

## *Forum prorogatum* before the International Court of Justice

The *Djibouti v. France* case

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### Introduction

The Republic of Djibouti, formerly the “French Territory of the Afars and the Issars”, is a small African state which gained its independence from France in 1977. Devoid of natural resources and with a desert climate preventing any agricultural development, this State— which is smaller than Rwanda and is surrounded by war-torn countries—has as its one saving grace its strategic access to the Bab Al-Mandab Strait, which is located between the Red Sea and the Gulf of Aden. Djibouti’s economy is mainly dependant on its deep-sea harbour, which doubles as Ethiopia’s sole reliable access to the sea. Furthermore, the territory serves as a trade gateway to East Africa.

More than 30 years after it became independent, Djibouti maintains very close relations with France. Although more and more countries are investing in Djibouti, France remains the country’s principal supporter and it continues to be Djibouti’s primary commercial partner. To quote the words of former French President Jacques Chirac to his Djiboutian counterpart in 2005: “our relationship is excellent in all respects. There is only one shadow which is cast over it: the Borrel affair.”<sup>1</sup>

On 9 January 2006, this ‘shadow’ over the Djibouti-France relationship became all the more gloomy with Djibouti’s initiation of proceedings before the International Court of Justice (ICJ) in The Hague. It is not an easy task to sum up the intricate series of incidents which led this small country, deeply in debt and crippled by an unemployment rate of nearly 60 percent, to bring its main financial backer before the ICJ. Indeed, a curious decade-long political and diplomatic muddle lies behind the proceedings in The Hague.

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<sup>1</sup> Working notes of the Africa Department of the French Ministry of Foreign Affairs in view of the meeting between Chirac and Guelleh on 17 May 2005. Unofficial translation (original text: “nos relations sont excellentes à tous points de vue. Il n’existe qu’une seule ombre à ce tableau : l’affaire Borrel”).

In bringing the case before the ICJ, Djibouti explained that France violated its international obligations by refusing to transmit the record relating to the investigation in the *Case against X for the murder of Bernard Borrel* to the judicial authorities in Djibouti. What at first sight looks like a standard administrative procedure is in fact a complex criminal case, mixing the political and strategic interests of both countries. Thus, before looking at the ICJ's Judgement itself, this commentary first focuses on the background of the case, and more specifically on the judicial question which is at the centre of the conflict: the *Borrel* case.<sup>2</sup>

## I. The *Borrel* case

To fully understand the *Djibouti v. France* case, one needs to go back to 19 October 1995, when the half-charred corpse of Bernard Borrel, a French magistrate and technical adviser to the Djiboutian Ministry of Justice, was found at the bottom of a ravine, 80 km away from the city of Djibouti, the country's capital city. Some 13 years afterwards, it is probably the only fact upon which the two Parties agree. According to the Djiboutian authorities, which concluded that the judge had committed suicide, Bernard Borrel doused himself with petrol, set himself on fire and then slid down a steep slope. This is a version of the events that the French judicial authorities no longer share.

### 1. Escalation of the legal battle

As early as 1995, the widow of the French judge initiated a judicial investigation in France. In 2000, the French authorities at first confirmed the Djiboutian theory that Borrel had committed suicide. However, in 2002, after additional medical expertise was employed, the theory that the judge had been murdered came to the fore. In 2004, the idea that the Djiboutian authorities had ordered a political murder began to be openly propagated in France.

Thus, the case progressively became a matter of state interest. In 2005, the current President of Djibouti, Ismaël Omar Guelleh, was accused by Djiboutian witnesses, then summoned as a witness himself by a French judge. In 2006, the *procureur de la république de Djibouti*, Djama Souleiman,<sup>3</sup> and the Djiboutian Head of National Security, Hassan Saïd, were accused in France of having exerted various forms of pressure upon witnesses.<sup>4</sup>

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<sup>2</sup> In its Judgement of 4 June 2008, the ICJ presents a summary of all the legal proceedings initiated in both France and Djibouti in relation to the death of Bernard Borrel. See International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgement, 4 June 2008 (hereafter, Judgement), paras. 19-38, pp. 10-19. Available at: <http://www.haguejusticeportal.net/eCache/DEF/9/388.html>

<sup>3</sup> Djama Souleiman Ali was appointed by Djibouti's Ministry of Foreign Affairs as the Agent in the case before the ICJ.

