

DECLARATION OF JUDGE OWADA

I concur with all the points in the operative clause of the Judgment relating both to jurisdiction and to the merits, except one. However, I have voted against subparagraph (1) (*d*) relating to jurisdiction to adjudicate upon the dispute concerning the arrest warrants issued against the two senior Djiboutian officials on 27 September 2006.

For this reason, I wish to make this statement to clarify my position on that point.

* *

1. As the Court rightly observes, “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” (Judgment, para. 63). While “the jurisdiction of the Court can be founded on *forum prorogatum* in a variety of ways, by no means all of which fall under Article 38, paragraph 5” (*ibid.*, para. 64), in the present case the Court can exercise jurisdiction on the basis of *forum prorogatum* only to the extent that the respondent State has, through its conduct before the Court or in relation to the applicant State, acted in such a way as to have consented to the jurisdiction of the Court (*ibid.*, para. 61).

2. It is thus clear that in the present case the basis and scope of the jurisdiction of the Court has to be determined strictly with reference to the scope of the consent given by the Respondent in its letter of 25 July 2006 in relation to the offer made by the Applicant in its Application. In other words, the overlapping elements in these two documents forming the common consent of the Parties define the precise scope of jurisdiction conferred upon the Court by the Parties in the present case.

3. When reduced to these essential elements, the present case brought before the Court on the basis of *forum prorogatum* is no different in its legal analysis from a case brought under Article 36, paragraph 2, of the Statute of the Court on the basis of two unilateral declarations accepting the jurisdiction of the Court under the optional clause, except for the fact that the consent of the Respondent in the present case has been given *ad hoc* by the letter of the Respondent of 25 July 2006 and is confined strictly to what the Respondent has accepted in terms of jurisdiction limited *ratione materiae* in relation to the Application of the Applicant.

4. Thus while it is true that “[f]or the Court to exercise jurisdiction on the basis of *forum prorogatum*, the element of consent must be either

explicit or clearly to be deduced from the relevant conduct of a State” (Judgment, para. 62), in a situation where the necessary element of consent is expressed in the written form of a letter from the Respondent as in the present case, rather than through its conduct that would enable the Court to deduce the element of consent as in the *Corfu Channel* case, the task of the Court should not be any different from a case based on two declarations under the optional clause. All that is required is to interpret and apply the two relevant documents, so that the precise scope of the common consent of the parties may be defined through identifying the overlapping elements common to the two relevant documents.

5. The Court in the present Judgment professes to follow this principle. It is my view, however, that the Judgment in fact makes a distinction between the present case where the Court’s jurisdiction is founded on *forum prorogatum* and other past cases where such is not the case, at any rate with regard to the scope of the subject-matter of the dispute over which the Court assumes jurisdiction.

6. The Judgment states that “[w]here jurisdiction is based on *forum prorogatum*, great care must be taken regarding the scope of the consent as circumscribed by the respondent State” (Judgment, para. 87). Specifically, in determining whether the Court has jurisdiction over events that took place after the filing of the Application, i.e., the witness summons of 2007 served on the President of Djibouti and the arrest warrants of 2006 issued against the Djiboutian senior officials, the Judgment rejects as irrelevant to the present situation the criteria established in its jurisprudence as to whether those facts or events which are subsequent to the filing of the Application are inseparably connected to the facts or events expressly falling within the purview of the Court’s jurisdiction, so that they may be covered by the scope of the subject of the dispute (e.g., *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*; *LaGrand (Germany v. United States of America)*; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*). The Judgment makes a distinction by stating that “[i]n none of these cases was the Court’s jurisdiction founded on *forum prorogatum*”. Whereas “[i]n the present case, where it is so founded, the Court considers it immaterial whether these later elements would ‘go beyond the declared subject of (the) Application’”,

“what is decisive is that the question of its jurisdiction over the claims relating to these arrest warrants is not to be answered by recourse to jurisprudence relating to ‘continuity’ and ‘connexity’, which are criteria relevant for determining limits *ratione temporis* to its jurisdiction, but by that which France has expressly accepted in its letter of 25 July 2006” (Judgment, para. 88).

