

**SPEECH BY H.E. JUDGE ROSALYN HIGGINS, PRESIDENT OF THE INTERNATIONAL
COURT OF JUSTICE, AT THE SIXTIETH SESSION OF THE
INTERNATIONAL LAW COMMISSION**

22 JULY 2008

Mr. Chairman,

Ladies and Gentlemen,

Friends and Colleagues,

I am delighted to address the International Law Commission (ILC) on the occasion of its Sixtieth Session. I congratulate the members elected to the Commission at the end of last year and the newly elected officers, including the Chairman, Mr. Edmundo Vargas Carreño.

Two months ago I had the privilege of speaking at the sixtieth anniversary celebrations for the International Law Commission. Today I am pleased to continue the decade-long tradition of the President of the International Court of Justice in addressing the plenary meeting and engaging in an exchange of views with the Commission.

As I have done for the past two years, I will today report on the judgments rendered by the International Court over the past year, always drawing special attention to aspects that have a particular relevance for the work of the ILC.

Since I addressed you last July the Court has rendered five decisions: three judgments on the merits, a judgment on preliminary objections and an order on provisional measures. These five cases have involved States from Latin America, North America, Asia, Europe and Africa. The subject-matter has ranged from the delimitation of maritime zones to the determination of sovereignty over maritime features to mutual assistance in criminal matters to interpretation of an earlier judgment.

I begin with the Judgment on the merits in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* delivered last October. Nicaragua asked the Court to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras in the Caribbean Sea. One of the first studies mandated by the General Assembly for the ILC was the law of the sea, which formed the basis for the negotiations at the 1958 United Nations Conference of the Law of the Sea and the adoption of four separate conventions.

In this case, Nicaragua maintained that this maritime boundary had never been delimited. Honduras contended that there already existed a traditionally recognized *uti possidetis* boundary along the 15th parallel. Honduras argued in the alternative that the 15th parallel had been tacitly agreed between the parties to be their maritime boundary. During the oral proceedings Nicaragua made a specific request that the Court pronounce on sovereignty over cays located in the disputed area to the north of the 15th parallel. Although the claim was formally a new one, the Court considered it to be admissible because it was inherent in the original claim. Since “the land dominates the sea”, in order to plot the maritime boundary the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area. That finding would necessarily have had territorial implications.

In respect of sovereignty over the four cays, Honduras had relied on the principle of *uti possidetis juris* as the basis of sovereignty. The Court observed that *uti possidetis juris* may, in

principle, apply to offshore possessions and maritime spaces (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992). It must however be shown in the present case that the Spanish Crown had allocated the disputed islands to one or the other of its colonial provinces. As the Parties had neither provided evidence clearly showing whether the islands were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence nor persuaded the Court of the existence of colonial *effectivités*, the Court concluded that it had not been established that either Honduras or Nicaragua had title to these islands by virtue of *uti possidetis*. After examining the evidence, the Court concluded that Honduras had sovereignty over the four islands on the basis of post-colonial *effectivités*.

As for the delimitation of the maritime areas between the two States, the Court considered Honduras's alternative arguments of *uti possidetis juris* and tacit agreement. The Court rejected the *uti possidetis juris* argument, finding that the 1906 Arbitral Award, which indeed was based on the *uti possidetis juris* principle, did not deal with the maritime delimitation between Nicaragua and Honduras. As regards tacit agreement, the Court carefully considered the evidence Honduras produced, including sworn statements by a number of fishermen attesting to their belief that the 15th parallel represented and continued to represent the maritime boundary. This gave the Court an opportunity, as it has had on previous occasions such as the 2004 *Congo v. Uganda* Judgment, to state its criteria for evaluating specific types of evidence. The Court noted:

“that witness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said.” (Para. 244.)

Having reviewed all of the practice placed before it, the Court concluded that there was no tacit agreement in effect between the Parties of a nature to establish a legally binding maritime boundary. Thus, the Court had to draw the boundary itself.