<sup>4</sup> The judgement in this case was rendered on 27 March 2008. The *chambre correctionnelle* of the *tribunal de grande instance de Versailles* gave a much heavier sentence than requested by the Public Prosecutor (a suspended sentence of one year's imprisonment): Djama Souleiman received a custodial sentence of 18

In 2007, despite his position as Head of State, President Guelleh—whilst travelling in France in order to attend to a France-Africa summit—was again summoned as a witness by the judge in charge of the *Borrel* case.

Since 2004, the Djiboutian judicial authorities (which closed the case after having concluded that Borrel had taken his own life) have stated that they would only be willing to reopen the case if France has new information at its disposal. This would necessitate the transferral of the investigation records from France to Djibouti; a transferral the French judges refuse to grant as it comes from the very same Djiboutian officials that are implicated in the case.

At the same time, the Djiboutian authorities developed their own theory. That is, Judge Borrel was investigating a paedophile network implicating French officials in Djibouti and it was *those* people who tried to get rid of a prying investigator. In 2007, a summons was issued against French citizens. In this escalation of judicial activity, the French executive found itself stuck between a rock and a hard place.

## 2. *Underlying geopolitical interests*

The geographic location of Djibouti continues to make the country an essential part of the French military network. The former colony hosts the largest French overseas military base, with some 2,800 personnel stationed there, and it provides strategic access to the Red Sea, the Indian Ocean and the Persian Gulf. It was arguably for this reason of strategic significance for France that Djibouti only gained its independence in 1977 – 17 years after most of France’s African colonies. Since the September 11 attacks, the United States has asserted its presence in Djibouti and likewise established a military base of 2,000 troops – its only such base in Sub-Saharan Africa. Djibouti now candidly uses this “opening to competition” to put pressure on France.

Since 2003, France has paid Djibouti 30 million euro in annual rent for its base, whereas previously it had to pay nothing. The construction of the new port of Djibouti and of its free-trade zone was granted to *Dubai Ports International*. The number of Chinese investments is also multiplying, especially in the hotel sector. Although Paris is still Djibouti’s principal backer, President Guelleh regularly proclaims that “Djibouti does not need France anymore”.<sup>5</sup>

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month’s imprisonment and Hassan Saïd a custodial sentence of one year. The two Djiboutian officials were convicted for having exerted various forms of pressure upon witnesses in the *Case against X for the murder of Bernard Borrel* so as to make them reconsider or discredit their statements implicating the current President of Djibouti, Ismaël Omar Guelleh. The Djiboutian Embassy in France issued a statement denouncing this judgement as “openly racist” (“ouvertement raciste”).

<sup>5</sup> “Djibouti n’a plus besoin de la France”, [www.jeuneAfrique.com](http://www.jeuneAfrique.com), 3 February 2008.

Yet, it seems that France, to some extent, *did* try to work alongside Djibouti in order to protect its interests in the area.<sup>6</sup> Members of the French Ministry of Foreign Affairs and of the French Ministry of Justice were suspected of having tried to communicate to Djibouti some elements of the record.<sup>7</sup>

It is because the French government does not have the power to order the handing over to Djibouti of this sensitive judicial record that Djibouti resorted to initiating proceedings before the ICJ. However, the International Court of Justice refrained from adjudicating on the merits of this inextricable judicial drama. As such, the ICJ Judgement of 4 June 2008 will in no way resolve the core issue at stake between Djibouti and France, namely that French judges continue to suspect the highest powers in Djibouti for the death of Bernard Borrel. However, the Judgement does raise a certain number of interesting legal questions. In particular, it was the first time that the ICJ had 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.

