States seek to ensure mutual respect for their sovereignty in an especially sensitive area.

16. This in no way means that States indiscriminately invoke these derogation clauses, particularly in breach of the principle of good faith. Quite to the contrary, as previously indicated, they are used rarely, and maintaining, as our opponents do, that the French Republic systematically seeks to hide behind this clause to refuse all judicial co-operation is to make accusations against the French Republic on the basis of a misrepresentation. It is moreover obvious that the notion of essential interests remains very narrow, as the words themselves indicate. I shall point out that before this request France had never refused any request for mutual assistance from the Djiboutian authorities, thus proving, if there were any need to, that the French Republic does not make improper use of this clause.

17. In the case in point, France refused to communicate the Borrel file in reliance on this clause. It considered that providing the file would be likely to prejudice its essential interests. In my view, one need only read the pleadings the Parties have submitted to the Court to understand that the refusal was not unjustified.

18. Furthermore, the fact that there was nothing arbitrary about the refusal by the French authorities is attested — if, that is, there is any need for such a demonstration — by the full compliance shown with the procedures required by the Convention on Mutual Assistance, and that is the fourth and final question raised by the present dispute:

Fourth question: What procedure were the French authorities required to follow in responding to the request for assistance?

19. The Convention gives two elements of guidance:

— first, and this is in Article 3, the requested State must execute letters rogatory "in accordance with its law"; in France, in the case of a letter rogatory like the one involved in the present action, it is for the investigating judge alone, as he or she alone has control over the file, to determine whether a request can be granted. That was the procedure followed in the present case;

58 — second, Article 17 provides that "[r]easons shall be given for any refusal of mutual assistance". In this connection, counsel for Djibouti try to juggle with various documents submitted to the Court. Thus relying on one of them, the 31 May 2005 letter from the Director of Criminal Affairs and Pardons at the Ministry of Justice, they would appear to argue between the lines

that, while reasons were given for the refusal (albeit not as fully as they would have liked), it was not notified by France, as Djibouti allegedly never received the letter[125]. But, relying on another document, the letter of 6 June 2005 from the French Ambassador to Djibouti, Applicant's counsel contend conversely that the refusal was indeed notified to them, but this time without a statement of reasons[126].

This studied balancing act appears to me to be beside the point in any case. Article 17 imposes no notification obligation and therefore, *a fortiori*, no procedures for any notification, while other conventions expressly impose a notification obligation, as one of the Applicant's counsel was good enough to acknowledge[127]. Thus, it is much more important to stick to the meaning and desired effect of this provision in ascertaining whether they have been respected. In this regard, the documents submitted to the Court and Djibouti's Memorial itself amply show that reasons were provided to the Republic of Djibouti in support of the refusal to transmit the Borrel file to it. Thus, it is apparent that the Applicant has established no violation of Article 17 or, *a fortiori*, of any other provision of the Convention.

20. These, in my view, are the questions to be answered by the Court. I shall nevertheless add two last points before concluding. First point: the Applicant's question-begging argument cannot be upheld that it will be possible to divide the file — indiscriminately, moreover — into the information which can be communicated and that which cannot. On this point, I believe that, here too, the evidence presented to you and the number of documents in the Borrel file which were declassified — at various times in the proceedings, by the way — so as to enable their inclusion in
59 the file, suffice to show the opposite. The file forms a whole. And, here again, it is not for the requesting State to supplant the French Republic in making the judgment.

21. Second point. Vitiating the provisions of Article 2 *(c)* of the 1986 Convention — which is what the Applicant's arguments would lead to — could jeopardize the conclusion of agreements for judicial co-operation and could prompt States to withdraw from those now in force. Let there be no doubt that the Court's response on this point will go well beyond the matter of judicial co-

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[125]CR 2008/2, pp. 41-43, paras. 45-51 (van den Biesen).

[126]*Ibid*., pp. 39-41, paras. 37-44 (van den Biesen).

[127]CR 2008/2, p. 26, para. 35 (Condorelli).

operation between France and Djibouti, since, I shall reiterate, these are standard clauses in this type of agreement.

22. Madam President, Members of the Court, as I made clear at the opening of the first round of France's oral argument, I can only endorse the Republic of Djibouti when it expresses the need to preserve the ties of co-operation and friendship existing between our two countries. I am convinced that the Court's decision will contribute to this.

23. Madam President, before concluding I should like to express my thanks to the Members of the Court for their kind attention throughout these oral proceedings, to the Registry for its invaluable support in organizing these hearings, and to the interpreters for their outstanding assistance.

24. I now have the honour to read out to you the final submissions of the French Republic, which, for the reasons set out in its Counter-Memorial and in the oral proceedings, and in accordance with the conclusions set out by Mr. Alain Pellet and Mr. Hervé Ascensio, requests the Court:

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

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

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

Thank you.

The PRESIDENT: Thank you, Ms. Belliard. The Court takes note of the final submissions that you have just read out on behalf of the French Republic, as it took note yesterday of the final submissions of the Republic of Djibouti.

60 In respect of the response given by France this afternoon to the question put by Judge Simma at the end of the hearing on 25 January, I shall add that Djibouti may submit any written comments it wishes to make on the response by Friday 1 February 2008 at the latest. Djibouti's comments will be communicated to France. The Court will not invite France to submit further observations.

That brings us to the end of this set of hearings devoted to oral argument by the Parties. I should like to thank the representatives of the Parties for the assistance they have provided the Court through their oral statements during these hearings.

I wish them a safe journey back to their respective countries and, in accordance with practice, I shall request the Agents to remain at the Court's disposal. With this proviso, I now declare these oral proceedings closed.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its judgment.

As the Court has no other business before it, the sitting is closed.

The Court rose at 5.55 p.m.