

SEPARATE OPINION OF JUDGE PARRA-ARANGUREN

Consent to jurisdiction under Article 38, paragraph 5, of Rules of Court — Court's understanding of the French reply as encompassing all claims mentioned in Djibouti's Application — Interpretation should be restricted to those claims mentioned in paragraph 2 of Djibouti's Application.

1. My vote in favour of paragraph 205, subparagraphs (1) (a) and (d), and of subparagraph (2) of the Judgment does not mean that I agree with each and every part of the Court's reasoning in reaching its conclusions.

2. On 29 January 2008 the Court informed Djibouti and France that it was retiring for deliberation. The deliberation on the merits in the case between Malaysia and Singapore started on 23 November 2007 and the Judgment was rendered on 23 May 2008. Public hearings began on 26 May 2008 on the preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the Court retiring for deliberation after their conclusion. Therefore constraints arising from the limited time fixed by the Court for the presentation of this separate opinion prevent me from setting out a complete explanation of my disagreement with paragraph 205, subparagraphs (1) (b) and (c). However I wish to advance some of my main reasons for voting against them.

3. Djibouti stated in its Application that it “seeks to found the jurisdiction of the Court under Article 38, paragraph 5, of the Rules of Court” (Application, p. 17, para. 20); and France informed the Court by a letter from its Minister for Foreign Affairs dated 25 July 2006, quoted in paragraph 77 of the Judgment:

“I have the honour to inform you that the French Republic consents to the Court's jurisdiction to entertain the Application pursuant to and solely on the basis of said Article 38 paragraph 5.

The present consent to the Court's jurisdiction is 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 the Republic of Djibouti.”

4. The Court concurs in Djibouti's assertions that the sole basis for the jurisdiction of the Court is Article 38, paragraph 5, of the Rules of Court, and states that, "the extent of the Court's jurisdiction will then inescapably depend on the scope and terms of the *post hoc* consent"; that "the State against which the application is submitted cannot broaden (or indeed transform) the dispute as compared with the scope of the application"; that the respondent

"State can, by its declaration, very well give only partial consent, and by so doing narrow the jurisdiction of the Court by comparison with that contemplated in the application, just as it can, moreover, consent to nothing at all and in this case prevent the Court from settling even the slightest part of the dispute, unless of course other bases for jurisdiction are present" (CR 2008/1 (translation), pp. 17-18, para. 10 (Condorelli);

and that it is the consent of France, as expressed in its letter of 25 July 2006, which determines the jurisdiction of the Court in the present case.

5. In the opinion of France, the Court's jurisdiction is restricted to deciding only the matter in respect of which it gave its consent, i.e., "the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti". France argues that "the dispute forming the subject of the Application" is determined in its paragraph 2, quoted in paragraph 68 of the Judgment, which reads as follows:

"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."

6. Consequently, France maintains that all the other claims mentioned by Djibouti in its Application are excluded from "the dispute forming the subject of the Application", and for this reason are outside the jurisdiction of the Court.

7. Djibouti maintains to the contrary that "the dispute forming the subject of the Application" in respect of which France gave its consent involves not only the refusal of the French authorities to execute the letter rogatory issued on 3 November 2004, but also all violations by France of its obligation to prevent attacks on the person, the freedom and the dignity of Djibouti's Head of State, Djibouti's *procureur général* and Djibouti's Head of National Security.

8. In determining its jurisdiction *ratione materiae* in the Judgment, the Court accepts Djibouti's contention.

9. Paragraph 69 of the Judgment states:

“Neither Article 40 of the Statute nor Article 38 of the Rules of Court subject the application to particular formal (as opposed to substantive) requirements regarding the manner by which the necessary elements of the application should be presented. Thus, if a section entitled ‘Subject of the dispute’ does not entirely circumscribe the extent of the issues intended to be brought before the Court, the subject-matter of the dispute may nonetheless be discerned from a reading of the whole Application.”

10. Paragraph 70 of the Judgment quotes the Court's statement to this effect in the case concerning *Right of Passage over Indian Territory (Portugal v. India)*, *Merits, Judgment, I.C.J. Reports 1960*, p. 33).

