COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DEMANDE EN INTERPRÉTATION DE L'ARRÊT DU 15 JUIN 1962 EN L'AFFAIRE DU *TEMPLE DE PRÉAH VIHÉAR (CAMBODGE c. THAÏLANDE)*

(CAMBODGE c. THAÏLANDE)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

ORDONNANCE DU 18 JUILLET 2011

2011

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 15 JUNE 1962 IN THE CASE CONCERNING THE *TEMPLE OF PREAH VIHEAR (CAMBODIA* v. *THAILAND)*

(CAMBODIA *v.* THAILAND)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER OF 18 JULY 2011

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REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 15 JUNE 1962 IN THE CASE CONCERNING THE *TEMPLE OF PREAH VIHEAR (CAMBODIA* v. *THAILAND)*

(CAMBODIA *v.* THAILAND)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; *Judges* ad hoc Guillaume, Cot; *Registrar* Couvreur.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application instituting proceedings filed in the Registry on 28 April 2011 by the Kingdom of Cambodia (hereinafter "Cam-

bodia"), whereby, referring to Article 60 of the Statute of the Court and Article 98 of the Rules of Court, Cambodia requests the Court to interpret the Judgment it rendered on 15 June 1962 in the case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)* (hereinafter the "1962 Judgment");

Makes the following Order:

1. Whereas, in its Application, Cambodia states that, in the first paragraph of the operative clause of the 1962 Judgment, the Court declared that "the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia"; whereas it believes that the Court could not have reached such a conclusion if it had not first recognized that a legally established frontier existed between the two Parties in the area in question; whereas it implies that, in the reasoning of the 1962 Judgment, the Court considered that the two Parties had, by their conduct, recognized the line on the map in Annex I to Cambodia's Memorial (hereinafter the "Annex I map"), a map drawn up in 1907 by the Franco-Siamese Mixed Commission, as representing the frontier between Cambodia and the Kingdom of Thailand (hereinafter "Thailand") in the area of the Temple of Preah Vihear; and whereas it recalls that, according to the jurisprudence of the Court, while in principle any request for interpretation must relate to the operative part of the judgment, it can also relate to those reasons for the judgment which are inseparable from the operative part;

2. Whereas, in its Application, Cambodia states that, in the second paragraph of the operative clause of the 1962 Judgment, the Court declared that "Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory"; whereas, according to Cambodia, this obligation derives from the fact that the Temple of Preah Vihear and its vicinity are situated in territory under Cambodian sovereignty, as recognized by the Court in the first paragraph of the operative clause, and "goes beyond a withdrawal from only the precincts of the Temple itself and extends to the area of the Temple in general"; and whereas Cambodia argues that the setting forth of this obligation in the operative clause of the Judgment indicates that it must be understood as a general and continuing obligation incumbent upon Thailand not to advance into Cambodian territory;

3. Whereas, according to Cambodia, Thailand believes that Cambodia's sovereignty is confined to the Temple and does not extend to the area surrounding it, authorizing Thailand to claim sovereignty over that area and to occupy it; whereas Cambodia claims that Thailand considers that the frontier in the area of the Temple has not been recognized by the Court and has still to be determined in law; whereas Cambodia asserts that, in the first paragraph of the operative clause of the 1962 Judgment, the Court clearly refused to confine Cambodia's sovereignty solely to the Temple, by determining the ownership of the latter "on the basis of the sovereignty over the

territory in which the Temple is situated"; and whereas a dispute therefore exists, according to Cambodia, as to the meaning and scope of the 1962 Judgment, in particular with regard to the extent of Cambodia's sovereignty;

4. Whereas, in its Application, Cambodia maintains that the jurisdiction of the Court to entertain a request for interpretation of one of its judgments is based directly on Article 60 of the Statute, which stipulates that, "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party";

5. Whereas, at the end of its Application, Cambodia presents the following request:

> "Given that 'the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia' (first paragraph of the operative clause), which is the legal consequence of the fact that the Temple is situated on the Cambodian side of the frontier, as that frontier was recognized by the Court in its Judgment, and on the basis of the facts and legal arguments set forth above, Cambodia respectfully asks the Court to adjudge and declare that:
>
> The obligation incumbent upon Thailand to 'withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory' (second paragraph of the operative clause) is a particular consequence of the general and continuing obligation to respect the integrity of the territory of Cambodia, that territory having been delimited in the area of the Temple and its vicinity by the line on the Annex I map, on which the Judgment of the Court is based";

6. Whereas on 28 April 2011, having filed its Application, Cambodia, referring to Article 41 of the Statute and Article 73 of the Rules of Court, also submitted a request for the indication of provisional measures in order to "cause [the] incursions onto its territory [by Thailand] to cease" pending the Court's ruling on the request for interpretation of the 1962 Judgment;

7. Whereas, in its request for the indication of provisional measures, Cambodia refers to the basis for the Court's jurisdiction invoked in its Application (see paragraph 4 above);

8. Whereas, in the said request, Cambodia claims that, since 22 April 2011, serious armed incidents have occurred in the area of the Temple of Preah Vihear and at several locations situated along the boundary between Cambodia and Thailand, and that those incidents have caused fatalities, injuries and the evacuation of local inhabitants; and whereas Cambodia contends that Thailand is responsible for those incidents;

9. Whereas, in its request, Cambodia asserts that, if that request were to be rejected and if Thailand persisted in its conduct, the damage caused to the Temple of Preah Vihear, as well as the loss of life and human suffering as a result of those armed clashes, would become worse;

10. Whereas Cambodia adds that "[m]easures are urgently required, both to safeguard [its] rights . . . pending the Court's decision — rights relating to its sovereignty, its territorial integrity and to the duty of non-interference incumbent upon Thailand — and to avoid aggravation of the dispute";

11. Whereas, at the end of its request for the indication of provisional measures, Cambodia asks the Court to indicate the following provisional measures pending the delivery of its judgment on the request for interpretation:

"— an immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory situated in the area of the Temple of Preah Vihear;
— a ban on all military activity by Thailand in the area of the Temple of Preah Vihear;
— that Thailand refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings";

and whereas it asks the Court, on account of the gravity of the situation, to consider its request for the indication of provisional measures as a matter of urgency;

12. Whereas, on 28 April 2011, the date on which the Application and the request for the indication of provisional measures were filed in the Registry, the Registrar informed the Thai Government of the filing of these documents and forthwith sent it signed originals thereof, pursuant to Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of this filing;

13. Whereas, on 4 May 2011, the Registrar informed the Parties that the Court, pursuant to Article 74, paragraph 3, of the Rules of Court, had fixed 30 May 2011 as the opening date for the oral proceedings on the request for the indication of provisional measures;

14. Whereas, pending the notification provided for by Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court by transmission of the printed bilingual text of the Application to the Members of the United Nations, the Registrar informed those States of the filing of the Application and its subject, and of the filing of the request for the indication of provisional measures;

15. Whereas, since the Court includes upon the Bench no judge of the nationality of the Parties, each of them proceeded, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc* in the case; whereas Cambodia chose Mr. Gilbert Guillaume for this purpose and Thailand chose Mr. Jean-Pierre Cot;

16. Whereas, at the public hearings held on 30 and 31 May 2011, in accordance with Article 74, paragraph 3, of the Rules of Court, oral observations on the request for the indication of provisional measures were presented by:

On behalf of Cambodia: H.E. Mr. Hor Namhong, *Agent*,
Sir Franklin Berman,
Mr. Jean-Marc Sorel;

On behalf of Thailand: H.E. Mr. Virachai Plasai, *Agent*,
Mr. Alain Pellet,
Mr. James Crawford,
Mr. Donald McRae;

whereas, during the hearings, a question was put by a Member of the Court to both Parties, to which replies were given in writing after the closure of the oral proceedings; and whereas each Party submitted to the Court its comments on the replies given by the other Party to that question;

* * *

17. Whereas, at the end of its second round of oral observations, the Kingdom of Cambodia asked the Court to indicate the following provisional measures:

> "— an immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory situated in the area of the Temple of Preah Vihear;
> — a ban on all military activity by Thailand in the area of the Temple of Preah Vihear;
> — that Thailand refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings";

18. Whereas, at the end of its second round of oral observations, the Kingdom of Thailand asked the Court,

> "[i]n accordance with Article 60 of the Rules of Court and having regard to the request for the indication of provisional measures of the Kingdom of Cambodia and its oral pleadings . . . to remove the case introduced by the Kingdom of Cambodia on 28 April 2011 from the General List";

* * *

DISPUTE AS TO THE MEANING OR SCOPE OF THE 1962 JUDGMENT AND JURISDICTION OF THE COURT

19. Whereas, when it receives a request for the indication of provisional measures in the context of proceedings for interpretation of a judgment under Article 60 of the Statute, the Court has to consider whether

the conditions laid down by that Article for the Court to entertain a request for interpretation appear to be satisfied;

20. Whereas Article 60 provides that: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party"; and whereas this provision is supplemented by Article 98 of the Rules of Court, paragraph 1 of which reads: "In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation . . ."';

21. Whereas the Court's jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case; whereas it follows that, even if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a request for interpretation provided that there is a "dispute as to the meaning or scope" of any judgment rendered by it; whereas the Court may indicate provisional measures in the context of proceedings for interpretation of a judgment only if it is satisfied that there appears prima facie to exist a "dispute" within the meaning of Article 60 of the Statute; and whereas, at this stage, it need not satisfy itself in a definitive manner that such a dispute exists;

22. Whereas a dispute within the meaning of Article 60 of the Statute must be understood as a difference of opinion or views between the parties as to the meaning or scope of a judgment rendered by the Court; and whereas the existence of such a dispute does not require the same criteria to be fulfilled as those determining the existence of a dispute under Article 36, paragraph 2, of the Statute (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-12; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 325, para. 53);

23. Whereas, moreover, it is established that a dispute within the meaning of Article 60 of the Statute must relate to the operative clause of the judgment in question and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative clause (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 35, para. 10; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 323, para. 47);

* *

24. Whereas the Court must now ascertain whether a dispute appears to exist between the Parties in the present case, within the meaning of Article 60 of the Statute;

25. Whereas Cambodia asserts that a dispute exists between the Parties as to the meaning and scope of the 1962 Judgment in three respects;

26. Whereas Cambodia argues, first, that the conclusion reached by the Court in the first paragraph of the operative clause of the 1962 Judgment, in which it asserts that the Temple "is situated in territory under the sovereignty of Cambodia", and the conclusion which it reaches "in consequence" in the second paragraph, namely that Thailand "is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory", are based on the Court's prior recognition, in the reasoning of the Judgment, of the frontier line between Cambodia and Thailand in the area of the Temple of Preah Vihear, as represented by the line on the Annex I map; and whereas, according to Cambodia, Thailand disputes this interpretation of the 1962 Judgment;

27. Whereas Cambodia maintains, secondly, that a dispute exists between the Parties as to the meaning and scope of the phrase "vicinity on Cambodian territory" used in the second paragraph of the operative clause of the 1962 Judgment to designate the area from which the Thai forces were obliged to withdraw; whereas, according to Cambodia, Thailand, believing that the frontier in the area of the Temple has not been established, is laying claim to "territory beyond the strict precincts of the Temple" and occupying that area regardless of the Judgment, in particular the second paragraph of the operative clause;

28. Whereas Cambodia argues, thirdly, that a dispute exists as to whether, as it claims, the obligation deriving from the second paragraph of the operative clause of the 1962 Judgment is of a general and continuing character, in so far as it is the consequence of the obligation incumbent upon Thailand not to infringe Cambodia's territorial sovereignty in the area of the Temple;

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29. Whereas Thailand maintains that there is no dispute as to the meaning or scope of the 1962 Judgment; whereas it does not dispute the fact that the Temple of Preah Vihear is situated in Cambodian territory, as is recognized in the first paragraph of the operative clause of that Judgment; whereas it claims furthermore not to dispute the fact that Thailand was under an obligation, pursuant to the second paragraph of the operative clause, to withdraw its military forces from the Temple or from its vicinity in so far as those forces were situated in Cambodian territory; whereas it asserts that this "instantaneous" obligation has been fully met by Thailand and cannot give rise to an interpretative judgment; and whereas Thailand maintains, in consequence, that the Court manifestly

lacks jurisdiction "to rule on Cambodia's request for interpretation" and, therefore, to indicate the provisional measures requested;

30. Whereas Thailand claims that the sole aim of Cambodia's Application is to have the Court decide that the frontier between the two countries derives from the Annex I map; whereas Thailand observes that while, in the reasoning of its 1962 Judgment, the Court did indeed base itself on the Annex I map in order to decide that the Temple was situated in Cambodian territory, it did not deduce that the entire frontier in this area derived from that map; and whereas Thailand further notes that the Court clearly refused to rule, in the operative clause of its Judgment, on Cambodia's submissions to it regarding both the legal status of the Annex I map and the frontier line in the disputed area;

*

31. Whereas, in the light of the positions adopted by the Parties, a difference of opinion or views appears to exist between them as to the meaning or scope of the 1962 Judgment; whereas this difference appears to relate, in the first place, to the meaning and scope of the phrase "vicinity on Cambodian territory" used in the second paragraph of the operative clause of the Judgment; whereas this difference of opinion or views appears to relate, next, to the nature of the obligation imposed on Thailand, in the second paragraph of the operative clause of the Judgment, to "withdraw any military or police forces, or other guards or keepers", and, in particular, to the question of whether this obligation is of a continuing or an instantaneous character; and whereas this difference of opinion or views appears to relate, finally, to the question of whether the Judgment did or did not recognize with binding force the line shown on the Annex I map as representing the frontier between the two Parties; whereas the Permanent Court of International Justice previously had occasion to state that a difference of opinion as to whether a particular point has or has not been decided with binding force also constitutes a case which comes within the terms of Article 60 of the Statute (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 11-12);

32. Whereas a dispute thus appears to exist between the Parties as to the meaning or scope of the 1962 Judgment, and whereas it therefore appears that the Court may, pursuant to Article 60 of the Statute, entertain the request for interpretation of the said Judgment submitted by Cambodia; whereas, in consequence, the Court cannot accede to the request by Thailand that the case be removed from the General List; and whereas there is a sufficient basis for the Court to be able to indicate the provisional measures requested by Cambodia, if the necessary conditions are fulfilled;

* *

PLAUSIBLE CHARACTER OF THE ALLEGED RIGHTS IN THE PRINCIPAL REQUEST AND LINK BETWEEN THESE RIGHTS AND THE MEASURES REQUESTED

33. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending the decision of the Court; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong to either party; whereas the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53); and whereas, in proceedings under Article 60 of the Statute, this supposes that the rights which the party requesting provisional measures claims to derive from the judgment in question, in the light of its interpretation of that judgment, are at least plausible;

34. Whereas, moreover, a link must be established between the alleged rights and the provisional measures sought to protect them (see *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 327, para. 58); and whereas, in proceedings under Article 60 of the Statute, this supposes that there is a link between the provisional measures requested by a party and the rights which it claims to derive from the judgment in question, in the light of the interpretation it gives to that judgment;

