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# *Forum prorogatum* in the Corfu Channel case and in subsequent ICJ jurisprudence

## *Forum prorogatum* w sprawie dotyczącej incydentu w Cieśninie Korfu i w późniejszym orzecznictwie Międzynarodowego Trybunału Sprawiedliwości

**Abstract**

This article concerns the concept of forum prorogatum, which for the first time was adressed by the International Court of Justice in the *Corfu Channel* case. The author focuses not only on the test of a voluntary and indisputable consent to the International Court of Justice jurisdiction as interpreted in this decision. She analyses subsequent evolution of forum prorogatum caused by the review of the Rules of the Court in 1978 and by the decision taken in *Djibouti v. France* case and pending Marhall Islands' Nuclear Zero case. The author is of the opinion that forum prorogatum needs further specification and clarifications, especially in the context of preliminary measures.

**Keywords**

International Court of Justice, forum prorogatum, Corfu Channel case, Djibouti v. France, Marshall Islands' Nuclear Zero case, jurisdiction of the International Court of Justice, consent to ICJ jurisdiction.

**Streszczenie**

Artykuł dotyczy pojęcia *forum prorogatum*, które po raz pierwszy było przedmiotem orzeczenia Międzynarodowego Trybunału Sprawiedliwości (MTS) przy okazji rozstrzygania sprawy dotyczącej incydentu w Cieśnienie Korfu. Autorka skupia się nie tylko na teście dobrowolnej i bezspornej zgody stron postępowania na jurysdykcję Międzynarodowego Trybunału Sprawiedliwości w interpretacji przyjętej w ww. decyzji, ale analizuje także późniejszą ewolucję instytucji *forum prorogatum*, która została spowodowana przez zmianę regulaminu MTS w 1978 roku i przez decyzję podjętą w sprawie Dżibuti przeciwko Francji i obecnie zawisłą sprawę wytoczoną przez Wyspy Marshalla. Autorka jest zdania, że instytucja *forum prorogatum* wymaga dalszego wyjaśnienia, w szczególności w kontekście tymczasowych środków zabezpieczających.

**Słowa kluczowe**

Międzynarodowy Trybunał Sprawiedliwości, *forum prorogatum*, Sprawa Incydentu w Cieśninie Corfu, *Sprawa Dżibuti przeciwko Francji*, jurysdykcja MTS, zgoda na jurysdykcję MTS.

## Introduction

The dispute to be analyzed arose between the United Kingdom and Albania. It concerned the destruction of British ships by Albanian sea mines in the straits of Corfu. On 9th April 1947 the United Nations Security Council issued a resolution in which it recommended "that the United Kingdom and the Albanian Government should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court"[1]. On the basis of this resolution, the United Kingdom filed an Application on 22nd May 1947, believing that the resolution constituted a basis for International Court of Justice ("Court", "ICJ")[2] jurisdiction. Reacting to this application, the Albanian Government forwarded to the Deputy-Registrar a letter dated 2nd July 1947 ("the letter"), in which it contested that the resolution constituted confirmation of jurisdiction. It presented its view that the dispute could not have been brought before the Court, except through the conclusion of a compromise between the two parties[3]. Nonetheless, Albania declared "it is prepared, notwithstanding this irregularity [due to the lack of a special agreement] in the action taken by the Government of the United Kingdom, to appear before the court"[4]. Despite the apparent clarity of this text, Albania raised preliminary objections contending that the letter did not recognize the jurisdiction of the Court, but expressed that it would appear before it only to challenge its jurisdiction[5]. In the ruling on this preliminary objection of 22nd March 1948, the Court asserted its jurisdiction on the basis of the doctrine of *forum prorogatum*. That notwithstanding, the UK and Albania concluded a special agreement recognizing the jurisdiction of the Court on 25th March 1948[6].