## II. The *Djibouti v. France* case before the ICJ

On 4 June 2008, the ICJ delivered its Judgement in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France). The matter in dispute before the Court was “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*”,<sup>8</sup> *i.e.* the refusal of France to hand over to Djibouti the Borrel record. Djibouti argued that, by refusing to do so, France had violated its international obligations under the 1977 Treaty of Friendship and Co-operation between the two countries, and the 1986 Convention on Mutual Assistance in Criminal Matters between France and Djibouti. Djibouti further asserted that, in summoning certain Djiboutian officials as *témoins assistés* (legally represented witnesses), France had violated its obligation to prevent attacks on the person, freedom or dignity of persons enjoying such protection.<sup>9</sup>

The Republic of Djibouti essentially asked the Court two things: to adjudge and declare that France was under an international legal obligation to (1) “execute the 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*”,

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<sup>6</sup> See International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Memorial of the Republic of Djibouti, 15 March 2007, (hereafter, Memorial), para. 81, p. 34. Available in French only at: <http://www.icj-cij.org/docket/files/136/14390.pdf>.

<sup>7</sup> Judgement, paras. 37-38, p.18. In 2005, proceedings are instituted against the French state. In 2007, during the presidential campaign in France, the Ministry of Foreign Affairs and the Ministry of Justice are searched by the judges, but they are denied access to the *Palais de l'Élysée*.

<sup>8</sup> Judgement, para. 1, and International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Application instituting proceedings (hereafter, Application), para. 2, p. 4, available in French only at: <http://www.icj-cij.org/docket/files/136/13104.pdf>.

<sup>9</sup> Application, para. 3, p. 4.

and (2) “withdraw and cancel the summonses of the Head of State of the Republic of Djibouti and of internationally protected Djiboutian nationals.”<sup>10</sup>

### 1. *Jurisdiction of the Court and forum prorogatum*

France consented to the Court’s jurisdiction pursuant to Article 38, paragraph 5 of the Rules of Court, by a letter from the French Ministry of Foreign Affairs to the Registry of the ICJ on 25 July 2006.<sup>11</sup> As the ICJ itself pointed out, it was the first time that the Court had to decide on the merits of a dispute brought before it by an application based on Article 38, paragraph 5, of the Rules.<sup>12</sup> Article 38(5) reads as follows:

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.

Three characteristics of Article 38(5) should be underlined before further consideration. First, Article 38(5) only allows the ICJ to transmit to a State an Application made against it. Thus, secondly, the Court shall take no action in the proceedings until consent to its jurisdiction has been explicitly given by the respondent State. This means that the Court is, technically speaking, only “seized” once the respondent State has expressed this consent. Thirdly, the State which is asked to consent to the Court’s jurisdiction is completely free to respond as it sees fit. The respondent’s consent has a deferred and *ad hoc* nature which makes this procedure a means of establishing *forum prorogatum*.

#### a. *Characteristics of forum prorogatum*

The jurisdiction of the International Court of Justice is entirely based on the consent of States. However, the compulsory jurisdiction of the Court accepted by a unilateral declaration pursuant to Article 36, paragraph 2 is only *one* form of expression of the consent of a State to the jurisdiction of the Court. Of all the forms of consent, *forum prorogatum* is by far the most flexible.<sup>13</sup>

<sup>10</sup> Judgement, paras. 16(c) and (h)(ii) and Memorial, V.2 Demandes, paras. 5-6, p. 68 (in French only).

<sup>11</sup> International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Letter from the Minister for Foreign Affairs of the French Republic (Consent to the Jurisdiction of the Court to Entertain the Application Pursuant to Article 38, paragraph 5, of the Rules of Court), 25 July 2006, available in French only at: <http://www.icj-cij.org/docket/files/136/13916.pdf>.

<sup>12</sup> Judgement, para. 63, p. 25.

<sup>13</sup> See Mohammed Bedjaoui, Fatsah Ouguergouz, *Le forum prorogatum* devant la Cour internationale de Justice : les ressources d’une institution ou la face cachée du consensualisme, *African Yearbook of International Law*, 1997, Vol. 5, pp. 91-114.

