

# HAGUE INTERNATIONAL TRIBUNALS

## *Forum Prorogatum* Returns to the International Court of Justice

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### Abstract

The ICJ interpreted Article 36(1) of its Statute – more specifically, the phrase ‘all cases which the parties refer to it’ – as permitting it to adopt the doctrine of *forum prorogatum* as a jurisdictional principle and to adapt this doctrine to the circumstances of international judicial process, as an informal way of founding its jurisdiction over the merits of a dispute. The resort to this doctrine has given rise to some concerns and has not received the general acceptance of states. The *Certain Criminal Proceedings in France* case marks the successful return of the doctrine to the ICJ and shows that the doctrine is a valuable tool for nationalists seeking to protect national interests and for internationalists seeking to promote the peaceful settlement of international disputes.

### Key words

Article 38(5) of the Rules of Court; consent; *forum prorogatum*; International Court of Justice; jurisdiction

## I. THE SUCCESSFUL RETURN OF *FORUM PROROGATUM*

On 9 December 2002, the Republic of the Congo (the Congo) filed an application against France, alleging that in attempting to prosecute a Congolese minister and to seek to examine the Congolese president as a witness, France violated the principle of sovereign equality and the criminal immunity of a foreign head of state. The Congo sought to found the jurisdiction of the International Court of Justice (ICJ or the Court), pursuant to Article 38(5)<sup>1</sup> of the Rules of Court, ‘on the consent of the

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1. Art. 38(5) of the 1978 Rules of Court states:

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.

French Republic, which will certainly be given'.<sup>2</sup> This is normally considered to be an attempt by the Congo to employ the doctrine of *forum prorogatum*.<sup>3</sup> Such an attempt can be described as a 'naked attempt' for the reason that when the application was filed there was *plainly* no basis for jurisdiction over the other state.<sup>4</sup> And yet such an attempt can be successful, sometimes.

In a letter dated 8 April 2003 and received on 11 April 2003 in the Registry, the French Republic stated that it 'consent[ed] to the jurisdiction of the Court to entertain the Application pursuant to Article 38, paragraph 5'.<sup>5</sup> This marks 'the first instance since the adoption in 1978 of Article 38, paragraph 5, of the Rules of Court, in which a State has thus accepted another State's invitation to recognize the jurisdiction of the International Court of Justice to deal with a case against it',<sup>6</sup> and thus the return of the doctrine of *forum prorogatum* to the International Court of Justice for the first time probably since the *Haya de la Torre* case.<sup>7</sup> The ICJ has now entered this case in the General List as 'the case concerning *Certain Criminal Proceedings in France (Republic of Congo v. France)*'.<sup>8</sup> The Court also heard oral arguments on 28–29 April 2003 on the Congo's request for provisional measures,<sup>9</sup> and on 17 June 2003 rendered its order denying this request for the reason that at present time there is no risk of irreparable prejudice to the Congolese leaders at issue or to the Congo itself.<sup>10</sup>

## 2. THE STATUTORY FRAMEWORK AND *FORUM PROROGATUM*

The jurisdiction of the ICJ in a contentious case is based entirely on the consent of states. The doctrine of *forum prorogatum* affords an informal way for a state to express consent to the Court's jurisdiction. Article 36(1) of the ICJ Statute provides that '[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'. Article 36(2) provides for the so-called 'Optional Clause' compulsory jurisdiction system under which states parties to the Statute may file separately an acceptance of the Court's jurisdiction, with two overlapping acceptances serving to found the Court's jurisdiction over the two states with respect to matters within the overlap. Article 40(1) provides that a case may be instituted

2. ICJ Press Release 2002/37 (9 Dec. 2002).

3. See S. Yee, 'Forum Prorogatum in the International Court', (1999) 42 *German Yearbook of International Law* 147; *idem*, 'Forum Prorogatum and the Indication of Provisional Measures in the International Court of Justice', in G. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), 565 (the 'Brownlie Festschrift'); *idem*, 'Forum Prorogatum and the Advisory Proceedings of the International Court', (2001) 95 *AJIL* 381.

4. See generally, Yee, 'Forum Prorogatum and the Indication of Provisional Measures', *supra* note 3. Such an attempt gives rise to various interesting questions relating to the Court's incidental jurisdiction.

5. ICJ Press Release 2003/14 (11 April 2003).

6. *Ibid.*

7. [1951] ICJ Rep. 71.

8. ICJ Press Release 2003/15 (23 April 2003). See also ICJ Verbatim Record CR 2003/20 (28 April 2003), 1.

9. ICJ Press Release 2003/16 (29 April 2003). The oral pleadings are available online at <[www.icj-cij.org/icjwww/idocket/icof/icofframe.htm](http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm)>.