The judgment on preliminary objections of 25th March 1948 constitutes a milestone in the institution of *forum prorogatum* in the proceedings before the ICJ (I). However, the legal framework established by the Corfu Channel decision was modified

[1] Corfu Channel (*United Kingdom of Great Britain and Northern Ireland v. Albania*) (Preliminary Objection) 1948, ICJ Reports 1948, 17. This article refers primarily to foreign legal sources. For Polish publications on the subject please see *inter alia* W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne*, Warszawa 2013, p. 347; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*, Warszawa 2004, p. 645-646; B. Winiarski, *Kilka uwag o rzekomym „forum prorogatum" w prawie międzynarodowym* [in:] T. Cieślak, L. Gelberg, W. Morawiecki, *Księga pamiątkowa ku czci Juliana Makowskiego z okazji 50-lecia pracy naukowej*, Warszawa 1957, pp. 247-255. In the context of directive Brussels IA see K.Weitz, *Między forum prorogatum a forum non prorogatum – wzmocnienie skuteczności umów jurysdykcyjnych w świetle rozporządzenia Bruksela IA*, „Palestra" 2014, no. 9, pp. 181-189.

[2] *Ibid* 9.

[3] *Ibid* 19.

[4] *Ibid* 19.

[5] *Ibid* 21.

[6] Corfu Channel, Special agreement concluded on March 25, 1948, ICJ Reports 1948, 29.

through the adoption of the 1978 Rules of procedure of the Court, which raised the question of its relevance in current proceedings of the Court (II).

## 1. Consent to the jurisdiction of the Court through *forum prorogatum* in the Corfu Channel case

### 1.1. Failure of the ICJ to decide whether the Security Council's resolution could constitute a basis for jurisdiction of the ICJ

As the United Kingdom claimed in its Application filed to the Deputy-Registrar, the recommendations of the Security Council under Article 36 (3) of the Charter of the United Nations ("Charter") to refer the case to the Court should be regarded as having an obligatory character, since they fall within the scope of Article 25 of the Charter. It reasoned that Albania, by its participation in the discussion concerning the dispute, as prescribed by Article 32 of the Charter, assumed the status of a Member State and therefore was obliged to comply with, *inter alia,* the decisions of the Security Council, as provided by Article 25 of the Charter[7]. Accordingly, no specific consent of Albania was required for the Court to have jurisdiction over the case.

In its judgment, the Court found that it was not necessary to address the question concerning its compulsory jurisdiction allegedly established by virtue of the Security Council resolution because of Albania's consent to jurisdiction[8]. However, in a separate opinion, the judges touched upon this problem and refused to adopt an interpretation of Article 36 (3) of the Charter "according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction"[9].

### 1.2. The test of a 'voluntary and indisputable acceptance of the Court's jurisdiction' in the Corfu Channel decision

Article 36(1) of the Statute of the ICJ ("Statute") provides the general grounds of the jurisdiction of the Court: "The 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) of the Statute indicates instances of the mandatory jurisdiction of the Tribunal. Article 40 of the Statute specifies methods of submission of a case – either by written application addressed to the Registrar or by a special agreement.

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[7] Corfu Channel 6.

[8] *Ibid* 15.

[9] Corfu Channel (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Preliminary Objection 1948, ICJ Reports 1948, 32 (separate opinion Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badawi Pasha Kryjowe) Similarly *ibid* 34 (dissenting opinion Judge Daxner).

In the letter the Albanian government stated: "acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future"[10]. The Court found that this particular sentence from the Albanian letter constituted "a voluntary indisputable acceptance of the Court's jurisdiction"[11]. Later, Albania argued that only Albania and the United Kingdom together could have brought the case before the ICJ by notification of the special agreement[12]. The ICJ indicated that the consent of a state may be transmitted for the purpose of a particular case in any form, since no particular form is required by the Statute or the Rules of Court ("Rules")[13]. It also held that an acceptance may be communicated by two separate, subsequent acts of the opposing parties[14].