In the *Genocide case* before the ICJ, Judge *ad hoc* Lauterpacht gave this particularly lucid definition: “[*Forum prorogatum*] is the possibility that if State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court.”<sup>14</sup>

It was the ICJ’s predecessor, the Permanent Court of International Justice (PCIJ), that transferred *forum prorogatum* into international law.<sup>15</sup> In 1934, on the occasion of the revision of Article 35 of the PCIJ’s Rules of Court—which relates to elements that an application instituting proceedings shall include—some judges voiced the opinion that *forum prorogatum* was in the interests of international justice as it allowed greater flexibility with regard to the necessary conditions in order for States to bring disputes before the Court.<sup>16</sup>

It did not take long for the ICJ to avail itself of this useful tool and it quickly established a similar precedent to that set by its predecessor. It happened as early as 1948 with the *Corfu Channel* case between the United Kingdom and Albania.<sup>17</sup> Between 1948 and 1952, a series of Judgements were delivered which confirmed the main characteristics of the use of *forum prorogatum* before the ICJ:<sup>18</sup>

- First, the consent of the Parties does not have to be expressed in any particular form. In the *Corfu Channel* case, the ICJ inferred Albania’s consent to its jurisdiction from a simple letter addressed to the Court.<sup>19</sup>

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<sup>14</sup> International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Order of 13 September 1993 (Further Requests for the Indication of Provisional Measures), Separate opinion of Judge *ad hoc* Lauterpacht, para. 24, p. 416, available at: <http://www.icj-cij.org/docket/files/91/7323.pdf>.

<sup>15</sup> It would be more accurate to talk about a ‘translation’ than a simple transfer. Indeed, the concept of *forum prorogatum*, which has its origins in Roman law, literally means “prorogated jurisdiction”: this is to say the *extension* of the jurisdiction of a court by agreement of the parties in a case which would otherwise be outside its jurisdiction. In international law however, the deferred consent by a State to the jurisdiction of the court has *stricto sensu* the effect to *create* and to *establish* the jurisdiction of the court. On this point, see Bohdan Winiarski, *Quelques réflexions sur le soi-disant forum prorogatum en droit international*, *Mélanges Spiropoulos*, 1947.

<sup>16</sup> On this point, see Shabtai Rosenne, *The Forum Prorogatum in the International Court of Justice*, *Revue hellénique de droit international*, 1953, pp. 1-26 and Bedjaoui, *op. cit.*

<sup>17</sup> International Court of Justice, *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), 1947-1948, documents available at: <http://www.haguejusticeportal.net/eCache/DEF/6/287.html>.

<sup>18</sup> For a short review of this jurisprudence, see Jacques Soubeyrol, ‘Forum prorogatum’ et Cour internationale de Justice : de la procédure contentieuse à la procédure consultative, *Revue générale de droit international public*, Volume 76, 1972, pp. 1098-1104. For a comparative analysis of PCIJ and ICJ jurisprudences on *forum prorogatum*, see Pierre Stillmunkes, “Le *forum prorogatum* devant la Cour permanente de Justice internationale et la Cour internationale de Justice”, *Revue générale de droit international public*, Volume 68, 1964, pp. 665-686.

<sup>19</sup> See *Corfu Channel*, Judgement on Preliminary objections: I.C.J. Reports 1948, p. 27. For the PCIJ jurisprudence on this point, see *Mavrommatis Jerusalem Concessions*, Series A, N°5, Judgement of 26 March 1925, p. 27, and *Rights of Minorities in Upper Silesia (Minority Schools)*, Series A, N°15, Judgement n°12, 26 April 1928, p. 23.

- Furthermore, this consent can either be explicit or implicit. For example, it can be deduced from the relevant conduct of the Parties. In the *Haya de la Torre* case, the Court ruled that pleading on the merits implied a tacit acceptance of its jurisdiction.<sup>20</sup>
- Conversely, mere participation in the proceedings is not “a non equivocal indication”, *a fortiori* when the purpose of this participation is to dispute the jurisdiction of the Court. The flipside of this absence of restriction concerning the form of expression of the consent is that the consent must be absolutely unequivocal.<sup>21</sup>
- Finally, once the consent of the Parties is given to the Court, it cannot be withdrawn unilaterally. The *Corfu Channel* case is very explicit on this point, and uses a formulation very similar to that of the PCIJ Judgement in the *Rights of Minorities in Upper Silesia (Minority Schools)* case.<sup>22</sup>

*b. Some criticism*

The Gordian Knot of establishing *forum prorogatum* lies in the way the Court can determine that the respondent State gave consent to its jurisdiction, especially when the Court relies on tacit consent. On this point, as well as on others, the use of *forum prorogatum* raises numerous questions.<sup>23</sup> In particular, it may open the gate to an abusive use of applying to the ICJ, allowing States to seize the Court with no real legal basis, purely for political purposes. *De facto*, *forum prorogatum* can seem to be nothing less