As you all know, the applicable law for the delimitation of the territorial sea between States with adjacent coasts is set out in Article 15 of the United Nations Convention on the Law of the Sea (UNCLOS). It provides that the equidistance method should be used unless historic title or “special circumstances” apply. Beyond the territorial sea, the deliberately ambiguous provisions of Articles 74 and 83 of UNCLOS apply. So far as the exclusive economic zone is concerned, Article 74 (1) provides that delimitation “shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”. The same formula (acknowledged everywhere as unsatisfactory, but all that could be agreed upon at the time) is employed in Article 83 (1) for delimitation of the continental shelf.

As you will also know, in more recent years, in a series of cases including *Qatar v. Bahrain* (2001) and *Cameroon v. Nigeria* (2002), the International Court has firmly established adjusted equidistance as the preferred method of delimitation for the EEZ and continental shelf as well as for territorial seas.

In the *Nicaragua v. Honduras* case, the Court was asked to draw a single maritime boundary between the areas of territorial sea, continental shelf and EEZ until it reaches the area where the rights of third States may be affected. We found that delimitation on the basis of the equidistance method was far from easy. Cape Gracias a Dios — where the Nicaragua-Honduras land boundary ends — is a sharply convex territorial projection with concave areas on both sides. This limited the choice of base points the Court could use, and any variation or error in situating those points would become disproportionately magnified in the resulting equidistance line. Moreover, the mouth of the River Coco, which joins the sea at Cape Gracias a Dios, is constantly changing its shape, with unstable islands forming, moving and disappearing over time. Taking all of this into consideration, the Court could not follow the preferred practice of establishing an equidistance line. So far as the territorial sea was concerned, we found ourselves in the “special circumstances” referred to in Article 15 of UNCLOS. We looked at the work that the ILC had undertaken during the drafting of the 1958 Convention on the Territorial Sea and the Contiguous Zone and found that it was indeed envisaged that a special configuration of the coast was a circumstance that might require a method of delimitation other than the equidistance method (para. 280).

The Court therefore decided to construct a bisector line, finding that this method provided the delimitation line with greater stability as it was less affected by instability of the area around Cape Gracias a Dios, and also greatly reduced the risk of error. We were unable to return to the equidistance method for the continental shelf and EEZ without there being a departure line from the coast based on that principle. Thus, the bisector method was used for the entire boundary. The line was then adjusted to take into account the territorial seas of the four cays. The use of the bisector method will be seen as a necessary exception to the now well-established equidistance method. And the Court made sure that it was absolutely clear from the text of the Judgment that the general principle of equidistance remains firmly in place.

One of the interesting sections of the Judgments concerns how to identify the relevant coasts for the drawing of the bisector line. Honduras suggested very narrow sectors of coast to the Court, whereas Nicaragua contended that the *entire* coasts of each State facing the Caribbean Sea should be used as the reference point. In the end, the Court selected coastal fronts that avoided the problem of “cutting off” Honduran territory and at the same time provided a façade of sufficient length to account properly for the coastal configuration in the disputed area.

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Two months later, the Court issued a Judgment on Preliminary Objections in another case brought by Nicaragua: *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. The underlying case concerns sovereignty over islands and cays in the western Caribbean and the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone. Colombia raised two preliminary objections based on the Pact of Bogotá and the optional clause of the Statute of the Court. This was a highly complex and technical case. I can only recount some of the more interesting questions.

First, the Court had to decide the subject-matter of the dispute. This entailed some debate between the Parties as to what was already “legally determined” (and could therefore *not* be the subject of a dispute) and what remained unsettled. Colombia claimed that the matters raised by Nicaragua had already been settled by a 1928 “Treaty concerning Territorial Questions at Issues between Colombia and Nicaragua” and its 1930 Protocol. Nicaragua replied that the question whether the 1928 Treaty has settled all questions between the Parties is “the very object of the dispute” and “the substance of the case”. The Court considered that the question whether the 1928 Treaty and 1930 Protocol settled certain matters did *not* form the very subject-matter of the dispute between the Parties and that, in the circumstances of the case, that question was therefore to

be seen as a preliminary one. Rather, the questions which formed the subject-matter of the dispute were, first, sovereignty over territory (namely the islands and other maritime features claimed by the Parties) and, second, the course of the maritime boundary between the Parties.