* *

Plausible Character of the Alleged Rights in the Principal Request

35. Whereas Cambodia contends that, in order to demonstrate the plausible character of the rights which it alleges in its request for interpretation and which it is seeking to protect — namely, the right to respect for its sovereignty in the area of the Temple of Preah Vihear and, more generally, its right to territorial integrity —, it is sufficient for it to establish that the existence of these rights may reasonably be argued; and whereas Cambodia points out that these rights are plausible in a number of respects, and in particular because they were determined with binding force by a judgment of the Court;

*

36. Whereas Thailand maintains that Cambodia, in order to establish the violation of the rights it claims to possess under the 1962 Judgment, refers

to incidents that occurred at locations some distance from the Temple; whereas it asserts that, no matter how the 1962 Judgment is construed, the Court did not decide anything about such incidents or the localities where they occurred; whereas, according to Thailand, Cambodia has no plausible right under Article 60 of the Statute to obtain an interpretation in respect of those incidents; whereas, moreover, the rights invoked in the request for interpretation must be based on the facts examined in the 1962 Judgment and not on facts subsequent to that Judgment; whereas Thailand claims that the rights invoked by Cambodia in its request nonetheless concern facts which took place long after the 1962 Judgment; and whereas, therefore, according to Thailand, such rights are not plausible for the purpose of the present request for the indication of provisional measures;

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37. Whereas it should, at the outset, be made clear that Article 60 of the Statute does not impose any time-limit on requests for interpretation; whereas the Court may entertain a request for interpretation in so far as there exists a dispute as to the meaning or scope of a judgment; and whereas such a dispute can, in itself, certainly arise from facts subsequent to the delivery of that judgment;

38. Whereas, at this stage in the proceedings, the Court does not have to rule definitively on the interpretation put forward by Cambodia of the 1962 Judgment and on the rights it claims to derive therefrom; and whereas, for the purposes of considering the request for the indication of provisional measures, the Court need only determine whether those rights are at least plausible;

39. Whereas, in the operative clause of its 1962 Judgment, the Court declared in particular that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia, and that Thailand was under an obligation to withdraw any military forces stationed at the Temple or in its vicinity on Cambodian territory; whereas the interpretation of the 1962 Judgment put forward by Cambodia in order to assert its rights — namely, the right to respect for its sovereignty in the area of the Temple of Preah Vihear and its right to territorial integrity — is that the Court was only able to reach these conclusions once it had recognized the existence of a frontier between the two States and found that the Temple and its "vicinity" were on the Cambodian side of that frontier; whereas, according to Cambodia, the phrase "vicinity on Cambodian territory" includes the area surrounding the precincts of the Temple; and whereas, consequently, in Cambodia's opinion, Thailand has a continuing obligation not to infringe Cambodia's sovereignty over that area;

40. Whereas the rights claimed by Cambodia, in so far as they are based on the 1962 Judgment as interpreted by Cambodia, are plausible;

41. Whereas this conclusion does not prejudge the outcome of the main proceedings; whereas it is nonetheless sufficient for the purposes of considering the present request for the indication of provisional measures;

* *

Link between the Alleged Rights and the Measures Requested

42. Whereas Cambodia maintains that the aim of the provisional measures requested is to protect rights which it invokes in its request for interpretation of the 1962 Judgment, namely, its sovereignty over the area of the Temple of Preah Vihear and, more generally, its territorial integrity; whereas it notes that Thailand's territorial claims cover the entire area of the Temple, beyond the strict precincts of the latter, and that these claims are reflected in the presence of Thai armed forces in that area, forces which Cambodia requests be withdrawn immediately and unconditionally; whereas Cambodia also asks the Court to indicate the measures requested so as to avoid an aggravation of the dispute in the principal proceedings; and whereas it is upon the rights thus asserted by Cambodia that the Court, in Cambodia's view, must focus in its consideration of the request for the indication of provisional measures;

*

43. Whereas Thailand claims that Cambodia's request for the indication of provisional measures does not meet the condition whereby a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought; whereas Thailand asserts in particular that Cambodia's request refers to a matter that cannot be the subject of an interpretation — the status of the Annex I map — and that it is based on allegations made in respect of facts that occurred in an area remote from that of the Temple of Preah Vihear and, consequently, unrelated to the area covered by the request for interpretation;

*

44. Whereas, in proceedings on interpretation, the Court is called upon to clarify the meaning and the scope of what the Court decided with binding force in a judgment (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Judgment, I.C.J. Reports 1950*, p. 402; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 223, para. 56; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 328, para. 63); whereas Cambodia is seeking clarification of the meaning and the scope of what the Court decided with binding force in the 1962 Judgment in the case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)*; whereas, in its Appli-

cation, Cambodia requests the Court to specify the meaning and scope of the operative clause of that Judgment in respect of the extent of its sovereignty in the area of the Temple (see paragraph 5 above); and whereas, in its request for the indication of provisional measures (see paragraph 11 above), Cambodia, pending the Court's final decision, is precisely seeking the protection of the rights to sovereignty over this area which it claims to derive from the operative clause of the 1962 Judgment;

45. Whereas the provisional measures sought thus aim to protect the rights that Cambodia invokes in its request for interpretation; and whereas the necessary link between the alleged rights and the measures requested is therefore established;

* * *

RISK OF IRREPARABLE PREJUDICE; URGENCY

46. Whereas the Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings (see, for example, *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 328, para. 65; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21, para. 63);

47. Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision (see, for example, *ibid.*, pp. 21-22, para. 64); and whereas the Court must consider whether, in these proceedings, such a risk exists;

* *

48. Whereas Cambodia refers to numerous armed incidents which allegedly took place as from 15 July 2008 along the frontier between the two States in the area of the Temple of Preah Vihear after the Temple was included on the UNESCO World Heritage List; whereas these armed incidents allegedly caused damage to the Temple, as well as loss of human life and bodily injuries; whereas Cambodia points out that, in a letter dated 21 July 2008 and addressed to the President of the Security Council, the Permanent Representative of Thailand to the United Nations stated that his Government claimed an area "adjacent" to the Temple of Preah Vihear and indicated that the frontier between Cambodia and Thailand in that

area was the subject of negotiations between the two States; whereas Cambodia also refers to armed incidents which are said to have taken place between the Parties in the area of the Temple in October 2008 and on 2 and 3 April 2009; whereas it adds that armed incidents occurred again between the Parties in that area between 4 and 7 February 2011; whereas Cambodia notes that these incidents led, on its initiative, to a meeting of the Security Council on 14 February 2011, where the Security Council called for a permanent ceasefire to be established between the two Parties and expressed its support for the Association of Southeast Asian Nations (hereinafter "ASEAN") in its efforts to find a solution to the conflict; whereas Cambodia refers in this respect to the proposal by the Chair of ASEAN to send Indonesian observers into the field so as to ensure the said ceasefire, and alleges that this proposal failed because of the conditions laid down by Thailand for its acceptance; whereas Cambodia claims that further incidents took place from 22 April 2011, not only in the area of the Temple of Preah Vihear, but also along the frontier near the Temples of Ta Moan/Ta Muen and Ta Krabei/Ta Kwai, situated approximately 150 kilometres to the west of the Temple of Preah Vihear, while making it clear that these latest incidents are not included in its request for the indication of provisional measures; whereas it maintains that the incidents which took place in the area of the Temple of Preah Vihear, and which are attributable to Thailand, have not only caused irreparable damage to the Temple itself, a UNESCO World Heritage site, but above all have resulted in the loss of human life, bodily injuries and the displacement of local people; and whereas Cambodia therefore requests the Court "to indicate provisional measures in order to stop any more destruction of the Temple once and for all, to prevent further casualties, and to preserve its rights over the area of the Temple of Preah Vihear";

49. Whereas Cambodia maintains that, while Thailand appears to be observing the oral ceasefire negotiated on 28 April 2011, several facts suggest that this situation is fragile and that there is a risk of aggravation of the dispute; and whereas it contends in particular that, since 28 April 2011, the conflict has not ceased but shifted to another frontier area, situated some 150 kilometres to the west of the area of the Temple of Preah Vihear;

50. Whereas Cambodia alleges that, if its request were to be rejected, and if Thailand persisted in its conduct, the damage to the Temple of Preah Vihear, as well as human suffering and loss of life, would become worse; and that measures are urgently required, both to safeguard the rights of Cambodia and to avoid aggravation of the dispute;

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51. Whereas, according to Thailand, the numerous armed incidents which have taken place in the area of the Temple were provoked by the

Cambodian armed forces and caused loss of human life, bodily injuries, the displacement of local people, and material damage in Thailand's territory; whereas it claims that the Thai armed forces responded to these attacks "with restraint and proportionality", duly exercising Thailand's right to self-defence; whereas it observes in particular that, between 4 and 7 February 2011, armed incidents took place at several locations along the frontier or in Thai territory within a radius of approximately 10 kilometres from the Temple of Preah Vihear; whereas it adds that similar incidents took place between 22 April and 3 May 2011 near the Temples of Ta Krabei/Ta Kwai and Ta Moan/Ta Muen, situated 150 kilometres from the Temple of Preah Vihear, and observes that these temples, because of their distance from the Temple of Preah Vihear, are not, however, covered by the 1962 Judgment; whereas Thailand nevertheless acknowledges that, on 26 April 2011, a 20-minute exchange of fire took place between the two sides some 2 kilometres from the Temple of Preah Vihear; and whereas it maintains that the oral ceasefire of 28 April 2011 concerns the sector of the Ta Krabei/Ta Kwai and Ta Moan/Ta Muen Temples, and not that of the Temple of Preah Vihear;

52. Whereas, according to Thailand, the only incidents that Cambodia can rely on for the purposes of a provisional measure are the incidents that took place in February 2011, "almost three months before the request for provisional measures was made", the exchange of fire on 26 April 2011, which resulted in no casualties, and the other incidents in April 2011 which occurred well beyond the area to which the request for interpretation relates; whereas Thailand further maintains that a team of Indonesian observers was created to help monitor the military situation between the two States in the border area; and whereas it concludes from the foregoing that there is no real and imminent risk that irreparable prejudice may be caused to the rights in dispute;

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53. Whereas, at this stage in the proceedings, the Court is only required to consider whether the circumstances brought to its attention call for the indication of provisional measures; whereas, in this case, the Court notes that it is apparent from the case file that incidents have occurred on various occasions between the Parties in the area of the Temple of Preah Vihear; whereas it observes that, since 15 July 2008, armed clashes have taken place and have continued to take place in that area, in particular between 4 and 7 February 2011, leading to fatalities, injuries and the displacement of local inhabitants; whereas damage has been caused to the Temple and to the property associated with it; whereas the Court notes that, on 14 February 2011, the Security Council called for a permanent ceasefire to be established between the two Parties and expressed its support for ASEAN in seeking a solution to the conflict; whereas the Chair of ASEAN therefore proposed to the Parties that observers be deployed along their boundary, but whereas this proposal was not put

into effect, however, because the Parties failed to agree on how it should be implemented; and whereas, in spite of these attempts to settle the dispute peacefully, there was a further exchange of fire between the Parties on 26 April 2011 in the area of the Temple;

54. Whereas the Court observes that the existence of a ceasefire "does not . . . deprive [it] of the rights and duties pertaining to it in the case brought before it" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 22, para. 37); and whereas it is therefore not obliged to establish, at this stage in the proceedings, whether the oral ceasefire negotiated between the Parties' military commanders on 28 April 2011 did or did not cover the area of the Temple of Preah Vihear;

55. Whereas the rights which Cambodia claims to hold under the terms of the 1962 Judgment in the area of the Temple might suffer irreparable prejudice resulting from the military activities in that area and, in particular, from the loss of life, bodily injuries and damage caused to the Temple and the property associated with it;

56. Whereas there are competing claims over the territory surrounding the Temple; whereas the situation in the area of the Temple of Preah Vihear remains unstable and could deteriorate; whereas, because of the persistent tensions and absence of a settlement to the conflict, there is a real and imminent risk of irreparable prejudice being caused to the rights claimed by Cambodia; and whereas there is urgency;

* * *

57. Whereas, taking account of the conclusions it has reached above, the Court considers that it can, in this case, indicate provisional measures, as provided for in Article 41 of its Statute, and that the circumstances require it to do so;

* * *

58. Whereas the Court recalls that it has the power under its Statute to indicate measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request, as Article 75, paragraph 2, of the Rules of Court expressly states, and whereas it has already exercised this power on several occasions (see, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 24-25, para. 76);

59. Whereas, when it is indicating provisional measures for the purpose of preserving specific rights, the Court, independently of the parties'

requests, also possesses the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, pp. 22-23, para. 41; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 44; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 26, para. 83);

* *

60. Whereas the Court has considered the terms of the provisional measures requested by Cambodia; whereas it does not find, in the circumstances of the case, that the measures to be indicated must be the same as or limited to those sought by Cambodia; and whereas the Court, having considered the material before it, deems it appropriate to indicate measures addressed to both Parties;