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<sup>20</sup> International Court of Justice, *Haya de la Torre* (Colombia v. Peru), Judgement of 13 June 1951: I.C.J. Reports 1951, p. 78, available at: <http://www.icj-cij.org/docket/files/14/1937.pdf>. This notion had been expressed by the PCIJ in the clearest way in *Rights of Minorities in Upper Silesia (Minority Schools)*, *op. cit.*, p. 24: “And there seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it. It seems hard to deny that the submission of arguments on the merits without making reservations in regard to the question of jurisdiction must be regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits of the suit.”

<sup>21</sup> See International Court of Justice, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Judgement (Preliminary Objections), 22 July 1952, I.C.J. Reports 1952, p. 114: “The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But that Government has consistently denied the jurisdiction of the Court. [...] No element of consent can be deduced from such conduct on the part of the Government of Iran. [...] Accordingly, the Court has arrived at the conclusion that it has no jurisdiction to deal with the case submitted to it by the Application of the Government of the United Kingdom.” Available at: <http://www.icj-cij.org/docket/files/16/1997.pdf>. This Judgement is the first from the ICJ in which the exact words “*forum prorogatum*” are used, marking its official use.

<sup>22</sup> See *Corfu Channel*, *op. cit.*, p. 29 and *Rights of Minorities in Upper Silesia (Minority Schools)*, *op. cit.*, p. 25. On the *Corfu Channel* case and *forum prorogatum*, see Humphrey Waldock, “Forum Prorogatum or acceptance of a unilateral summons to appear before the international Court”, *The International Law Quarterly*, Volume 2, No. 3, 1948, pp. 377-391.

<sup>23</sup> See Yee Sienho, “*Forum prorogatum* returns to the International Court of Justice”, *Leiden Journal of International Law*, 16 (2003), pp. 701-713.

than a subsequent straightening out of an ill-founded request to the ICJ. Thus, it is easy to understand how it can be used for political purposes in order to force a State either to accept the jurisdiction of the Court or to publicly recognise that it is not willing to resolve a dispute pacifically.<sup>24</sup>

Concerns were also expressed in relation to some legal consequences of resorting to *forum prorogatum* when the Court relies on tacit consent to its jurisdiction, especially when it comes to identifying which State organs have the authority to confer jurisdiction to the ICJ. Hence, ruling that to plead on the merits of the case constitutes tacit acceptance of the jurisdiction of the Court means conferring such powers to the Agents of the Parties regardless of the domestic law of that State.<sup>25</sup> This is perhaps one of the reasons why *forum prorogatum* has so far been rarely used by States and the ICJ. In fact, between the *Haya de la Torre* case in 1951, and the case concerning *Certain Criminal Proceedings in France* in 2003, the ICJ not once relied on *forum prorogatum* to establish its jurisdiction.<sup>26</sup>

Hence, for the first time in more than 50 years, the ICJ had the opportunity to reaffirm, with the *Djibouti v. France* case, the modalities of application of the *forum prorogatum* doctrine. The judges of the ICJ recalled in their judgement of 4 June 2008 that “the jurisdiction of the Court can be founded on *forum prorogatum* in a variety of ways”<sup>27</sup> provided that the attitude of the respondent State is “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”.<sup>28</sup> In the present case, the consent of France was given in the most explicit terms, in a letter of acceptance addressed to the Registrar of the

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<sup>24</sup> The introduction of Article 38(5) in 1978 was made with the aim of avoiding such recourse to the ICJ for political purposes. Previously, applications which were filed upon a consent thereto yet to be given or manifested by another State were entered in the General List of the Court, in the same way as any other application, and even if the Court patently had no jurisdiction over the dispute. The respondent State had the responsibility to explicitly reject the Court’s jurisdiction over the case. If this occurred, the Court was consequently obliged to issue orders uniquely so as to remove them from its List. See Judgement, para. 63, p. 25.

<sup>25</sup> See Stillmunkes, *op. cit.*, p. 677.