Having clarified this, the Court proceeded to examine Colombia's first preliminary objection that pursuant to Articles VI and XXXIV of the Pact of Bogotá, the Court was without jurisdiction under Article XXXI of the Pact to hear the controversy submitted to it by Nicaragua. Article VI of the Pact provides that the dispute settlement procedures in the Pact

“may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty”.

Colombia argued that the 1928 Treaty and 1930 Protocol had settled matters between the Parties at the date of the conclusion of the Pact in 1948. Nicaragua contended that the 1928 Treaty was invalid or had been terminated and that, even if that was not the case, it did not cover all the matters now in dispute between the Parties.

The Court held that the 1928 Treaty was valid and in force at the date of the conclusion of the Pact of Bogotá in 1948. It was then able to proceed to decide what, if anything, had been settled by the 1928 Treaty. Three islands had been named in the 1928 Treaty as belonging to Colombia: San Andrés, Providencia and Santa Catalina. The Court found that the question of their sovereignty has been settled by the Treaty within the meaning of Article VI of the Pact of Bogotá and thus upheld Colombia's first preliminary objection in this respect. This was a finding that the Court needed to and could make at the preliminary objections stage. However, various other questions before the Court — the scope and composition of the rest of the San Andrés Archipelago, sovereignty over certain cays, and the question of maritime delimitation — were held not to have been settled by the 1928 Treaty and thus the Court had jurisdiction to decide them, but at the merits stage of proceedings.

Another interesting legal point considered by *Nicaragua v. Colombia* was the relationship between two titles of jurisdiction: one based on a treaty and one on the Statute of the Court. This question arose because Nicaragua had argued that jurisdiction was based on both the Pact of Bogotá and the Article 36 (2) of the Statute, the so-called optional clause. The Court stated that when it was faced with the two titles of jurisdiction, it could not deal with them simultaneously. In this case, it therefore decided to proceed from the particular to the more general, without thereby implying that the Pact of Bogotá prevailed over and excluded the second title of jurisdiction. The provisions of the Pact of Bogotá and the declarations made under the optional clause represented two distinct bases of the Court's jurisdiction which were not mutually exclusive.

Given the Court's finding that there was no extant legal dispute between the Parties on the question of sovereignty over the three named islands, it could not have jurisdiction over this question either under the Pact of Bogotá or on the basis of the optional clause declarations. No practical purpose would be served by proceeding further with the matters raised in the second preliminary objection filed by Colombia.

We are now moving ahead to the merits in this case and the Court has fixed this November as the time-limit for the filing of the Counter-Memorial of Colombia. It is noteworthy that we have three other pending cases on our docket that invoke the Pact of Bogotá as a basis of jurisdiction

(*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; *Maritime Dispute (Peru v. Chile)*; *Aerial Herbicide Spraying (Ecuador v. Colombia)*). The Great Hall of Justice is full of Latin American ambassadors, following each of these cases avidly.

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After this line of cases involving Latin American States, the Court issued a Judgment in May on the merits in a case between two Asian States: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*. This case was brought to the Court by special agreement between the Parties. As I had previously given advice to one of the Parties, I recused myself from the case and it was presided over by the Vice-President, Judge Al-Khasawneh.

The dispute once again involved sovereignty over maritime features: Pedra Branca/Pulau Batu Puteh (a granite island on which Horsburgh lighthouse stands), Middle Rocks (consisting of some rocks that are permanently above water) and South Ledge (a low-tide elevation). As with *Nicaragua v. Honduras*, this case was fact-heavy, with over 4,000 pages of pleadings.

Malaysia contended that it has an original title to Pedra Branca/Pulau Batu Puteh (dating back from the time of its predecessor, the Sultanate of Johor) and that it continued to hold this title, while Singapore claimed that the island was *terra nullius* in the mid-1800s when the United Kingdom (its predecessor) took lawful possession of the island in order to construct a lighthouse. After reviewing the evidence submitted by the Parties, the Court found that the territorial domain of the Sultanate of Johor did cover in principle all the islands and islets within the Straits of Singapore and did thus include Pedra Branca/Pulau Batu Puteh. This possession of the islands by the Sultanate was never challenged by any other Power in the region and therefore satisfied the condition of “continuous and peaceful display of territorial sovereignty”. The Court thus concluded that the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh. This ancient title was confirmed by the nature and degree of the Sultan of Johor’s authority exercised over the Orang Laut (“the people of the sea”, who inhabited or visited the islands in the Straits of Singapore, including Pedra Branca/Pulau Batu Puteh and made this maritime area their habitat).

