# SEPARATE OPINION OF JUDGE TOMKA

*[Translation]*

Forum prorogatum — *Application inviting the Respondent to consent to the jurisdiction of the Court (Article 38, paragraph 5, of the Rules of Court) — Subject of the dispute — Legal grounds — Claims made in the Application — Contradiction introduced by the Applicant between the subject of the dispute and the claims — Interpretation of the agreement on jurisdiction established by two unilateral acts — Jurisdiction of the Court* ratione materiae *— Jurisdiction of the Court* ratione temporis.

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1. The Judgment which the Court has just delivered is more jurisprudential than practical in scope because the Court has been called upon to interpret and clarify its jurisdiction established by *forum prorogatum.* It may even be wondered whether it was really necessary to seise the principal judicial organ of the United Nations for a ruling, after more than four months of deliberations, on the refusal by a Parisian investigating judge to comply with the request, presented in the form of an international letter rogatory, to transmit copies of the record of a case she was investigating to her Djiboutian opposite number. Each must take his own view.

2. Although on 2 September 2005 Djibouti filed a declaration with the United Nations Secretary-General, valid for a period of five years, recognizing the jurisdiction of the International Court of Justice, in accordance with Article 36, paragraph 2, of its Statute, it well knew that the Court did not have jurisdiction to entertain the dispute it wished to submit to the Court, because France had no longer been bound by such a declaration since 1974.

3. In submitting its Application introducing proceedings on 9 January 2006, Djibouti therefore sought to found the jurisdiction of the Court on the consent that it was counting on from France. This possibility is envisaged by Article 38, paragraph 5, of the Rules of Court.

4. Eight months after a copy of Djibouti's Application had been transmitted to the French Government, the latter informed the Court on 9 August 2006, by a letter from its Minister for Foreign Affairs dated 25 July 2006, that "the French Republic 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. But it also specified that consent to the jurisdiction of the Court

> "was valid only for the purposes of the case, within the meaning of Article 38, paragraph 5, [of the Rules of Court] 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 (Judgment, para. 4, emphasis added).

5. There is thus no doubt that France consented to the jurisdiction of the Court in the present case. But the question which arises is that of the scope of that jurisdiction *ratione materiae* and *ratione temporis*, all the more so since, in its Counter-Memorial, France raised an objection, asserting that "Djibouti's Memorial goes beyond the claims formulated in the Application" (Counter-Memorial of France (CMF), p. 7, para. 2.3). In its Counter-Memorial, France asserts that

> "the jurisdiction [of the International Court of Justice] is strictly limited *ratione materiae* and *ratione temporis* to facts connected to the international letter rogatory of [3] November 2004, of which the French authorities' refusal of execution is described in the Application as being '[t]he subject of the dispute'" (*ibid.,* p. 16, para. 2.26).

France states that the jurisdiction of the Court "cannot extend to claims involving facts arising subsequent to the Application which are not the direct consequence of the alleged non-execution of this international letter rogatory" *(ibid.)*. According to France, the jurisdiction of the Court does not extend to the claims by the Republic of Djibouti concerning alleged violations of immunities said to be enjoyed by certain Djiboutian officials, including, in particular, the President of the Republic of Djibouti *(ibid.)*.

6. In order to establish the scope of the Court's jurisdiction in this case, a determination is required on the scope of the case submitted to the Court by Djibouti on 9 January 2006, because the French consent to jurisdiction "is valid only for the purposes of the case", in other words, according to France, "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein".

7. Both Parties agree that it is for the Court to declare

> "to what extent these distinct acts [i.e. Djibouti's Application, France's letter of acceptance], employing different words, give rise to a real consent . . . that is to say an agreement on a single, specific subject precisely delineating the scope of the Court's jurisdiction" (CR 2008/1, p. 23, para. 8, (Condorelli); CR 2008/4, p. 33, para. 20, (Pellet)).

8. The dispute is circumscribed by its subject and by its parties. The term "the subject of the dispute" was chosen for the Statute of the Court in 1920, in preference to the term "the nature of the dispute", because it was regarded as more exact and more suitable from the point of view of

*res judicata*[1]. It is the parties and the subject of the dispute which circumscribe a particular case. The *res judicata* rule is set out in Article 59 of the Statute: the decision of the Court has no binding force except between "the parties and in respect of that particular case".

