

International Court of Justice — Jurisdiction — *Forum prorogatum* — Rules of Court, Article 38(5) — Application of principle — Whether consent required to be given in particular form — Consent limited to claims formulated in Application — Events mentioned in the Application — Related events occurring after Application filed

International Court of Justice — Procedure — Application — Rules of Court, Article 38(1) and (2) — Requirement that Application specify precise nature of claim, together with a succinct statement of the facts and grounds on which the claim is based — Whether particular form required — Application to be read as a whole

International criminal law — Mutual criminal assistance — Letters rogatory — Requirement to execute letter rogatory or give valid reasons for not doing so — Convention on Mutual Assistance in Criminal Matters, 1986, between Djibouti and France — Witness summonses addressed to head of State and senior officials by foreign court

State immunity — Jurisdictional immunity — Head of State — Senior officials of State — Personal immunity of Head of State — Duty to accord respect to Head of State — Whether issuance of witness summons requesting his testimony a violation of immunity — Whether senior officials entitled to benefit from State immunity

CERTAIN QUESTIONS OF MUTUAL ASSISTANCE IN
CRIMINAL MATTERS

(DJIBOUTI *v.* FRANCE)¹

International Court of Justice. 4 June 2008

(Higgins, *President*; Al-Khasawneh, *Vice-President*; Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka,

¹ The Republic of Djibouti was represented by HE Ambassador Siad Mohammed Doualeh, *Agent*, Mr Phon van den Biesen, *Deputy Agent*, Professor Luigi Condorelli, *Counsel and Advocate*, and Mr Djama Souleiman Ali, Dr Makane Moïse Mbengue, Dr Michail Vagias and Ms Souad Houssein Farah, *Counsel*. The French Republic was represented by Ms Edwige Belliard, *Agent*, Professor Alain Pellet and Professor Hervé Ascensio, *Counsel*, Mr Samuel Laine, *Adviser*, and Ms Sandrine Barbier, Mr Antoine Ollivier and Mr Thierry Caboche, *Assistants*.

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INTERNATIONAL COURT OF JUSTICE
148 ILR 1Keith, Sepúlveda-Amor, Bennouna and Skotnikov, *Judges*; Guillaume²
and Yusuf,³ *Judges ad hoc*)

SUMMARY:⁴ *The facts*:—In October 1995 the body of a French judge, who had been seconded to the Ministry of Justice in Djibouti, was discovered in Djibouti. Investigations into the circumstances of his death were commenced in both Djibouti and France. The investigating judge in the French investigation issued two international letters rogatory seeking judicial assistance which were duly executed by the authorities in Djibouti. In 2004 the authorities in Djibouti addressed a letter rogatory to the French authorities seeking information relating to the investigation. The French investigating judge declined to execute the letter rogatory.⁵ On 17 May 2005 the French investigating judge issued a witness summons to the President of Djibouti who was then on an official visit to France. The President did not respond to the summons, details of which appeared in the French press.⁶ On 14 February 2007 the investigating judge notified the Ministry of Justice that she wished to obtain, through the intermediary of the French Ministry of Foreign Affairs, the appearance, as a witness, of the President of Djibouti. Again, details of this request appeared in the French press. The President declined to appear.⁷ In 2004 and 2005 a French court also issued witness summonses to two senior officials of the Government of Djibouti, the Head of National Security and the procureur de la République, summoning them as *témoins assistés* (legally assisted witnesses). They declined to appear. In 2006 arrest warrants were issued for the two officials and they were subsequently found guilty *in absentia* of subornation of perjury.⁸

On 9 January 2006 Djibouti filed an Application with the International Court of Justice in which it claimed that France's response to the letter rogatory had violated Article 17 of the Convention on Mutual Assistance in Criminal Matters, 1986 ("the 1986 Convention"), between the two States. The Application also alleged violation of the Treaty of Friendship and Co-operation, 1977 ("the 1977 Treaty") between Djibouti and France. The Application also made reference to the witness summonses issued in 2004 and 2005. Djibouti maintained that it was confident that France would agree to the jurisdiction of the Court so that jurisdiction would be founded upon Article 38(5) of the Rules of Court.⁹ France notified the Court that it accepted the jurisdiction of the Court "only for the purposes of the case, within the meaning of Article 38, paragraph 5, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein".

² Appointed by France. ³ Appointed by Djibouti. ⁴ Prepared by the Editors.

⁵ See paras. 24-30. ⁶ See para. 31. ⁷ See para. 32. ⁸ See paras. 33-36.

⁹ Article 38(5) provides that:

When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not, however, be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

During the proceedings, Djibouti made claims regarding the witness summons of February 2007 addressed to the President and the arrest warrants issued in respect of the two senior officials. France contested the jurisdiction of the Court with regard to those claims which it maintained had not been expressly formulated in the Application and submitted that all the claims were without merit.

