

DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

*Jurisdiction — Reference to the Court pursuant to Article 38, paragraph 5, of the Rules of the Court — Scope of the consent given by the Parties — The Court lacks jurisdiction to entertain new claims not formulated in the Application.*

1. This is the first time in the Court's history that a case has been referred to it pursuant to Article 38, paragraph 5, of the Rules, according to which:

“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.”

2. In this case, on 9 January 2006, Djibouti brought an action against France based on Article 38, paragraph 5, expressing its confidence “that the French Republic will agree to submit to the jurisdiction of the Court to settle the present dispute”. By letter of 25 July 2006, France accepted the jurisdiction of the Court “within the meaning of Article 38, paragraph 5”, but made it clear that its consent applied “only for the purposes of the case, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein”.

3. As paragraph 48 of the Judgment reminds us, in this case, as in any other, it is necessary to determine the scope of the consent given by the parties to the Court's jurisdiction. Furthermore, it is stressed in paragraph 62 of the Judgment that:

“The consent allowing for the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*. As the Court has recently explained, whatever the basis of consent, the attitude of the respondent State must ‘be capable of being regarded as ‘an unequivocal indication’ of the desire of that State to accept the Court's jurisdiction in a ‘voluntary and indisputable manner’.”

4. A court's jurisdiction is determined in the light of the claims submitted by the parties on which that court will be required to rule in the operative part of its judgment. In this case, it is therefore necessary to

establish what claims Djibouti submitted and the extent to which France consented to the Court adjudicating on those claims.

5. In the final version of its submissions, Djibouti presented three sets of claims to the Court:

- (a) the first set relates to the execution by France of the letter rogatory which Djibouti addressed to France on 3 November 2004;
- (b) the second set relates to the decisions taken by the French investigating judges before the Application was filed, i.e. the witness summons addressed to the President of the Republic of Djibouti on 17 May 2005 and the summonses to appear as *témoins assistés* (legally assisted witnesses) addressed to two senior Djiboutian officials on 3 and 4 November 2004 and 17 June 2005;
- (c) the third set relates to the decisions taken by the investigating judges after the Application had been filed, i.e. the witness summons addressed to the President of the Republic of Djibouti on 14 February 2007 and the arrest warrants issued on 27 September 2006 against two senior Djiboutian officials.

6. France recognizes that the Court has jurisdiction to rule on the first set of claims. It objects to the Court's jurisdiction *ratione materiae* in relation to the second set, and on grounds which it defines as *ratione temporis* in relation to the third.

7. The Court has to determine whether or not, in its letter of 25 July 2006, France consented to the Court adjudicating on the second and third sets of claims. To answer this question, it is necessary to examine Djibouti's original submissions and France's letter of consent, which the Court has done.

8. At first sight, Djibouti's Application appears to be limited in scope. In paragraph 1, it is presented as an application concerning the violation by France of its "international obligations in respect of mutual assistance in criminal matters". According to paragraph 2, "[t]he 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 "Borrel file". Consequently, the Court entitled the case between Djibouti and France: "Certain Questions of Mutual Assistance in Criminal Matters".

9. However, in paragraph 4, headed "Nature of the Claim", the Application proceeds to list a series of considerations which — following a practice which is unfortunately all too common — mix together, in an extremely confused way, submissions and the grounds supporting them (for the Court's condemnation of this practice, see the case concerning *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 52). Paragraph 4 (h) (ii) of this extensive list requests the Court to declare that France must

"withdraw and cancel the summonses of the Head of State of the

Republic of Djibouti and of internationally protected Djiboutian nationals to testify as *témoins assistés* [legally represented witnesses] in respect of subornation of perjury in the ‘Case against X for the murder of Bernard Borrel’”.

It will be noted that:

- this claim is formulated in only the briefest of terms;
- it is inaccurate as regards the President of the Republic of Djibouti, since he was not summoned to testify as a *témoin assisté*;
- the Application does not mention the positions or names of the other Djiboutian nationals affected by the summonses to which the claim refers;
- the proceedings instituted in France in respect of subornation of perjury are confused with those concerning the death of Bernard Borrel.