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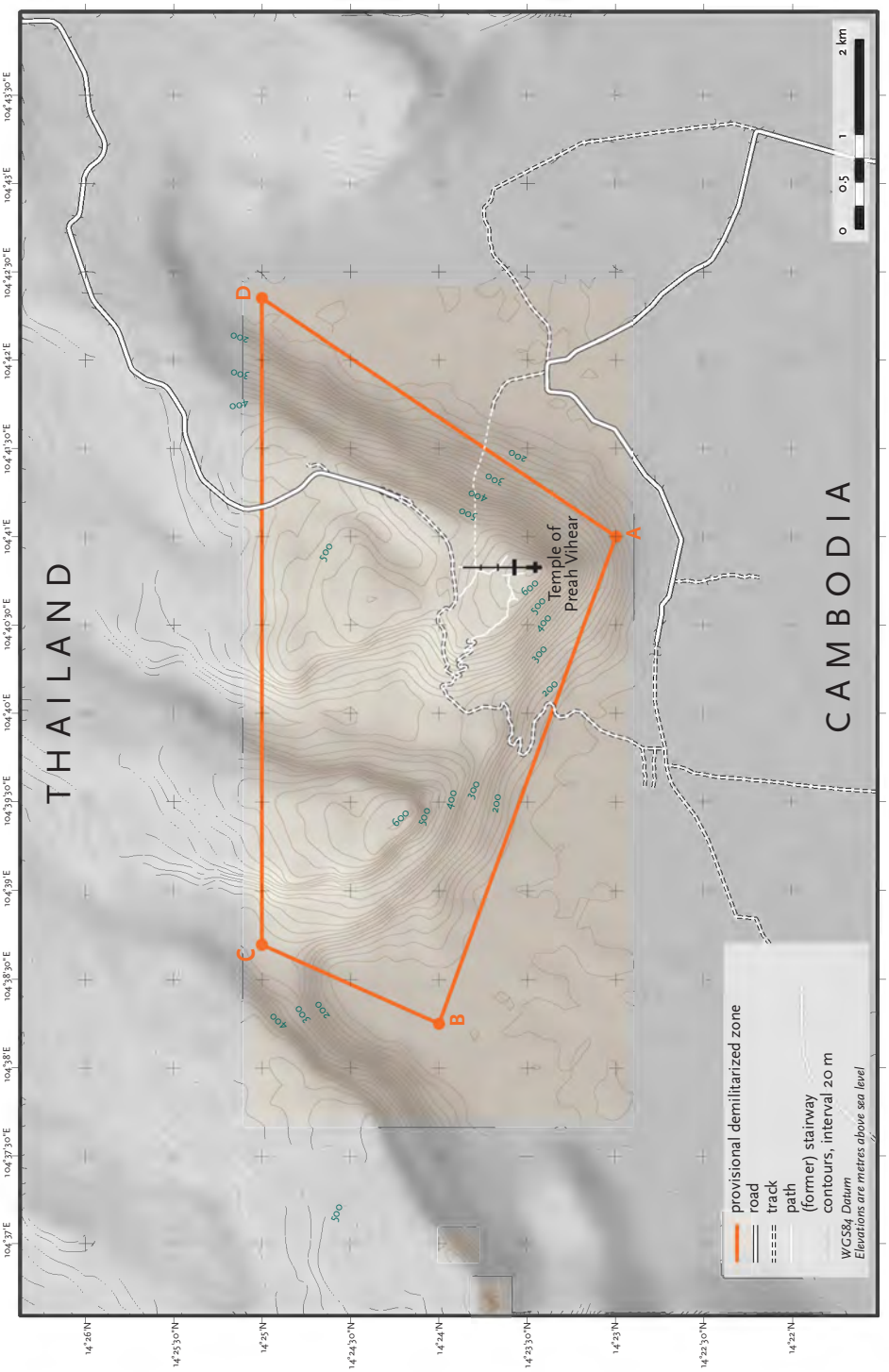
61. Whereas the area of the Temple of Preah Vihear has been the scene of armed clashes between the Parties and whereas the Court has already found that such clashes may reoccur; whereas it is for the Court to ensure, in the context of these proceedings, that no irreparable damage is caused to persons or property in that area pending the delivery of its Judgment on the request for interpretation; whereas, moreover, in order to prevent irreparable damage from occurring, all armed forces should be provisionally excluded from a zone around the area of the Temple, without prejudice to the judgment which the Court will render on the request for interpretation submitted by Cambodia; and whereas, therefore, the Court considers it necessary, in order to protect the rights which are at issue in these proceedings, to define a zone which shall be kept provisionally free of all military personnel, without prejudice to normal administration, including the presence of non-military personnel necessary to ensure the security of persons and property;

62. Whereas this provisional demilitarized zone shall be delimited by straight lines connecting the following points, the co-ordinates of which are calculated on the basis of the WGS 84 system: point A, situated at latitude 14° 23′ N and longitude 104° 41′ E; point B, situated at latitude 14° 24′ N and longitude 104° 38′ 15″ E; point C, situated at latitude 14° 25′ N and longitude 104° 38′ 40″ E; and point D, situated at latitude 14° 25′ N and longitude 104° 42′ 20″ E (see sketch-map below);

SKETCH–MAP OF PROVISIONAL DEMILITARIZED ZONE IDENTIFIED BY THE COURT

This sketch-map has been prepared for illustrative purposes only



63. Whereas both Parties, in order to comply with this Order, shall withdraw all military personnel currently present in the zone as thus defined; whereas both Parties shall refrain not only from any military presence within that provisional demilitarized zone, but also from any armed activity directed at the said zone;

64. Whereas, in addition, both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone;

65. Whereas it is not disputed that the Temple of Preah Vihear itself belongs to Cambodia; whereas Cambodia must, in all circumstances, have free access to the Temple and must be able to provide fresh supplies to its non-military personnel; and whereas Thailand must take all necessary measures in order not to obstruct such free and uninterrupted access;

66. Whereas the Court reminds the Parties that the Charter of the United Nations imposes an obligation on all Member States of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; whereas the Court further recalls that United Nations Member States are also obliged to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; and whereas both Parties are obliged, by the Charter and general international law, to respect these fundamental principles of international law;

* * *

67. Whereas the Court's orders "on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations with which both Parties are required to comply (see, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 258, para. 263);

* * *

68. Whereas the decision given in the present proceedings on the request for the indication of provisional measures in no way prejudges any question that the Court may have to deal with relating to the request for interpretation;

* * *

69. For these reasons,

THE COURT,

(A) Unanimously,

Rejects the Kingdom of Thailand's request to remove the case introduced by the Kingdom of Cambodia on 28 April 2011 from the General List of the Court;

(B) *Indicates* the following provisional measures:

(1) By eleven votes to five,

Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at that zone;

IN FAVOUR: *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Guillaume;

AGAINST: *President* Owada; *Judges* Al-Khasawneh, Xue, Donoghue; *Judge* ad hoc Cot;

(2) By fifteen votes to one,

Thailand shall not obstruct Cambodia's free access to the Temple of Preah Vihear or Cambodia's provision of fresh supplies to its non-military personnel in the Temple;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; *Judges* ad hoc Guillaume, Cot;

AGAINST: *Judge* Donoghue;

(3) By fifteen votes to one,

Both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; *Judges* ad hoc Guillaume, Cot;
AGAINST: *Judge* Donoghue;

(4) By fifteen votes to one,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; *Judges* ad hoc Guillaume, Cot;

AGAINST: *Judge* Donoghue;

(C) By fifteen votes to one,

Decides that each Party shall inform the Court as to its compliance with the above provisional measures;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; *Judges* ad hoc Guillaume, Cot;

AGAINST: *Judge* Donoghue;

(D) By fifteen votes to one,

Decides that, until the Court has rendered its judgment on the request for interpretation, it shall remain seised of the matters which form the subject of this Order.

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; *Judges* ad hoc Guillaume, Cot;

AGAINST: *Judge* Donoghue.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eighteenth day of July, two thousand and eleven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

President OWADA appends a dissenting opinion to the Order of the Court; Judge KOROMA appends a declaration to the Order of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Order of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judges XUE and DONOGHUE append dissenting opinions to the Order of the Court; Judge *ad hoc* GUILLAUME appends a declaration to the Order of the Court; Judge *ad hoc* COT appends a dissenting opinion to the Order of the Court.

(Initialled) H.O.
(Initialled) Ph.C.

DISSENTING OPINION OF PRESIDENT OWADA

With regret, I had to vote against the most cardinal section (subparagraph (B) (1)) in the operative part of the Order (para. 69). With a view to clarifying my position as to why I had to vote against this most cardinal part of the Order, I wish to state the reasons for my dissent in this opinion attached to the main Order as follows:

1. A request for the indication of provisional measures is made by one of the parties during the course of the proceedings in the main case as its *incidental proceedings*. As such, the scope of the request and the jurisdiction of the Court to deal with the request is limited by its very nature to being incidental to the main case. The extent of competence of the Court to deal with such a request and to indicate an order if it considers that circumstances so require is to be determined by this fact, both in terms of the scope of the measures that it can indicate and in terms of the jurisdiction it has in indicating such measures.

2. It is my considered view that the present Order, where it indicates that

> "[b]oth Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, *as defined in paragraph 62 of the present Order*, and refrain from any military presence within that zone and from any armed activity directed at that zone" (Order, para. 69 (B) (1); emphasis added),

goes beyond this limit inherent in this essential characteristic of the provisional measures as being incidental to the main dispute.

3. The scope of the provisional measures that may be indicated by the Court in the present proceedings and the jurisdiction to deal with the request for provisional measures have their legal basis in the main case. The main case brought by Cambodia before the Court is "a request for interpretation of [the] Judgment [of the Court] of 15 June 1962 . . . in which [the Court] decided the merits of the *Temple of Preah Vihear* case between Cambodia and the Kingdom of Thailand" (Application, para. 1). The present Order has found that it has jurisdiction to rule on the question of interpretation, to the extent that, under Article 60 of the Statute of the Court, "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party". This is the basis of the jurisdiction of the Court for indicating provisional measures relating to the main case (Order, para. 21), which means that this

defines the limit of the jurisdiction of the Court in indicating provisional measures.

4. It is true that the Court "shall have the power to indicate, if it considers that circumstances so require, *any provisional measures* which ought to be taken to preserve the respective rights of either party" (Statute of the Court, Art. 41, para. 1; emphasis added). In the past case law of the Court, the Court indeed has often indicated, *proprio motu*, to both of the parties to withdraw their forces from the area in dispute or in conflict, "with a view to preventing the aggravation or extension of the dispute whenever it consider[ed] that circumstances so require" (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 18).

5. Out of a total of some 40 Orders of the Court on the indication of provisional measures, there are three cases in which this issue of withdrawal of forces of the parties in the case in question came about and in which the Court did in fact indicate provisional measures to order both of the parties to the dispute to disengage their respective armed forces from potential or actual armed conflict and to withdraw their respective forces from a certain zone specified in the Order. They are:

(a) the case concerning *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 12, para. 32;

(b) the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 49; and

(c) the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 27-28, para. 86.

6. However, in the past cases, the Court indicated, as a provisional measure pending the final outcome of the decision of the Court on the merits in the main case, that: "[b]oth Governments should continue to *observe the ceasefire* instituted by agreement between [the two parties]" (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 12, para. 32 1 (C); emphasis added);

> "[b]oth Governments should withdraw their armed forces to such positions, or behind such lines, as may, within twenty days of the date of the present Order, be determined by an agreement between those Governments, it being understood that the terms of the troop withdrawal will be laid down by the agreement in question and that, failing such agreement, the Chamber will itself indicate them by means of an Order (*ibid.*, para. 32 1 (D));

or that

> "[b]oth Parties should ensure that the presence of any armed forces

> in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to 3 February 1996 (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 49 (3));

or that

> "[e]ach Party shall refrain from sending to, or maintaining *in the disputed territory*, including the *caño*, any personnel, whether civilian, police or security" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (1); emphasis added).

7. In none of these cases has the Court ever gone so far as to order the parties to withdraw from a "provisional demilitarized zone" which is devised artificially by the Court for the purposes of military disengagement of the parties and which comprises part of the territories that indisputably belong to the sovereignty of one or the other of the parties, as it is the case in the present situation.

8. I have no disagreement with the view of the Court adopted in this Order that the Court has the power to indicate provisional measures, which have the binding force upon the parties (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109), provided that certain conditions under Article 41 of the Statute, including the existence of prima facie jurisdiction to deal with the case, are met. For this reason, I embrace the basic proposition of the Court as developed in this Order, including its approach to indicate that "[b]oth Parties shall immediately withdraw their military personnel currently present [in a certain specified zone],. . . and refrain from any military presence within that zone and from any armed activity directed at that zone" (Order, para. 69 (B) (1)), on the condition that that specified *zone* is defined and delimited in a manner consistent with the principle of sovereignty of the parties involved and with the extent of the jurisdiction of the Court as conferred upon it in the specific context of the present case.

9. What I cannot accept, with great regret, is the way in which the Court has decided in an artificial manner to demarcate this "provisional demilitarized zone" without legitimate justification.

What is demarcated in paragraph 62 of the Order for the purpose of setting up a "provisional demilitarized zone" is in my view devoid of legal justification, intruding as it does into part of the territories which indisputably belong to the sovereignty of one or the other of the Parties. In this sense, what this Order prescribes by way of establishing this "provisional demilitarized zone" is qualitatively different as a legal régime from all the other examples that I have referred to above, inasmuch as in all the other precedents that I have cited, what the Court prescribed was to ask the parties to withdraw from the areas the sovereignty of which was being

contested — the areas that constituted the very subject of the dispute in issue. In such a situation where, pending the outcome of the final determination of the Court, the issue of to whom this piece of disputed territory in question belongs is unclear, it is not just reasonable but also clearly within the power and jurisdiction of the Court to indicate to the parties such provisional measures as to disengage their forces only in relation to this disputed piece of territory. By contrast, the present situation is different in nature. The Court is ordering, with binding force, that each of the Parties be compelled to withdraw its forces from a certain portion of its own territory, even if on a provisional basis, over which no one disputes that it has an unfettered sovereignty to exercise.

10. In my view, this clearly goes beyond the power of the Court in relation to the indication of provisional measures under the Statute and the jurisdiction conferred upon the Court with regard to the indication of provisional measures of protection.

11. The legal situation would be quite different, if such provisional measures were taken by the Security Council under Chapter VII of the United Nations Charter "[i]n order to prevent an aggravation of the situation" (Charter, Art. 40). The Security Council is expressly empowered to take such "provisional measures" under the Charter, for the specific purpose referred to in its Article 40. The International Court of Justice is not the Security Council; the Court is not empowered by its Statute, nor authorized by the United Nations, to take measures, even on a provisional basis, which would encroach upon the sovereignty of a State without its consent, either explicit or implicit, even with the best of intentions.

12. I have no doubt whatsoever that the Court has acted in the present case with the best of intentions, emanating from its serious concern that the situation on the ground involved in the case, if unattended, would bring about *a real risk of irreparable prejudice which is present and imminent*.

Indeed, the Order specifically refers to this concern that there is a real risk

> "[that] the area of the Temple of Preah Vihear has been the scene of armed clashes between the Parties . . .; [that] the Court has already found that such clashes may reoccur; [and that] it is for the Court to ensure, in the context of these proceedings, that no irreparable damage is caused to persons or property in that area pending the delivery of its Judgment on the request for interpretation" (para. 61).

13. I share all these concerns of the Court. That is why I am in agreement with the Order, to the extent that it indicates the establishment of *some* "provisional demilitarized zone" compatible with its competence and jurisdiction, as a mechanism for preventing this real risk from becoming a reality. However, this has to be done within the legitimate competence of the Court as the court of law.

14. One view that may be advanced in favour of the establishment of this quadrangular zone artificially drawn on the map rather than the more classical exclusion zone based on the disputed territory is that given the unique geomorphological characteristic of the terrain involved, the demilitarization of the territory in dispute between the Parties may be extremely difficult, if not impossible, to enforce, whereas this artificially created demilitarization zone takes into account the specific topographical features of the area and is therefore more amenable to effective enforcement.

15. While I accept that rationale, I find it difficult to believe that the approach of the proposed zone will be easier to *implement* — not to *enforce* — than the approach based on the "territory in dispute" (see paragraph 9 of this opinion). What appears to be reasonable on the map may not necessarily be reasonable from the viewpoint of implementation on the ground. To my mind, what is at issue in this situation is not the question of *enforcement* of the demilitarized zone by a third party authority, but the feasibility of *implementation* of the demilitarized zone by the Parties. My own view is that as long as the Parties are willing to implement the Order of the Court — and there is no reason to think otherwise — the respective boundaries as claimed by each of the Parties as its own are well known to each of the Parties and easy to implement and observe the injunction prescribed by the Court on demilitarization, whereas the artificial line of demarcation to designate the provisional demilitarization zone may be clear on the map but it may turn out to be difficult for the Parties to implement.

16. In the final analysis, what in my view ensures the adherence of the Parties to the provisional measures prescribed by the Court is not the enforceability of the decision, but rather the legitimacy and persuasiveness based on the reasonableness of the proposition given by the Court. From this point of view, it is regrettable that this quadrangular zone includes more of the territory of one Party under its undisputed sovereignty than that of the other Party, although this imbalance may be wholly explicable and understandable when account is taken of the geomorphological characteristics of the terrain. It is earnestly hoped that this solution indicated by the Court will not lead to a misunderstanding of the intention of the Court in creating a provisional demilitarization zone.