The Court then looked at whether this title was affected by developments in the period between 1824 and the 1840s, including various treaties and a letter from Sultan Abdul Rahman in which he “donated” certain territories, which were already within the British sphere of influence, to his brother. After careful consideration of the legal effects of these developments, the Court found that none of them brought any change to the original title.

The Court turned next to the legal status of Pedra Branca/Pulau Batu Puteh after the 1840s to determine whether Malaysia and its predecessor retained sovereignty over the island. In this regard, it examined the events surrounding the selection process of the site of the lighthouse, its construction, as well as the conduct of the Parties’ predecessors between 1852 and 1952, but was unable to draw any conclusions for the purposes of the case.

The Court placed great emphasis on a letter written on 12 June 1953 to the British Adviser to the Sultan of Johor in which the Colonial Secretary of Singapore asked for information about the status of Pedra Branca/Pulau Batu Puteh in the context of determining the boundaries of the “Colony’s territorial waters”. In a letter dated 21 September 1953, the Acting State Secretary of Johor replied that the “Johore Government [did] not claim ownership” of the island. The Court found that the reply showed that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh.

The Court finally examined the conduct of the Parties after 1953 with respect to the island. It found that certain acts, including the investigation of shipwrecks by Singapore within the island's territorial waters and the permission granted or not granted by Singapore to Malaysian officials to survey the waters surrounding the island, may be seen as conduct *à titre de souverain*. The Court also considered that some weight can be given to the conduct of the Parties in support of Singapore's claim. The Court concluded that by 1980 (when the dispute crystallized) sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore and still lay with Singapore.

As for Middle Rocks, the Court observed that the particular circumstances which led it to find that sovereignty over Pedra Branca/Pulau Batu Puteh rested with Singapore did not apply to Middle Rocks. It therefore held that original title to Middle Rocks should remain with Malaysia as the successor to the Sultanate of Johor. As for South Ledge, the Court noted that this low-tide elevation fell within the apparently overlapping territorial waters generated by Pedra Branca/Pulau Batu Puteh and by Middle Rocks. As the Court had not been mandated by the Parties to draw the line of delimitation with respect to their territorial waters, the Court concluded that sovereignty over South Ledge belonged to the State in the territorial waters of which it is located.

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After this series of territorial and maritime disputes, the Court delivered a Judgment last month in a completely different type of case: *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. I will spend some time on this case as it raises a number of legal issues that the members of the Commission might find to be of interest.

Forming a backdrop to the *Djibouti v. France* case was the death of Judge Bernard Borrel, a French national who had been seconded as Technical Adviser to the Ministry of Justice of Djibouti. On 19 October 1995, the body of Judge Borrel was discovered 80 km from the city of Djibouti. Various judicial investigations to determine the cause of Judge Borrel's death were opened in Djibouti and France. The case in France was known as the *Case against X for the murder of Bernard Borrel*. Both Parties agreed that it was not for the International Court of Justice to determine the circumstances in which Judge Borrel met his death. Rather, the dispute before the ICJ concerned the resort to bilateral treaty mechanisms that existed between parties for mutual assistance in criminal matters.

On 9 January 2006, Djibouti filed an Application against France in respect of a dispute concerning the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the *Case against X for the murder of Bernard Borrel*, in violation of two bilateral treaties: the 1986 Convention on Mutual Assistance in Criminal Matters and the 1977 Treaty of Friendship and Co-operation.

The Application further referred to the issuing, by the French judicial authorities, of witness summonses to the Djiboutian Head of State and senior Djiboutian officials, allegedly in breach of, *inter alia*, the principles and rules governing the diplomatic privileges and immunities.

By a letter dated 25 July 2006, the French Minister for Foreign Affairs informed the Court that France "consents to the Court's jurisdiction to entertain the Application pursuant to, and solely on the basis of . . . Article 38, paragraph 5", of the Rules of Court, while specifying that this consent was "valid only . . . in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" by Djibouti.

