

SEPARATE OPINION OF JUDGE KOROMA

Relevance of the 1977 Treaty of Friendship and Co-operation in the Case against X for the murder of Bernard Borrel investigation — Issues involved — Co-operation, sovereign equality and mutual respect — 1986 Convention on Mutual Assistance in Criminal Matters — Domestic law not a reason for non-performance of conventional obligation — Reciprocity as one of underlying precepts in concluding such a treaty, and purpose of the Convention — Inviolability of immunity of Djiboutian Head of State — Need for apology as remedy to be expressed in operative paragraph — Legal significance of operative paragraph.

1. I have voted in favour of the operative paragraph for various reasons, among which is France's willingness to consent, allowing the Court to exercise prorogated jurisdiction in this case. Regrettably, the confidence placed by France in the Court has not been matched by an approach to the issues that would have achieved the purpose of the jurisdiction conferred on the Court. Hence the following comments.

2. In this case, Djibouti complains of the alleged violation by France of the Convention on Mutual Assistance in Criminal Matters, concluded on 27 September 1986 by the two States, and of the Treaty of Friendship and Co-operation, concluded by them on 27 June 1977. The violations of these Conventions are said to derive from France's refusal to execute an international letter rogatory issued by a Djiboutian investigating judge requesting the transmission of a copy of the record of the investigation opened in France against X for the murder of Bernard Borrel, and from the issuing by French judicial authorities of witness summonses addressed to the Djiboutian Head of State.

3. Djibouti has also asked the Court to adjudge and declare: that the French Republic is under an international legal obligation to foster all co-operation aimed at promoting the speedy disposition of the *Case against X for the murder of Bernard Borrel*, in compliance with the principle of sovereign equality between States, as laid down in Article 2, paragraph 1, of the United Nations Charter and in Article 1 of the Treaty of Friendship and Co-operation between the French Republic and the Republic of Djibouti; that the French Republic is under an international obligation to execute the international letter rogatory seeking 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*; and that the French Republic is under an international obligation to ensure that the Head of State of the Republic of Djibouti, as a foreign Head of State, is not subjected to any insults or attacks on his dignity on French territory.

4. Responding to Djibouti's claim that, by failing to execute the international letter rogatory, France violated the Treaty of Friendship and Co-operation between the two countries, the Court observes: that, notwithstanding the broad intention to promote mutual respect described in Article 1 of the 1977 Treaty, the primary objective of the Treaty is the promotion of co-operation in the economic, monetary, social and economic fields; that, while these provisions setting out aspirations are not bereft of legal content, mutual assistance in criminal matters, the subject regulated by the 1986 Convention, is not mentioned among the fields of co-operation enumerated in the 1977 Treaty; and that judicial co-operation is therefore not subject to the undertakings and procedures governed by the Treaty. The Court goes on to state that an interpretation of the 1986 Convention taking into account the spirit of friendship and co-operation stipulated in the 1977 Treaty cannot stand in the way of a party to that Convention relying on a clause in it which allows for the non-performance of a conventional obligation under certain circumstances.

5. In my view, the issue is not whether or not the 1986 Convention allows for the non-performance of a conventional obligation under certain circumstances, but rather whether, in applying the Convention in the context of investigating an allegedly serious crime, the murder of a citizen of one of the parties to the Convention, calling in aid the 1977 Treaty of Friendship and Co-operation between the two Parties, especially where the Treaty is not being invoked either to impede or subvert the criminal investigation but rather to further it, can be considered as standing in the way of a party's reliance on a provision in the Convention allowing for non-performance under certain circumstances. In my view, calling in aid the Treaty in such circumstances cannot be regarded as preventing recourse to a clause permitting non-performance of a conventional obligation. Invoking the Treaty of Friendship and Co-operation to further the investigation, in my view, not only serves the overall interests of the parties to the Treaty but also accords with its object, purpose and spirit. Both parties to the Treaty have an interest in uncovering the facts and circumstances surrounding the death of Bernard Borrel, and invoking the Treaty of Friendship and Co-operation together with the 1986 Convention would only have given meaning and effectiveness to their efforts.

6. Moreover, apart from stipulating that there shall be co-operation between the two Parties, the 1977 Treaty recognizes equality and mutual respect to be the basis of relations between the two countries.

7. Accordingly, where the 1986 Convention is to be applied in relations between the two countries, due account must be taken of those enduring principles, which, among others, form the basis of the relationship between the two countries.

8. This is especially so when Djibouti, in a spirit of co-operation, equality and mutual respect, complied with France's requests to execute

international letters rogatory relating to the murder of Mr. Borrel. As France itself stated, it received excellent co-operation from the Djiboutian authorities and judiciary, which always displayed the openness required for the investigation in France to proceed smoothly. Also, according to France, the French judges who visited Djibouti on several occasions in connection with letters rogatory always enjoyed full co-operation from the Djiboutian authorities, who provided them with access to the necessary documents, witnesses and sites, including the presidential palace and contrary to what may have been written in certain newspapers, nothing in those documents pointed to the implication of the Djiboutian authorities.