Nonetheless, the Application did contain claims in respect of the summonses addressed to the Djiboutian Head of State and to two other Djiboutian nationals by the French investigating judges.

10. France consented to 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”. It therefore placed two conditions on its consent to the Court’s jurisdiction. That consent applies:

- (1) to the dispute forming the subject of the Application;
- (2) strictly within the limits of the claims formulated therein.

11. Consequently, France did not consent to the Court’s jurisdiction to adjudicate on claims which were not formulated in the Application. In other words, and as admirably specified by the Court in paragraph 83 of its Judgment: “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”.

12. The Court does not, therefore, have jurisdiction to deal with the arrest warrants and summonses issued after the Application was filed. The Court rightly took that view in relation to the arrest warrants of 27 September 2006. However, it found that it did have jurisdiction to rule on the summons addressed to the Djiboutian Head of State on 14 February 2007, pointing out in paragraph 91 of the Judgment that this summons was “but a repetition” of the preceding one of 17 May 2005. That is far from the case: the procedure applied in 2007 differed from that applied in 2005 and, if the Djiboutian Head of State had agreed to testify, his statement would have had to be taken not by investigating Judge Clément, but in writing by the President of the Court of Appeal or the judge delegated by him, pursuant to Article 656 of the French Code of Criminal Procedure. Furthermore, over a period of nearly two years, there had been developments in the case, and the questions put to the Head of State would not necessarily have been the same as in 2005. Djibouti’s claim in

relation to this new summons constituted a fresh claim, and did not fall within the Court's jurisdiction as defined in France's letter of 25 July 2006.

13. The position is somewhat different as regards the summonses that pre-dated the Application. Djibouti did present claims in its Application relating to these summonses. Those claims were certainly brief, shrouded in confusion and contained material errors. However, France was able to identify them without great difficulty. Consequently, the second of the conditions laid down by France in its consent to the Court's jurisdiction is satisfied in respect of the summonses pre-dating the Application.

14. It thus remains to be seen whether the first condition is satisfied too: do these claims fall within "the dispute forming the subject of the Application"? If the Application had been drafted in a normal way, there would be no doubt on this point: the subject of an application consists in the various claims presented by the applicant State; a dispute exists between the Parties as regards the determination of those claims. Usually, the claims, the subject of the Application and the subject of the dispute are one and the same.

15. The problem in this case stems from the difference between:

- (a) the subject of the Application, as set out in paragraph 2 thereof; and
- (b) the claims regarding the contested summonses, which do not fall within the subject of the Application as thus defined.

Such a presentation is unfortunate. Admittedly, the Court is not required to attach to matters of form the same degree of importance which they might possess in municipal law (*Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 613, para. 26). But it is to be regretted that the Parties should foster such confusion in the way that they present their applications. I would therefore be inclined to take the view that, once the subject of an application has been defined in accordance with Article 40 of the Statute and Article 38 of the Rules of Court, any submissions which fall outside that subject are inadmissible.

16. France did not, however, draw attention to these shortcomings when it expressed its consent to the Court's jurisdiction; nor did it specify, at that point, that it was consenting to that jurisdiction solely in respect of those claims falling within the subject of the dispute as defined in paragraph 2 of the Application.

17. In these circumstances, the Court was faced with a very confused Application and a somewhat elliptical consent to jurisdiction. It could have focused on the shortcomings of either one or the other. It decided to treat the former as a normal application, and concluded that France had consented to its jurisdiction in respect of all the claims which Djibouti had formulated in the Application. That decision is understandable in

law, but it seems to me to set a bad precedent. It is, in fact, likely to encourage the submission of applications drafted — sometimes deliberately — with a complete lack of rigour, and to inhibit the use of Article 38, paragraph 5, of the Rules of Court. I have supported it in the interest of Franco-Djiboutian relations, in order to secure a more comprehensive settlement of the dispute, but wished to record here my regrets and my concerns.

*(Signed)* Gilbert GUILLAUME.

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