SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

Reissuing of an irregular judicial act — Continuation or cessation of jurisdiction — Forum prorogatum *and logical continuity of consent — Incomplete analysis of the terms of the Respondent's consent — Independent legal nature of the second summons — Inappropriate transposition of the* Right of Passage *case law — The subject of the dispute according to the Application — Justiciable Dispute — Difference between "in breach of" and "as well as the . . . breaching of" — Extension of jurisdiction* ratione materiae.

1. In this case, legal rigour makes it impossible to accept the proposition that: "[t]he summons sent to the President of Djibouti on 14 February 2007 was but a repetition of the preceding one, even though it had been corrected as to form" (Judgment, paras. 91 and 95).

2. The basis for this proposition may be summarized as follows: because the Court has jurisdiction to deal with the summons of 17 May 2005, it therefore also has jurisdiction to adjudicate on that of 14 February 2007, the Application having been filed in the Registry on 9 January 2006. It is possible to subscribe to the view that, having realized their material error, the authorities of the French Republic then regularized the original summons by repairing the irregular document or by issuing a new legal act. For the Judgment, the summons of 14 February 2007 merely confirms an initial act which had been recognized as unlawful by both Parties, in the eyes of French law. This interpretation — which is not without its attractions — has its place in French administrative law when the issue is no more than the reopening of the time-limit in *ultra vires* proceedings.

3. However, the Court's approach, when it has been called upon to rule for the first time on *forum prorogatum*, is likely to prompt some reservations as regards this means of expressing *ad hoc* consent to jurisdiction. The Judgment's interpretation of the consent expressed in the Respondent's letter is, on the face of it, a logical conclusion based on the connection between the two summonses, but it is not the result of a rigorous analysis of the terms of the Respondent's letter.

4. To determine the scope of the jurisdiction which the Respondent has accepted *ratione materiae*, paragraph 83 of the Judgment examines the latter's intention by critically analysing the phrase "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein". However, the selection of this phrase is open to criticism, both grammatically and in terms of logical

analysis. The Judgment has commented on the explanatory statement whose purpose is to illustrate the main proposition on which France's consent hinges. That main proposition is in fact referred to in paragraph 68 of the Judgment and reads as follows: "the dispute concerns the refusal by the French . . . authorities to execute an international letter rogatory . . . in violation of the Convention . . . of 27 September 1986 . . .". Assessing the scope of jurisdiction *ratione materiae* by reference to the Respondent's written pleadings and declarations as a whole is an approach which illustrates, but does not actually set forth the basic proposition. A detailed analysis of the Respondent's letter was indispensable.

5. The construction which the Judgment places on the second summons is difficult to accept. Formally, as regards the first summons, it will be noted that not only did France withdraw that summons, but Djibouti maintained throughout that it was null and void. The fact that it was withdrawn, because of formal irregularities, satisfied Djibouti's demand. That legal act had consequently been wiped out and deprived of its effect, so that when the second summons was issued, the first no longer existed. Logically, in relation to the first summons, the new summons constituted a new judicial act. The fact that the second summons had the same object as the first is a relevant point at a more fundamental legal level, or in terms of the reasons behind the act. The zeal of the investigating judge may well be criticized, but, in law, does regularizing a judicial document constitute an unlawful act? It may be a political error, but that is not the kind of issue on which the Court has to decide.

6. Is the fact that the object of the two summonses is the same, as the Judgment rightly points out, sufficient to permit the conclusion that they are one and the same summons? There is no question that the legal nature of these two judicial acts is the same. In law, each act has its own primary or immediate cause. The summons of 14 February 2007 is the direct consequence of Djibouti's rejection of the summons of 17 May 2005 addressed to the Head of State of Djibouti when he was on an official visit to France. Given the precise reason for the second summons, and the fact that the wiping out of the legal effects of the first summons impinges on the relationship between the two acts, they cannot simply be equated and thus deemed to be identical.