(*Signed*) Hisashi OWADA.

DECLARATION OF JUDGE KOROMA

1. The provisional Order adopted by the Court in this case establishes a *provisional* demilitarized zone that includes within it territory under the undisputed sovereignty of Cambodia, as well as territory under the undisputed sovereignty of Thailand. As pointed out in the Order, the establishment of this provisional zone in no way prejudices the outcome of the Application before the Court. It does not affect the rights claimed by either Party. Rather, the Order is designed to prevent further armed clashes between the Parties that might prejudice the rights of either Party while the case is pending before the Court. I have, accordingly, voted in favour of the Order.

2. Article 41 of the Court's Statute grants the Court the power to indicate provisional measures "which ought to be taken to preserve the respective rights of either party". In my view, when determining the precise nature of the provisional measures to be indicated in a given case, the Court must take into consideration the factual situation, including the existence, nature, and magnitude of an armed conflict between the Parties. The Court must also assess the risk of any further armed conflict occurring while the case is pending that could prejudice the rights of either Party. In other cases which have come before the Court similar to the one under consideration, in which there was a significant risk of further armed conflict between the parties, the Court has indicated provisional measures similar to those indicated in this case in order to preserve the rights of the parties until the case was decided on the merits (see, e.g., *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 49).

3. In the present case, the evidence provided to the Court demonstrated that there had been repeated incidents of armed conflict between the Parties in the area surrounding the Temple in the years and months preceding this Order. In addition, there have been reports of shelling from heavy artillery in the area surrounding the Temple. Taking into consideration these circumstances, the Court decided to create a provisional demilitarized zone of a size adequate to minimize the risk of further armed clashes — including shelling — in the disputed area while the case is pending before the Court.

4. In the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, I voted in favour of the Court's Order regulating the position of the armed forces of the parties with the understanding that the Order would preserve the respective rights of both

parties without prejudging the issue before the Court (*I.C.J. Reports 1996 (I)*, declaration of Judge Koroma, p. 30). In my view, the Court's present Order should accomplish the same objective; however, it bears re-emphasizing that the demilitarized zone created by the Court is only temporary and does not affect the rights claimed by either Party. The Court's Order should therefore be seen as an effort to prevent further armed conflict between the two Parties while preserving the sovereign rights of each of them.

(Signed) Abdul G. KOROMA.

DISSENTING OPINION OF JUDGE AL-KHASAWNEH

I wish, in appending this dissenting opinion, to explain briefly the reasons that led me, not without regret, to vote against operative paragraph 69 (B) (1) of the Order.

Such explanation is all the more called for since I take no issue, in principle, with the premise upon which the Order is predicated, namely that all the conditions necessary for the indication of provisional measures have been met in the present instance. I thus agree that the Court's jurisdiction and the prima facie existence of a dispute within the meaning of Article 60 of the Statute of the Court have both been established and that, likewise, the rights alleged in the principal request are plausible and at risk of irreparable prejudice.

What I question, however, is the link between those plausible rights that ought to be conserved and protected pending a final judgment and one of the measures indicated by the Court, namely the establishment of a "provisional demilitarized zone" around the Temple of Preah Vihear.

What are the rights that need to be urgently protected? According to paragraph 55 of the Order, these are:

> "the rights which Cambodia claims to hold under the terms of the 1962 Judgment in the area of the Temple [that] might suffer irreparable prejudice resulting from the military activities in that area and, in particular, from the loss of life, bodily injuries and damage caused to the Temple and the property associated with it".

It seems plain to me (and I leave aside the finer points as to the Temple itself being incontestably Cambodian and hence outside the purview of the principal request) that those rights can be adequately and effectively protected by indicating a provisional measure directing both Parties to refrain from any military activities in the area around the Temple without necessarily defining that area and much less by establishing a "provisional demilitarized zone" as is presently contained in the Order.

The provisional demilitarized zone, as defined in the Order, contains parts of territory indisputably Cambodian or indisputably Thai as well as parts where sovereignty is at issue. I see no justification for asking each of the two Parties to withdraw its respective troops from the areas that appertain to it. Therefore, the measure is excessive since the protection to be given to the rights at issue can be achieved adequately and effectively by directing the Parties that they must strictly refrain from any military activities.

Besides, the concept of a demilitarized zone has been condemned to obsolescence by modern developments in the fields of artillery, missiles and other forms of projectiles.

The Court's power to indicate measures is wide, and rightly so, but because of this it should be exercised with caution. The imposition of a demilitarized zone, the spatial definition of which is not defined on the basis of a discernible criterion, is therefore both unnecessary for the protection of the rights at issue and infinitely open to accusations of arbitrariness. A more sensible approach would have been to restrict the provisional measures to a strict observation of a ceasefire in the area of the Temple, coupled with a measure directing Thailand not to obstruct access to the precincts of the Temple and a measure directing the two Parties to allow the observers, appointed by ASEAN, to access the Temple area.

(Signed) Awn Shawkat AL-KHASAWNEH.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. Introduction

1. I have concurred, with my vote, for the adoption today, 18 July 2011, by the International Court of Justice (I.C.J.), of the present Order of provisional measures of protection in the case of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*. Given the great importance that I attribute to the issues dealt with in the present Order, or else underlying it, I feel obliged to leave on the records of this transcendental case (as I perceive it) the foundations of my own personal position on them. I do so moved by a sense of duty in the exercise of the international judicial function, even more so as some of the lessons I extract from the present decision of the Court are not explicitly developed and stated in the present Order. This appears to be, in my view, a unique case, lodged again with the Court after half a century; it discloses, in my view, a series of elements for reconsideration not only of the spatial, but also the temporal dimensions, which can hardly pass unnoticed.

2. This being so, I shall develop my reflections that follow pursuant to the following sequence: *(a)* the passing of time and the *chiaroscuro* of law; *(b)* the density of time; *(c)* the temporal dimension in international law; *(d)* the search for timelessness; *(e)* from timelessness to timeliness; *(f)* the passing of time and the *chiaroscuro* of existence; *(g)* time, legal interpretation, and the nature of legal obligation; *(h)* from time to space: territory and people together (in Cambodia's and Thailand's submissions); *(i)* the effects of provisional measures of protection in the *cas d'espèce* (encompassing the protection of people in territory; the prohibition of use or threat of force; and the protection of cultural and spiritual world heritage); and *(j)* provisional measures of protection, beyond the strict territorialist approach. The way will then be paved for the presentation of my final considerations, *sub specie aeternitatis*.

II. The Passing of Time: The *Chiaroscuro* of Law

3. The case of the *Temple of Preah Vihear* brings to the fore, now in May 2011, as it did half a century ago, in 1961-1962, the multifaceted relationship between time and law, an issue which discloses the *chiaroscuro* of international law as well as, ultimately, of existence itself (cf. *infra*). One cannot assume a linear progress in the regulations of relations among States *inter se*, or among human beings *inter se*, or among States and human beings. The present requests for provisional measures and for interpretation in respect of the Judgment of this Court, of 15 June 1962, bear witness of the element of factual unpredictability of endeavours of peaceful settlement, to guard us against any assumption as to definitive progress achieved in those relations among States or among human beings, or among the former and the latter.

4. In a public sitting before this Court of half a century ago, precisely that of the morning of 5 March 1962, in the same case of the *Temple of Preah Vihear*, the learned jurist Paul Reuter (who happened to be one of the counsel for Cambodia), pondered that the passing of time is not linear, nor is it always the same either; it contains variations. For example, in his perception, "[a]t certain hours, in the splendour of the Mediterranean, time seems to have stopped its flight and maybe things are down to black and white"[1].

5. May I add, in this connection, that, to someone (like myself) from, and in, the South Atlantic, for example, the *chiaroscuro* also exists, but not so sharply distinguished as in the summer of the Mediterranean four seasons. There, in the South Atlantic, in the two — the dry and the rainy — seasons, the *chiaroscuro* evolves in greater grey shades. Yet, the *chiaroscuro* falls thereupon as well. All regions of the world have their own *chiaroscuro*, each one with its own characteristics, and the region of the Temple of Preah Vihear is no exception to that. Ancient cultures, in distinct parts of the world, grasped the mystery of the passing of time in distinct ways, as in the never-ending succession of the *chiaroscuro*.

6. The *chiaroscuro* of international law itself was, coincidentally, referred to in the public sitting of 1 March 1962, in the same case of the *Temple of Preah Vihear*; in the opening of the sitting, the then President of the Court, Judge B. Winiarski, recalled that, forty years earlier, precisely on 15 February 1922, the former Permanent Court of International Justice held its first sitting; ever since, and throughout four decades, "the element of permanency" of international justice had taken shape[2], further fostered by the acceptance by States of numerous compromissory clauses, and the fact that the successor ICJ became "the principal judicial organ of the United Nations", while remaining, within the framework of the UN, an independent judicial organ. And he added that:

> "The function of the Court is to state the law as it is; it contributes to its development, but in the manner of a judicial body, for instance when it analyses out a rule contained by implication in another, or when, having to apply a rule to a specific instance, which is always individualized and with its own clear-cut features, it gives precision to the meaning of that rule, which is sometimes surrounded by (. . .) the *chiaroscuro* of international law."[3]

7. There was only this brief reference to such *chiaroscuro* in Judge Winiarski's message in 1962; he did not elaborate on it, the reference was sufficient. Thus, four decades of operation of international justice had not removed the *chiaroscuro* of international law. Today, five other decades

[1] *I.C.J. Pleadings, Temple of Preah Vihear (Cambodia* v. *Thailand)*, Vol. II, p. 525.
[2] *Ibid.*, p. 121.
[3] *Ibid.*, p. 122.

later, that *chiaroscuro* remains present, as disclosed by the case of the *Temple of Preah Vihear* brought again before this Court. The *chiaroscuro* of law appears enmeshed with the passing of time. This is one of the aspects of the complex relationship between time and law, which, despite much that has been written on it, keeps on challenging legal thinking in our days.

III. The Density of Time

8. Turning attention to time and law, in his aforementioned *plaidoirie* of 5 March 1962, in the case of the *Temple of Preah Vihear*, Paul Reuter saw it fit to add:

> "Time exercises a powerful influence over the establishment and consolidation of legal situations . . . how does international law measure lapse of time? It is quite clear that in international law there exists no time-limit such as national bodies of law recognize . . . There are those who think that this situation constitutes an imperfection of international law. We do not at all think so. On the contrary, we think that this uncertainty gives to international law a flexibility that enables it to be adapted to the varying character of specific circumstances."[4]

9. Three such circumstances were identified by Reuter, namely: the matters at issue, the "density" of time, and the dynamics of the relations between the States concerned[5]. In his view, "[i]n the first place the length of the time-limit depends on the matters involved. There are matters in regard to which security and legal acts correspond to an imperative requirement of society"[6] (e.g., territorial or maritime spaces). It is, however, in relation to the second circumstance — the "density" of time — that Reuter devoted special attention, expressing his reflections in a language which disclosed a certain literary flair:

> "In this adaptation of circumstances, this adaptation to concrete circumstances of each species, a second element must be taken into consideration which we would be tempted to call 'the density' of time. The time of man is not the time of the stars. What constitutes the time of men is the density of real events or of potential events which might have taken place. And what makes up the density of human time assessed on the legal level is the density, the multitude of legal acts which did find or might have found room within that period.
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> In the life of nations, just like in the life of individuals, there are light years, happy years, when nothing happens and nothing can hap-

[4] *I.C.J. Pleadings, Temple of Preah Vihear (Cambodia* v. *Thailand)*, Vol. II, p. 203.
[5] Cf. *ibid.*, pp. 203-204.
[6] *Ibid.*, p. 203.

> pen. However, there are also heavy years, years full of substance. If we apply these considerations to the circumstances of this case we see that there might be light years: 1908-1925; but also heavy years: 1925, 1934-1935, 1937, 1939-1940, 1946, 1949 and we would consider therefore that this period is particularly dense."[7]

10. But as time does not cease to pass, and keeps on flowing, one could now add, half a century later, as subsequent years of particular "density", in respect of the present case of the *Temple of Preah Vihear*, those of 1961-1962, 2000, 2007-2008 and 2011. This can be confirmed by an examination of the *dossier* of the *cas d'espèce* and of the records of the recent public sittings before this Court, of 30-31 May 2011 (concerning the Joint Communiqué between Cambodia and Thailand of 14 June 2000 regarding the demarcation of their land boundary, and, particularly — for the purposes of the present provisional measures of the ICJ —, the events which preceded and promptly followed the inscription of the Temple of Preah Vihear in UNESCO's World Heritage List on 7 July 2008 — cf. *infra*). The temporal dimension, in the present case of the *Temple of Preah Vihear*, can be examined, in my understanding, from distinct angles.

11. In 1998, in the adjudication of the case *Blake* v. *Guatemala* by the Inter-American Court of Human Rights (IACtHR — merits, judgment of 24 January 1998), I deemed it fit to retake Reuter's point and to seek to develop it further. I pondered therein, *inter alia*, that:

> "The time of human beings certainly is not the time of the stars, in more than one sense. The time of the stars — I would venture to add — besides being an unfathomable mystery which has always accompanied human existence from the beginning until its end, is indifferent to legal solutions devised by the human mind; and the time of human beings, applied to their legal solutions as an element which integrates them, not seldom leads to situations which defy their own legal logic (. . .). One specific aspect, however, appears to suggest a sole point of contact, or common denominator, between them: the time of the stars is inexorable; the time of human beings, albeit only conventional, is, like that of the stars, implacable." (Para. 6.)

IV. The Temporal Dimension in International Law

12. The temporal dimension marks presence in the domain of humanities[8] in general, and of law in particular. The awareness of time, of the

[7] *I.C.J. Pleadings, Temple of Preah Vihear (Cambodia* v. *Thailand)*, Vol. II, p. 203.

[8] It has for centuries attracted the attention of philosophers and thinkers (such as, *inter alia*, Plato, Aristotle, Seneca, Saint Augustine, Plotino, Descartes, Pascal, Kant, Proust, Spinoza, Newton, Husserl, Bergson, Ricœur, among others); it has, moreover, been present

temporal dimension, is essential to the labour not only of those who seek to secure the evolution of law, but also to those concerned with ascribing to this latter foreseeability and juridical security. One is to be aware of the influence of the passage of time in the *continuation* of the rules of international law[9], as well as in the *evolution* of the rules of international law: this is not a phenomenon external to law.

13. The temporal dimension is clearly inherent to the conception of the "progressive development" of international law. By the same token, the conscious search for new juridical solutions is to presuppose the solid knowledge of solutions of the past and of the evolution of the applicable law as an open and dynamic system, capable of responding to the changing needs of regulation[10]. In effect, the temporal dimension underlies the whole domain of law in general, and of public international law in particular[11].