10. *Certain Criminal Proceedings in France (The Congo v. France)*, Order of 17 June 2003 (Provisional Measures), [2003] ICJ Rep., now available online only <[www.icj-cij.org/icjwww/idocket/icof/icoforder/icof\\_iorder\\_20030617.pdf](http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030617.pdf)>.

by notification of a special agreement or by application. Article 36(1) is practically an exact replica of the corresponding article found in the Statute of the Permanent Court of International Justice (PCIJ or the Court). As envisioned by the original drafters of the PCIJ Statute, Article 36(1)<sup>11</sup> was intended to provide two ways in which the parties may found the jurisdiction of the Court, that is, either by a special agreement concluded with regard to a particular case or by a previous agreement in regard to a certain category of cases. Thus Article 36(1) did provide for certain forms of expressing consent to the jurisdiction of the PCIJ.

Relying on the absence of any *express* formal requirement in this article, however, the PCIJ interpreted it as providing for none. It interpreted Article 36(1) – more specifically, the phrase ‘all cases which the parties refer to it’ – as permitting it to adopt the doctrine of *forum prorogatum* as a jurisdictional principle and to adapt this doctrine to the circumstances of international judicial process, as a ‘third way’, to borrow Judge Huber’s phrase,<sup>12</sup> of founding the jurisdiction of the Court over the merits of a dispute. This interpretation appeared to have worked in a modification of Article 36(1) of the PCIJ Statute. Then the Court in its 1934–36 rule making accommodated the application of *forum prorogatum*, in the light of its case law, by requiring that the applicant ‘as far as possible’, but with no absolute imperative, specify in its application the provision on which the applicant sought to found the Court’s jurisdiction.<sup>13</sup> The drafters of the ICJ Statute,<sup>14</sup> however, intended that the ICJ follow the jurisprudence of the PCIJ and thus may be deemed to have confirmed the latter’s case law on *forum prorogatum*. As a result, Article 36(1) of the ICJ Statute may be interpreted as providing for no specific formal requirement for expressing consent to jurisdiction and as encompassing the application of *forum prorogatum* as a normal method of founding the jurisdiction of the Court over the merits of a dispute.

### 3. THE ORIGIN AND OPERATION OF *FORUM PROROGATUM* IN THE WORLD COURT

The term *forum prorogatum* appears to have been coined by the judges of the PCIJ when they discussed the proposed amendments to the Rules of Court in 1934.<sup>15</sup> However, the concept, sometimes couched in slightly different terms, such as ‘pro-rogation of jurisdiction’, has a long pedigree. It originated in Roman law and has been inherited by many national legal systems. As traditionally understood, *forum*

11. The PCIJ Statute did not contain paragraph numbers, but for the sake of convenience, they will be used herein.

12. *Rights of Minorities in Upper Silesia (Minority Schools)*, 1926 PCIJ, Series A, No. 15, at 52 (Dissenting Opinion of Judge Huber). A declaration made under Art. 36(2) is apparently treated as a species of ‘previous agreement’.

13. PCIJ, Series D, No. 2, 3rd Addendum (1936), 65–66; 69; 913. This rule has been in effect since then. Art. 38(2) of the current Rules of Court states:

The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.

14. 13 UNCIO 381, 384; Yee, ‘*Forum Prorogatum* in the International Court’, *supra* note 3, 182–3, notes 190–3 and accompanying text.

15. PCIJ, *supra* note 13, 69 (minutes of 9th Meeting, 24 May 1934).

*prorogatum* means the extension of the jurisdiction of a court by agreement of the parties in a case which would otherwise be outside the court's jurisdiction.

Adopted by the PCIJ, *forum prorogatum* was first applied in its traditional sense of extending already existing jurisdiction. In this sense, the Court's jurisdiction *ratione personae* over the parties, as well as jurisdiction *ratione materiae* over a certain matter, has been established by some prior consent. That consent, however, covers some, but not all, issues relating to the dispute. After proceedings have been instituted, the parties agree either by express declaration or by successive conduct implying agreement to extend their consent to cover additional issues.

The Court has not only adopted the concept of *forum prorogatum* but also adapted it to the circumstances of the international judicial process. From time to time, a state may unilaterally make an application to institute proceedings before the Court, relying on a defective jurisdictional basis. Sometimes it may do so although it is clear that no special agreement or treaty or convention in force has granted jurisdiction to the Court. At this point, the Court has received an application, but it has no jurisdiction over the subject matter of the application. The respondent state, or more accurately the state against which the application has been filed,<sup>16</sup> is in effect given an opportunity to accept the jurisdiction of the Court. Sometimes the respondent agrees, either by express declaration or by successive conduct implying agreement, such as arguing the merits of the case without further ado, to accept the Court's jurisdiction, *post hoc*, after proceedings with respect to the dispute have been instituted. Once this is done, the Court would consider its jurisdiction to have been established and proceed to adjudicate the dispute. In so doing the Court applies the concept of *forum prorogatum* to sanctify this prolonged process of consenting to the jurisdiction of the Court and to establish its jurisdiction over a case. Thus, this aspect of the application of the concept of *forum prorogatum* is not an extension of existing jurisdiction as of the time when the case was instituted, but an establishment of *initial* jurisdiction over the matter. This is not part of the traditional doctrine of *forum prorogatum*. States have also attempted, without success until 8 April 2003, when France accepted the Congo's invitation to consent to the Court's jurisdiction, to employ the doctrine of *forum prorogatum* by filing an application plainly stating that there is no existing jurisdiction over the application and that the Court's jurisdiction over the respondent has yet to be established.<sup>17</sup>