7. Moreover, an analysis shows that these two summonses cannot be regarded as inseparable. To clarify the discussion, it is not the summons — the physical document — that is at issue, but the decision of the investigating judge to summon the President of Djibouti. The summonses cannot be regarded as inseparable unless the second summons is the legal consequence of the first. But in this case, the fact that the first summons was withdrawn or invalid did not automatically give rise to the second. There had to be a fresh decision, a deliberate act on the part of the investigating judge; that was the legal situation, which is why the option of formal correction or *erratum* was not used. In this case, the logical con-

OPINION INDIVIDUELLE DE M. LE JUGE RANJEVA

Réédition d'un acte judiciaire irrégulier — Continuité ou discontinuité de la compétence — Forum prorogatum *et continuité logique du consentement — Analyse incomplète des termes de l'acceptation du défendeur — Autonomie juridique du second acte de convocation — Caractère inapproprié de la transposition de la jurisprudence du droit de passage — Objet du différend selon la requête — Différend justiciable — Différence entre « en violation » et « ainsi que des violations » — Prorogation de la compétence* ratione materiae.

1. En la présente affaire, la rigueur juridique ne permet pas de souscrire à la proposition: «La convocation adressée le 14 février 2007 au président de la république de Djibouti n'était qu'une simple répétition de la précédente, quoique la forme en eût été rectifiée.» (Arrêt, par. 91 et 95.)

2. Cette conclusion peut se résumer de la manière suivante: parce que la Cour est compétente pour connaître de la convocation du 17 mai 2005, elle est donc compétente pour statuer sur la convocation du 14 février 2007, la requête ayant été enregistrée au Greffe le 9 janvier 2006. En fait, on peut accepter l'idée selon laquelle les autorités de la République française, s'étant rendu compte de leur méprise sur le fond, ont régularisé la convocation initiale en ressuscitant l'acte irrégulier ou en édictant un nouvel acte juridique. Pour l'arrêt, la convocation du 14 février 2007 ne serait qu'un acte confirmatif d'un acte initial reconnu, au regard même du droit français, comme illicite par les deux Parties. Cette construction, par ailleurs intéressante, a sa place en droit du contentieux administratif français lorsqu'il s'agit uniquement de la réouverture du délai d'action dans un recours pour excès de pouvoirs.

3. En revanche, la démarche de la Cour, dans le cas où elle est appelée à statuer pour la première fois sur le *forum prorogatum*, est de nature à susciter une réserve vis-à-vis de ce mode d'expression de l'acceptation *ad hoc* de la compétence juridictionnelle. En effet, l'interprétation que l'arrêt donne du consentement exprimé dans la lettre d'acceptation du défendeur apparaît comme une conclusion logique liée à la connexité des deux convocations, mais non comme la conséquence d'une analyse restrictive des termes de la lettre du demandeur.

4. Pour déterminer le domaine de la compétence *ratione materiae* acceptée par le défendeur, au paragraphe 83, l'arrêt analyse l'intention de cette Partie en faisant le commentaire exégétique du membre de phrase «pour le différend qui fait l'objet de la requête et dans les strictes limites des demandes formulées dans celle-ci». Mais le choix de ce membre de phrase est critiquable sur le plan grammatical et sur le plan de l'analyse

nection which the investigating judge made between the failure of the first summons and the next step, namely the issuing of a fresh summons, does not necessarily establish that the two are linked inseparably; each summons is an independent legal act, and it does not follow that the invalidity or failure of the first summons automatically results in the issuing of a second.

