



INTERNATIONAL COURT OF JUSTICE

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

The Court finds that France, by not giving Djibouti the reasons for its refusal to execute the letter rogatory presented by the latter on 3 November 2004, failed to comply with its international obligation under Article 17 of the 1986 Convention on Mutual Assistance in Criminal Matters and that the finding of this violation constitutes appropriate satisfaction; it rejects all other claims by Djibouti

THE HAGUE, 4 June 2008. The International Court of Justice (ICJ), principal judicial organ of the United Nations, today rendered its Judgment in the case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France).

In its Judgment, which is final, binding and without appeal, the Court,

(1) As regards its jurisdiction,

- finds unanimously that it has jurisdiction to adjudicate upon the dispute concerning the execution of the letter rogatory addressed by the Republic of Djibouti to the French Republic on 3 November 2004;
- finds by fifteen votes to one that it has jurisdiction to adjudicate upon the dispute concerning the summons as witness addressed to the President of the Republic of Djibouti on 17 May 2005, and the summonses as “témoins assistés” (legally assisted witnesses) addressed to two senior Djiboutian officials on 3 and 4 November 2004 and 17 June 2005;
- finds by twelve votes to four that it has jurisdiction to adjudicate upon the dispute concerning the summons as witness addressed to the President of the Republic of Djibouti on 14 February 2007;
- finds by thirteen votes to three that it has no jurisdiction to adjudicate upon the dispute concerning the arrest warrants issued against two senior Djiboutian officials on 27 September 2006;

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

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

Reasoning of the Court

In its Judgment the Court begins by observing that “[t]he Parties concur that it is not for the Court to determine the facts and establish responsibilities in the Borre case, and in particular, the circumstances in which Mr. Borrel met his death”. It adds that the Parties agree “that the dispute . . . does however originate in that case, as a result of the opening of a number of judicial proceedings, in France and in Djibouti, and the resort to bilateral treaty mechanisms for mutual assistance between the Parties”.

— Jurisdiction

The Court notes that Djibouti sought to found the Court’s jurisdiction on Article 38, paragraph 5, of the Rules of Court. It further observes that, by letter of 25 July 2006, France consented to the Court’s jurisdiction “pursuant to and solely on the basis of said Article 38, paragraph 5”, specifying that this consent “is valid only for the purposes of the case . . . i.e., in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein”.

The Court points out that “this is the first time it falls to the Court to decide on the merits of a dispute brought before it by an application based on Article 38, paragraph 5, of the Rules of Court”. It explains that this provision was introduced by the Court into its Rules in 1978, in order “to allow a State which proposes to found the jurisdiction of the Court to entertain a case upon a consent thereto yet to be given or manifested by another State to file an application setting out its claims and inviting the latter to consent to the Court dealing with them, without prejudice to the rules governing the sound administration of justice”. The deferred and ad hoc nature of the Respondent’s consent makes the procedure a means of establishing forum prorogatum. While France expressly agreed to the Court’s jurisdiction under Article 38, paragraph 5, of the Rules of Court in its letter of acceptance dated 25 July 2006, its expression of consent “must, however, be read together with Djibouti’s Application to discern properly the extent of the consent given by the Parties to the Court’s jurisdiction, and thereby to arrive at that which is common in their expressions of consent”.

The Court observes that, although paragraph 2 of Djibouti’s Application, entitled “Subject of the Dispute”, relates solely to the transmission of the Borre case file to Djibouti, the Application, taken as a whole, has a wider scope which includes the summons sent to the Djiboutian President on 17 May 2005 and those sent to two senior Djiboutian officials on 3 and 4 November 2004 and 17 June 2005. The Court also notes that “when France, which had full knowledge of the claims formulated by Djibouti in its Application, sent its letter of 25 July 2006 to the Court, it did not seek to exclude certain aspects of the dispute forming the subject of the Application from its jurisdiction”. The Court accordingly finds that “the claims concerning both subject-matters referred to in Djibouti’s Application, namely, France’s refusal to comply with Djibouti’s letter rogatory and the summonses to appear sent by the French judiciary, on the one hand to the President of Djibouti dated 17 May 2005, and on the other hand to two senior Djiboutian officials dated 3 and 4 November 2004 and 17 June 2005, are within the Court’s jurisdiction”.