<sup>26</sup> International Court of Justice, *Certain Criminal Proceedings in France* (Republic of the Congo v. France), 2003, documents available at: <http://www.haguejusticeportal.net/eCache/DEF/6/188.html>. This case has numerous similarities with the *Djibouti v. France* case. The *Congo v. France* case concerns criminal proceedings in France against political figures in Congo, following the alleged massacre by the *Cobra* militias of the current President of Congo of about 350 refugees in Brazzaville. Congo criticizes France for the issuance by the French judiciary of letters rogatory to hear as a witness the President of Congo, Sassou Nguesso, when he was on an official visit in France. Congo sought to found its jurisdiction on the consent France could give. On 8 April 2003, France informed the ICJ that it consented to its jurisdiction pursuant Article 38, paragraph 5. This letter uses the exact same wording as the letter of 25 July 2006 in the *Djibouti v. France* case. On this case and *forum prorogatum*, see Yee Sienho, *op. cit.*, pp. 710-713.

<sup>27</sup> Judgement, para. 64, p. 26.

<sup>28</sup> Judgement, para. 62, p. 25, quoting *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 2006, p. 18.

ICJ, dated 25 July 2006: “the French Republic consents to the Court’s jurisdiction to entertain the Application.”<sup>29</sup>

*c. The specific question of determining the scope of the consent*

However, France did not fail to express, in its Counter-Memorial, restrictions with regard to the scope of its consent, which applies “in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein.”<sup>30</sup> The Court, however, pointed out that it was up to the Court itself “to discern properly the extent of the consent given by the Parties”, by reading France’s expression of consent together with Djibouti’s application.<sup>31</sup> Once more, the Court refused to bind itself to questions of formulation used by the applicant and the respondent. It indicates that the subject-matter of the dispute must be discerned from a reading of the whole Application, rather than of a single section, even if this section is entitled “Subject of the dispute”.<sup>32</sup>

Nevertheless, the Court underlined that “where jurisdiction is based on *forum prorogatum*, great care must be taken regarding the scope of the consent as circumscribed by the respondent State.”<sup>33</sup> The reasoning of the Court is especially interesting regarding its jurisdiction over certain witness summonses and arrest warrants which were not addressed in Djibouti’s Application, or which occurred after the Application was filed. Usually, when the Court has to examine its jurisdiction over facts subsequent to the filing of the application, it must first determine whether those facts are connected to the facts already falling within the Court’s jurisdiction and whether considering them would transform the “nature of the dispute”. In the present case however, the Court decided to set aside the previous jurisprudence on this question, arguing that none of the cases concerned were based on *forum prorogatum*. In this case, the Court ruled that the criteria of “continuity” and “connexity” were *not* relevant: only the letter of 25 July 2006 was significant. In this letter France had expressly accepted the competence of the Court in the case, “in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein.” As these subsequent summonses were not formulated in Djibouti’s Application, the Court ruled that they were outside its jurisprudence.<sup>34</sup>

One could be satisfied with the balance the ICJ managed to find between the interests of justice and that of State sovereignty: the Court interpreted the scope of France’s

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<sup>29</sup> Letter of 25 July 2006, *op. cit.*.

<sup>30</sup> *Ibid.*

<sup>31</sup> Judgement, para. 65, p. 26.

<sup>32</sup> *Ibid.*, paras. 65-95, pp. 26-33. France argued that paragraph 2 of Djibouti’s Application, entitled “Subject of the dispute”, only mentioned the refusal by the French Government to execute the letter rogatory, and thus, France did not give its consent to the jurisdiction of the Court over submissions formulated in other parts of the Application. See Counter-Memorial, para. 2.14.

<sup>33</sup> Judgement, para. 87, p. 31.

<sup>34</sup> *Ibid.*, paras. 85-88, pp. 30-32.

consent as broader than Paris contended, but excluded some of Djibouti's subsequent submissions. This means that, while reaffirming the absence of formality in the way the Application needs to be organised, the Court insisted on protecting the sovereign nature of the consent of France.