8. As regards the interpretation of the scope of jurisdiction *ratione materiae*, the Judgment cites the method which the Court applied in the case concerning *Right of Passage over Indian Territory* when examining the subject of that dispute. In that context, the Court referred to the examination, on a cumulative basis, of the "Application itself . . ., the Submissions of the Parties and the Statements made in the course of the hearings . . ." (*Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 33). The issue in that case was the interpretation of the subject of the dispute in the light of India's declaration of 28 February 1940. The Court was required to consider an objection based on a declaration of consent to jurisdiction that was objective, general and abstract in nature. Simply transposing that method is not entirely appropriate in relation to *ad hoc* consent in *forum prorogatum*. The question did not concern the interpretation of the consent, but the definition of the justiciable dispute in the light of the consent given by the Respondent.

9. The description of the subject of the dispute, as formulated in the Application, is the legal ground for consent. There is no doubt that this case concerned the alleged breaches of obligations under international law. It was brought not only to shed light on the circumstances in which the Respondent allegedly failed to perform its legal obligations, but also to obtain possible redress for the violation of obligations laid down by international law. The difficulty arises because the Court is required to rule not on the dispute in its entirety, but only on the justiciable dispute as defined in the Respondent's declaration. The Court thus needed to identify quite clearly the dispute between the Parties in relation to the *Borrel* case, the Court's jurisdiction on the matter, and the justiciable dispute *stricto sensu*.

10. Where doubt exists as to the interpretation of an act, the Judgment has to undertake a critical analysis of the relevant proposition. In the Application, the Applicant refers to a "dispute . . . in breach of . . .", whereas in the Memorial, it refers to the "dispute . . . as well as the . . . breaching of . . .". It is common ground that the Respondent's consent to jurisdiction related to the subject of the dispute, within the limits of the claims set out in the Application. The expression "in breach of" leads on to a proposition justifying or explaining the reason for the justiciable dispute, but the phrase "as well as the breaching of" relates to something quite different: matters which are additional to the main proposition. The fact is that, in the official language of both Parties, the interpretation of the scope of jurisdiction — according to the Judgment, which was more concerned to interpret the confused and frequently ill-considered

explanations of the Parties, and of the Respondent in particular — goes beyond what was the stated intention of the Respondent.

11. An analysis shows that this approach was taken in the Judgment as a result of the confusion, outlined in paragraph 83, between the grounds of the dispute and the ground for consent to the Court's jurisdiction. For the purposes of *forum prorogatum*, only the latter may be taken into consideration. The consent to jurisdiction expresses both the extent of and the limits to acceptance of the Court's jurisdiction. In *forum prorogatum*, this scope is determined in a positive way because of the *ad hoc* nature of the consent, but negatively when it comes to dealing with the objections it contains. In this case, the objections to jurisdiction, which fall into several categories, must be examined on a cumulative basis in order to give full effect to the Respondent's declaration.

12. At a formal and instrumental level, the Application is the material act on which the Respondent's own act is founded. It follows that the construction which is placed on the Memorial and other documents cannot take precedence over the literal interpretation of the Application, as duly filed. Since there is no critical analysis of the text of the Application, the analysis contained in the Judgment is a commentary on the justifications which each Party has put forward to support its claims. In comparison with the justiciable claim, the Parties' position on the additional claims has no bearing on the subject of the justiciable dispute. Otherwise, the Judgment would be one based on equity, a judgment of Solomon.

13. The construction wrongly placed on the concept of the breaching of obligations in order to found jurisdiction has led to the latter being extended. *Forum prorogatum* has been interpreted as a means of extending jurisdiction *ratione materiae*. This has resulted in some perverse side effects: the Judgment focuses more on examining the causes and manifestations of the dispute than on considering the scope of jurisdiction as expressed through *forum prorogatum*. In the Applicant's defence, it should be pointed out that the Respondent's conduct has not made it any easier to settle the dispute: this impacted adversely on the strategy pursued by the Applicant in arguing its case. The wish to embrace all aspects of the dispute has resulted in a confused deployment of the various procedural elements: arguments, grounds, dispute and claims. Consequently, the fundamental concept that only the claims set out in the submissions may be the subject of a ruling by the Court has been lost sight of.

(Signed) Raymond RANJEVA.