The Court held that the reservations of the Albanian government concerning the method of bringing the case by the UK expressed together with an indication of Albanian's acceptance of the ICJ's jurisdiction for this case meant simply the lack of Albanian consent to such a method in future cases[15]. The ICJ stressed that consent once given cannot be withdrawn at a later stage of proceedings, since in the letter the Albanian government expressly waived its right to raise any objection concerning an application filed by the United Kingdom[16].

Judge Daxer did not share this view. In his dissenting opinion he concluded that the letter was "a recognition of the jurisdiction of the Court for the purpose of enabling Albania to appear before it"[17], and it cannot serve as a basis for jurisdiction of the ICJ to solve the case.

Nevertheless the ICJ ruled that the Albanian letter constituted undisputable consent, as after a decision on preliminary objections, the parties concluded a special agreement. Also, in the judgment on the merits of the case, the ICJ indicated that it was the special agreement, not the consent expressed in the letter, which constituted grounds for the ICJ's jurisdiction[18].

[10] Corfu Channel 19.
[11] *Ibid* 27.
[12] *Ibid* 21.
[13] *Ibid* 27.
[14] *Ibid* 28.
[15] *Ibid* 28.
[16] *Ibid* 27.
[17] *Ibid* 40.
[18] Corfu Channel (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Decision on Merits 1949, ICJ Reports 1949, 7.

## 2. Evaluation of the Corfu Channel case and the subsequent evolution of *forum prorogatum*

### 2.1. Assessment of the Corfu Channel ruling

#### 2.1.1. Recommendations of Security Council

The reasoning of the United Kingdom regarding the obligatory character of Security Council recommendations has no proper footing either in the wording of the relevant provisions or in the common understating of the word "recommendations". The approach presented in a separate opinion deserves full acceptance. At the same time, since both parties committed a significant part of their argumentation to this issue, the ICJ erred in failing to address it in its decision. Article 25 of the Charter deals only with "decisions", which have binding force, unlike recommendations[19]. The two opposing terms cannot be regarded as referring to the same legal act.

In addition, the resolution of the Security Council specified that the dispute shall be referred to the Court in accordance with the Statute of the Court. This clear reference to the Statute means acceptance of the obligatory character of the prescribed procedure and the necessity to act within the legal boundaries indicated therein. Therefore, the Resolution indicates that the parties, according to the relevant provisions, shall either bring their case by joint agreement or by a unilateral application in accordance with Article 36 of the Statute[20]. This particular drafting supports the conclusion that Article 36 (3) of the Charter was not meant to create the compulsory jurisdiction of the ICJ in a dispute[21]. The same view was confirmed in the Aerial Incident[22]. However, the possibility of either unilateral or joint application is not precluded. If a resolution is to be regarded as automatically creating the jurisdiction of the Court, it should not have mentioned filing an application to the Court, since such a reference would be superfluous. Moreover, establishing the jurisdiction of the Court without the consent of the Parties is an institution unknown either to the Statute or to the Charter[23].

Recommendations of the Security Council do not have binding force, but they cannot be denied to have a certain impact on Member States. It was correctly pointed out that, apart from its political significance, the Member States are "at a minimum legally obliged to consider them in good faith, although not to comply with them"[24].

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[19] B. Simma, [in:] Bruno Simma [et al.] (eds), *The Charter of the United Nations. A commentary, Volume I*, Third Edition, Oxford University Press 2012, p. 792.

[20] T. Giegerich, [in:] B. Simma [et al.] (eds), *op. cit.*, p. 1138

[21] R. B. Russel, J. E. Muther, *A History of the United Nation Charter*, The Brooking Institutions 198, pp. 604-605, 661.

[22] Case concerning the Aerial Incident of 10 August 1999 (*Pakistan v. India*) 2000, ICJ Reports 2000, 127.

[23] T. Giegerich, *op. cit.*, p. 1138.