16. Technically the state against which an application is filed is not a 'respondent' state until it has accepted the invitation to submit to the jurisdiction of the Court. For the sake of simplicity, the term 'respondent state' will be used throughout this comment to indicate any state against which an application has been filed, whether or not the Court has jurisdiction over that state when the application is filed.

17. Unsuccessful attempts include: *Treatment in Hungary of Aircraft and Crew of United States of America (US v. Hungary)*, [1954] ICJ Rep. 99; *Treatment in Hungary of Aircraft and Crew of United States of America (US v. USSR)*, [1954] ICJ Rep. 103; *Aerial Incident of March 10th, 1953 (US v. Czechoslovakia)*, [1956] ICJ Rep. 6; *Aerial Incident of Oct. 7th, 1952 (US v. USSR)*, [1956] ICJ Rep. 9; *Aerial Incident of Sept. 4th, 1954 (US v. USSR)*, [1958] ICJ Rep. 158; *Aerial Incident of Nov. 7th, 1954 (US v. USSR)*, [1959] ICJ Rep. 276; *Antarctica (UK v. Argentina)*, [1956] ICJ Rep. 12; *Antarctica (UK v. Chile)*, [1956] ICJ Rep. 15; Press Communiqué 99/4, 16 Feb. 1999 (Application filed by Eritrea against Ethiopia alleging violation of diplomatic immunities, not yet entered on the General List); *Legality of Use of Force Cases*, [1999] ICJ Rep. In these last cases, Yugoslavia attempted to employ the doctrine by invoking Art. 38(5) of the Rules of Court in its cases against France, Germany, Italy, Spain, and the United States. These respondents stated that they had given no consent under this rule and that they would not do so in the future. See, e.g., [1999] ICJ Rep. 924–5 (United States).

The application of *forum prorogatum* by the ICJ and PCIJ has become a flexible way in which to establish the jurisdiction of the Court, in addition to special agreements and treaties in force. The most obvious feature of *forum prorogatum* is its flexibility with respect to the timing and form of consent. However, the application of the doctrine ultimately rests on the same consensual basis as do special agreements and treaties in force; essentially it is a particular form of special agreement without its formalities. Only when the Court is satisfied that there is an agreement to have it decide the dispute does it proceed to adjudicate upon the matter.

The experiences of the PCIJ and the ICJ in applying the doctrine of *forum prorogatum*, primarily in *Rights of Minorities in Upper Silesia (Minority Schools)*,<sup>18</sup> *Corfu Channel (Preliminary Objections)*,<sup>19</sup> and *Haya de la Torre*,<sup>20</sup> reveal that they have been flexible with respect to both the timing and the form of consent.<sup>21</sup> They differ as to the care they have taken to ascertain the existence of the consent. In some cases the PCIJ did not appear to exercise sufficient care in doing so, while giving draconian effect to the consent thus established. The ICJ, on the other hand, has been increasingly rigorous in ascertaining the existence of consent, especially when consent is alleged to have been given implicitly. Through rulemaking, particularly in 1978, it has also attempted to prevent the abuse of the doctrine by an applicant state.<sup>22</sup> Moreover, the Court has shown a certain reluctance to infer consent to its jurisdiction over the merits of a dispute at the provisional measures stage,<sup>23</sup> and is vigilant towards the rights of third parties.<sup>24</sup> The one area that gives rise to some concern is its treatment of the authority of a state to give consent, but the absence of protests from states indicates that this has not been an issue.

#### 4. CONCERNS AND SOLUTIONS: AN EVALUATION

The application of the doctrine of *forum prorogatum* has given rise to two principal questions. First, is it legitimate for the Court to apply it at all, given that the Statute itself does not give clear support to such an application? The dissenting judges in *Upper Silesia* and *Corfu Channel* challenged the application of *forum prorogatum*, claiming that such application was not permitted under the Statute. This charge appears to be partly valid. When the principle was first applied by the PCIJ, it suffered from a legitimacy deficit in the sense that by so doing the PCIJ modified its

18. 1926 PCIJ, Series A, No. 15.

19. [1947–48] ICJ Rep. 15.

20. [1951] ICJ Rep. 71.