9. Djibouti identified the French Republic as the Party against which it was seeking to bring proceedings before the Court. It has also clearly indicated, on a number of occasions, that the refusal to execute the international letter rogatory (dated 3 November 2004) constitutes the subject of the dispute.

10. To begin with, on 28 December 2005, the President of Djibouti granted full powers to Mr. Djama Souleiman Ali

> "[f]or the purpose of filing with the International Court of Justice the Application by the Republic of Djibouti against the French Republic concerning the violation by the latter of its international obligations towards the Republic of Djibouti, *notably the violation of the Convention between the Republic of Djibouti and the Government of the French Republic dated 27 September 1986*" [the Convention on Mutual Assistance in Criminal Matters] (Application instituting proceedings, p. 37; emphasis added).

11. Then the Djiboutian Minister for Foreign Affairs and International Co-operation informed the President of the International Court of Justice that

> "in accordance with Article 42, paragraph 1, of the Statute of the Court and Article 40, paragraph 2, of the Rules of Court, the Government of the Republic of Djibouti has appointed Mr. Djama Souleiman Ali . . . as Agent in *the following case*: Republic of Djibouti *v*. the French Republic, *concerning the violation* by the French Republic *of its international obligations* to the Republic of Djibouti *under the Convention on Mutual Assistance in Criminal Matters* between the Government of the Republic of Djibouti and the Government of the French Republic, of 27 September 1986" (*ibid.*, p. 39; emphasis added).

12. Lastly, the Agent of Djibouti communicated to the President of the International Court of Justice

> "an Application whereby the Republic of Djibouti is instituting *proceedings* against the French Republic *concerning the violation* by the latter *of its international obligations* to the Republic of Djibouti *in respect of mutual assistance in criminal matters*" (*ibid.*, p. 3; emphasis added).

13. Djibouti's Application is entitled: "Application by the Republic of Djibouti against the French Republic for the *violation*, vis-à-vis the

[1] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux* of the Proceedings of the Committee (16 June-24 July 1920), p. 734.

Republic of Djibouti, *of its international obligations in respect of* mutual assistance in criminal matters (Application instituting proceedings, p. 5, para. 1; emphasis added). What is important in the title of the Application is the fact that the *obligations allegedly breached* by France *related to mutual assistance in criminal matters*. The focus of the dispute was therefore intended to be the (alleged) violation of the obligations assumed by France with respect to mutual assistance in criminal matters vis-à-vis Djibouti, and not of other international obligations of France. This would indeed seem to be how France understood the case when it was entered in the General List under the title "Case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*". And this title has remained unchanged, despite the Court's conclusions as to its jurisdiction.

14. In its Application, and in accordance with Article 40, paragraph 1, of the Statute, Djibouti indicated *the subject of the dispute*. According to Djibouti,

> "*The subject of the dispute* concerns *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 of the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic, of 27 September 1986, and in breach of other international obligations borne by the French Republic to the Republic of Djibouti." (Application instituting proceedings, p. 5, para. 2; emphasis added.)

Although Article 40 of the Statute merely requires that the subject of the dispute shall be indicated, Djibouti was quite specific in its Application. For it, "[t]he subject of the dispute concerns the refusal . . . to execute *an* international letter rogatory". The act at the origin of the dispute is defined by Djibouti itself as the refusal by France to act upon the international letter rogatory. According to Djibouti, France breached a number of its obligations by that refusal: those arising from the Convention on Mutual Assistance in Criminal Matters, as well as certain other obligations. These other obligations are enumerated in the Application in the section entitled "Legal Grounds": mentioned here are the obligations laid down in the 1977 Treaty of Friendship and Co-operation, the obligation "deriving from . . . principles . . . to prevent attacks on the person, freedom or dignity of an internationally protected person", and "the principle . . . that a State may not invoke principles or doctrines under its internal law as justification for its failure to perform a treaty" (Application, p. 5, para. 3).

15. The expression "legal grounds" (Application, p. 5, para. 3) is not included in the Statute but does appear in the Rules of Court (Art. 38, para. 2), which stipulate that the Application "shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". The requirement to indicate the "grounds on which the claim is based" was first introduced in the 1936 Rules of Court, which thus implemented Article 63 of the Court's Statute. The preparatory documents reveal that "grounds" meant "the indication of the stipulations of the interpretation on which the solution of the case depends" and that "practice has shown the usefulness . . . of these indications with regard to the provisions of Article 63 of the Statute" [2]. The legal grounds are merely the legal arguments which, according to the Applicant, support its claims.