Held:—(1) (unanimously) The Court had jurisdiction to adjudicate upon the dispute concerning the execution of the letter rogatory addressed by Djibouti to France on 3 November 2004. While the jurisdiction of the Court was based upon the consent of the Parties, neither the Statute nor the Rules of Court dictated the form in which consent had to be given. Consent given by a respondent State after the filing of an application was capable, under the principle of *forum prorogatum*, of establishing a basis for the jurisdiction of the Court. For the Court to exercise jurisdiction on the basis of *forum prorogatum*, however, the element of consent had to be explicit or capable of being clearly deduced from the relevant conduct of a State. In accordance with Article 38(5) of the Rules of Court, where there was no basis for jurisdiction at the time of filing of the application, the Court would not enter the case on the General List unless and until the respondent State had indicated that it consented to the jurisdiction. In such a case the respondent State was free to give a consent limited to certain matters and the Court was required to ensure that it did not exceed the jurisdiction thus conferred. In the present case, France had consented to the jurisdiction of the Court only “in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein”. This acceptance clearly covered the claim regarding the letter rogatory. France’s argument that the consent did not extend to other claims, though framed as an objection to the admissibility of those claims, was in reality an argument that the Court lacked jurisdiction in respect of them (paras. 60-79 and 205(1)(a)).

(2) (by fifteen votes to one, Judge Parra-Aranguren dissenting) The Court had jurisdiction to adjudicate upon the dispute concerning the summons as witness addressed to the President of Djibouti on 17 May 2005 and the summonses as *témoins assistés* addressed to two senior officials of Djibouti on 3 and 4 November 2004 and 17 June 2005. Article 38(5) of the Rules of Court had to be read in conjunction with Article 38(2), which required that an application specify the precise nature of the claim. Neither the Rules nor the Statute, however, prescribed the form in which the application should indicate the precise nature of the claim and it was not necessary that this should be clear from the section entitled “subject of the dispute”, so long as the application as a whole made clear precisely what was claimed. Although the Application referred, in the section entitled “subject of the dispute” only to the letter rogatory, it was plain from the Application as a whole that Djibouti’s claim also concerned the 2005 summons to the President and the 2004 and 2005 summonses to the two officials. France’s consent had to be read as applicable

to the claim as set out in the Application as a whole (paras. 68-70, 71-84 and 205(1)(b)).

(3) (by twelve votes to four, Judges Ranjeva, Parra-Aranguren and Tomka and Judge *ad hoc* Guillaume dissenting) The Court had jurisdiction to adjudicate upon the dispute concerning the summons as witness addressed to the President of Djibouti on 14 February 2007. Although this summons was issued after the filing of the Application, it was, in substance, the same summons which had been issued on 17 May 2005 and the dispute regarding it thus fell within the terms of France's acceptance of the Court's jurisdiction (paras. 89-95 and 205(1)(c)).

(4) (by thirteen votes to three, Judges Owada and Skotnikov and Judge *ad hoc* Yusuf dissenting) The Court had no jurisdiction to adjudicate upon the dispute concerning the arrest warrants issued against two senior officials of Djibouti on 27 September 2006. The arrest warrants having been issued after the filing of the Application, they were not mentioned therein. Although the Court had, in earlier cases, exercised jurisdiction over facts and events occurring after the filing of an application provided that those facts and events were sufficiently connected to facts and events in respect of which jurisdiction was already established and consideration of them would not transform the nature of the dispute, such an approach was not appropriate where jurisdiction was based upon *forum prorogatum*. France had accepted the jurisdiction of the Court only with regard to matters strictly within the limits of the Application. The warrants were new legal acts in respect of which France could not be held to have accepted jurisdiction (paras. 85-88 and 205(1)(d)).

(5) (unanimously) By not giving Djibouti the reasons for its refusal to execute the letter rogatory of 3 November 2004, France failed to comply with its international obligations under Article 17 of the 1986 Convention. The finding of a violation constituted appropriate satisfaction.

(a) The scope of the obligation to render assistance in a criminal investigation was defined by the terms of the 1986 Convention. The fact that Djibouti had complied with French requests for assistance did not give rise to an obligation for France to reciprocate save to the extent that the 1986 Convention so required. Under Article 3 of the 1986 Convention, the obligation to execute a letter of rogatory was to be realized in accordance with the law of the requested State. By referring to its internal law, France was not seeking to avoid its international obligations in a manner contrary to Article 27 of the Vienna Convention on the Law of Treaties but to give effect to those obligations (paras. 116-24).

(b) The evidence did not establish that France had given a separate undertaking to execute the letter rogatory (paras. 125-30).