14. Time is inherent to law, to its interpretation and application, and to all the situations and human relations regulated by it. One of the ineluctable pitfalls of legal positivism (still very popular in the legal profession in our days) lies in its vain attempt to conceive law in general, and international law in particular, *independently* of time. Legal positivism and political "realism", with their static vision of the world, focused on the legal order or the "reality" of a given moment, have, not surprisingly, been invariably subservient to the established order, to the relations of domination and power. Neither the positivists, nor the "realists", have shown themselves capable of anticipating and understanding — and have difficulties to accept — the profound transformations of contemporary international law in the unending search for the realization of the imperatives of justice.

15. Startled by the changes occurred in the world, they have had to move or jump from one historical moment to another, entirely distinct, seeking to readjust themselves to the new empirical "reality", and then

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in modern historiography, as disclosed by the writings on the matter of, e.g., Fernand Braudel (*Ecrits sur l'histoire*, 1969), G. J. Whitrow (*Time in History*, 1988), Norbert Elias (*Über die Zeit*, 1984), among others.

[9] Cf. K. Doehring, "Die Wirkung des Zeitablaufs auf den Bestand völkerrechtlicher Regeln", *Jahrbuch 1964 der Max-Planck-Gesellschaft*, Heidelberg, 1964, pp. 70-89.

[10] A. A. Cançado Trindade, "Reflections on International Law-Making: Customary International Law and the Reconstruction of *Jus Gentium*", *International Law and Development/Le droit international et le développement* (Proceedings of the 1986 Conference of the Canadian Council on International Law/Travaux du Congrès de 1986 du Conseil canadien de droit international), Ottawa, 1986, pp. 78-81, and cf. pp. 63-81.

[11] As to this latter, illustrations can be found in the work on the so-called "intertemporal law", in the Sessions of Rome (1973) and Wiesbaden (1975) of the Institut de droit international. Cf., in particular, 55 *Annuaire de l'Institut de droit international (AIDI)* (1973), pp. 27, 33, 35-37, 48, 50, 86, 106 and 114-115; and 56 *AIDI* (1975), pp. 536-541. The debates and work of the Institut disclosed an ambivalence, antinomy or tension between the forces in favour of the evolution or transformation of the legal order and those in favour of the stability or legal security — and this was to be reflected in the cautious resolution adopted by the Institut in Wiesbaden in 1975.

trying to apply again to this latter the static scheme which they are mentally used to, once again projecting their illusion, of permanence and "inevitability", into the future, and, at times — almost in desperation — also into the past. Their basic error has been their minimization of the *principles*, as well as of the temporal dimension of social facts. They can only behold interests and advantages, and do not seem to believe in human reason, in the *recta ratio*[12], nor in the human capacity to extract lessons from the historical experience.

16. Time marks a noticeable presence in the whole domain of international procedural law. As to substantive law, the temporal dimension permeates virtually all domains of public international law, such as — to evoke a few examples — the law of treaties (regulation *pro futuro*), peaceful settlement of international disputes (settlement *pro futuro*), State succession, the international law of human rights (the notion of potential victims), international environmental law (the preventive dimension), among others. In the field of regulation of spaces (e.g., law of the sea, law of outer space), the temporal dimension stands out likewise. There is nowadays greater awareness of the need to fulfill the interests of present and future generations (with a handful of multilateral conventions in force providing for that).

17. Evolving international law, attentive to secure an element of previsibility in the conduction and regulation of the social relations subjected thereto, is itself permeated by the major enigma which permeates the existence of all subjects of law: the passage of time. If one seeks for answers to that enigma, I am afraid we can hardly find them in the domain of law, or elsewhere. Instead, some consolation for the lack of answers to that overwhelming enigma can perhaps be found in the domains of philosophy or theology.

V. The Search for Timelessness

18. The present case is, by the way, centred on the Temple of Preah Vihear, which appears to resist the onslaught of time and to be endowed with a touch of timelessness. The Temple of Preah Vihear, a monument of Khmer art, dates back to the first half of the eleventh century, and is located on a high promontory of the range of the Dangrek mountains (one of religious significance, by the border between Cambodia and Thailand). The Temple of Preah Vihear is composed of a series of sanctuaries linked

[12] The *recta ratio* was well captured and conceptualized, throughout the centuries, by Plato, Aristotle, Cicero, and Thomas Aquinas, and, subsequently, situating it in the foundations of *jus gentium* itself, by Vitoria, Suárez and Grotius.

by a system of pavements and staircases over an axis 800 metres long, rising up the mountain, and standing on the edge of a cliff 547 metres high.

19. This *millénaire* masterpiece of Khmer art and architecture was erected and used for religious purposes. It was dedicated to Shiva (one of the Hindu divine triad of Vishnu, Shiva and Brahma — cf. *infra*). It was intended to stand for time immemorial, to bring together the faithful of the region, to fulfill their spiritual needs. Temples and shrines, giving expression to different religious faiths, have been erected in times past in distinct localities in all continents, in search of timelessness, to render eternal the human faith, carved in stone to that end.

20. Writing in 1912, Max Scheler deemed it fit to point out that the construction of temples, monasteries, cathedrals, shrines of the more distant past, engaged generations of people who built them, within their communities that were to survive them, thus giving them the feeling of being inserted, in peace with themselves, into eternity, in the continuity of human generations[13]. Writing twelve years later, in 1924, Stefan Zweig regretted that, in the modern world, human beings no longer erect such temples or monuments, in an epoch of fast communications and precipitated action, when they pursue objectives which appear usually quite close. Ours is an epoch which has lost the idea of a durable image; no one, or no generation, would spend nowadays their whole life building a shrine, a temple or a cathedral. Our modern world "counts the hours with different measures, and life goes by with distinct velocities". We have

> "forgotten the art of expressing our essence in durable stones for the years which do not finish. (. . .) We are quite aware to have lost the aptitude for the infinite, (. . .) the aptitude to give shape so powerfully in one work *(obra)* to the spirit of a whole people, to the genius of an epoch."[14]

Hence the importance of preservation of such sanctuaries or temples[15], as cultural and spiritual heritage of humankind (cf. *infra*).

21. Being itself the concrete expression of human inspiration, the Temple of Preah Vihear seems now faced with the threat of human resentment (cf. *infra*). Recent developments (2007-2011) in the region of that part by the border between Cambodia and Thailand suggest that the times of human beings remain troubled and unpredictable, to a far greater extent than the times of stars. The shrines of the Temple of Preah Vihear appear now surrounded by tension, hostilities and conflict, proper of the human condition.

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[13] M. Scheler, *L'homme du ressentiment*, *op. cit. infra* note 69, p. 41.

[14] S. Zweig, *Tiempo y Mundo — Impresiones y Ensayos (1904-1940)*, Barcelona, Edit. Juventud, 1998, pp. 147-148 *[my translation]*.

[15] It has been pointed out that, in their art, there is "une jonction miraculeuse entre le temporel et l'intemporel"; G. Duby, *Le temps des cathédrales — L'art et la société, 980-1420*, Paris, Gallimard, 1979, p. 117.

VI. From Timelessness to Timeliness

22. What was meant to be a monument endowed with *timelessness*, is now again the object of contention before this Court, raising before it, *inter alia*, the issue of *timeliness*. The case of the *Temple of Preah Vihear* is now, half a century after its adjudication by the Court on 15 June 1962, brought again to the attention of the Court, by means of two requests from Cambodia, one for interpretation of the 1962 Judgment, and the other for provisional measures of protection.

23. In the first request, for interpretation, Cambodia draws attention to its timeliness. In the public sitting of 30 May 2011 before the Court, though conceding that the prolonged lapse of time, of half a century, since the Court's Judgment of 15 June 1962, render "certain aspects" of the present case "unusual", it pointed out that Article 60 of the Court's Statute (that it invoked as basis of jurisdiction of the Court in the *cas d'espèce*) contains no time-limit for such a request for interpretation. In its view, "the right to seek the assistance of the Court to resolve a dispute of that kind is not subjected to any time-limit by Article 60 of the Statute"[16].

In sustaining the timeliness of its request for interpretation, Cambodia referred to paragraphs 29-35 of the request itself, lodged with the Court on 20 April 2011, wherein it referred to tensions, hostilities and incidents occurred in the area of the Temple of Preah Vihear in 2008, 2009 and 2011 (paras. 33-35); Cambodia also invoked, in its request, Article 2 (3) and Chapter VI of the UN Charter (para. 32).

24. Thailand, in turn, in the public sitting of 30 May 2011 before the Court, stressed the consequence it beheld, of the passing of so much time, for the Cambodian requests recently lodged with the Court. While conceding that there is no time-limit in Article 60 of the Statute, it argued that

> "an interpretation goes back to the text of the Judgment; whereas a request for provisional measures relates to the future conduct of normally both parties. There is a tension between the two, which becomes ever more acute as time passes."[17]

It added that the character of the Court's "interpretation jurisdiction is such that provisional measures will only be available in special cases, especially when a lengthy period has elapsed since the first judgment"[18]. The fact that both Thailand and Cambodia — or, more precisely, those who have served as counsel for one and the other, in the recent public sittings before this Court — have felt compelled to address, each one in

[16] ICJ, *Compte rendu* (CR) CR 2011/13, of 30 May 2011, p. 31. And, to the same effect, CR 2011/15, of 31 May 2011, pp. 23-24.

[17] CR 2011/16, of 31 May 2011, p. 18.

[18] *Ibid.*, p. 20. And, to the same effect, CR 2011/14, of 30 May 2011, pp. 32-33 and 26.

its own way, the issue of timeliness in the circumstances of the *cas d'espèce*, seemingly startled by it, renders the present case of the *Temple of Preah Vihear*, in my view, indeed fascinating. It shows the human face of an inter-State case before the World Court.

VII. The Passing of Time: The *Chiaroscuro* of Existence

25. In effect, the present case of the *Temple of Preah Vihear* appears to contain some lessons, not so easy to grasp. As already pointed out, it enshrines the *chiaroscuro* not only of law (cf. *supra*), but also of existence itself. It suggests that we, mortals, still have to learn to live within boundaries in space and in time, so as to live in peace (mainly of mind). As to space, those boundaries which bring countries and their peoples together, rather than separate them. As to time, those which link day and night, light and darkness, life and after-life. As I have already indicated, all cultures, including the ancient ones, in distinct latitudes, grasped the mystery of the passing of time, each one in its own way.

26. As I pondered in my separate opinion in the case of *Bámaca Velásquez* v. *Guatemala*, resolved by the IACtHR (judgment on reparations, of 22 February 2002):

> "Time keeps on being a great mystery surrounding human existence. Human knowledge of the extreme frontiers of life (birth and death) continues to be limited, and such frontiers have become 'more mobile' as a consequence of the cultural changes and the technological development, what attributes an even greater responsibility to the jurists, who ought to be attentive to the ethical codes and to the cultural manifestations in evolution. (. . .) The very conscience of time is 'a very late product of human civilization' (. . .). Despite all that has been written on the subject, the very *origin* of the cultures still continues without an answer[19]; and time and space, which they seek to explain, appear ultimately as mental creations of the social conscience, which allow to conceive a unified and coherent cosmos[20]. Of the essence of cultural life are 'the perception and the awareness of time', which, in turn, constitute component elements of 'the solidarity of human generations which succeeded each other and return, repeating each other as the *stations*'[21]. Time was even considered as in the *Confessions* of Saint Augustine — as an essential aspect of the spiritual

[19] E. Cassirer, *Essai sur l'homme*, Paris, Ed. de Minuit, 1975, p. 47, and cf. p. 243.

[20] A. Y. Gurevitch, "El Tiempo como Problema de Historia Cultural", *Las Culturas y el Tiempo*, Salamanca/Paris, Ed. Sígueme/UNESCO, 1979, pp. 260-261. In this way, "converted into ruler of time", the human being "is also dominated by it" (*ibid.*, p. 261).

[21] *Ibid.*, pp. 280 and 264, and cf. p. 272.

life of the individuals and groups, as an integral part of the social conscience itself."[22] (Paras. 4-5.)

27. In fact, there is no social *milieu* wherein collective representations pertaining to its origin and to its destiny are not found. There is a spiritual legacy which is transmitted, with the passing of time, from generation to generation, conforming a "perfect spiritual continuity among generations"; hence the relevance of the conscience of living *in time*, and of the burial rites[23]. Just as the living experience of a human community develops with the continuous flux of thought and action of the individuals who compose it, there is likewise a spiritual dimension which is transmitted from an individual to another, from a generation to another, which precedes each human being and survives him, *in time*. The *passing* of time, a source of desperation to some, in fact brings the living ineluctably closer to their dead, and binds them together, and the preservation of the spiritual legacy of our predecessors constitutes a means whereby they can themselves communicate with the living, and vice-versa.

28. The living perceive time in distinct ways. Chronological time is not the same as biological time. In a life-time, time seems different for each age. Children seem to live in the moment, adults their day-to-day life, and the elderly their epoch or personal history. Biological time is not the same as psychological time. Time gives human beings, at first, innocence, gradually replaced, later, with the passing of years, by growing experience. The time of human beings nourishes them, first, with hope, and, later, with memory. The time of human beings is indeed implacable.

29. Time links the beginning and the end of human existence, rather than separates them. Time impregnates human existence of memory, and enables the search for the meaning of each moment of existence. Time appears to invite the cultivation of the study of history, and shows the ephemerous in the search for supremacy and glory. It is arguable whether life-time can be invoked as an adequate measure to approach a legal situation extending in time, and even less so to approach the nature of a legal obligation.

30. As to the relationship between the passing of time and human existence, in a couple of his many and *célèbres Letters to Lucilius*[24] (124 in

[22] Few persons, like Saint Augustine, felt with such intensity the inscrutable mystery of time. In the insurmountable pages on the matter, of Book XI of his *Confessions* (written between the years 398 to 400), to the question "what is time? ", he answered: "if no one asks me, I know it; but if I want to explain it to whoever asks me, then I do not know it" (para. 17). And he added, as to the "three times" (or "three moments in the spirit", namely, "expectation, attention and remembrance" — para. 37): the three times — past, present and future — "are in the mind and I do not see them elsewhere. The present of the past is memory. The present of the present is the vision. The present of the future is the expectation" (para. 26).

[23] E. Durkheim, *Las Formas Elementales de la Vida Religiosa*, Madrid, Alianza Ed., 1993 (reed.), pp. 393, 419, 436, 443 and 686.

[24] In particular, his *Letters*, Nos. XII, LXXVIII, CII and CXXII.

number), Seneca warns us, in his wise stoicism, that just as we have time, time has us: in our brief life-time, a few of us try to gather knowledge, while the majority tries to accumulate possessions, goods and wealth; yet, the passing of time dispossesses us of everything — Seneca lucidly concludes — and we leave this world as helpless as we entered it. Life-time is shorter than many continuing legal obligations.