[24] *Ibid*, p. 1144.

In conclusion, recommendations of the Security Council made under Article 36 (3) of the Charter do not have an obligatory character, since they are not decisions in the meaning of Article 25 of the Charter, and, as a result, cannot create the compulsory jurisdiction of the Court.

### 2.1.2. The Albanian letter – true consent?

In light of the above, *forum prorogatum* means bringing a case before the Court when one of the parties[25] earlier did not officially accept the jurisdiction of this body but its agreement is to be transmitted to the Court in a particular case[26]. Of course, filing a special agreement of the parties to a dispute also prorogates the jurisdiction of the Court[27], but in this situation states express their common will to have their cases adjudicated in this way. More problems arise when one party files a unilateral application within the meaning of Article 40 of the Statute.

In the Corfu Channel case, the Court further developed this concept in two respects. First, it correctly found that the consent of a respondent needs to be voluntary. This means that filing a unilateral application by a state is a form of invitation for a respondent to accept the jurisdiction of the Court when this jurisdiction cannot be established upon other grounds. The nature of this action lies in the freedom of a respondent state to accept it or not[28] – it is under no obligation to do so.

The legal question addressed in the Corfu Channel case was whether an application shall include an indication of a provision that establishes the jurisdiction of a Court in a particular case. Clearly, it is not required by Statute or the Rules. It allows searching for grounds of jurisdiction beyond the literal wording of those legal acts. According to Article 32 (2) of the Rules, an applicant must specify "as far as possible" the grounds for jurisdiction of the Court[29]. Such grounds shall not exist at the time of application[30], however they may be created later by virtue of a party's consent. This issue was widely discussed by Waldock, also in the light of a dissenting opinion by Judge Huber in the Minorities School case[31].

Secondly, the consent must be undisputable. The Court reasoned that the consent could have been given in any form since applicable legal provisions require no specific

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[25] It shall be noted that before expressing a consent to a jurisdiction, a respondent party in not *sensu stricto,* a party to a case, see S. Rosenne, *The Law and Practice of the International Court, 1920-2005, Vol. II Jurisdiction*, Martinus Nijhoff Publishers, Leiden/Boston 2006, p. 672.

[26] I. Brownlie, *Principles of Public International Law,* 7th edition, OUP, Oxford 2008, p. 724.

[27] *Ibid,* p. 724.

[28] S. Rosenne, *op. cit.*, p. 673.

[29] Corfu Channel 27-28, see also S. Rosenne, *op. cit.*, p. 681.

[30] S. Rosenne, *op. cit.*, p. 682.

[31] C. Humprey, M. Waldock, *Forum Prorogatum or acceptance of a unilateral summons to appear before the International Court,* "International Law Quarterly" 1948, no. 2, p. 377

form. This conclusion should be accepted[32]. Naturally, the jurisdiction of the Court cannot be derived from the parties' consent that contradicts the provisions of the Statute, for example those that refer to the form of consent[33]. In the Corfu Channel case, however, such a situation clearly did not occur, since Article 40 of the Statute differentiates only between unilateral and joint application. It refers neither to a special written form, nor does it impose any particular limitations.

In the Corfu Channel case, the consent of the Albanian government was forwarded by a formal letter to the Court, and subsequently to the Application of the United Kingdom. In the letter Albania expressed its agreement to have the case resolved by the Court. However, neither other forms nor different timing of expressing consent should be excluded[34]. There is no provision in the Statute that prohibits acceptance of a state's conduct, both before the Court and toward an applicant state, as a form of expression of its agreement to the jurisdiction of the Court[35]. The Permanent Court of Justice also accepted this approach in Judgment No. 4, Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly[36], where the consent of Bulgaria was found in a submission regarding the substance of the application, and in the Minorities School case[37], where Poland in its counter memorial addressed solely the merits of the dispute and only later, in a rejoinder, made a plea on lack of jurisdiction. An imposition of limitations regarding the form or time of expressing consent would be inconsistent with the Statute itself.