However, some judges expressed grave reservations on the matter, and understandably so. In his individual opinion, in relation to the jurisdiction *rationae materiae*, Judge Tomka underlined the contradiction between the Court's assertion that the consent of the respondent must be "certain" and the Court's determination to "discern" the subject-matter of the dispute from a reading of the whole Application (especially when this consent has been formally expressed): "*l'État qui a été invité à accepter la compétence de la Cour et qui y a consenti, risque de découvrir plus tard que la Cour donne au différend et à son objet une définition différente de la sienne.*"<sup>35</sup> As for jurisdiction *rationae temporis*, Judge Tomka added: "*je vois mal comment la France pouvait expressément accepter la compétence de la Cour pour un différend concernant un fait qui ne s'était pas encore produit.*"<sup>36</sup>

On this matter, the author would give preference to the declaration of Judge Skotnikov, who did not agree with the Court when it set aside the previous jurisprudence relating to the extension of the Court's jurisdiction to facts that occurred after the Application was filed. For Judge Skotnikov, it is evident that France accepted the jurisdiction of the Court over an ongoing dispute, and was aware of this when it consented to the Court's jurisdiction. Henceforth, this consent subsequently included eventual developments which form part of the "dispute forming the subject of the Application".<sup>37</sup> In any case, if *forum prorogatum* is a flexible way of seizing the International Court of Justice, this flexibility does not have unanimous support when it comes to determining the extent of the expressed consent.

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<sup>35</sup> Separate opinion of Judge Tomka, para. 25, p. 5 (emphasis added). Unofficial translation: "[T]he State which has been invited to consent to the Court's jurisdiction, and did so, may later discover that the Court gives a different definition to the dispute and to its subject-matter." On this point, see also the declaration of Judge Owada (on the exclusion of subsequent arrest warrants) and the separate opinion of Judge Parra-Aranguren (France did not give its consent to the whole Application).

<sup>36</sup> Individual opinion of Judge Tomka, para. 30, p. 6 (emphasis added). Unofficial translation: "I do not see how France could have given its *explicit* consent to the jurisdiction of the Court over a dispute relating to a fact that had not yet occurred."

<sup>37</sup> Declaration of Judge Skotnikov, paras. 2-3, p. 1: "I cannot agree with the Court's reading of France's letter of acceptance of the Court's jurisdiction as excluding developments arising directly out of the questions which constitute the subject-matter of the Application but which occurred after it was filed. [...] the Respondent has not excluded from the Court's jurisdiction new developments within the case as it was framed in the Application." And para. 8, p. 2: "I do not see why this jurisprudence [on extension of jurisdiction] would not be pertinent in the present case or in a *forum prorogatum* case in general."

## 2. *Judgement on the merits*

Despite the strategic issues at stake in this case and the questions concerning jurisprudence, from a legal point of view one must conclude that this Judgement has only marginal interest when it comes to the actual merits of the case.

First, it must be noted that, in relation to the issue of the execution of the letters rogatory, Djibouti had only scarce legal arguments on which to rely. The Treaty of Friendship and Co-operation referred to in the Application does not mention mutual assistance in criminal matters.<sup>38</sup> As for the Convention on Mutual Assistance in Criminal Matters of 27 September 1986, the Court underlined, *inter alia*, that the obligation to execute international letters rogatory laid down in Article 3 is an obligation to “ensure that the procedure is put in motion, [but] the State does not thereby guarantee the outcome.”<sup>39</sup>

In the end, the Court only concluded that France failed to comply with its obligation on a purely procedural matter, that is to say the legal obligation to notify Djibouti of its reasons for refusing to execute a letter rogatory pursuant to Article 17 of the said 1986 Convention.<sup>40</sup> Even so, the Court merely seems to reproach France for not having *sufficiently* notified Djibouti of its reasons for refusing.<sup>41</sup> However, the conclusions of the Court do not leave room for speculation with regards to the core issue at stake in this case: “nor, in any event, would it [*i.e.* the Court] have been in a position so to do [order the Borrel file to be transmitted], having itself no knowledge of the contents of the file.”<sup>42</sup>

Djibouti also called into question two witness summonses in the *Borrel* case, issued by a French investigating judge, to the President of the Republic of Djibouti. The Court quoted its Judgement in the case concerning the *Arrest Warrant of 11 April 2000*, stating that a Head of States enjoys “full immunity from criminal jurisdiction and inviolability [...] against any act of authority of another State”.<sup>43</sup> On this point, the Court ruled that a “witness summons” is “merely an invitation to testify, which the Head of State could freely accept or decline” and thus, President Guelleh was not subject to any measure of constraint.<sup>44</sup>

As for the other senior Djiboutian officials whose international protection was allegedly violated by France, namely the *procureur de la République* and the Head of National Security of Djibouti, the Court began by reproaching Djibouti for the lack of clarity of its argument, before ruling that “there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not

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<sup>38</sup> Judgement, para. 105, p. 36.