7. It should be pointed out, however, that the jurisprudence in question relating to so-called “continuity” and “connexity” has been developed, not so much in the context of limitation *ratione temporis* as precisely for the purpose of determining the scope of the subject-matter which forms the basis of acceptance of the jurisdiction of the Court by the parties. Thus in the *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* case, the Court stated that “[t]he submission is one based on *facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application*” and “[a]s such it falls within the scope of the Court’s jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961” (*I.C.J. Reports 1974*, p. 203, para. 72; emphasis added). In my view, this is exactly the situation with regard to the present case in relation to the witness summonses. In other words, the sole issue here is whether or not the events of 2006 relating to the arrest warrants issued after the filing of the Application by Djibouti arose directly out of the issue that constitutes the subject-matter of the Application.

8. The Court declares that “[a]lthough the arrest warrants could be perceived [to be] a method of enforcing the summonses, they represent *new legal acts* in respect of which France cannot be considered as having implicitly accepted the Court’s jurisdiction” and that “[t]herefore, the claims relating to the arrest warrants arise in respect of issues which are outside the scope of the Court’s jurisdiction *ratione materiae*” (Judgment, para. 88; emphasis added).

9. It is hard to follow, however, why the issuance of arrest warrants, which after all is nothing else than what is the necessary legal consequence that is bound to follow from the refusal to comply with the summonses (Article 109 of the French Code of Civil Procedure), represents a new legal act that should be excluded from the scope of jurisdiction, whereas the issuance of the new summons to the President was “a repetition of the preceding one”, which the Respondent itself admitted as null and void, and thus “in its substance, it is the same summons” (Judgment, para. 91), thus bringing this latter act within the purview of the jurisdiction of the Court.

10. In my view, the issue in both instances is the same. It is the issue of whether the acts subsequent to the filing of the Application fall within the scope of the acceptance by France of the Court’s jurisdiction *ratione materiae* as can be deduced from the language used in France’s letter of 25 July 2006, in particular the expression “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” (*ibid.*, para. 77).

11. I agree with the Judgment that the limitation on jurisdiction imposed by France in this letter is clearly not a limitation *ratione temporis* but a limitation *ratione materiae*. Precisely for this reason, the issue of whether the two instances fall within the scope of “the dispute forming the subject of the Application” is a question that relates to the limitation

on substance, and not to the limitation on time. When one examines Djibouti's Application carefully, the items in paragraph 4 (*e*), (*f*) and (*h*) (ii) clearly refer to a state of affairs (the existence of violation of immunities) that prevailed at the time of Djibouti's Application, rather than particular events (the issuance of summonses) that had taken place by the time of the submission of its Application (Application, p. 7, para. 4). In this sense, the jurisprudence of the Court as established in the cases referred to above (see paragraph 6 above) is of relevance to the present case in terms of limitation on substance, and not in terms of limitation on time, in interpreting what is contained in France's letter of acceptance. (It would be different, if France's letter had spoken of the finite limitation *ratione temporis* expressly excluding everything that had happened after the date of Application from the jurisdiction of the Court.)

12. For these reasons I regretfully cannot agree with the Judgment on this point, in that the Judgment departs from the established jurisprudence on the issue of the scope of the "subject-matter of the dispute" in introducing a new criterion of whether the subsequent events after the submission of the Application were "new legal acts" or not (Judgment, para. 88). By this yardstick, the new summons issued in 2007 addressed to the President of Djibouti should also be a new legal act.

13. It may be added that in spite of this reservation on my part, I concur with the Judgment of the Court as far as the merit aspects of this issue relating to the immunity of the senior Djiboutian officials are concerned. Under these circumstances, my reservation on this point of jurisdiction in the final analysis does not affect the conclusion that the Court has reached on the issue of the immunity of the senior Djiboutian officials.

(Signed) Hisashi OWADA.