The aforementioned concept has been addressed in two later cases: Ambatielos[38] and Anglo-Iranian Oil Company[39]. In the first case, the Court found that there should be no discrepancies between parties upon the scope of consent. If there is uncertainty as to the existence of "clear agreement", the Court cannot exercise jurisdiction. The changes were made during oral proceedings; therefore it was not the original consent of the parties which the Court referred to. Apparently it has altered its previous attitude, with the Court subsequently clarifying that the consent needs to be "real, not merely apparent"[40].

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[32] I. Brownlie, *op. cit.*, p. 724. For a notion of concept see also: Haya de la Torre (Columbia v. Peru) 1951, ICJ Reports 1951, 71.

[33] H. Thirlway, *The law and procedure of the International Court of Justice: 1960-1989*, "The British Yearbook of International Law" 1989, p. 77.

[34] S. Yee, *Forum prorogatum Return to the International Court of Justice*, "Leiden Journal of International Law" 2003, vol. 16, p. 705.

[35] Similarly: I. Browlie, *op. cit,* p. 724. Also written proceedings before the Court express Parties' consent to jurisdiction, see Mavrommatis Jerusalem Concessions 1925, *"Series* A" 1925, no. 5, Judgment, 27.

[36] Judgment No. 4, Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly.

[37] Rights of Minorities in Upper Silesia (*Germany v. Poland*), Judgment of 1928, No. 12, Series A, 1928, No. 15 P.C.I.J., 24.

[38] Ambatielos (*Greece v. Unied Kingdom*) 1952, ICJ Reports 1952, 28, 39.

[39] Anglo-Iranian Oil Company (*United Kingdom v. Iran*) 1952, 1952 ICJ Reports, 93.

[40] I. Browlie, *op. cit.*, p. 724.

Lastly, the ICJ's findings in the Corfu Channel case should be assessed in light of the special agreement concluded after the judgment on preliminary objections. In fact, there were some discrepancies as to the nature of Albania's consent, since were it not for their existence – no special agreement would be needed. However, assessing Albanian consent expressed in the letter from the perspective of the subsequently concluded special agreement seems to be pointless. All that the ICJ had at the time of deciding on preliminary objections was the letter that undoubtedly allowed for the conclusion that Albania was willing to accept the jurisdiction of the ICJ. Therefore, once the Albanian government agreed to the jurisdiction of the ICJ at an earlier stage of the proceedings, it would not be able to withdraw its consent since it fundamentally endangers the accuracy of decision-making process[41].

### 2.2. Changing the nature of the institution of *forum prorogatum*

#### 2.2.1. The adoption of Article 38 § 5 of the 1978 Rules of procedure of the Court

*Forum prorogatum* has "appeared" in the history of ICJ jurisdiction only a few times so far. The concept was created by the PCIJ in the aforementioned cases and developed by the Corfu Channel judgment. As a follow-up to an improper use of *forum prorogatum* for political reasons[42], i.e., filing an application without grounds for jurisdiction of the ICJ just to "communicate" a dispute to the world (since a case would be listed in the Registry once an application was filed), Article 38 (5) was added to the Rules. This stipulates that an application remains ineffective as long as consent to the jurisdiction of a prospective respondent state is not transmitted to the Court. The very last sentence of this paragraph in fact distorts the original meaning assigned to *forum prorogatum* in the Corfu Channel case since it deprived this basis for jurisdiction of its original flexibility. It appears that this provision does not therefore regulate *forum prorogatum* in a strict sense.