21. For analyses of the case law of the two courts, see Yee, *supra* note 3. A pioneering piece on the topic is H. Waldock, 'Forum prorogatum or Acceptance of a Unilateral Summons to Appear Before the International Court', (1948) 2 *International Law Quarterly* 377. Other useful studies are: S. Rosenne, *The Law and Practice of the International Court, 1920–1996* (1997), II, 695; M. Bedjaoui, 'The Forum Prorogatum Before the International Court of Justice: The Resources of an Institution or the Hidden Face of Consensualism', *ICJ Yearbook* (1996–1997), 216 (Speech given before the Sixth Committee in 1996 as President of the ICJ).

22. See Art. 38(5) of the 1978 Rules, *supra* note 1.

23. See Yee, 'Forum Prorogatum and the Indication of Provisional Measures', *supra* note 3, discussing the Court's rejection of the argument for applying *forum prorogatum* in *Genocide Convention (Bosnia v. Yugoslavia)*, [1993] ICJ Rep. 325, 341–2.

24. See *Société Commerciale de Belgique*, 1939 PCIJ, Series A/B, No. 78, 173.

Statute by case law. However, the endorsement by the drafters of the ICJ Statute of the PCIJ's jurisprudence may have compensated for this defect.<sup>25</sup>

Second, does the application of the doctrine of *forum prorogatum* treat state consent cavalierly and dilute it? There is no reason to believe that the application of the doctrine downplays the importance of consent as the basis for jurisdiction. Stripped to its essentials, the application of *forum prorogatum* only has the effect of reading Article 36(1) as meaning not that 'the consent of both parties is necessary before a case can be taken before the Court',<sup>26</sup> as the original drafters intended, but that the consent of both parties is necessary before a case can be adjudicated by the Court. Such an application does not really affect the fundamental principle that 'no state can, without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration, or to any other kind of pacific settlement',<sup>27</sup> if the ultimate test is whether judicial function is in fact exercised. The problem if at all lies in the insufficient care taken by the PCIJ, and perhaps the ICJ in *Corfu Channel*, to ascertain the existence of consent.

Nevertheless, applying the principle of *forum prorogatum* to establish the Court's initial jurisdiction may cause some anxiety in those states that guard against any infringement of their sovereignty or even any appearance thereof. A respondent state may resent being taken before the Court without its consent even though the Court may not adjudicate upon the matter until that state ultimately gives its consent. For such a state, the consent requirement applies not only to jurisdiction but also to the form of seisin.<sup>28</sup> The state may feel that its sovereignty is violated when it is unilaterally arraigned before the Court without its consent to such an eventuality. It appears that states consider the World Court to be the ultimate stage on which sovereignty is showcased and they would only appear on that stage on the condition of perfect equality and with the dignity appropriate to sovereign states.<sup>29</sup> *Forum prorogatum* goes against this, although one might argue that by coming to the Court to argue the merits of the case a respondent would have waived any and all objections. This notion of waiver, however, does not assuage two other concerns. First, the application of *forum prorogatum* appears to open the door to abuse of the judicial process by some states for political gains. An applicant state may know that there is no chance that the respondent would accept its invitation to appear before the Court, but nonetheless may file a unilateral application in order to gain undue publicity that would result from media reporting or, before 1978, from the

25. See Yee, 'Forum Prorogatum in the International Court', *supra* note 3, 160–6; 180–4.

26. PCIJ Advisory Committee of Jurists, *Procès verbaux* (1920), 235.

27. *Status of Eastern Carelia (Advisory Opinion)*, 1923 PCIJ, Series B, No. 5, 27.

28. *Cf. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)*, [1995] ICJ Rep. 57–60 (Dissenting Opinion Judge Shahabuddeen); P. Weil, 'Compétence et saisine: un nouvel aspect du principe de la juridiction consensuelle', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), 833. The Court appears to give more weight to the ultimate exercise of judicial function than to the mere seisin. But see *Nottebohm*, Preliminary Objection, Judgement, [1953] ICJ Rep. 122 ('the seisin of the Court is one thing, the administration of justice is another. The latter is governed by the Statute, and by the Rules.').

29. E. Lauterpacht, *Aspects of the Administration of International Justice* (1991), 48–9, marvelled at the fact that a state may be willing to accept without specific consent a procedure that is rapid and unreasoned, such as Security Council proceedings, but not one that is deliberate, ordered and rational, such as ICJ proceedings.

requirement that such an application be sent to all members of the United Nations and other states eligible to appear before the Court. Such publicity may have the effect of portraying the respondent as the villain. Second, the application of *forum prorogatum* may dilute the quality of state consent. The realities of state consent may be adversely affected when it is deemed to have been implied by conduct that is susceptible to differing interpretations. The imperfect authority of the agents and officials of a state and possible mistakes may add to this problem.