9. Against this background, one is bound to ask what inference could have been drawn had Djibouti declined to co-operate by not acceding to France's earlier request to execute the letter rogatory relating to the matter? Not only would it have appeared that Djibouti had failed to co-operate under the Treaty in the investigation of Borrel's death, but the implication would have been even worse. The purpose of Djibouti's request for the execution of its letter rogatory should have been seen as falling within the terms and spirit of both Parties' declared desire to co-operate in discovering the facts surrounding the tragic death of Bernard Borrel. Given these circumstances, compliance with Djibouti's request could not be seen as impeding the exercise by France of its right not to perform its conventional obligations under certain circumstances. Indeed, France itself undertook in a press release issued on 29 January 2005 that a copy of the record concerning the death of Judge Borrel would be transmitted to the Djiboutian judiciary in order to allow the competent authorities of that country to decide whether there were grounds for opening an investigation into the matter. After a party has given such an undertaking, insistence on compliance by that party with its obligation cannot be regarded as denying it the right to rely on a treaty clause allowing for non-performance of a conventional obligation. This is so even where the clause makes reference to domestic law and where it is unclear whether or not that reference is to the procedural means for implementing the substantive obligation without any effect on the substantive obligation itself. In any event, a party to a treaty may not invoke its domestic law as a reason for the non-fulfilment of its international obligation; nor does domestic law take precedence over an international obligation.

10. An additional sign of the Court's reluctance to engage squarely with the issues is found in paragraph 119 of the Judgment, where it is stated that the concept of reciprocity, invoked by Djibouti in support of its argument that France should be compelled to execute the letter rogatory, does not require France to act in a similar manner. In other words, the Court considers that Djibouti cannot rely on the principle of reci-

procuity in seeking execution of the international letter rogatory submitted by it to France. The Court adds for good measure 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. I find this response to be extraordinary, if not misconceived. As a matter of principle, reciprocity is one of the precepts underlying a bilateral treaty, such as the 1986 Convention, and is inherent in it. A State enters into a treaty relationship expecting that the other party will perform its own treaty or conventional obligations. Even when not expressed in the instrument, this principle, like that of good faith or *pacta sunt servanda*, is presumed to underlie the treaty. Therefore, to state, as the Judgment does, that Djibouti cannot rely on the principle of reciprocity because the treaty nowhere so stipulates is to imply that such principles are neither inherent in, nor to be taken into consideration when interpreting and applying, a treaty unless they are expressly stated therein. To clarify further, it is my view that, even under a treaty of mutual assistance, one party is obliged to do, or abstain from doing, something to or for the other. In this regard, and as stated earlier, France's and Djibouti's respective requests for the execution of letters rogatory dealt with the same subject-matter and had the same purpose — to further the investigation into the murder of Bernard Borrel. Both Parties should have been required to facilitate and further this process in keeping with the overriding purpose of the Convention.

11. It should therefore be evident that, under the Convention, each party is required to give assistance to the other in matters relating to judicial co-operation in pursuit of a criminal investigation. If France had been able, under the 1986 Convention, to obtain Djibouti's co-operation in the investigation into the death of Bernard Borrel, Djibouti was entitled to expect France to comply on a reciprocal basis and to satisfy Djibouti's request for the execution of the letter rogatory relating to the death. It is therefore mistaken to conclude either on the basis of legal principles or in light of the object and purpose of the Convention that, since the principle of reciprocity was not expressed in the Convention, France was not under a reciprocal duty to execute Djibouti's letter rogatory.

12. Comment is also warranted in respect of the reply to Djibouti's allegation that the two witness summonses in the *Borrel* case, issued by the French investigating judge to the President of the Republic of Djibouti on 17 May 2005 and 14 February 2007, *violated* the immunity from jurisdiction enjoyed by the Djiboutian Head of State, and, in particular, that there was a breach of France's obligation to respect the honour and dignity of the Head of State when the witness summonses addressed to him were leaked to the Agence France-Presse. Replying to the allegations, the

Court recognized that there were formal defects in the summons addressed to the Djiboutian Head of State on 17 May 2005 and considered that an apology would have been due from France in respect of it. But the Court nevertheless decided that neither the 2005 summons nor that of 14 February 2007 was an attack on the honour or dignity of the President.

13. The Court reaches this conclusion after noting that Article 29 of the Vienna Convention on Diplomatic Relations is necessarily applicable to Heads of State. The Article provides as follows:

“The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”

The Court thus recognizes that international law imposes on receiving States the obligation to respect the inviolability, honour and dignity of Heads of State. Inviolability has been construed to imply immunity from all interference whether under colour of law or right or otherwise, and connotes a special duty of protection, whether from such interference or from mere insult, on the part of the receiving State. Yet the Court found that by “inviting” the Head of State to give evidence by sending him a facsimile and by setting him a short deadline without consultation to appear at the investigating magistrate’s office, France failed to act in accordance with the courtesies due to a foreign Head of State and no more. In my view, the actions complained of involved not merely matters of courtesy, they concerned the obligation implied in the *inviolability* of, and the need to respect the honour and dignity of, the Head of State, and his immunity from legal process, in whatever form, which was breached when the witness summonses were sent to him, and this was compounded by the leaks to the press. It is clear that the intention was a failure to show the proper respect due, as well as a deliberate violation of the dignity and honour of, the Head of State. Accordingly, the Court should have considered whether the Head of State’s inviolability was infringed in relation to the respect he was entitled to as a Head of State; and, if the Court came to the conclusion that it was infringed, whatever form the infringement had taken — formal defects or otherwise — then the apology, as a remedy, which the Court considered due from France for the breach should have been reflected in the operative paragraph as a finding of the Court.

14. The findings of the Court are tantamount to determinations made by the Court and are usually expressed in the operative paragraph of the Judgment, indicating the decision of the Court, which is of significance for a party in that it shows that: the Court has reached a decision; that decision constitutes *res judicata*; and the party in whose favour it is made

is entitled to its enforcement or implementation. It is thus especially important that the Court's finding of a violation of the obligation should have been reflected in the operative paragraph, as this has a legal significance of its own in the structure of the Judgment.

(Signed) Abdul G. KOROMA.