The Court further observes that Djibouti also seeks to bring before the Court events occurring subsequent to the filing of the Application, namely, the summons addressed to the President of Djibouti on 14 February 2007 and the arrest warrants made out against the two senior officials on 27 September 2006. It first considers that “[a]lthough the arrest warrants could be perceived as a method of enforcing the summonses [of 3 and 4 November 2004 and 17 June 2005], they represent new legal acts in respect of which France cannot be considered as having implicitly accepted the Court’s jurisdiction”. The Court finds the situation to be different in respect of the summons addressed to the President of Djibouti on 14 February 2007, since it “was in relation to the same case” and “to the same legal question” as the summons dated 17 May 2005. It was therefore “but a repetition of the preceding one, even though it had been corrected as to form”. The Court thus reaches the conclusion that the Parties accepted its jurisdiction to deal with the summons of 14 February 2007.

— Court’s response to Djibouti’s final submissions on the merits

Having established the precise scope of its jurisdiction in the case, the Court considers the claims made on the merits by the Republic of Djibouti.

It turns first to the alleged violation by France of the Treaty of Friendship and Co-operation between France and Djibouti of 27 June 1977. While pointing out that the provisions of the Treaty are relevant rules of international law having “a certain bearing” on relations between the Parties, the Court states that “the fields of co-operation envisaged in the Treaty do not include co-operation in the judicial field” and that the relevant rules referred to above impose no concrete obligation in the case.

The Court next considers the Convention on Mutual Assistance in Criminal Matters of 27 September 1986 between the Parties. Djibouti claimed in the first place that Article 1 of the Convention places France under an obligation to execute the international letter rogatory. It added in the second place that France undertook to carry this out in January 2005 and that it failed to perform this undertaking. Lastly, Djibouti contended, as a subsidiary argument, that France breached the obligation in question when it gave Djibouti notice of its refusal to execute the letter rogatory. The Court examines these three points in turn.

The Court first addresses arguments relating to reciprocity in the implementation of the Convention that were raised by Djibouti.

Article 1 of the Convention provides that: “The two States undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State.”

Djibouti maintains that this Article imposes on the two Parties an obligation of reciprocity in implementing the Convention. Pointing out that the French judicial authorities have benefited from its assistance and co-operation on a number of occasions since 1996, it argues that it was entitled to expect reciprocity from France when it submitted its own international letter rogatory on 3 November 2004. The Court observes “that the Convention nowhere provides that the granting of assistance by one State in respect of one matter imposes on the other State the obligation to do likewise when assistance is requested of it in turn”. It accordingly considers that Djibouti “cannot rely on the principle of reciprocity in seeking execution of the international letter rogatory it submitted to the French judicial authorities”.

The Court next examines the obligation to execute the international letter rogatory set out in Article 1 of the Convention and, according to Djibouti, elaborated in Article 3, paragraph 1, of the Convention, which provides: “The requested State shall execute in accordance with its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the

requesting State for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.”

The Court observes “that the obligation to execute international letters rogatory laid down in Article 3 of the 1986 Convention is to be realized in accordance with the procedural law of the requested State”. However, while that State must of course “ensure that the procedure is put in motion”, it does not thereby guarantee the outcome, “in the sense of the transmission of the file requested in the letter rogatory”. The Court accordingly considers that France was not under an obligation pursuant to Article 3 to transmit the Borrel file.

The Court then turns to France’s alleged undertaking to execute the international letter rogatory transmitted by Djibouti. It first notes that the terms of the letter of 27 January 2005, in which the Principal Private Secretary to the French Minister of Justice informed Djibouti’s Ambassador in Paris that he had “asked for all steps to be taken to ensure that a copy of the [Borrel] record . . . is transmitted to the Minister of Justice and Penal and Muslim Affairs of the Republic of Djibouti before the end of February 2005” and had asked the procureur in Paris “to ensure that there is no undue delay in dealing with this matter”, “entail no formal undertaking by [France] to transmit the Borrel file”. The Court points out in particular that the Principal Private Secretary was not empowered to give a definitive commitment, since in France the authority to execute letters rogatory lies exclusively with investigating judges.

Lastly, the Court examines Djibouti’s claim that France breached the obligation to execute the international letter rogatory by violating the provisions of Articles 2 and 17 of the 1986 Convention.