VIII. Time, Legal Interpretation, and the Nature of Legal Obligation

31. This is an appropriate moment to turn attention to time, legal interpretation and the nature of legal obligation. In this connection, in the course of the proceedings before the Court concerning the request for provisional measures of protection in the present case of the *Temple of Preah Vihear*, Thailand, at a given moment of its pleadings of 30 May 2011, argued that:

> "Even in the long history of the law of nations, 50 years is a considerable time. The last two judges who participated in the *Temple* case died in 1989 — Judge Morelli on his 89th birthday, Judge Bustamante just after his 94th. Yet Cambodia would have the Court speak in a continuous present, prescribing the withdrawal of forces whose members were not born at the time, enjoining activities which, if they have occurred at all, began long after the time."[25]

32. Even taking a life-time as a measure to approach a legal situation which appears to subsist in time, are 50 years really a considerable time? In my perception, a lapse of 50 years may be seen from different angles. For a very young person, in the dawn of life-time, looking forward in time, 50 years may appear far too long a time. For an elderly person, approaching the twilight of life-time, looking back in time, 50 years may appear to have passed by very fast, to have been not so long at all. The impression I can hardly escape from, is that mere chronological time does not assist us much: it seems to conceal more than what it discloses.

33. In the long history of the law of nations, 50 years may appear a long, or not so long a time, depending on how we see them, and on what period of that history we have in mind. All will depend on the density of time (cf. *supra*) of the period at issue — whether at that period much has happened, or nothing significant has taken place at all. In any case, the work

[25] CR 2011/14, of 30 May 2011, p. 33.

undertaken in the Court by the generation of Judges Morelli and Bustamante is *linked* to the work being undertaken in the Court by the present generation of its Judges. Ours is a common mission, prolonged in time. The present Order of provisional measures of protection, which the Court is adopting today, 18 July 2011, half a century after its Judgment of 15 June 1962, in the case of the *Temple of Preah Vihear*, bears witness of this.

34. One cannot lose sight of the fact that time and space do not form part of the empirical or real world, but are rather part of our "mental constitution", of our apparatus "to grasp the world"[26], to examine and understand events that have occurred or occur and mark our lives. The perception of time was gradually devised by human beings to help them, at first, to overcome "the briefness and the unicity" of their lives; with that, living in their social environment, human beings imagined they could in a way "deceive death" itself[27]. Cultures seek to explain time and space, each one in its own way. It is widely reckoned today that cultures, in their diversity, also assist human beings to relate themselves with the outside world, to strive to understand it.

35. In so far as human knowledge is concerned, there are no final answers on law, nor on humanities, nor even on science. Law is not self-sufficient, as legal positivists, in their characteristic arrogance (symptomatic of short-sightedness), seem to assume. In my understanding, law has much to learn from other branches of human knowledge, and vice-versa. The limitations of human knowledge recommend a certain modesty as to what we do. As to law, there is a *continuing* quest for the realization of justice.

36. I have already drawn attention to the fact that both Thailand and Cambodia, in the course of the very recent proceedings before the Court in the case of the *Temple of Preah Vihear*, have shown their preoccupation with how to approach properly, each one in its own way, the issue of timeliness in the circumstances of the *cas d'espèce* (cf. *supra*). Underlying their concerns are, first, the distinct theses they uphold of legal interpretation itself, and secondly, the distinct theses that Cambodia and Thailand uphold of the existence of a *continuing*, or else an *instantaneous* obligation, respectively.

37. As to the first point, concerning legal *interpretation*, it should not pass unnoticed that both Cambodia[28] and Thailand[29] evoked, in distinct ways, *obiter dicta* of the Judgment No. 11 (of 16 December 1927) of the old Permanent Court of International Justice (PCIJ) in the case of the *Factory at Chorzów — Interpretation of Judgments Nos. 7 and 8*, in order to seek to substantiate their submissions on the matter. In fact, with

[26] K. Popper, *En Busca de un Mundo Mejor*, Barcelona, Ed. Paidós, 1996, pp. 171-173.

[27] A. Y. Gurevitch, "El Tiempo como Problema de Historia Cultural", *op. cit. supra* note 20, p. 263.

[28] CR 2011/13, of 30 May 2011, pp. 29, 34 and 36; CR 2011/15, of 31 May 2011, pp. 15, 22 and 24-25.

[29] CR 2011/14, of 30 May 2011, pp. 22-24 and 38-40.

regard to legal interpretation, in my view some precision is here called for, which I deem it fit to dwell upon in the present separate opinion. In an application for *revision* of a judgment (which is not the case here), the facts to take into account are only those set forth in the original application, which formed the object of the corresponding judgment. There could not be new or additional facts, which would fall outside the scope of revision, and would call for a new application, a new case, if the applicant State would wish to submit to the Court.

38. This is not the situation in an application for *interpretation* of a judgment. In so far as interpretation is concerned, in my understanding, one cannot make abstraction of subsequent facts, which gave rise to the different views advanced by the contending parties. Even more so when *both* parties rely upon, or refer to, such new or subsequent facts, in their submissions to the Court, as they have done in this case of the *Temple of Preah Vihear*. The Court can take such new facts into account, in order to perform faithfully its judicial function and its duty to decide on the request for interpretation lodged with it.

39. We have not yet reached this stage. We are presently taking cognizance of *provisional measures of protection*. In this respect, the considerations I have just made apply even more forcefully, in face of a situation which appears to be endowed with the prerequisites of urgency and gravity, an imminence of irreparable harm (cf. *infra*). I shall turn to this point later; for the moment, suffice it to point out that, in a request for provisional measures of protection like the present one, the Court cannot simply decline to answer the points raised before it.

40. As to the second point, concerning the *nature* of legal obligation, in its request for interpretation, of 20 April 2011, Cambodia saw it fit to refer to a "permanent situation" and an obligation endowed with a "caractère de permanence" (para. 37), and explained:

> "The obligation incumbent upon Thailand to 'withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory' (second paragraph of the operative clause) is a particular consequence of the general and continuing obligation to respect the integrity of the territory of Cambodia (. . .)." (Application instituting proceedings, p. 37, para. 45.)

41. The point was retaken by both Parties in their respective pleadings before the Court, of 30-31 May 2011, concerning the Application for provisional measures of 28 April 2011. In its submissions of 30 May 2011, Thailand retorted that the applicant State was attempting to transform into a "continuing obligation" what was "an immediate and instantaneous obligation" deriving from paragraph 2 of the *dispositif* of the Court's Judgment of 1962 in the present case of the *Temple of Preah Vihear*[30].

[30] CR 2011/14, of 30 May 2011, p. 25.

42. On the following day (public sitting of 31 May 2011), Cambodia replied that the obligation at issue was not "immediate and instantaneous", but rather *"continuous and permanent"*, because it was "the consequence of the fact that a State should not violate the territorial sovereignty of another State". To regard that obligation as "instantaneous" — Cambodia concluded, convincingly in my view — would allow the respondent State "to withdraw its troops the day after the Judgment and move them back in again a week later"[31]. In the domain of inter-State relations, when the fundamental principle of the prohibition of use or threat of force (cf. *infra*) is at stake, the corresponding obligation is, in my understanding, a continuing or permanent one, for the States concerned.

IX. From Time to Space: Territory and People Together

43. It is time now to move from my considerations on time and law to those pertaining to space and law. I can hardly develop my considerations on space without relating it to the human element of statehood: the population. In their recent submissions before the Court in the case of the *Temple of Preah Vihear*, the contending Parties themselves, Cambodia and Thailand, much to their credit, were attentive to territory *together* with people. In the public sitting of 30 May 2011, Cambodia expressed its concern with the fatal victims of, and those injured in, the armed hostilities of 15 July 2008, 4 to 7 February 2011[32], as well as with the "50 000 personnes de la population civile de la région", encompassing the "zone" of the Temple of Preah Vihear, as well as the zones of the Temples of Ta Moan and Ta Krabei, as a result of the hostilities of 22 April 2011[33]. For its part, Thailand, in its pleadings on the same day, conceded that "[d]es dizaines de milliers d'habitants de la région frontière ont été déplacés"[34].

44. In its final submissions to the Court, in the public sitting of 31 May 2011, Cambodia stated:

> "The rights which Cambodia is seeking to protect do indeed relate to the area of the Temple and to the cultural and spiritual heritage which the Temple represents, as well as the prejudice which Cambodia might suffer through the infringements of its sovereignty and territorial integrity and the threat to the lives of its population."[35]

45. Thailand, for its part, in its final submissions of the same day, argued that "events at the Ta Kwai and Ta Muen Temples are of no

[31] CR 2011/15, of 31 May 2011, p. 18.
[32] CR 2011/13, of 30 May 2011, p. 20, and cf. pp. 44-45.
[33] Cf. *ibid.*, p. 22, and cf. p. 46.
[34] CR 2011/14, of 30 May 2011, p. 16, and cf. p. 51.
[35] CR 2011/15, of 31 May 2011, p. 15 *[translation]*.

relevance to the present proceedings", and that there was "no risk of aggravation of the dispute due to Thailand's behaviour". It added that:

> "The picture is that of two neighbouring countries sharing a common border approximately 800 kilometres long where people engage in peaceful activities every day throughout the year. This is the fact between peoples of Thailand and Cambodia — the fact that has not and will not change."[36]

46. In sum, neither of the contending Parties focused on territory only; both of them took duly into account the fate of the local population. This having been so, at the end of the public sitting of the Court of 31 May 2011, I deemed it fit to put the following questions to both Parties:

> "Dans la demande en indication de mesures conservatoires objet de la présente procédure, il est notamment indiqué que les incidents qui se sont produits depuis le 22 avril 2011 dans 'la zone du temple de Préah Vihéar' ainsi qu'en d'autres lieux situés le long de la frontière entre les deux Etats parties au différend ont provoqué des 'morts, blessés et évacuations de populations'.
>
> Les Parties peuvent-elles donner à la Cour de plus amples informations concernant le déplacement de ces populations? Combien d'habitants ont été déplacés? Ceux-ci ont-ils pu retourner en toute sécurité et volontairement dans leurs foyers? Où dans la région sont-ils installés? Y sont-ils installés depuis longtemps? Quel est leur mode de vie? Quelle est la densité de population dans la région?
>
> Pour préserver l'équilibre linguistique de la Cour, je me permets de poser la même question aux Parties en anglais.
>
> In the present request for the indication of provisional measures by the Court, it is stated, *inter alia*, that, as a result of the incidents occurred since 22 April 2011 in 'the area of the Temple of Preah Vihear', as well as at other places along the boundary between the two contending States, 'fatalities, injuries and the displacement of local inhabitants' were caused.
>
> What further information can be provided by the Parties to the Court about such displaced local inhabitants? How many inhabitants were displaced? Have they safely and voluntarily returned to their homes? Whereabouts do they live in the region? Have they been settled there for a long time? What is their *modus vivendi*? What is the population density of the region?"[37]

[36] CR 2011/16, of 31 May 2011, pp. 26 and 28-29.
[37] *Ibid.*, p. 32.

1. Cambodia's First Submissions

47. On 6 June 2011, Cambodia responded to my questions, including seven annexes[38] to its response[39]. At the beginning of its response, Cambodia explained that it understood my questions as referring to the displacement of the local population from, on the one hand, the area of the Temple of Preah Vihear, and, on the other hand, from other places along the border between the two States. Cambodia submitted that, since that there are no inhabitants living in the Temple itself, Cambodia understood the expression the "area of the Temple", from my questions, as the area indicated on map 5 attached to Cambodia's request for interpretation (and projected by Cambodia during the public hearing before the Court).

48. Cambodia further submitted that "the consequences of the incidents in this area have affected the villages or dwellings in the immediate proximity"[40] of the said area. It is further reiterated that, although the incidents are interconnected, Cambodia was only requesting the indication of provisional measures in the area of the Temple itself. Cambodia also explained that its response to my questions was limited to the most recent events, even though some of the displacements of the local inhabitants were sometimes "the result of incidents that took place before 22 April 2011" and that the "consequences of such displacements have been prolonged beyond 22 April". Cambodia submitted that the information provided in its response covered the period of 22 April to 5 May 2011.

49. Cambodia further submitted that, during that period, more than 50,000 persons were placed in provisional camps and 10,000 inhabitants were sheltered by their close entourage and friends in secured areas. Cambodia asserted that, during these "armed aggressions", the Cambodian Red Cross provided food supply and assisted in the reconstruction of their dwellings; and that donations from various institutions and private persons also provided assistance to the population.

50. As to the *area of the Temple of Preah Vihear* precisely, Cambodia responded that a total of 9,412 persons were displaced from three villages in the proximity[41] of the area of the Temple. Cambodia added that the inhabitants returned to their homes on 5 May 2011 and that the camps were closed also on 5 May 2011. Yet, it further contended, the local inhabitants who worked in the market at close proximity to the Temple were not able to resume their activities because the market "was destroyed

[38] The seven annexes consist of photos of the Province of Ouddor Meanchey (between 22 April and 3 May 2011) referred to in Cambodia's response, as well as a map of the area of the Temple of Preah Vihear.

[39] Réponse du Royaume du Cambodge à la question posée aux Parties par M. le juge Cançado Trindade, of 7 June 2011, pp. 1-12.

[40] In the original French text: "les conséquences des incidents dans cette zone ont touché des village [sic] ou habitations à proximité immédiate de cette zone".

[41] Cambodia referred in this regard to the map attached to its response (Annex 7).

by the combats"[42]. Cambodia contended, moreover, that 80 per cent of the local population practises agriculture for a living, and that the population density of the region is about 50 persons/km^2.

51. As to *other areas in the region*, Cambodia submitted that, in the Province of Ouddor Meanchey, 52,538 persons, who come from various villages along the border with Thailand near the Temples of Ta Moan and Ta Krabei (that is, 150 kilometres west of the area of the Temple of Preah Vihear), have been displaced. It further submitted that 52 houses in this region have been "partially or totally destroyed"[43] and that 147 (out of 194) schools have been closed, making it impossible for 39,873 students to go to school. Cambodia added that local inhabitants have lived in distinct villages established a long time ago[44]. In response to my question as to whether they have returned safely and voluntarily to their homes, Cambodia contended, moreover, that the local inhabitants have returned to their homes on 5 May 2011 and that the camps have been closed also on 5 May 2011. It added that 85 per cent of the displaced population make their living from their agricultural production[45]. Last but not least, Cambodia submitted that the population density in this region is about 28-29 persons/km^2.

2. *Thailand's First Submissions*

52. On 7 June 2011, Thailand submitted its response to my questions, and included therewith one map illustrating the location of the provinces and districts referred to in its response[46]. Thailand began by addressing the incidents *near the Temples of Ta Muen and Ta Kwai* (situated about 150 kilometres from the Temple of Preah Vihear[47]). In respect of the incidents that took place, from 22 April to 3 May 2011, in the Surin Province (where Ta Muen and Ta Kwai Temples are situated), it submitted, in response to my questions, first that Thai authorities evacuated 45,042 local inhabitants to "safe shelters" as of 22 April 2011, "[a]s a precautionary

[42] Cambodia further submitted that the local inhabitants live in the immediate proximity of the Temple of Preah Vihear and that they have settled in the village of Sra Em since its establishment in 1997, in Svay Chrum village since 1995 and in the village of Samdech Techo Hun Sen since 2009.

[43] Cambodia refers in this regard to the pictures attached to its response.