This was the first time that it fell to the Court to decide on the merits of a dispute brought before it on the basis of *forum prorogatum*. Article 38, paragraph 5, of the Rules of Court was introduced 30 years ago. (One other case on the docket is brought on this basis: *Certain Criminal Proceedings in France (Republic of the Congo v. France)*.) The Court stated that “the consent allowing for the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*” (para. 62). It went on to examine the extent of the mutual consent of the Parties, as evidenced by Djibouti’s Application and the letter of France. It found that France’s letter to the Court did not seek to limit jurisdiction to the refusal to execute the letter rogatory, but accepted jurisdiction over the Application as a whole, including claims relating to summonses sent to the Djiboutian President and other Djiboutian officials. The Court did, however, exclude the arrest warrants issued for senior Djiboutian officials from its jurisdiction. These arrest warrants were issued in the period after the filing of the Application. The Court found that it was clear from France’s letter that its consent did not go beyond what was in that Application. Although the arrest warrants could be perceived as a method of enforcing the summonses (which were within the Court’s jurisdiction), they represented new legal acts in respect of which France could not be considered as having implicitly accepted the Court’s jurisdiction.

On the merits, the case raised a number of interesting legal issues including the role of the internal law of a State when there is a dispute as to compliance with a treaty which makes reference to internal law, the duty to give reasons for refusal to co-operate as envisaged in a treaty, and the immunities of State officials from foreign criminal jurisdiction. I will highlight the Court’s reasoning as regards these topics.

Article 3 of the 1986 Convention on Mutual Assistance in Criminal Matters provided that a State to which a request for mutual assistance had been made “shall execute *in accordance with its law* any letters rogatory relating to a criminal matter and addressed to [them] by the judicial authorities of the requesting State . . .”. Djibouti argued that this created an obligation of result, and that the requirement for a State to execute letters rogatory “according to its law” merely indicated the procedure to be followed in the performance thereof; according to it, this interpretation was consonant with the provisions of Article 27 of the Vienna Convention on the Law of Treaties, which stipulates that: “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. France countered that Article 3 of the 1986 Convention in fact constituted a direct reference to the internal law of the requested State and that accordingly, the means would determine the outcome. Put another way, France considered that, so far as the correct internal procedure of a State is followed, the obligation to execute “according to its law” under Article 3 would be properly met.

The Court held that:

“the ultimate treatment of a request for mutual assistance in criminal matters clearly depends on the decision by the competent national authorities, following the procedure established in the law of the requested State. While it must of course ensure that the procedure is put in motion, the State does not thereby guarantee the outcome, in the sense of the transmission of the file requested in the letter rogatory . . .” (Para. 123.)

The Court saw no reason why the rule of customary law reflected in Article 27 of the Vienna Convention on the Law of Treaties would be applicable in this instance. In fact, here the requested State is invoking its internal law *not* to justify an alleged failure to perform the international obligations contained in the 1986 Convention, but, on the contrary, to apply them according to the terms of that Convention.

The Court then considered the nature of the duty to give reasons for refusal of mutual assistance. It was unable to accept the contention of France that the fact that the reasons have come within the knowledge of Djibouti during the proceedings meant that there had been no violation of the duty. A legal obligation to notify reasons for refusing to execute a letter rogatory was not

fulfilled through the requesting State learning of the relevant documents only in the course of litigation, some long months later. It added that the bare reference to the exception contained in the Convention did not satisfy the duty to give reasons; some brief further explanation was called for. This was not only a matter of courtesy, but also allowed the requested State to substantiate its good faith in refusing the request. It may also enable the requesting State to see if its letter rogatory could be modified so as to produce a better outcome.

The Court thus found that France's reasons for refusing to transfer the record of the investigation in the *Borrel* case to the Djiboutian authorities were in good faith and fell within the provisions of the 1986 Convention; but France did violate its obligation under the 1986 Convention to give reasons for its refusal to execute the letter rogatory. Since these reasons had, in the meantime, entered the public domain, the Court determined that "its finding of this violation constitute[d] appropriate satisfaction" — there was no point in ordering their publication.