16. Although the Court teaches that "[n]o applicant *may come to the Court without being able to indicate*, in its Application, the State against which the claim is brought and *the subject of the dispute*. . ." (Judgment, para. 64; emphasis added), it nevertheless limits this requirement, since "while indeed it is desirable that what the Applicant regards as the subject-matter of the dispute is specified under that heading in the Application, nonetheless, the Court must look at the Application as a whole" (*ibid.*, para. 67).

17. The Court refers to its observation in the case concerning *Right of Passage over Indian Territory (Portugal* v. *India)* (*I.C.J. Reports 1960*, p. 33), in order to conclude "that the subject of the dispute was not to be determined exclusively by reference to matters set out under the relevant section heading of the Application" (Judgment, para. 70).

18. This jurisprudence concerning the determination of the dispute and its subject was recalled by the Court ten years ago in the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*, in which it observed that "[i]t is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties" (*Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30). It went on to say that

> "The Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute. Thus, in the case concerning the *Right of Passage over Indian Territory*, the Court, in order to form a view as to its jurisdiction, defined the subject of the dispute." (*Ibid.*, p. 449, para. 30.)

[2] *P.C.I.J., Series D, No. 2*, pp. 868-869 *[translation by the Registry]*. Article 63 of the Statute confers on third States the right to intervene in the proceedings when what is at issue is the interpretation of a convention in which not only the parties to the dispute have participated but other States also.

19. I doubt whether this jurisprudence can be followed where the jurisdiction of the Court is established, as in the present case, on the basis of *forum prorogatum*. In the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)* and in the other cases mentioned there (*I.C.J. Reports 1998*, pp. 447-449, paras. 29-31), in other words, *Nauru*, *Interhandel*, *Right of Passage over Indian Territory* and *Nuclear Tests*, the unilateral declarations recognizing the jurisdiction of the Court made under Article 36, paragraph 2, of the Statute were relied on as the basis of jurisdiction. Those declarations had been made long before the birth of the disputes unilaterally submitted to the Court. It is understandable that a State which has seised the Court relying on the declarations made under Article 36, paragraph 2, of the Statute should vigorously assert that the dispute falls within the Court's jurisdiction. It follows that it defines that dispute in such a way as to prompt the Court to conclude that it has jurisdiction. Through its objections, the Respondent will argue that, in the light of the various unilateral declarations and the reservations they contain, the dispute (or at least some aspects of it and the related claims) eludes the jurisdiction of the Court. In all these cases, the Court must itself determine the dispute between the parties and its subject, so as to be able to decide whether or not it falls within its jurisdiction, given the terms of the unilateral declarations made, including the various "reservations" (or rather limitations) which States sometimes add to them.

20. The Court has recalled its jurisprudence developed in the cases brought before it under Article 36, paragraph 2, of the Statute, even though the present case is covered by Article 36, paragraph 1, of the Statute; that gave the Court an opportunity to set out its perception of the subject of the dispute between the Parties.

Hence the Court recalls the legal grounds relied on in Djibouti's Application (Judgment, para. 73), as well as certain claims made in it (*ibid.*, para. 74), before concluding

> "that, despite a confined description of the subject of the dispute (its *'objet'*) in the second paragraph of the Application, the said Application, taken as a whole, has a wider scope which includes the summonses sent to the Djiboutian President on 17 May 2005 and those sent to other Djiboutian officials on 3 and 4 November 2004" (*ibid.*, para. 75).

21. It is the Court which gives the subject of the dispute a wider scope, despite the fact that Djibouti adopted a narrower view of it in its Application. It is not certain that, when it consented to the jurisdiction of the Court, France perceived the subject of the dispute in the same way as the Court does in its Judgment.

22. There are elements in the case pointing to the fact that, from the outset, France thought that the dispute, for which it had accepted the jurisdiction of the Court, concerned "the interpretation given by each

party to the implementation of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti" (Memorial of Djibouti (MD), Ann. 32, Statement from the French Ministry of Foreign Affairs, 20 October 2006).

A few days later, on 15 November 2006, the Minister of State for Co-operation, Development and Francophony declared to the National Assembly:

> "In view of the difficulties we have had in implementing the Convention on Mutual Assistance between France and Djibouti, this issue has been brought before the International Court of Justice by Djibouti. We have announced that we agree to the Court settling the dispute between our two countries, which essentially concerns questions of procedure." (MD, Ann. 33.)