11. It is observed in paragraph 71 of the Judgment that:

“Paragraph 2 of Djibouti's Application, entitled ‘Subject of the dispute’ (see paragraph 68 above), focuses on the (non-)transmission of the *Borrel* case file to Djibouti. That paragraph does not mention any other matters which Djibouti also seeks to bring before the Court, namely, the various summonses sent to the President of Djibouti and two senior Djiboutian officials. Naturally, no reference was made in that paragraph to the summons addressed to the President of Djibouti on 14 February 2007, nor to the arrest warrants made out against the two above-mentioned officials on 27 September 2006, as these were events subsequent to the filing of the Application.”

12. However paragraph 72 adds:

“A further examination of the Application, on the other hand, reveals that both under the headings ‘Legal grounds’ and ‘Nature of the claim’, Djibouti mentions the summonses issued before the filing of the Application and requests specific remedies in so far as it considers them to be violations of international law.”

13. Paragraphs 73 and 74 of the Judgment quote paragraph 3, subparagraph (*c*), and paragraph 4 of Djibouti's Application and in paragraph 75 of the Judgment the Court notes 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”.

14. Paragraph 83 of the Judgment concludes

“it is the view of the Court that, on the basis of a plain reading of the text of France's letter to the Court, by its choice of words, the con-

sent of the Respondent is not limited to the ‘subject of the dispute’ as described in paragraph 2 of the Application.

First, as observed above, the subject of the dispute appears from the Application, viewed as a whole, to be broader than that specified in paragraph 2. Further, the expression ‘subject of the Application’ used in France’s letter of acceptance is not the same as the expression ‘subject of the dispute’. Furthermore, in accordance with its ordinary meaning, the term ‘Application’ used in the letter of acceptance must be read as comprising the entirety of the Application. Finally, there is nothing in France’s letter of acceptance suggesting that it intended to limit the scope of its consent, as it could have done, to any particular aspect of the Application. By its inclusion in the letter of the phrase ‘in respect of the dispute forming the subject of the Application *and* strictly within the limits of the claims formulated *therein*’ (emphasis added), France had intended to prevent Djibouti from presenting claims at a later stage of the proceedings which might have fallen within the subject of the dispute but which would have been new claims. As regards the use of the conjunctive ‘and’ in the phrase in question, France presented several arguments [see CR 2008/7, p. 13 (Pellet)] aiming to demonstrate that the wording employed in the letter was ‘carefully weighed’ [CR 2008/4, p. 34 (Pellet)]. Given these circumstances, the Court finds 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.”

15. I do not share the conclusion of the Court.

16. In the first place, I consider that the Court’s statement in the case concerning *Right of Passage over Indian Territory (Portugal v. India)* (*Merits, Judgment, I.C.J. Reports 1960*, p. 33), quoted in paragraph 70 of the Judgment does not apply to the present case, because in that decision the Court was not determining its jurisdiction on the basis of Article 38, paragraph 5, of the Rules of Court.

17. In my opinion, France did not consent to the jurisdiction of the Court in the present case in respect of all claims described in the Application presented by Djibouti. If that had been the case, its letter of 25 July 2006 would have simply stated that France consented to have the Court decide on Djibouti’s Application, with no further elaboration.

18. However, that is not what the French declaration says. The reference to Djibouti’s Application in general terms is found in its first paragraph, not in the second, where France expresses its limited consent to the jurisdiction of the Court. France did not agree to have the Court decide all claims described by Djibouti in its Application but only some

of them, i.e., those “in respect of the dispute forming the subject of the Application” and “strictly within the limits of the claims formulated” by Djibouti. Therefore, contrary to the finding in the final sentence of paragraph 81 of the Judgment, the French declaration, in my opinion, “read as a whole”, interpreted “in harmony with a natural and reasonable way of reading the text”, leads to the conclusion that France’s true intention was to consent to the jurisdiction of the Court only over “the dispute forming the subject of the Application”, as it was unilaterally defined by Djibouti in paragraph 2 of its Application.

19. Moreover, in the second paragraph of its letter dated 25 July 2006 France consented to the Court deciding “the dispute forming the subject of the Application”, not to deciding the Application as a whole. Therefore, France’s consent was given in respect of the dispute described by Djibouti not in the whole Application but only in paragraph 2 under the heading “Subject of the Dispute”, which does not mention any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti’s Head of State, Djibouti’s *procureur général* or Djibouti’s Head of National Security. Consequently, these are not part of “the dispute forming the subject of the Application”, which is the only matter in respect of which France consented to a decision by the Court, and for this reason the Court does not have jurisdiction to rule upon them.