[44] Namely: 2,517 families, totalling 11,124 inhabitants, have been living in the Kok Morn village; 3,198 families, totalling 13,408 persons, have been living in the Ampil village; 1,103 families, totalling 4,913 persons, have been living in the village of Kok Khpos; 1,934 families, totalling 9,651 people, have been living in the O'Smach village; 1,493 families, amounting to 6,809 persons, have been living in the Bansay Rak village; 990 families, totalling 4,913 persons, have been living in the Kaun Kriel village; and 354 families, amounting to 1,720 people, have been living in the Trapeang Prey village.

[45] And that 52,421 hectares have been contaminated by "unexploded ordnances (UXOs)", including 8,000 hectares of cultivated land from a total of 37,093 hectares.

[46] Reply of the Kingdom of Thailand to the question put to both Parties by Judge Cançado Trindade, of 7 June 2011, pp. 1-4.

[47] Thailand uses the denomination "Temple of Phra Viharn".

measure to prevent loss of lives of the Thai population in the area around Ta Kwai and Ta Muen Temples in Surin Province". It added that on 2 May 2011 "all [inhabitants] returned safely and voluntarily to their homes" and have since then resumed their lives normally.

53. Moreover, Thailand submitted that the evacuated population came from the Phanom Dong Rak, Prasat, Kabcheung and Sangkha districts and that the majority of them were born in the region "and their families have lived there for many generations". Thailand contended that the majority of them are farmers; they cultivate rice, rubber trees, sweet potatoes, sugar cane and some of them also engage in silk worm breeding industry. Regarding the population density of the region, Thailand responds that, in the Phanom Dong Rak district, there are 116 persons/km^2, with a total population accounting for 37,197 persons; in the district of Prasat, the population of the subdistrict of Choke Na Sam is 139 persons/km^2 and of Kok Sa-ard subdistrict is 203 persons/km^2, making the total population of the Prasat district 11,423 persons; in the Kabcheung district, the population density is 105 persons/km^2, amounting to a total of 60,421 persons; and the Sangkha district has a population density of 126 persons/km^2, making the total population 127,592 persons.

54. Concerning the *Buriram Province*, which is adjacent to the Surin Province, Thailand asserted that the incidents that took place since 22 April 2011 in the area around Ta Kwai and Ta Muen Temples prompted the Thai authorities to evacuate the local population in the Ban Kruat district of the Buriram Province, which is situated about 10 kilometres from the Ta Kwai and Ta Muen Temples. Thailand submits that, "[a]s a precautionary measure to prevent loss of lives of the Thai population in the area near the site of the clashes", 7,396 local inhabitants were evacuated by Thai authorities to "safe shelters" from 22 April 2011. Thailand further submits that on 2 May 2011 "all [inhabitants] returned safely and voluntarily to their homes" and have since then resumed their lives normally.

55. It added that the local inhabitants live in the Ban Kruat district of the Buriram Province and that the "majority of [them] were born there and their families have lived in the region for many generations"; the majority of them "are farmers who cultivate rice, rubber trees, sweet potatoes, and sugar cane". It further contended that the population density of the Ban Kruat district is 136 persons/km^2, the total population amounting to 73,400 persons. Finally, as to the *incident at Phu Makhua*, situated 2.5 kilometres from the Temple of Preah Vihear, Thailand submitted that no local inhabitants were displaced, as a result of the said incident, which occurred on 26 April 2011.

3. Cambodia's Second Submissions

56. On 13 June 2011, Cambodia submitted its comments to the responses provided by Thailand to my questions put to both Parties

(cf. *supra*). Cambodia first noted that Thailand provided very little information concerning the area of the Temple of Preah Vihear itself and indicated that no population was displaced there from; in its view, that statement showed that, until recent incursions, the situation on the ground complied with the Court's 1962 Judgment concerning Cambodia's control and sovereignty over the area of the Temple. Cambodia further submitted that Thailand's response confirmed that there were incidents in the area of the Temple and at other sites, at the time of the filing of the request for provisional measures, which were needed to preserve the rights at stake and to prevent irreparable harm.

57. Moreover, Cambodia contended that, although calm had been restored and the populations had returned to their homes since 2 May 2011, yet the calm was fragile and nothing could guarantee that armed hostilities would not break out again, as they did in July 2008, October 2008, April 2009, February 2011 and April 2011. As to Thailand's account of displaced populations in an area 150 kilometres west of the Temple, Cambodia reiterated its argument that "only the incidents in the area of the Temple of Preah Vihear should be taken into account", and that "the incidents in the area 150 kilometres away from the Temple of Preah Vihear should not enter into consideration for the measures the Court might pronounce"[48].

4. Thailand's Second Submissions

58. On 14 June 2011, Thailand presented its comments to the responses provided by Cambodia to my questions put to both Parties (cf. *supra*)[49]. Thailand first submitted that some information provided in Cambodia's response was either of no relevance, or referred to incidents that occurred before 22 April 2011, thus falling outside the scope of my questions (cf. *supra*). Referring to the villages of Sra Em, Svay Chrum and Samdech Techo Hun Sen, Thailand submitted that the *only* incident outside the Ta Muen and Ta Kwai Temples area occurred after 22 April 2011 at Phu Makhua, on 26 April 2011. Thailand submits that this incident was a minor one resulting from a misunderstanding. Thailand contended that there was no link between the evacuation of the three villages referred to in Cambodia's response and the incident of 26 April 2011. Thailand thus submits that the evacuation of these villagers could not be the consequence of incidents that took place from 22 April 2011, as I inquired in the question I put to the Parties (cf. *supra*).

[48] Observations du Royaume du Cambodge sur la réponse fournie par le Royaume de Thaïlande à la question posée aux Parties par M. le juge Cançado Trindade, of 14 June 2011, pp. 1-2; Cambodia further dismissed Thailand's claim of sovereignty over the Temples of Ta Moan and Ta Krabei and argued that this stemmed from Thailand's unilateral interpretation regarding the border line in this area.

[49] Thailand enclosed one attachment to its comments.

59. Thailand further argued that Cambodia did not specify when the evacuation began or the reasons for the evacuation, and that Cambodia herself admitted that the origin of the displacement could have been the incidents that took place before 22 April 2011. Thailand submits that this,

> "together with the fact that no incident occurred anywhere within 150 kilometres of the Temple of Phra Viharn since 7 February 2011, (. . .) leads to the only plausible conclusion that (. . .) the alleged evacuation of the three villages was in fact undertaken as a result of the incidents that occurred during February 2011" [50].

In Thailand's view, this displacement fell outside the scope of the questions I posed to the Parties. Furthermore, Thailand argued that Cambodia's response concerning the establishment of the three villages confirmed its argument — made during the hearings — that villagers were put in the region only recently to serve political motives outside the scope of the current proceedings. As to Cambodia's statement that some inhabitants could not resume their work in the market, because of the latter's destruction, Thailand retorted that the market was destroyed as a result of the incidents that occurred in April 2009, thus also outside the scope of the questions I put to both Parties [51].

5. General Assessment

60. The two rounds of submissions and comments, provided by the Parties in response to my questions (cf. *supra*), clarify some of the issues underlying the present case of the *Temple of Preah Vihear*, lodged with the Court. Yet, there remain still some points of difference between the Parties. Their submissions, at first, differ in respect of the motivation or reason for the evacuation of local inhabitants. While Cambodia asserts that some of the evacuation was the consequence of incidents that took place before 22 April 2011, Thailand claims that local inhabitants were displaced as "a precautionary measure to prevent loss of lives of the Thai population" in the area near the site of the clashes [52]. Secondly, while Cambodia maintains that "only the incidents in the area of the Temple of

[50] Comments of the Kingdom of Thailand on the reply given by the Kingdom of Cambodia to the question put to both Parties by Judge Cançado Trindade, of 14 June 2011, p. 1, and cf. pp. 1-3.

[51] As to the province of Ouddor Meanchey, Thailand argued that Cambodia's reference to 52,421 hectares of land contaminated by "unexploded ordnances" (UXOs) was irrelevant to both the question and the present proceedings, since, according to its understanding, any UXOs contaminated area found in Cambodia is "the result of past conflicts in Cambodia that lasted until 1998"; *ibid.*, p. 2. Last but not least, Thailand questioned the credibility of the photographs submitted by Cambodia, since no information was provided as to the exact dates and locations where they were taken; *ibid.*

[52] Reply of the Kingdom of Thailand to the question put to both Parties by Judge Cançado Trindade, of 7 June 2011, p. 2.

Preah Vihear should be taken into account"[53] for the indication of provisional measures, in its response Thailand does not focus on incidents in the area of the Temple of Preah Vihear, but concentrates rather on displacements that took place in an area situated about 150 kilometres from the Temple of Preah Vihear[54].

61. Thirdly, as to the displaced persons themselves, Cambodia refers to 9,412 persons displaced in the area of the Temple of Preah Vihear and 52,538 displaced persons in the Province of Ouddor Meanchey; Thailand, for its part, submits that 45,042 local inhabitants were evacuated in the Surin Province, 7,396 local inhabitants were displaced in the Buriram Province and no inhabitants were displaced as a result of the incident on 26 April 2011 at Phu Makhua (situated 2.5 kilometres from the Temple of Preah Vihear). The Parties responses coincide, however, on the statement that the displaced population has returned safely and voluntarily to their homes, even though Cambodia claims that their date of return is 5 May 2011[55], while Thailand claims that they returned on 2 May 2011[56].

62. In sum and conclusion of the matter at issue, while the responses provide some clarification and the situation seems to have progressed in a positive manner, with regard to the safe and voluntary return of local inhabitants to their homes, the calm achieved remains fragile, and seems to be provisional. The ceasefire is only verbal. There are no assurances that the armed hostilities will not resume and that the population will not be displaced yet again. The ceasefire seems to be temporary, and nothing indicates that the conflict will not break out again. Accordingly, in my view, the situation in the present case requires the indication of provisional measures of protection to prevent or avoid the *further aggravation* of the dispute or situation, given its current gravity, urgency, and the risks of irreparable harm.

63. May I just observe, in this connection, that it has become almost commonplace today to evoke provisional measures of protection to prevent or avoid the "aggravation" of the dispute or situation at issue. Yet, this sounds almost tautological, given the fact that a dispute or situation which calls for provisional measures of protection is already — *per defini-*

[53] Observations du Royaume du Cambodge sur la réponse fournie par le Royaume de Thaïlande à la question posée aux Parties par M. le juge Cançado Trindade, of 14 June 2011, pp. 1-2.

[54] Cf. Comments of the Kingdom of Thailand on the reply given by the Kingdom of Cambodia to the question put to both Parties by Judge Cançado Trindade, of 14 June 2011, p. 1.

[55] It is noted, however, that in its comments to Thailand's responses, in a letter dated 13 June 2011, Cambodia claims that "calm was restored (and populations returned) as early as 2 May 2011"; Observations du Royaume du Cambodge sur la réponse fournie par le Royaume de Thaïlande à la question posée aux Parties par M. le juge Cançado Trindade, of 14 June 2011, pp. 1-2.

[56] Reply of the Kingdom of Thailand to the question put to both Parties by Judge Cançado Trindade, of 7 June 2011, p. 2.

tionem — endowed with gravity and urgency, given the probability or imminence of irreparable harm. It would thus be more accurate to evoke provisional measures of protection to prevent or avoid the *"further aggravation"* of the dispute or situation at issue.

X. The Effects of Provisional Measures of Protection in the *Cas d'Espèce*

64. International law in a way endeavours to be *anticipatory* in the regulation of social facts, so as to avoid disorder and chaos, as well as irreparable harm. What is anticipatory is law itself, and not the unwarranted recourse to force. We are here before the *raison d'être* of provisional measures of protection, to prevent and avoid irreparable harm in situations of gravity and urgency. They are endowed with a preventive character, being anticipatory in nature, looking forward in time. They disclose the preventive dimension of the safeguard of rights. Here, again, the time factor marks its presence in a notorious way.

65. As I pointed out in my lengthy dissenting opinion (105 paragraphs) in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 165-200, provisional measures of protection, as evolved in recent years, have enabled contemporary international tribunals to secure the protection of rights in a *preventive* way, and to undertake a *continuous monitoring* (projected in time) of compliance with them, on the part of the States concerned. Here, once again, further lessons can be extracted from this case of the *Temple of Preah Vihear*, also in respect of: *(a)* the protection of people in territory; *(b)* the prohibition of use or threat of force; *(c)* the protection of cultural and spiritual world heritage. Let me turn next to these particular points.

1. The Protection of People in Territory

66. There is epistemologically no impossibility or inadequacy for provisional measures, of the kind of the ones indicated in the present Order, not to extend protection also to human life, and to cultural and spiritual world heritage (cf. *infra*). Quite on the contrary, the reassuring effects of the provisional measures indicated in the present Order are that they do extend protection not only to the territorial zone at issue, but also, by asserting the prohibition of the use or threat of force — pursuant to a fundamental principle of international law (cf. *infra*) —, to the life and personal integrity of human beings who live or happen to be in that zone or near it, as well as to the Temple of Preah Vihear itself, situated in the aforementioned zone, and all that the Temple represents.

67. The present Order of provisional measures of protection has taken due account of the concerns of both contending Parties with securing the protection of people in territory. In addition to the answers which both Parties have given to the question I put to them at the end of the public sitting of the Court of 31 May 2011 (cf. *supra*), the Parties have made sure to convey to the Court their concerns on the point at issue throughout the proceedings of the case. And the Court, in the Order it has just adopted, has taken due account of those concerns.

68. Thus, the Court acknowledged, in the present Order, Cambodia's complaints of "serious armed incidents" occurred in the area of the Temple of Preah Vihear since 22 April 2011, that caused "fatalities, injuries and the evacuation of local inhabitants" (para. 8), as well as Cambodia's warning as to the worsening of the situation, with "loss of life and human suffering as a result of those armed clashes" (para. 9). Further on, the Court again acknowledged Cambodia's complaints of "numerous armed incidents" that took place in the area of the Temple of Preah Vihear since 15 July 2008, that caused "irreparable damage to the Temple itself", part of the cultural heritage of humankind, as well as "loss of human life, bodily injuries and the displacement of local people" (para. 48)[57]. And, once again, it took note of Cambodia's warning as to the worsening of the situation, with "damage to the Temple of Preah Vihear, as well as human suffering and loss of life" (para. 50).

69. The Court, likewise, acknowledged, in the present Order, Thailand's complaints of "numerous armed incidents" occurred in the area of the Temple of Preah Vihear which caused "loss of human life, bodily injuries, the displacement of local people, and material damage" (para. 51). Having considered the submissions of both Parties as to the facts, the Court found that:

> "since 15 July 2008, armed clashes have taken place and have continued to take place in that area, in particular between 4 and 7 February 2011, leading to fatalities, injuries and the displacement of local inhabitants; (. . .) damage has been caused to the Temple and to the property associated with it" (para. 53)[58].

70. Yet, the Court's valuation or assessment of the prima facie evidence (proper to provisional measures of protection) which the Parties brought to its attention was not, in my view, satisfactory: the Court did not extract all the consequences that it could, and should, from the facts

[57] Cambodia further noted that those incidents led, on its initiative, to a meeting of the UN Security Council on 14 February 2011 (para. 48).