Perhaps for these reasons, *forum prorogatum* does not appear to have been generally embraced by states, and from the *Haya de la Torre* case in 1951<sup>30</sup> until *Certain Criminal Proceedings in France* was entered in the General List in April 2003, the Court did not appear to have relied on this doctrine in any decision to establish its jurisdiction, although there was considerable discussion of the doctrine in Judge ad hoc E. Lauterpacht's separate opinion in the *Genocide Convention* case (*Bosnia v. Yugoslavia*).<sup>31</sup> The expansionist tendencies that appear to accompany the application of the principle do not accord with the presumption in favour of state freedom in choosing the ways and means of settling interstate disputes. The presumption prevailed in 1920 when statesmen decided to reject the compulsory jurisdiction system recommended by the Advisory Committee of Jurists, and was reaffirmed in 1945 by the founding nations of the United Nations when they chose to maintain the system of consensual jurisdiction, despite strong support for compulsory jurisdiction on both occasions. To this day, it does not appear to have lost any currency. This state of affairs and the problems attending the application of *forum prorogatum* do not favour its wide application, for if the Court treats state consent cavalierly, even if only slightly, it may in the long run discourage states from appearing before it.<sup>32</sup>

The ICJ appears to be aware of these problems and seems to have taken measures in its jurisprudence and rulemaking to alleviate the anxiety of states. Previously when an attempt to employ the doctrine of *forum prorogatum* was made, the case would be entered in the General List, giving the impression that the General List was utilized by some states as a convenient and high-profile way of embarrassing other states, particularly during the Cold War. The 1978 Rules in Article 38(5)<sup>33</sup> changed all that, making the entry of a case in the General List conditional on the acceptance by the respondent state of the Court's jurisdiction for the purposes of the case. According to one view, this provision was intended as a means of 'forestalling any undue political exploitation of the "case" and preventing its being given untimely publicity',<sup>34</sup> thus preventing the embarrassment of a state which is sued despite the fact that it has not consented to the Court's jurisdiction. If so, its effect is doubtful, because the Court<sup>35</sup> still issues a press release about such an attempt to employ the doctrine and because nothing can prevent the applicant state from making public the filing of an application.

30. *Supra* note 20.

31. [1996] (I) ICJ Rep. 416.

32. See I. Brownlie, *Principles of Public International Law* (1998), 724.

33. *Supra* note 1.

34. See Bedjaoui, *supra* note 21, 223.

35. The International Court of Justice press releases are issued by the Registry.

Nor is it clear how the 1978 Rules may affect the then existing case law because of the infrequent subsequent resort to the doctrine. At least Article 38(5) of the 1978 Rules of Court serves to highlight to the respondent state the absence of jurisdiction over it and over the case, when that is the case, and thus may help to ensure the quality of state consent. As a result, this provision would seem to lead to greater express resort to the doctrine, if it is resorted to at all, before the Court takes up the case, thus reducing the chances of implicit consent assuming a role larger than it deserves.

Still, the 1978 Rules do not expressly prevent implicit consent from serving as a basis for jurisdiction. Article 38(5) of the Rules does require 'consent' by the respondent state before the case can be entered in the General List, but it does not require it to be expressed in a particular way, express or otherwise, although it gets close to requiring express consent. Thus one may conclude that these Rules do not stop the respondent from coming to the Court to argue the merits of the case without first having said anything about jurisdiction. Yet the particularity of the ICJ procedure of requiring the entry of a case in the General List before further action can be taken may effectively require an express acceptance by the respondent state of the Court's jurisdiction before other procedural steps can be taken.

Nevertheless, there is a chance that consent as implied when the respondent state simply comes to argue the matter (whether it is a request for provisional measure or the merits of the main dispute) might still play a role. For example, if a request for a provisional measure is transmitted to the respondent state but not other states, and if the respondent state files a reply without saying anything about jurisdiction but arguing on the substance of the request, what should the Court do? Furthermore, if somehow the applicant state files a Memorial, despite the fact that the case has not been entered in the General List, if the Memorial is transmitted to the respondent state, and if the respondent state then files a Counter-Memorial on the merits of the case without mentioning jurisdiction, what should the Court do?

In my view, under these circumstances there is no reason for the Court not to follow its established case law involving *forum prorogatum* and to consider its jurisdiction to be well founded by implied consent, for the purpose of ordering provisional measures in the former scenario,<sup>36</sup> and for the purpose of rendering final judgement in the latter. If Article 38(5) of the Rules is read so as to prevent implicit consent (as manifested in arguing the merits of the matter without mentioning jurisdiction), it may go against the Statute as interpreted in the Court's case law regarding *forum prorogatum*, and thus raises a question of constitutional dimension – whether the Court may make rules in derogation of the Statute.