In addition to the claims regarding the letter rogatory, the Court considered Djibouti's claims that the immunities of Djibouti's Head of State and two senior State officials had been violated by France through the issuance of witness summonses. The immunity of State officials from foreign criminal jurisdiction is a topic on the ILC's agenda for this session, with Mr. Kolodkin appointed as Special Rapporteur. As I will explain, the facts of the *Djibouti v. France* case did not allow the Court to enter into a detailed examination of this topic. Nonetheless, the legal findings that we did make have pertinence for your consideration of this important and difficult issue.

As regards the Head of State, Djibouti referred to two witness summonses issued by a French investigating judge to President Guelleh on 17 May 2005 and 14 February 2007. As each differed in form, the Court considered them separately. The 17 May 2005 summons was issued during President Guelleh's official visit to the President of the French Republic in Paris. The summons was sent by the investigating judge by facsimile to the Djiboutian Embassy in France, inviting President Guelleh to attend in person at the judge's office at 9.30 a.m. the following day. Djibouti argued this summons contained an element of constraint, citing provisions of the French Code of Criminal Procedure. France replied that President Guelleh was summoned as an ordinary witness and not as a "témoin assisté" — a person against whom there is evidence that he could have participated as the perpetrator or accomplice. France admitted that the summons was issued with procedural defects, but claimed that it was purely an invitation which imposed no obligation on President Guelleh.

The Court recalled the statement in its *Arrest Warrant* case (*Democratic Republic of the Congo v. Belgium*) "that in international law it is firmly established that . . . certain holders of high-ranking office in a State, such as the Head of State . . . enjoy immunities from jurisdiction in other States, both civil and criminal" (*Judgment, I.C.J. Reports 2002*, pp. 20-21, para. 51). A Head of State enjoys in particular "full immunity from criminal jurisdiction and inviolability" which protects him or her "against any act of authority of another State which would hinder him or her in the performance of his or her duties" (*ibid.*, p. 22, para. 54). The Court noted in the *Djibouti v. France* case that "the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State" (para. 174 of the Judgment).

The Court held the summons of 17 May 2005 was not associated with the measures of constraint provided for in the French Code of Criminal Procedure; it was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State. The Court nonetheless noted that the summons was not issued in a manner consistent with the courtesies due to a foreign Head of State and for that "an apology would have been due".

The 14 February 2007 invitation to testify was issued in accordance with French law. This time the investigating judge did not approach President Guelleh directly, but rather sent a letter to

the French Minister of Justice expressing the wish to obtain the President's written testimony and asking the Minister to make contact with the Minister for Foreign Affairs. The Court held that this invitation to testify could not have infringed the immunities from jurisdiction enjoyed by the Djiboutian Head of State.

The leaking of information to the French media regarding the summonses was raised by Djibouti. For instance, the facsimile containing the 17 May 2005 summons had been sent at 3.51 p.m., and was publicly reported by *Agence France-Presse* at 4.12 p.m. the same day. The Court observed if it had been proven by Djibouti that this confidential information had been passed from the offices of the French judiciary to the media, such an act could have constituted not only a violation of French law, but also a violation by France of its international obligations. But in this case it had not been provided with probative evidence which would establish that the French judicial authorities were the source behind the dissemination of the confidential information.

As for the immunities of State officials, Djibouti claimed that the issuing of summonses as *témoins assistés* to the *procureur de la République* of Djibouti and the Head of National Security violated their immunities. The summonses related to allegations of subornation of perjury. Djibouti initially contended that the *procureur de la République* and the Head of National Security benefited from personal immunities from criminal jurisdiction and inviolability. In this regard, the Court noted:

“that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case” (para. 194).

During the oral proceedings, Djibouti reformulated its claims and asserted that the *procureur de la République* and the Head of National Security were entitled to functional immunities, requesting the Court to acknowledge that “a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as the organ.” This was, in essence, a claim of immunity for the Djiboutian State, from which the *procureur de la République* and the Head of National Security would be said to benefit.