23. However, according to the interpretation of the Court, France's acceptance of the Court's jurisdiction "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" constitutes consent whose scope is not limited "to any particular aspect of the Application" (Judgment, para. 83).

24. In my view, France accepted the jurisdiction of the Court in respect of "the dispute forming the subject of the Application", in other words, in respect of the dispute as circumscribed by Djibouti in its Application. Every dispute is circumscribed by its subject and its parties. There is no doubt that the wishes of the two Parties overlap in wanting the Court to settle the dispute concerning France's refusal to execute the international letter rogatory.

25. The Court teaches that "[t]he consent allowing for the Court to assume jurisdiction must be certain" (*ibid.*, para. 62). I am not sure that this is the case as regards the questions concerning the immunity of the Head of State and of certain senior Djiboutian officials. One notes a contradiction in the Application between the subject of the dispute declared *expressis verbis* and the legal arguments and claims. The Applicant should not benefit from any ambiguity on its part. In my view, therefore, greater importance should have been given to the precise terms of the Application; legal security requires it. Otherwise, the State which has been invited to accept the jurisdiction of the Court, and has consented to it, runs the risk of later discovering that the Court is giving the dispute and its subject a different definition from its own at the time when it declared its acceptance on the basis of the express terms of the Application.

26. The Court was thus in a position to conclude that its jurisdiction was limited *ratione materiae* to the dispute concerning France's refusal to execute the international letter rogatory regarding the transmission to Djibouti of the record relating to the investigation in the *Case against X for the murder of Bernard Borrel*.

27. The majority voted for a broader jurisdiction *(boni judicis est ampliare jurisdictionem)*. It was able to do so because France, in its somewhat elliptical letter of acceptance, did not take the trouble to underline the contradictions in the Application and to specify unequivocally the scope of its consent. After long consideration, but not without some hesitation, I voted with the majority of the Court.

28. But I cannot subscribe to the Court's finding (Judgment, paras. 95 and 205 (1) *(c)*) that it has jurisdiction also to consider the second witness summons sent to the President of the Republic of Djibouti on 14 February 2007, in other words, over a year after the filing of Djibouti's Application and over five months after France's acceptance of the jurisdiction of the Court "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti".

To justify its finding, the Court emphasizes that "[t]he French letter of acceptance did not, however, contain a temporal limitation" (*ibid.*, para. 94).

29. For this aspect of the case, the Court treats France's letter of acceptance as a genuine declaration recognizing the compulsory jurisdiction of the Court within the meaning of Article 36, paragraph 2, of the Statute, which it patently is not.

30. The Court adds that what is decisive in this case is what France expressly accepted in its letter of 25 July 2006 (*ibid.*, para. 88). I fully concur with that.

But I find it hard to see how France could expressly accept the jurisdiction of the Court in respect of a dispute concerning a fact which had not yet occurred. France accepted the jurisdiction of the Court "for the claims described in Djibouti's Application", filed on 9 January 2006. The claims concerned the alleged violations supposedly committed before the filing of the Application. According to the majority, the summons of 14 February 2007 simply reiterated the preceding one dated 17 May 2005; this does not strike me as convincing. Matters would be different if it had been a continuous act having started in May 2005 and continued until February 2007. But that is not the case. Each summons constituted a separate act. It was therefore impossible for me to vote in favour of subparagraph (1) *(c)* of the operative clause.

31. The case is now closed. What lessons does it hold? Despite the apparent flexibility of *forum prorogatum*[3], this case shows that a State which is invited to accept the jurisdiction of the Court according to the procedure laid down in Article 38, paragraph 5, of the Rules of Court

[3] See M. Bedjaoui, "The *forum prorogatum* before the International Court of Justice: The resources of an institution or the hidden face of consensualism", *I.C.J. Yearbook 1996-1997*, No. 51, pp. 216-234.

must be meticulous in the drafting of its positive response if it wishes to avoid any surprises on the part of the Court. I remain convinced that it is always preferable, instead of accepting the jurisdiction of the Court by means of this procedure, to propose that the Applicant should conclude a special agreement, clearly specifying the legal matters which the Parties in contention wish to see settled by the Court.

*(Signed)* Peter TOMKA.