#### 2.2.2. Applying 38 § 5 of the Rules of the Court to provisional measures procedures in the Republic of the Congo v. France[43]

On 9th December 2002 the Republic of the Congo ("Congo") filed an application that concerned provisional measures to be granted against France. Congo relied solely on Article 38 (5) of the Rules – it did not indicate any other jurisdictional basis. France consented to the jurisdiction of the Court on 8th April 2003. The Court did not expressly analyze whether the consent of a respondent is required when an applicant state demands

[41] Right of Minorities in Upper Silesia 25.
[42] H. Thirlway, *op. cit.*, p. 80.
[43] Certain Criminal Proceedings in France (*Congo v. France*) 2003, 2003 ICJ Reports, 102.

provisional measures. The Court did not proceed with the case until France granted its consent. Therefore, the Court clarified[44] its position as to the use *of forum prorogatum* towards interim measures – no action, in situations similar to Congo v. France, shall be undertaken until an opposing party grants its consent. This approach deserves full acceptance – granting provisional measures is a procedural power which the Court shall exercise only after the parties' acceptance of its jurisdiction. Article 38 (5) of the Rules clearly stipulates that "no action shall be taken". Were it not for this provision, the Court would probably have power regarding provisional measures[45]. The conclusion reached by the ICJ also means that Article 38 (5) of the Rules applies equally to the concept of *prima facie* jurisdiction.

### 2.3. The Continuing Relevance of the Corfu Channel case in the Djibouti v. France ruling of 2008[46]

Djibouti filed an application to the ICJ against France, clarifying that the subject of the dispute is France's refusal to execute a letter rogatory, although it also covered issuance of the witness summons for Djibouti officials. Djibouti indicated Article 38 (5) of the Rules as a basis for the jurisdiction of the Tribunal. In a letter dated 25th July 2006[47] France accepted jurisdiction of the Court only for the purpose of this particular case and "strictly within the limits of the claim formulated therein"[48]. However, in its memorial Djibouti argued that France's consent also included an arrest warrant issued after France's acceptance of jurisdiction[49].

#### 2.3.1. The requirement of "'an unequivocal indication' of the desire of a state to accept the Court's jurisdiction in a 'voluntary and indisputable' manner"

The Court held that "the jurisdiction of the Court can be founded on *forum prorogatum* in a variety of ways" as long as the respondent's consent is "an unequivocal indication" of the desire of that state to accept the Court's jurisdiction in a "voluntary and indisputable" manner[50]. The ICJ in Djibouti v. France reasserted the Corfu Channel case's requirements for consent, but it added the abovementioned, apparently because the Court after adopting Article 38 (5) of the Rules, when establishing jurisdiction, must

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[44] S. Rosenne, *op. cit*., pp. 685-687.

[45] H. Thirlway, *The Law and procedure of the International Court of Justice. Fifty years of* jurisprudence, Volume II, Oxford University Press 2013, p. 1626.

[46] Certain questions of mutual assistance in criminal matters (*Djibouti v. France*) 2008, 2008 ICJ Reports, 177.

[47] *Ibid*, 4.

[48] *Ibid*, 44.

[49] *Ibid*, 17.

[50] *Ibid*, 25.

rely on a "firm consensual basis"[51]. The Court was not forced to further specify this requirement since France consented by a formal letter. However, the Court showed its inclination to limit instances when the consent may be deducted.

### 2.3.2. Jurisdiction over Djibouti's claims regarding facts subsequent to France's consent

The ICJ decided that arrest warrants issued by France after France's acceptance of jurisdiction did not fall within the scope of the consent and that "where jurisdiction is based on *forum prorogatum,* great care must be taken regarding the scope of the consent as circumscribed by the respondent"[52]. Since arrest warrants were not expressly enumerated in Djibouti's application[53], France did not agree to the Court's jurisdiction over them. The ICJ concluded that "the question of its jurisdictions over the claims [...] is not to be answered by recourse to jurisprudence relating to "continuity" and "connexity" [...] but by that which France expressly accepted in its letter"[54]. Thus, the Court's decision is that jurisprudence concerning continuity and connexity will be of no use in case of *forum prorogatum*[55].