<sup>39</sup> *Ibid.*, para. 123, p. 40.

<sup>40</sup> Judgement, paras. 149-152, pp. 47-48.

<sup>41</sup> “Some brief further explanation was called for”, *Ibid.*, para. 152, p. 48.

<sup>42</sup> *Ibid.*, para. 202, p. 60.

<sup>43</sup> *Ibid.*, para. 170, p. 53, quoting International Court of Justice, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgement (14 February 2002), I.C.J. Reports 2002, para. 54, p. 23, available at: <http://www.haguejusticeportal.net/smartsite.html?id=785&CH=DEF>.

<sup>44</sup> Judgement, paras. 170-171, p. 53.

being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961.”<sup>45</sup>

## Conclusion

While it is certain that this Judgement will by no means solve the diplomatic dispute which has shadowed the Franco-Djiboutian relationship for the last ten years, it nevertheless is of high value in the sense that it gave the ICJ the opportunity to return to the modalities of the use of *forum prorogatum*. The *forum prorogatum* doctrine is not without its critics. One may wonder what would prevent a Party that is willing to give “non equivocal consent” to the Court’s jurisdiction from doing so by concluding a special agreement. Many ambiguities would be avoided, starting with the political motivations which can influence the decision of a State to go before the ICJ without the consent of the respondent State.

Of course, *forum prorogatum* is, above all, a flexible way of seizing the International Court of Justice and, as such, it serves the interests of justice by facilitating access to the Court. Additionally, the introduction in 1978 of Article 38(5) brought a certain number of additional guarantees when a Party resorts to *forum prorogatum*. Hence, no proceedings exist as such where the respondent State has not given “non equivocal” consent. Since this amendment, the Court’s role has been limited to simply transmitting the Application to the concerned State. In the present case, the Court did not fail to note the importance of taking all the necessary precautions, especially concerning the scope of the consent given by France.

However, there are many questions which still remain. It is clear—and the Judgement of 4 June confirmed this—that Djibouti’s legal arguments were rather blurred to say the least. The Court describes, in rather direct terms, the weakness of Djibouti’s reasoning, in invoking treaties of co-operation with France as well as concerning the alleged diplomatic immunities. One can see here the consequence of ill-considered recourse to the ICJ, which was only allowed by *forum prorogatum*.<sup>46</sup> Nevertheless, would France have given its consent to the jurisdiction of the Court if Djibouti’s Application was based on more robust legal arguments? Probably not. The extremely low number of instances in which States have resorted to *forum prorogatum* is perhaps the consequence of the following paradox: the probability that a State consents to the jurisdiction of the Court on an *ad hoc* basis is inversely proportional to the credibility of the Application filed against it; unless, of course, a State is willing to lose a case before the ICJ solely for the sake of justice...

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<sup>45</sup> Judgement, paras. 185-194, pp. 57-58.

<sup>46</sup> In his individual opinion, Judge Tomka expressed himself in the following severe tones: “On peut même se demander s’il était vraiment nécessaire de saisir l’organe judiciaire principal des Nations Unies.” Separate opinion of Judge Tomka, para. 1, p. 1. Unofficial translation: “One can wonder if it was really necessary to seize the principal judicial organ of the United Nations.”

On the merits, if the Court had ruled that France violated an obligation contained in the Convention on Mutual Assistance with Djibouti, the latter would have obtained neither the handing over of the record of the *Borrel* case, nor an end to the proceedings against its senior officials. As such, this Judgement will probably not put an end to the dispute between the two countries. Incidentally, if Djibouti decided to end its diplomatic relations with France, the current French ambassador in Djibouti could well experience feelings of *déjà vu*: the same ambassador was in charge in Rwanda in 2006 when the Rwandan Government decided to suspend its relations with Paris. The current Rwandan President, Paul Kagamé, was condemning France for a French investigation concerning him, in relation to the death of four French citizens, the pilots of the late President Habyarimana.