

DECLARATION OF JUDGE KEITH

1. While I agree fully with the decision reached by the Court in this case, I disagree with aspects of its reasoning relating to France's refusal to comply with Djibouti's letter rogatory. I will take this opportunity to explain why.

2. The Court concludes that France's refusal to comply with Djibouti's letter rogatory was not in breach of France's obligations under the 1986 Convention because the refusal was for reasons which fell within the scope of Article 2 (*c*) of the Convention (Judgment, para. 148). The only statement of reasons for that refusal on which the Court relies and, as it explains (*ibid.*, para. 146), may rely is that formulated by Judge Clément in her *soit-transmis* of 8 February 2005.

3. Article 2 of the Convention provides as follows:

“Assistance may be refused:

- (a) if the request concerns an offence which the requested State considers a political offence, an offence connected with a political offence, or a fiscal, customs or foreign exchange offence;
- (b) if the request concerns an offence which is not punishable under the law of both the requesting State and the requested State;
- (c) if the requested State considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or others of its essential interests.”

4. The power of the requested State to refuse assistance under Article 2 (*c*) is particularly broad, when all the features of its wording are considered both in their own terms and by comparison with the wording of subparagraphs (*a*) and (*b*) of the provision. Notwithstanding that, I agree with the Court that it has power to examine the reasons even though that power of examination is very limited. In support of its power, the Court refers to the proposition codified in Article 26 of the Vienna Convention on the Law of Treaties and to two judgments of the Permanent Court of International Justice as affirming that the concept of good faith applies to the exercise of such broad powers, and to two judgments of its own as affirming the competence of the Court when faced with treaty provisions giving wide discretion (Judgment, para. 145). The limited extent of that power, as understood by the Court, appears clearly from its consideration of the reasons given by the judge for her conclusion that transmitting the file would be “contrary to the essential interests of France”: in the Court's words, “the file contained declassified

'defence secret' documents, together with information and witness statements in respect of another case in progress". To support that conclusion, the Court does no more than quote six sentences from the judge's reasons which appear to relate only to the declassified documents and not at all to the other "case in progress" (Judgment, para. 147). The Court also mentions the question whether part of the file could have been handed over, but that, as it indicates, is not a matter which the judge addresses in her reasons (*ibid.*, para. 148). Before I consider her reasons, I supplement the Court's discussion of the law relevant to the exercise of such broadly worded powers.

5. The two decisions of the Permanent Court of International Justice to which the Court refers support not only absence of good faith but also abuse of rights as a restraint on the exercise by a State of a power conferred on it by a treaty. This Court in the *Admissions* opinion in 1948 similarly said that, while Article 4 of the Charter of the United Nations exhaustively prescribes the conditions for the admission of new Members, that provision did not "forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with [those] conditions"; further, Article 4 allowed for "a wide liberty of appreciation" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, *Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 63-64; see also the joint dissenting opinion, pp. 91-92, para. 20). And counsel for France accepted that the principles of abuse of rights and misuse of power (*abus de droit* and *détournement de pouvoir*) may be relevant to the exercise of the power in issue in this case. The Agent added that, while the requested State retains for itself a wide discretion, this in no way means that States indiscriminately invoke these derogation clauses; it is moreover obvious, she said, that the notion of essential interests remains very narrow, as the words themselves indicate.

6. I now consider the reasons given by the judge in her *soit-transmis* against the principles of good faith, abuse of rights and *détournement de pouvoir*. Those principles require the State agency in question to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors. In the words of the Court in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* the good faith obligation reflected in Article 26 of the Vienna Convention "obliges the Parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized" (*Judgment, I.C.J. Reports 1997*, p. 79, para. 142). (The International Law Commission similarly states in its commentary to what became Article 26 of the Vienna Convention that it is implicit in the requirement of the good faith application of treaty obligations that a party must abstain from acts calculated to frustrate the object and purpose of the treaty (*Yearbook of the International Law*

Commission, 1966, Vol. II, p. 211, para. 4; see also the other authorities cited in paragraph 2). The general purpose of the 1986 Convention is indicated by its Article 1: the Parties are to afford each other, in accordance with the provisions of the Convention, the widest measure of judicial assistance in criminal matters. Among the relevant provisions of the Convention are Articles 2 and 3, the latter of which regulates in part the obligation to respond to letters rogatory. In relation to Article 3, the Court, as it says, cannot question the decision of the competent French court that under French law it is the investigating judge who has the determinative role (Judgment, para. 146). That brings the matter back to Article 2 (c), for the investigating judge cites no other provision to justify her refusal, and to the reasons which she gives in her *soit-transmis* for that refusal.

7. Did the judge in her *soit-transmis* have regard to matters not within the scope of Article 2 (c) in breach of the principles of law mentioned above? In two respects, she appears to have done that. First, the judge says that the October 2004 opening of the investigation by Djibouti “appears to be an abuse of process”; this may well have been a reason for her saying in 2005, as she had said in 2004, that the request did not conform with the Convention in terms of its statement of the object of and reason for the request, a requirement specifically laid down in Article 13 of the Convention; but the ground on which she is depending for refusing the request is rather that she has reason under Article 2 (c) to take that action. In my view this appears to be an abuse of power or a *détournement de pouvoir* — an exercise of the power for wrong reasons and a thwarting of the purpose of the Convention. Second, the judge refers to the refusal of one of the Djibouti officials to respond to a witness summons. That is again a matter that has nothing to do with Article 2 (c), and again is an apparent abuse of power.