France replied that such a claim would fall to be decided on a case-by-case basis by national judges. As functional immunities are not absolute, it was, in France's view, for the justice system of each country to assess, when criminal proceedings are instituted against an individual, whether, in view of the acts of public authority performed in the context of his duties, that individual should enjoy, as an agent of the State, the immunity from criminal jurisdiction that is granted to foreign States. Since the two senior officials never claimed before the French criminal courts the immunities which Djibouti now claimed on their behalf, France argued the ICJ did not have sufficient evidence available to it to make a decision.

The Court observed that it had never been verified before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of the officials' duties as organs of State. It added that these various claims regarding immunity were not made known to France, whether through diplomatic exchanges or before any French judicial organ, as a ground for objecting to the issuance of the summonses in question (para. 195). At no stage were the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed the International Court, informed by the Government of Djibouti that the acts complained of by France were its *own* acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out. The Court observed that

“the State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.” (Para. 196.)

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Finally, last week the Court issued an Order on Provisional Measures in a case between Mexico and the United States. On 5 June 2008 Mexico filed a Request for interpretation of the 2004 *Avena* Judgment, which had held “that the United States had breached Article 36 of the Vienna Convention on Consular Relations in the cases of 51 Mexican nationals [who had been arrested, tried and sentenced to death in the United States] by failing to inform them . . . of their rights to consular access and assistance”. Mexico’s Request for interpretation related to paragraph 153 (9) of the Judgment, which laid down the remedial obligations incumbent upon the United States, namely “to provide, by means of its own choosing, review and reconsideration of the convictions and sentences” of the Mexican nationals. Mexico claimed dispute had arisen between the Parties as to the scope and meaning of paragraph 153 (9). On the same day, Mexico filed a request for the indication of provisional measures, asserting that, since the Court had rendered the *Avena* Judgment, “requests by the Mexican nationals for the review and reconsideration mandated in their cases . . . ha[d] repeatedly been denied” and that the State of Texas had set the execution date for one of the nationals named in the *Avena* Judgment, Mr. Medellín, on 5 August 2008, while four other Mexican nationals could shortly receive an execution date. Mexico therefore asked the Court to order a stay of those executions pending a final decision of the Court on its Request for interpretation.

The United States argued that there existed no dispute with respect to the meaning and scope of paragraph 153 (9) between itself and Mexico, and, that being so, the Application of Mexico should be dismissed “on grounds of manifest lack of jurisdiction”. The United States emphasized that, like Mexico, it regarded that stated remedy as a clear obligation of result. The Court examined the wording of Article 60, which provides for requests for interpretation, and noted that the French and English versions were not in total harmony: the French uses the word “contestation” while the English refers to a “dispute”. The Court held that the term “contestation” is wider in scope than “différend”, does not require the same degree of opposition and that its underlying concept is more flexible in its application to a particular situation. The Court found that, while it seemed that both Parties regarded paragraph 153 (9) of the *Avena* Judgment “as an international obligation of result”, they nonetheless “apparently [held] different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon all those authorities”. Having found all the other conditions for the issuance of provisional measures were met, the Court ordered the United States to “take all measures necessary to ensure” that the five named Mexican nationals were not executed pending the judgment on the Request for interpretation, unless and until they receive review and reconsideration. We are now moving swiftly ahead with the proceedings on the Request for interpretation.

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This concludes my summary of the judicial activities of the Court over the past year.

In terms of our pending cases, we have concluded hearings on preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. During the oral proceedings the Parties made extensive references to the ILC Articles on State Responsibility. The Judgment is under preparation and the issues are complex. After the Summer, we will be hearing arguments on the merits in a case between Romania and Ukraine concerning maritime delimitation in the Black Sea.

Three new contentious cases were filed with the Court since the beginning of the year. In January, Peru submitted a maritime dispute against Chile. In March, Ecuador instituted proceedings against Colombia concerning the alleged aerial spraying by Colombia of toxic herbicides at locations near and across its border with Ecuador. And, as I mentioned, last month Mexico submitted a *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals* along with a request for the indication of provisional measures. Our current docket therefore stands at 12 cases.

It has been a pleasure to be with you twice this year, once on the occasion of your sixtieth anniversary and again today for the annual address by the President of the ICJ. On behalf of the Court, I wish the best to the Commission for its work in the coming weeks.