It should be analyzed whether the nature of *forum prorogatum* justifies abandoning the above-mentioned concepts. According to Article 38 (2) of the Rules, a state has to „specify the precise nature of the claim". If one agrees with the flexible nature of *forum prorogatum,* the logical consequence is to allow the extension of the scope of a written consent beyond the claims specified therein by also including the subsequent "developments" of a case that have their origin in a dispute referred to in the consent[56].

It may be argued that the nature of prorogated jurisdiction is so specific that a higher level of certainty is needed and the consent of a respondent cannot apply to a claim that was "essentially modified" in subsequent proceedings[57]. In Djibouti v. France, the Court took a path of protection of "France's consent sovereignty"[58], but in fact it was not endangered. France had agreed to the jurisdiction over a dispute and later undertook, from the author's point of view, actions that undoubtedly were within the scope of France's consent. Those actions were substantially related to the issues enumerated in Djibouti's

[51] J. Grote, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France),* [in:] R. Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law,* Oxford University Press, Oxford 2012, p. 2.

[52] Djibouti v. France 87.

[53] *Ibid.*

[54] *Ibid, 88*

[55] J. Grote, *op. cit*., p. 2.

[56] Certain questions of mutual assistance in criminal matters (*Djibouti v. France*) 2008, 2008 ICJ Reports, 284 (Declaration of Judge Skotnikov), V. Pouliot, *Forum prorogatum before the International Court of Justice: the Djibouti v. France case,* http://www.haguejusticeportal.net/index.php?id=10170#n37, access 5.04.2016.

[57] S. Rosenne, *op. cit*., p. 677, Ambatielos, 28, 29.

[58] V. Pouliot, *op. cit.*

application. In conclusion, the Court artificially abandoned the established jurisprudence of continuity and connexity, notwithstanding the fact that the nature of *forum prorogatum* is not contradictory to it.

### 2.4. Further development – Marshall Islands' Nuclear Zeo Case[59]

The most recent episode of the forum prorogatum saga before ICJ started in April 2014. The Republic of Marshall Islands ('RMI') filed a dispute before the Court against 9 states, namely, the United States ("US"), the United Kingdom ("UK"), France, Russia, China, India, Pakistan, Israel, and North Korea for violating their nuclear disarmament obligations under international law and the Treaty on the Non-Proliferation of Nuclear Weapons[60]. US, France, Russia, Israel, North Korea and China were invited by RMI to accept the jurisdiction of the ICJ on the basis of *forum prorogatum*. So far, only China has responded by refusing to accept the jurisdiction of the ICJ. The remaining states have not replied and cosequently those cases could not have been entered in the General List.

A similar problem occured in August 2014, when Argentina sought to initiate proceedings against the US regarding a dispute concerning a judicial decisions of the US relating to the restructuring of the Argentine Sovereign Debt[61].

It clearly demonstrates a significant drawback of this institution – if a state does not want to react in any way, there is no possibility to establish a jurisdiction based on *forum prorogatum*.

## Conclusions

*Forum prorogatum* is an established institution in the jurisprudence of the Court. Initially, the ICJ was occupied with the issue of possibly bringing a claim by a unilateral application of one country while the respondent country, at the time of filing this document, was not under its jurisdiction. After adding Article 38 (5) of the Rules, the prior judgments remained in force. However, the decision in Djibouti v. France reflects an apparently less flexible approach which needs further specification, including the scope of its application towards preliminary measures. Undisputedly, *forum prorogatum* is not going to lose its significance, but apparently states opposing the jurisdiction of the ICJ adopted a new way of securing themselves against '*forum prorogatum':* namely, by not responding to invitations to initiate proceedings at all, as was done in 2014.

[59] http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=160&code=miuk, access 5.04.2016.
[60] http://www.un.org/disarmament/WMD/Nuclear/NPTtext.shtml, access 5.04.2016.
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