(c) Article 2 of the 1986 Convention gave the requested State a wide discretion regarding whether to execute a letter rogatory. That discretion was, however, to be exercised in good faith in accordance with the principle stated in Article 26 of the Vienna Convention. Under French law it was for the investigating judge to determine the application of Article 2 and the reasons

which she gave for her decision not to execute the letter rogatory fell within Article 2 (paras. 136-48, 154-6).

(d) Article 17 of the 1986 Convention required that France give reasons for its refusal to execute the letter rogatory. It had not done so and had therefore violated Article 17 (paras. 149-53).

(6) (by fifteen votes to one, Judge *ad hoc* Yusuf dissenting) All other submissions presented by Djibouti were rejected.

(a) France was not in breach of its obligations under the 1977 Treaty of Friendship. Mutual assistance in criminal matters was not one of the subjects mentioned in that Treaty and was regulated by the 1986 Convention. While the general obligations under the Treaty were relevant to the interpretation of the 1986 Convention, they could not preclude France relying upon express provisions of the 1986 Convention to decline a request for co-operation (paras. 96-114).

(b) France's failure to execute the letter rogatory was within the scope of the discretion under Article 2 of the 1986 Convention (paras. 154-6).

(c) France had not violated the immunity from jurisdiction, or the inviolability, of the Head of State of Djibouti. While a Head of State enjoyed full immunity from criminal jurisdiction and inviolability, the witness summons addressed to the President of Djibouti on 17 May 2005 was not associated with measures of constraint and was merely an invitation to testify which the President was free to accept or decline. Although it was regrettable that the summons had not complied with the requirements of French law and that the French Ministry of Foreign Affairs had failed to apologize, these facts did not amount to a violation of immunity. Article 29 of the Vienna Convention on Diplomatic Relations, 1961,¹⁰ imposed positive obligations with regard to a foreign Head of State which would have been violated had it been proved that the French judiciary had leaked details of the summons to the media, but there was no such proof (paras. 161-75).

(d) The witness summons of 14 February 2007 followed the procedure required by French law and was expressly couched in the language of an invitation; it could not have violated the immunity of the Head of State (paras. 176-80).

(e) The claim regarding the summons as *témoins assistés* addressed to two senior officials of Djibouti on 3 and 4 November 2004 and 17 June 2005 amounted, in effect, to an assertion of the immunity of the State of Djibouti from which its two officials would benefit, since the two officials were not entitled to personal immunities. The State which claimed such immunity on behalf of its officials was expected to notify the authorities of the other State of that claim and, in doing so, it necessarily assumed responsibility for any wrongful acts committed by those officials. Djibouti had not made a claim of immunity to the French courts and thus could not succeed in its claim that its immunity had been violated (paras. 181-200).

¹⁰ See para. 174 of the Judgment.

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(7) (unanimously) The declaration that France had violated its obligations to Djibouti under Article 17 of the 1986 Convention constituted sufficient satisfaction (paras. 201-4).

Separate Opinion of Judge Ranjeva: The Court had lost sight of the fundamental proposition that only the claims set out in the submissions might be the subject of a ruling by the Court. The second summons to the President of Djibouti could not reasonably be regarded as merely an extension of the first (pp. 80-4).

Separate Opinion of Judge Koroma: In applying the 1986 Convention due account was to be taken of the principles of equality and mutual respect recognized in the 1977 Treaty. The Court had failed squarely to engage with the issues in respect of reciprocity and had failed to make clear the nature of the duty of respect owed by France to the Head of State of Djibouti (pp. 84-90).

Separate Opinion of Judge Parra-Aranguren: France had not accepted the jurisdiction of the Court in respect of all claims described in the Application but only those which fell strictly within the dispute which formed the subject of the Application. That did not include the question of the summonses addressed to the President and the two officials (pp. 90-6).

Declaration of Judge Owada: The legal analysis of the jurisdiction of the Court in a case based on *forum prorogatum* was no different from that in a case where jurisdiction was founded on declarations under the Optional Clause, except that the declaration of acceptance of jurisdiction was made after the Application had been filed. Jurisdiction was still limited to what had been accepted by the Respondent, whose statement of acceptance therefore required careful analysis. France's acceptance had included the claims in respect of the arrest warrants for the two officials as these were included within the subject-matter of the dispute even though they post-dated the Application (pp. 96-100).

Separate Opinion of Judge Tomka: France's acceptance of the jurisdiction of the Court was confined to the subject of the dispute set out in the Application. It could not, therefore, have extended to claims in respect of an event which had not happened at the time that the Application was filed. The Court had confused a declaration which formed the basis for *forum prorogatum* with a declaration under the Optional Clause (pp. 100-8).