20. In paragraph 1 of the Application, Djibouti had already described the “subject of the dispute” in the same manner as in paragraph 2, when it stated:

“In the name of the Government of the Republic of Djibouti and in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice and Article 38 of the Rules of Court, we have the honour to file the following Application: ‘Application by the Republic of Djibouti against the French Republic for the violation, vis-à-vis the Republic of Djibouti, of its international obligations in respect of mutual assistance in criminal matters’.”

21. The Court quotes paragraph 3, subparagraph (c), and paragraph 4 of Djibouti’s Application in paragraphs 73 and 74 of the Judgment and in paragraph 83 the Court notes that “the subject of the dispute appears from the Application, viewed as a whole, to be broader than that specified in paragraph 2”, because Djibouti mentions in the Application the summonses issued by France in violation of its international obligations under the headings “Legal Grounds” and “Nature of the Claim”. However, said summonses are also mentioned in the Application under the heading “Statement of Facts” and “Statement of the Grounds on Which the Claim is Based”, and notwithstanding these references to them, the last section of the Application, under the heading “Jurisdiction of the

Court and Admissibility of the Present Application”, describes the “Subject of the Dispute” in the same manner as in its paragraphs 1 and 2. This is evidenced in paragraph 22 of Djibouti’s Application, which reads as follows:

“The question which the Court is asked to decide is indisputably legal, not political, in nature. That there exists a dispute on the question is established by the fact that the French authorities, while aware that the procedure followed in this matter contravenes international law, have not considered themselves to be in a position to intervene to procure the execution of the international letter rogatory requesting the transmission to the judicial authorities in Djibouti of the record of the investigation in the ‘Case against X for the murder of Bernard Borrel’.”

22. Given the above, it is my opinion that “the dispute forming the subject of the Application” referred to by France in the second paragraph of its letter dated 25 July 2006 must be understood to be that described in paragraph 2 of Djibouti’s Application under the heading “Subject of the Dispute”, and in its paragraphs 1 and 22.

23. Additionally, it may be observed that Documents I, III and IV attached to Djibouti’s Application refer to the institution of proceedings against France before the International Court of Justice but do not mention any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti’s Head of State, Djibouti’s *procureur général* or Djibouti’s Head of National Security.

24. The letter of 4 January 2006 from Mr. Djama Souleiman Ali, State Prosecutor of the Republic of Djibouti, to the President of the International Court of Justice reads:

“I have the honour to communicate to you herewith 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, together with certified copies of the Treaty of Friendship and Co-operation between the French Republic and the Republic of Djibouti, of 27 June 1977, and 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.” (Application, Document I, p. 3.)

25. On 28 December 2005 the President of the Republic of Djibouti signed the “Delegation of Powers”, providing as follows:

“We, Ismaïl Omar Guelleh, President of the Republic, Head of Government, grant Full Powers to Mr. Djama Souleiman Ali, State Prosecutor of Djibouti.

For 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." (Application, Document III, p. 37.)

26. Document IV attached to Djibouti's Application is an undated letter from the Minister for Foreign Affairs and International Co-operation of the Republic of Djibouti to the President of the International Court of Justice which reads as follows:

"I have the honour to inform you 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, State Prosecutor of Djibouti, 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." (Application, Document IV, p. 39.)

27. Therefore, from the silence of Djibouti's State Prosecutor, its President and its Minister for Foreign Affairs and International Co-operation, as evidenced in the above quotations, it may be concluded that none of them considered "the dispute forming the subject of the Application" to include any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti's Head of State, Djibouti's *procureur général* or Djibouti's Head of National Security.

28. The above-indicated reasons lead me to conclude that the Court does not have jurisdiction *ratione materiae* to decide any claims mentioned by Djibouti but not included in paragraph 2 of its Application. Therefore it is mainly because of the Court's lack of jurisdiction, not for the reasons set out in the Judgment, that I voted in favour of paragraph 205, subparagraphs (1) (d) and (2) (b).

(Signed) Gonzalo PARRA-ARANGUREN.