8. I say that in those two respects the judge “appears” to have refused to exercise the power for the wrong reasons, outside the scope of Article 2 (c), since it may be that she sets out those two matters simply as part of the narrative. It is definitely the case however that in the final part of the *soit-transmis* the judge not only returns to the requirement of Article 13 but links it to the power of the requested State under Article 2 (c):

“Moreover, while Article 13 (b) of the Convention . . . states that requests for assistance must indicate the object of and the reason for the request, *which was not done in the present case*, Article 2 (c) of the Convention also provides that the requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or others of its essential interests.

That is the case with regard to transmission of the record of our proceedings.” (Emphasis added.)

The judge, having recalled in the next three sentences that certain documents which had earlier been classified as “defence secrets” had been declassified and had been transmitted to her, concludes as follows:

“To accede to the Djiboutian judge’s request would amount to an abuse of French law by permitting the handing over of documents that are accessible only to the French judge.

Handing over our record would entail indirectly delivering French intelligence service documents to a foreign political authority.

Without contributing in any way to the discovery of the truth, such transmission would seriously compromise the fundamental interests of the country and the security of its agents.”

It is striking that in that passage the judge makes no assessment at all, in terms of Article 2 (*c*), of the likely prejudice that the release of the particular declassified documents would present to national security. Although she knows those documents and it is she who, under French law, is to make the definitive determination, she makes that determination only in the most general terms, without drawing in any express way on her particular knowledge. The documents had been declassified, and, in terms of the judge’s reference to the threat to “security of . . . agents” resulting from the transmission of the file, the identity of the authors of certain documents was, as appropriate, to be protected in terms of the declassification ruling of the advisory committee (see its Avis 2004-12 of 2 December 2004 relating to 13 of the documents).

9. Moreover, to return to a point which the Court raises (Judgment, para. 148 and see para. 4 above), the judge gives no indication of why it would not be enough to withhold just the 25 declassified documents (consisting of about 50 pages) which she identifies and why the totality of the 35 volumes of the record must be withheld. It is significant in that respect that in a letter of 6 January 2005, the Minister of Defence had indicated that he was not opposed to the partial handing over of the file (see paragraphs 26 and 37 of the Judgment). The judge does not say, as counsel for France does, consistently with France’s Counter-Memorial, that the entire file in those volumes is rife (*irrigué*) with the sensitive information; but that counsel frankly informed the Court that he had not seen the notes in question. On what basis then could he argue that the record was permeated by the declassified documents? Nor does the judge call attention to the fact, as counsel for France informed the Court, that Djibouti’s request of seeking the whole file was particularly rare. Given that usual practice, the presence of only 25 sensitive documents from the bulky file, and given the purpose of the Convention, this appears to be a plain case

for the judge to suggest to the Djiboutian authorities that they reconsider the scope of their request. In failing to address expressly those two alternative methods of affording Djibouti the widest measure of judicial assistance in terms of Article 1 of the Convention, while protecting the interests stated in Article 2 (*c*), the judge has not, in my view, had proper regard to the purpose of the Convention. This conclusion is supported by the ruling of the Court, with which I agree, that the Convention is to be interpreted and applied in a manner which takes into account the friendship and co-operation which the two States posited as the basis of their mutual relations in the Treaty of 1977 (Judgment, para. 113; see also para. 114).

10. It may be countered that the examination of the *soit-transmis* which I have undertaken in paragraphs 7 to 9 above is not appropriate, given the extent of the power conferred by Article 2 (*c*), the nature of a State's assessment under that provision of its national interests and the need to defer in the usual case to that assessment. Two responses may be given. The first is that the examination does not in any way question the substantive assessment by the requested State of likely prejudice to its national interests. The examination is much more confined and directed to a distinct matter — the purpose of the Convention under which the power is to be exercised. It does not involve any attempt to assess and weigh the matters covered by Article 2 (*c*). The second response relates to the obligation, set out in Article 17, of a State refusing a request to give reasons to the requesting State. Such an obligation has several purposes: it places a discipline on the decision maker refusing a request under Article 2 or any other relevant provision of the Convention including Articles 1 (2), 10 or 13; the reasons inform the requesting State whether the power has been properly exercised in accordance with the law; and the statement may enable the requesting State to take follow-up steps to repair any flaw in its request, as the Court says in its Judgment (paragraph 152; see also paragraph 9 above). I should add that, while the two Parties did not approach the case exactly in the way I have, both accepted that the power conferred by Article 2 on the requested State was subject to some limits and addressed the elements discussed above.

11. It does not follow that, because France, in my view, has not complied with the Convention in making its decision under Article 2 (*c*), it is obliged to transmit the file either in whole or within the terms and conditions determined by the Court, as requested by Djibouti in its final submissions. On the contrary, as I see the matter, France has yet to make a decision, in accordance with the law, in response to the letter rogatory, on the substance of the issues presented by the request and in particular by Article 2 (*c*) of the Convention. For me, one fact is very significant in

determining what remedy, if any, would have been appropriate in respect of that failure. That fact is the failure of Djibouti, following the receipt by its Foreign Minister of the letter of 6 June 2005 from the French ambassador communicating France's refusal to comply with the request, to take any action at all to seek the reversal or the elucidation of that refusal. That was so, as the Court recalls (Judgment, paras. 30 and 144), although the Minister, only 20 days earlier, had complained to the Ambassador that France had not yet honoured "its commitments", as he put it, given in the letter of 27 January 2005, to hand over the file. That failure, taken with the passage of time, would in my view have led to the denial of any positive remedies such as those claimed by Djibouti in its final submissions in respect of the French refusal.

(Signed) Kenneth KEITH.