Under Article 2 (c) of the Convention, a requested State may refuse to execute a letter rogatory if it considers that execution is likely to prejudice its sovereignty, its security, its ordre public or other of its essential interests. The Court recalls that the 8 February 2005 soit-transmis of Judge Clément, the investigating judge, states the grounds for her decision to refuse the request for mutual assistance, explaining why transmission of the file was considered to be “contrary to the essential interests of France”, in that the file contained declassified “defence secret” documents, together with information and witness statements in respect of another case in progress. The Court finds that the reasons given by Judge Clément fall within the scope of Article 2 (c) of the Convention.

The Court then addresses Djibouti’s claim that France violated Article 17 of the Convention, providing that “[r]easons shall be given for any refusal of mutual assistance”. It recalls that France informed Djibouti of its refusal to comply with the request for assistance by letter dated 6 June 2005. The Court concludes that, as no reasons were given in that letter, France failed to comply with its obligation under Article 17 of the Convention. It observes however that that failure did not preclude France from relying upon Article 2 (c).

On the other hand, the Court does not uphold any of the other final submissions presented by Djibouti at the conclusion of the hearings. In particular, the Court finds: that the summons addressed to the President of Djibouti by the French investigating judge on 17 May 2005 “was not associated with the measures of constraint provided for by . . . the French Code of Criminal Procedure”; that it was “merely an invitation to testify which the Head of State could freely accept or decline”; and that, consequently, “there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State”. The Court notes however that Judge Clément addressed the summons to the Djiboutian President notwithstanding the formal procedures laid down by Article 656 of the French Code of Criminal Procedure, which deals with the “written statement of the representative of a foreign Power”. The Court nevertheless considers that these formal defects under French law surrounding the summons of 17 May 2005 (service by facsimile transmission of the invitation to testify, short deadline for appearance, etc.) “do not in themselves constitute a violation by France of its international obligations regarding the immunity from

criminal jurisdiction and the inviolability of foreign Heads of State”. The Court further observes that, “if it had been shown by Djibouti that . . . confidential information [concerning the witness summons addressed to its Head of State] had been passed from the offices of the French judiciary to the media, such an act could have constituted . . . not only a violation of French law, but also a violation by France of its international obligations [in respect of protecting the honour and dignity of Heads of State]”. However, the Court recognizes that it does not possess any probative evidence that would establish that the French judicial authorities are the source behind the dissemination of the confidential information in question.

The Court finds that the second summons, dated 14 February 2007, was issued following the procedure laid down by Article 656 of the French Code of Criminal Procedure, and therefore in accordance with French law. It notes that the consent of the Head of State was expressly sought in this request for testimony, which was transmitted through the intermediary of the competent authorities and in the form prescribed by law. The Court therefore considers that this measure cannot have infringed the immunities from jurisdiction enjoyed by the Djiboutian Head of State. In respect of Djibouti’s claim that the communication to the media, in breach of the confidentiality of the investigation, of confidential information concerning the second witness summons is to be regarded as an attack on the honour or dignity of its Head of State, the Court again observes that it has not been provided with “probative evidence which would establish that the French judicial authorities were the source behind the dissemination of the confidential information at issue here”.

Finally, in regard to Djibouti’s claim that France infringed the immunities said to be enjoyed by the procureur de la République and the Head of National Security of Djibouti, the Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case. The Court also observes that at no stage were the French courts or the Court “informed by the Government of Djibouti that the acts complained of by France were its own acts” and that the two officials “were its organs, agencies or instrumentalities in carrying them out”. The Court therefore rejects Djibouti’s claims in this respect.

— Remedies

The Court, having found that the reasons invoked by France, in good faith, under Article 2 (c) fall within the provisions of the 1986 Convention, decides not to order the Borrel file to be transmitted with certain pages removed, as Djibouti requested in the alternative. At the same time, the Court recalls that it has found a violation by France of its obligation under Article 17 of the 1986 Convention to give reasons for its refusal to execute the letter rogatory. The Court determines that “its finding of this violation constitutes appropriate satisfaction”.

Composition of the Court

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges ad hoc Guillaume, Yusuf; Registrar Couvreur.

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

A summary of the Judgment appears in the document “Summary No. 2008/2”, to which summaries of the declarations and opinions are annexed. In addition, this press release, the summary and the full text of the Judgment can be found on the Court’s website (www.icj-cij.org) under “Press Room” and “Cases”.

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