On a strict interpretation of Article 38(5) of the Rules of Court, one may argue that in the first scenario – where the respondent state comes to argue the substance of the request for provisional measures without addressing jurisdictional issues – the Court must either (i) treat the respondent state's arguing on the substance of

36. I have drawn a distinction between implied consent for the purpose of ordering provisional measures and implied consent for the purpose of the whole case: see Yee, 'Forum Prorogatum in the International Court', 178–9, and generally in 'Forum Prorogatum and the Indication of Provisional Measures', both *supra* note 3.



the request for provisional measures as implied consent for the purposes of that request only, which would not meet the requirement of that article for the entry of the case in the General List; or (ii) treat the conduct of the respondent state as implying consent for the purposes of the case (merits) so as to meet the requirement of that article for the entry of the case in the General List, which would go against the existing attitude of the Court in not attributing too much to the states at the preliminary stage of the proceedings. Neither alternative is attractive. One may argue that so read, Article 38(5) of the Rules is too restrictive and not conducive to the good administration of justice. Accordingly, Article 38(5) of the Rules should be read so as to permit the treatment of the respondent state's arguing on the substance of the request for provisional measures as implied consent for the purpose of that request only, and to permit the entry of the case in the General List for this limited purpose only. Such a reading could be based on Article 48 of the Statute, under which the Court may make orders controlling the proceedings in a particular case. The better course would be for the Court to make this clear by amending the Rules, exercising its authority under Article 30 of the Statute.

These two scenarios as described above are not necessarily impossible. We know that if the request for provisional measures is, as has happened, incorporated in the same document that contains the application, the request is transmitted as part of that document to the respondent state. It is not clear whether it will be transmitted if the request is filed separately before the case is entered in the General List, although there is no reason why it should not be. It is less clear whether a Memorial filed separately under the same circumstances would be transmitted. One may argue that the language in Article 38(5) of the Rules – ‘nor any action be taken in the proceedings’ – addresses actions that involve a measure of judicial function, not including transmitting materials to the opposing parties, and therefore does not bar the Court from sending requests for provisional measures or Memorials to the other side. However, in the light of this uncertainty, an applicant state intent upon taking full advantage of *forum prorogatum* (particularly the benefit of implied consent) may consider the possibility of filing the application together with its request for provisional measures (if any) and/or Memorial as one big document, so as to ensure their transmission by the Registrar as a whole to the respondent state.

In any event, the Court's attempts at improving the quality of consent are laudable, and hopefully they will inspire confidence in the Court's treatment of state consent and lead to the expanded use of the doctrine of *forum prorogatum* as one of the means of founding the Court's jurisdiction. Perhaps the French Republic's acceptance of the Congo's invitation to litigate before the Court is the fruit of these efforts.

Finally, it should be pointed out that by relaxing the normal rules relating to the timing and form of consent, the application of *forum prorogatum* has the potential, at least theoretically, of giving priority to the content over the form of state consent, thereby facilitating the exercise of state sovereignty in the peaceful settlement of international disputes. This will ultimately serve the interests of international justice. For this reason, the use of the principle should be encouraged, provided that the quality of the consent can be guaranteed.

Nevertheless, one may wonder whether this doctrine is necessary, for if the parties indeed intend to have the Court decide a matter, there is little to prevent them from concluding a special agreement for that purpose, which would afford the parties greater control over the issues to be decided.<sup>37</sup> This argument may obtain in most cases. However, there may be cases, as described by Judge Anzilotti,<sup>38</sup> in which although one of the parties may find it difficult to accept a special agreement, it may respond if the case is brought before the Court and refrain from objecting to the Court's jurisdiction. In such cases, if applied with sufficient care to insure the existence of consent, the doctrine of *forum prorogatum* will be able to move the case forward, and thus will facilitate the exercise of state sovereignty and expand the jurisdiction of the Court. This possibility may be sufficient to justify retaining the doctrine of *forum prorogatum*.

## 5. THE *CERTAIN CRIMINAL PROCEEDINGS IN FRANCE* CASE AND ITS SIGNIFICANCE

The views expressed above received some support in the acceptance by France on 8 April 2003 of the Congo's invitation to appear before the Court regarding the merits of the Congo's Application of 9 December 2002, in the case now docketed as *Certain Criminal Proceedings in France*. One can only speculate as to whether the concerns discussed above might have gone through the minds of the relevant decision-makers in France. In any event, whatever concerns that the application of the doctrine of *forum prorogatum* may give rise to, they were not of such a nature as to prevent France from taking the decision it has.

In addition to the more or less psychological factor that Judge Anzilotti pointed out, other factors might also play an important role in a successful resort to the doctrine of *forum prorogatum*. And these factors may vary from state to state, and from time to time. The reasons why France was moved to adopt such an attitude *at this particular juncture* are of great interest to students of the judicial settlement of disputes, given its previous non-appearance in the *Nuclear Tests* cases,<sup>39</sup> the termination of its declaration filed under Article 36(2) of the ICJ Statute,<sup>40</sup> its denunciation of the General Act of 1928 for the Pacific Settlement of International Disputes,<sup>41</sup> and its opposition to the United States' resort to force in Iraq in late March and April 2003.