Declaration of Judge Keith: The Court's reasoning in respect of France's failure to comply with the letters rogatory was unsatisfactory. The decision of the French investigating judge had to be assessed against the principles of good faith and abuse of rights. The judge had had regard to matters outside the scope of Article 2(c) of the 1986 Convention (pp. 108-14).

Declaration of Judge Skotnikov: The Court should have held that it had jurisdiction in respect of the arrest warrants issued for the two officials. The terms of France's acceptance did not freeze an ongoing dispute. Had it been proved that the French judiciary had leaked the information about the

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summonses to the press, that would have constituted a failure to act in accordance with the courtesy due to a Head of State, rather than a violation of obligations under international law (pp. 114-17).

Declaration of Judge ad hoc Guillaume: The terms of France's acceptance of the jurisdiction of the Court were such that the Court's jurisdiction did not extend to events which occurred after the filing of the Application. However, jurisdiction was established as regards those matters raised in the Application even if the formulation of the claims was unsatisfactory. It was regrettable, nevertheless, that the Court had not shown more rigour in its application of the criteria of Article 38(5) of the Rules of Court (pp. 117-22).

Separate Opinion of Judge ad hoc Yusuf: The Court had adopted too narrow an approach to its jurisdiction; it should have applied the same standard to the arrest warrants as it had to the second witness summons addressed to the President since both events had occurred after the filing of the Application. On the merits, France's conduct had violated provisions of the 1986 Convention other than Article 17. In addition, France's conduct had violated the immunity of the President of Djibouti (pp. 122-40).

The text of the Judgment and the Separate Opinions and Declarations is set out below:

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[180] 1. On 9 January 2006, the Republic of Djibouti (hereinafter "Djibouti") filed in the Registry of the Court an Application, dated 4 January 2006, against the French Republic (hereinafter "France") in respect of a dispute:

concern[ing] the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the

Case against X for the murder of Bernard Borrel, in violation [181] of the Convention on Mutual Assistance in Criminal Matters between the [Djiboutian] Government and the [French] Government, of 27 September 1986, and in breach of other international obligations borne by [France] to . . . Djibouti.

In respect of the above-mentioned refusal to execute an international letter rogatory, the Application also alleged the violation of the Treaty of Friendship and Co-operation concluded between France and Djibouti on 27 June 1977.

The Application further referred to the issuing, by the French judicial authorities, of witness summonses to the Djiboutian Head of State and senior Djiboutian officials, allegedly in breach of the provisions of the said Treaty of Friendship and Co-operation, the principles and rules governing the diplomatic privileges and immunities laid down by the Vienna Convention on Diplomatic Relations of 18 April 1961 and the principles established under customary international law relating to international immunities, as reflected in particular by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973.

2. In its Application, Djibouti indicated that it sought to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court and was “confident that the French Republic will agree to submit to the jurisdiction of the Court to settle the present dispute”. In the Application it also reserved the right

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

3. The Registrar, in accordance with Article 38, paragraph 5, of the Rules of Court, immediately transmitted a copy of the Application to the Government of France and informed both States that, in accordance with that provision, the Application would not be entered in the General List of the Court, nor would any action be taken in the proceedings, unless and until the State against which the Application was made consented to the Court’s jurisdiction for the purposes of the case.

4. By a letter dated 25 July 2006 and received in the Registry on 9 August 2006, the French Minister for Foreign Affairs informed the Court that France “consents to the Court’s jurisdiction to entertain the Application pursuant to, and solely on the basis of . . . Article 38, paragraph 5”, of the Rules of Court, while specifying that this consent was “valid only for the purposes of the case, within the meaning of

Article 38, paragraph 5, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein” by Djibouti. The Registry immediately transmitted a copy of this letter to the Djiboutian Government, and the case was entered in the General List of the Court under the date of 9 August 2006, of which the Secretary-General of the United Nations was notified on the same day.

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

6. By letters dated 17 October 2006, the Registrar informed both Parties that [182] the Member of the Court of French nationality had notified the Court of his intention not to take part in the decision of the case, taking into account the provisions of Article 17, paragraph 2, of the Statute. Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, France chose Mr Gilbert Guillaume to sit as judge *ad hoc* in the case.

7. Since the Court included upon the Bench no judge of Djiboutian nationality, Djibouti proceeded to exercise its right conferred by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr Abdulqawi Ahmed Yusuf.

8. By an Order dated 15 November 2006, the Court fixed 15 March 2007 and 13 July 2007, respectively, as the time-limits for the filing of the Memorial of Djibouti and the Counter-Memorial of France; those pleadings were duly filed within the time-limits so prescribed.

9. The Parties not having deemed it necessary to file a Reply and a Rejoinder, and the Court likewise having seen no need for these, the case was therefore ready for hearing.

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