37. In *Minquiers and Ecréhos*, [1953] ICJ Rep. 47, the United Kingdom and France instituted proceedings before the Court by special agreement, although both had filed declarations under Art. 36(2).

38. PCIJ, *supra* note 13, 67–8.

39. *Nuclear Tests (Australia v. France)*, [1974] ICJ Rep. 253; *Nuclear Tests (New Zealand v. France)*, [1974] ICJ Rep. 457. For general discussion of the 'non-appearance' phenomenon, see, e.g., H. Thirlway, *Non-appearance before the International Court of Justice* (1985).

40. 907 UNTS 129 (14 Jan. 1974).

41. See: <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/treaty-29.asp#N9>>. This notice was dated 10 Jan. 1974 and stated that France did not believe that the General Act was still in force in the first place, and the denunciation was made as a 'subsidiary' act. Also mentioned in: *Nuclear Tests (Australia v. France)*, *supra* note 39, at 272, para. 60; *Nuclear Tests (New Zealand v. France)*, *ibid.*, at 457, 477, para. 63.

### 5.1. The reasons for France's consent

The importance of this event is clear to all the players. During the hearing on Congo's request for provisional measures, the Agent of France (Mr Ronny Abraham) highlighted that his presence 'au nom de la République française' before the Court was 'pour mon pays un moment important et exceptionnel'.<sup>42</sup> The reason why this was so was as follows:

Pour la première fois en effet depuis longtemps, la France comparait devant l'organe judiciaire principal des Nations Unies après avoir accepté sa compétence pour que soit tranché un différend de droit international qui l'oppose à un autre Etat.<sup>43</sup>

The Agent then proceeded to give the official version of the reasons for France's acceptance of the Congo's invitation to argue the merits of the case:

5. Si mon pays a ainsi consenti à ce que votre juridiction connaisse du différend dont l'objet est défini dans la requête, c'est d'abord pour manifester solennellement l'importance qu'il attache au respect scrupuleux du droit international, en tout domaine et en toutes circonstances, au principe de bonne foi dans les relations internationales, à l'exigence de la recherche, dans toute la mesure du possible, des modes de règlement pacifiques les plus appropriés des différends entre Etats.

6. C'est aussi, faut-il le préciser, pour marquer le respect et la confiance que lui inspire votre Cour, et la manière dont elle s'acquitte de sa tâche éminente de dire le droit, de préciser, par une jurisprudence éclairante, la portée des règles qui s'imposent aux Etats, acteurs de la société internationale. La présente affaire soulève, à cet égard, d'intéressantes et importantes questions, qui restent à ce jour en partie controversées, et qu'il vous appartiendra d'élucider, avec le discernement, l'objectivité et l'autorité incomparables qui sont les vôtres. La France est heureuse, par le consentement qu'elle a donné, de vous en fournir l'occasion.

7. Enfin, il est à peine besoin d'ajouter que, si la France se présente aujourd'hui volontairement devant vous, c'est aussi parce qu'elle a la conviction que ni les règles qu'elle applique dans son ordre juridique en matière pénale, ni les actes accomplis par ses autorités judiciaires dans l'espèce qui vous est soumise, ne sont le moins du monde en contradiction avec les exigences du droit international. C'est donc en pleine confiance que la France vient dans votre prétoire, assurée qu'elle est de faire valoir son bon droit.<sup>44</sup>

From this statement one can see three factors that have figured in the French decision-making: the importance of the search in good faith for peaceful settlement of international disputes in international relations; the confidence France has in and the respect it has for the Court; and its belief that neither its laws nor the acts of its judiciary in this particular case violated any rules of international law.

Other factors may have also played a part. First, the relatively discrete and perhaps 'innocuous' nature of the dispute seems also to make the dispute ripe for resolution by the Court. The Agent of France characterized the questions presented

42. ICJ Verbatim Record CR 2003/21 (28 April 2003, uncorrected version), 6, para. 1.

43. *Ibid.*

44. *Ibid.*, at 7.

as ‘intéressantes et importantes’.<sup>45</sup> Still, one wonders whether France would still accept the Congo’s invitation to appear if the dispute were about nuclear weapons. Second, the question not explicitly addressed by the Agent of France is whether at this particular moment France intended to provide a counter-example to the unilateral use of force by the United States in Iraq, a question which might be on many people’s minds. Finally, it is not clear whether the fact that the Congo is a former colony of France has figured in the decision-making process in Paris, although the Congo seemed particularly upset by the judicial process in France, taking that process as an attack on its honour and dignity.<sup>46</sup>

## 5.2. National and international interests in *forum prorogatum*

The acceptance by France of the Court’s jurisdiction in this case is of great value at this particular moment. Both the nationalists (who emphasize national interests) and the internationalists (who emphasize that a properly functioning international system is important) can benefit from a careful study of the doctrine of *forum prorogatum* and the attitude of France.

At a time when the number of states filing acceptances of the Court’s jurisdiction under Article 36(2) is not large, and when those acceptances, even when filed, have been narrowly crafted so as to exclude many issues from the Court’s jurisdiction, national decision-makers now have proof that the use of the doctrine of *forum prorogatum* may make a significant difference in one’s efforts to protect national interests, including national honour and dignity. Those who make an attempt, even a naked one, may ultimately savour the sweet taste of success at least as far as jurisdiction is concerned. The merits of the case are of course a different matter. One might call this the lottery effect of *forum prorogatum*. While the chance of success is not clear or significant,<sup>47</sup> it does exist.<sup>48</sup> Those who never try it would have to be content with the fact that they would never know whether an attempt to employ the doctrine may have worked to their advantage. Accordingly, it would seem that national interest concerns make it incumbent upon the decision-makers to give *forum prorogatum* serious consideration.

Those who pursue national interests should also appreciate that, while the chance of a successful attempt to employ the doctrine of *forum prorogatum* is not good, such a chance may offer the final avenue for a state to settle disputes peacefully, particularly if on the opposing side is a powerful state. Furthermore, if the attempt is successful, the ICJ becomes a most attractive forum for states to appear under conditions of absolute equality, and thus the best forum for the defence of national honour and dignity.

This situation may also make demands of professional responsibility on those advocates and counsel advising an applicant state which is intent on going to court. It would seem that counsellors to governments now have the duty to advise states

45. *Ibid.*

46. See ICJ Verbatim Record CR 2003/22 (29 April 2003, uncorrected version), 21.

47. See *supra* note 17, and accompanying text.

48. See the conduct of France in *Certain Criminal Proceedings in France*; and the discussion of the case law of the PCIJ and ICJ in Yee, ‘*Forum Prorogatum* in the International Court’, *supra* note 3.

that *forum prorogatum* can be employed as the potential main basis for jurisdiction when the Court clearly has no jurisdiction and as a potential subsidiary basis for jurisdiction when other colourable bases exist.<sup>49</sup> The Congo and its relevant decision-makers in this case should be commended for their courage in resorting to the principle of *forum prorogatum* and for doing an exemplary job in protecting their national interest.

The internationalists may take pleasure in several aspects of this case. First of all, the internationalists may find it refreshing that the Congo did give the principle of *forum prorogatum* a try, despite unpromising prospects, and succeeded in bringing the case before the Court. Second, the internationalists have proof that unilateral seisin of the Court against another need not necessarily be perceived as an unfriendly act. Indeed, a state feeling secure in itself should not take being sued as an affront. Rather, a state's being taken to the Court is a measure of greatness and of evidence that other states perceive it as a peace-loving, significant state, not an untouchable bully or an insignificant state to be ignored. Third, it is encouraging to see France, a permanent member of the Security Council, coming back to the Court, when it could simply have ignored the Congo's invitation and, despite its past practice of ignoring the Court when colourable jurisdictional bases existed, proclaiming the importance of the search in good faith for the peaceful resolution of disputes and its confidence in the Court. Finally, the proceedings were played out against the background of, and represent at least to the internationalists a promising alternative to, the United States' unilateral resort to force in Iraq.

The internationalists can now hope that the French decision to resort to the doctrine of *forum prorogatum* presages the beginning of the greater use of the doctrine (the dormancy of which might have given some the premature impression that it is *passé*), a more ready resort to the judicial settlement of international disputes, which are legion, and ultimately the deepening of the rule of law in the international community. This would be the result if other states began to emulate both the Congo in its willingness to take the initiative to resort to *forum prorogatum* and France in agreeing to the application of the doctrine by accepting the invitation to settle the dispute before the ICJ.<sup>50</sup>

It would be interesting to see whether the reasons that motivated France to appear before the Court in the *Certain Criminal Proceedings in France* case may move it soon to reaccept the Court's 'compulsory jurisdiction' by filing a declaration under Article 36(2) of the ICJ Statute. That would be the ultimate example for France to set and for other states to follow.

49. For example, one would never know whether India might have accepted the jurisdiction of the Court if Pakistan had attempted to employ *forum prorogatum* in the *Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)*, [2000] ICJ Rep. 12.

50. After this paper was completed and ready to go to press, Liberia also filed, on 4 Aug. 2003, an application against Sierra Leone, resorting to Art. 38(5) of the Rules of the Court. See ICJ Press Release 2003/26 (5 Aug. 2003). As of 11 Aug. 2003, no action had been taken by Sierra Leone. It remains to be seen whether Sierra Leone will follow France's example and accept the invitation to litigate before the ICJ.