[58] The Court further noted that, "on 14 February 2011, the [UN] Security Council called for a permanent ceasefire to be established between the two Parties and expressed its support for ASEAN in seeking a solution to the conflict" (para. 53).

pertaining to the *protection of people* in territory. The Court's main attention was focused on *territory* itself (one of the component elements of statehood), and not so much of the *people*, which, in my perception, is the most precious constituent element of statehood. I shall turn again to this point later on (cf. items XI-XII, *infra*) in the present separate opinion.

2. The Prohibition of Use or Threat of Force

71. On a distinct line of considerations, the Court, in its present Order, indicated provisional measures to the effect that:

> "Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at that zone;
>
> Thailand shall not obstruct Cambodia's free access to the Temple of Preah Vihear or Cambodia's provision of fresh supplies to its non-military personnel in the Temple;
>
> . . . . . .
>
> Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."[59]

72. Underlying the Court's decision — informing and conforming it — is the fundamental principle of the prohibition of the use or threat of force. In fact, in the corresponding reasoning of the Court in the present Order, it is clearly stated that:

> "the Charter of the United Nations imposes an obligation on all Member States of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; (. . .) United Nations Member States are also obliged to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; and (. . .) both Parties are obliged, by the Charter and general international law, to respect these fundamental principles of international law"[60] (para. 66).

[59] Resolutory points B (1), (2) and (4) of the *dispositif*.

[60] Or, in the other official language of the Court,

> "la Charte des Nations Unies fait obligation à tous les Etats Membres de l'Organisation des Nations Unies de s'abstenir dans leurs relations internationales de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout Etat, soit de toute autre manière incompatible avec les buts des Nations Unies; (. . .) les Etats membres de l'Organisation sont également tenus de régler leurs différends internationaux par des moyens pacifiques, de telle manière que

73. Due attention is rightly given by the Court to compliance with the fundamental principles of international law, as enshrined into the UN Charter (Art. 2) and reckoned in general international law, in particular that of the prohibition of use or threat of force (Art. 2 (4)), in addition to that of the peaceful settlement of disputes (Art. 2 (3)). This has in fact been a concern of the Court in recent years. Three relevant precedents can be here recalled in this connection, namely, the case of the *Frontier Dispute (Burkina Faso/Republic of Mali)* (1986), the case of the *Land and Maritime Boundary (Cameroon* v. *Nigeria)* (1996), and the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (2000).

74. In those previous three cases, the Court, in indicating provisional measures of protection, most significantly went *beyond the inter-State dimension*, in expressing its concern also for *the human persons (les personnes humaines)* in situations of risk, or vulnerability and adversity. Thus, in its Order of 10 January 1986 in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the Chamber of the Court asserted the power, "independently of the requests submitted by the Parties", to indicate provisional measures "with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require" (*I.C.J. Reports 1986*, p. 9, para. 18)[61]. It can exercise such power, it added, even more so in case of "a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes", when it can adopt such provisional measures "as may conduce to the due administration of justice" (*ibid.*, p. 9, para. 19). It decided to indicate those measures, comprising the withdrawal by the Parties of their armed forces, as it was of the view that the facts at issue "expose the persons and property in the disputed area, as well as the interests of both States within that area, to serious risk of irreparable damage" (*ibid.*, p. 10, para. 21).

75. One decade later, in its Order of 15 March 1996 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, the Court pondered that:

> "the rights at issue in these proceedings are sovereign rights which the Parties claim over territory, and (. . .) these rights also concern persons; (. . .) independently of the requests for the indication of provisional measures submitted by the Parties to preserve specific rights,

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la paix et la sécurité internationales ainsi que la justice ne soient pas mises en danger; et (. . .) les deux Parties sont tenues, en vertu de la Charte et du droit international général, de respecter ces principes fondamentaux du droit international".

[61] In a notorious precedent, that of the Court's Order of 10 May 1984, in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court determined that the circumstances of the case required it to indicate provisional measures, as provided by Article 41 of its Statute, without prejudging the question of its jurisdiction as to the merits (*I.C.J. Reports 1984*, p. 186, paras. 39-40).

> the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require (. . .); (. . .) the events that have given rise to the request, and more especially the killing of persons, have caused irreparable damage to the rights that the Parties may have over the Peninsula; (. . .) persons in the disputed area and, as a consequence, the rights of the Parties within that area are exposed to serious risk of further irreparable damage" (*I.C.J. Reports 1996 (I)*, pp. 22-23, paras. 39 and 41-42).

Accordingly, in the provisional measures it indicated, the Court determined, *inter alia*, that the Parties were to refrain from any action by their armed forces, which might prejudice the rights of each other in respect of whatever judgment the Court might render in the case, or which might "aggravate or extend" the dispute before it[62].

76. Almost half a decade later, in its Order of 1 July 2000, in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the Court, once again, was attentive *also* to the fate of persons. It pondered that, in the *cas d'espèce*, it was "not disputed" that:

> "grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities, have been committed on the territory of the Democratic Republic of the Congo; (. . .) in the circumstances, the Court is of the opinion that persons, assets and resources present on the territory of the Congo, particularly in the area of the conflict, remain extremely vulnerable, and that there is a serious risk that the rights at issue in this case (. . .) may suffer irreparable prejudice" (*I.C.J. Reports 2000*, p. 128, paras. 42-43).

77. This being so, the Court was of the view that "independently of the requests" by the Parties for provisional measures, it was endowed, under Article 41 of the Statute, with the power to indicate such measures with a view to "preventing the aggravation or extension of the dispute" whenever it considered that the circumstances so required. In the case opposing the Democratic Republic of the Congo to Uganda, it was of the opinion that there existed "a serious risk of events occurring which might aggravate or extend the dispute or make it more difficult to resolve" (*ibid.*, para. 44). Accordingly, in the measures it indicated the Court determined that the Parties must "prevent and refrain from any action, and in particular any armed action", which might "aggravate or extend the dispute", and, furthermore: "Both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for

[62] Paragraph 1 of the *dispositif*.

fundamental human rights and for the applicable provisions of humanitarian law."[63]

78. It should not pass unnoticed here that, very recently, for less than in the present case of the *Temple of Preah Vihear*, opposing Cambodia to Thailand (wherein successive armed hostilities have occurred), the Court has indicated provisional measures of protection, in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, opposing Costa Rica to Nicaragua (*Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 6). In this case, competing claims between the contending Parties, and Nicaragua's intention to carry out activities in the border area, were regarded by the Court as sufficient to conform "a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death" (*ibid.*, p. 24, para. 75), and for it, accordingly, to order provisional measures of protection.

79. The fundamental principle of international law of the prohibition of the use or threat of force has found expression on numerous occasions, before and after its insertion into the UN Charter (Article 2 (4)) at the 1945 San Francisco Conference. After its assertion at the 1907 II Hague Peace Conference, it became of nearly universal application under the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy (the Briand-Kellogg Pact)[64]; following the UN Charter, the fundamental principle at issue was restated by the 1970 UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, the 1974 UN Definition of Aggression, and the 1987 UN Declaration on Enhancing the Effectiveness of the Principle of the Non-Use of Force.

80. The over-all prohibition of the use or threat of force is a cornerstone of contemporary international law. For its part, the 1997 UNESCO Declaration on the Responsibilities of the Present Generations towards the Future Generations stated (Article 9 (2)) that:

> "The present generations should spare future generations the scourge of war. To that end, they should avoid exposing future

[63] Paragraphs 1 and 3 of the *dispositif*. May it be recalled, however, that, in its subsequent Order of 10 July 2002, in the case of the *Armed Activities on the Territory of the Congo*, opposing the Democratic Republic of the Congo to Rwanda, the Court did not indicate provisional measures, as it found itself without prima facie jurisdiction to do so (*I.C.J. Reports 2002*, p. 249, para. 89), though it expressed its deep concern with "the deplorable human tragedy, loss of life, and enormous suffering" in the east of the Democratic Republic of the Congo resulting from "the continued fighting there" (*ibid.*, p. 240, para. 54).

[64] Followed, in the American continent, by the 1933 Pact Saavedra Lamas, the 1938 Declaration of Principles adopted by the Inter-American Conference of Lima, and the 1948 OAS Charter.

> generations to the harmful consequences of armed conflicts as well as all other forms of aggression and use of weapons, contrary to humanitarian principles."

The corresponding obligation, not to resort to force, or to the threat of it, is not a simple immediate or "instantaneous" obligation (whatever that may mean); it is, by definition, a continuing or permanent obligation.

81. Decisions ensuing from, and grounded on, the fundamental principle of the prohibition of the use or threat of force, such as the provisional measures of protection aforementioned, can nowadays be approached, in my perception, from a humanist perspective, proper of the contemporary *jus gentium*: this is the case of the provisional measures of protection just adopted by the Court in the present case of the *Temple of Preah Vihear*, which took into account people and territory *together*, *comme il faut*, in the circumstances of the case, keeping in mind the fundamental principles of international law of the prohibition of the use or the threat of force and of peaceful settlement of disputes. The Court should, from now onwards, in such circumstances, embrace expressly and more resolutely this approach (cf. items XI-XII, *infra*).

3. Space and Time, and the Protection of Cultural and Spiritual World Heritage

82. My considerations on space and law seem likewise permeated by time. This is also what ensues from an examination of the submissions by the contending Parties with regard to the inscription of the Temple of Preah Vihear in UNESCO's World Cultural Heritage List on 7 July 2008. In its request for interpretation (of 28 April 2011) of the Court's Judgment of 15 June 1962 in the case of the *Temple of Preah Vihear*, Cambodia stated:

> "It was therefore only from 2007, when steps were taken to have the Temple of Preah Vihear declared a World Heritage site [by UNESCO], that the issue of a territorial claim by Thailand emerged (. . .)." (Application instituting proceedings, p. 15, para. 15.)

83. And Cambodia referred, in this connection, to the recent hostilities which ensued there from:

> "the recent period has been marked by a serious deterioration in relations between them, the origin of which may be found in the opening of discussions within UNESCO to have the Temple declared a World Heritage site.
>
> The Temple was included on the List of World Heritage sites by UNESCO on 7 July 2008, despite strong opposition from Thailand. As from 15 July 2008, large numbers of Thai soldiers crossed the bor-

> der and occupied an area of Cambodian territory near the Temple, on the site of the Keo Sikha Kiri Svara Pagoda (. . .). This Pagoda was built by Cambodia in 1998 and had not previously given rise to any protest from Thailand (. . .).” (Application instituting proceedings, p. 13, paras. 13-14.)

84. Cambodia singled out, in particular, “the serious incidents of 15 July 2008” (*ibid.*, p. 15, para. 16), and added that, “[i]n these various incidents between 2008 and 2011, architectural features of the Temple have been damaged, leading to inquiries and reports by the UNESCO authorities (. . .)” (*ibid.*, p. 29, para. 35). Furthermore, in its request for provisional measures of 28 April 2011, Cambodia asked the Court to order the withdrawal of troops and the prohibition of any military activities in “the zone of the Temple of Preah Vihear”, given the urgency and the “gravity of the situation” (*ibid.*, pp. 9-11, paras. 7-9). Last but not least, Cambodia stated, in its pleadings of 30 May 2011 before the Court, that “following the designation of the Temple of Preah Vihear as a UNESCO World Heritage Site on 7 July 2008, Thailand decided to dispute that designation by force of arms within a unilaterally defined area close to the Temple”; hence the “armed incidents” which followed, on 15 July 2008, that is, “immediately after the inscription of the Temple in the World Heritage of UNESCO on 7 July 2008”[65].

85. For its part, Thailand addressed this particular issue in its pleadings before the Court, of 30-31 May 2011. Thailand began by admitting clearly and frankly, in its pleadings of 30 May 2011, that it accepts the Court’s Judgment of 15 June 1962 in the case of the *Temple of Preah Vihear*:

> “despite the fact that the Temple is a very important cultural and historical symbol for its people. This explains why the Court’s decision provoked consternation and ill feeling in Thailand at all levels of society, to the extent that for some it became a national trauma, which is still manifesting itself today in various ways.”[66]

86. In its following pleadings of 31 May 2011, turning to the inscription of the “Temple of Preah Vihear” on UNESCO’s World Cultural Heritage List, Thailand deemed it fit to add:

> “The Temple requires a buffer zone as a World Heritage site, and that can only be found in Thai territory. We understand that, and have always been ready and willing to undertake a joint nomination with Cambodia. It is Cambodia’s constant refusal of such joint undertaking that is the root cause of the problems that have arisen over the inscription.”[67]

[65] CR 2011/13, of 30 May 2011, pp. 32, 39-40, para. 6. *[Translation.]*
[66] CR 2011/14, of 30 May 2011, p. 3, para. 3. *[Translation.]*
[67] CR 2011/16, of 31 May 2011, p. 26, para. 4.

87. To Thailand, thus, the inscription of the Temple of Preah Vihear on the World Cultural Heritage List of UNESCO, at the 32nd Session of the World Heritage Committee (Quebec City, 2008), became a matter of concern regarding its border with Cambodia in the area in the vicinity of the Temple. The Temple itself was in the middle of the controversy, which seems to have been reignited by the Temple's inscription in the aforementioned List of UNESCO, as a result of Cambodia's Application. Thailand expressly admitted its resentment, going back to the Court's Judgment of 15 June 1962 (cf. *supra*).

88. Here we are faced with the time element again. Resentment flows with the passing of time; it may last for a short time, months or years, or it may prolong for a much longer time, decades, passing on from one generation to another, or even centuries. History is full of examples illustrating such prolongation in time[68]. Here, again, simple chronological time does not help much in assessing each situation, as the "horizontal" approach of chronological time does not reveal the depth of the problem of resentment in each historical situation[69]. What is important here is to be attentive to the complexities of the relationship between time and law, in the settlement of international disputes.

89. It has recently been pointed out, rightly and with due sensitivity, that:

> "A travers la protection des biens culturels, ce ne sont donc pas seulement des monuments et des objets que l'on cherche à protéger, c'est la mémoire des peuples, c'est leur conscience collective, c'est leur identité, mais c'est aussi la mémoire, la conscience et l'identité de chacun des individus qui les composent. Car en vérité, nous n'existons pas en dehors de notre famille et du corps social auquel nous appartenons.
>
> Fermez les yeux et imaginez Paris sans Notre-Dame, Athènes sans le Parthénon, Gizeh sans les Pyramides, Jérusalem sans le Dôme du Rocher, la Mosquée Al-Aqsa ni le Mur des Lamentations, l'Inde sans le Taj Mahal, Pékin sans la Cité interdite, New York sans la statue de la Liberté. Ne serait-ce pas un peu de l'identité de chacun de nous qui nous serait arrachée?"[70]

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[68] Cf., e.g., Marc Ferro, *El Resentimiento en la Historia* (*Le ressentiment dans l'histoire*, 2007), Madrid, Ed. Cátedra, 2009, pp. 9-187.

[69] Cf. *ibid.*, p. 185. Some decades ago, in his endeavours to elaborate a phenomenology and sociology of resentment, Max Scheler identified factors which had to do with the structure of the society concerned, or else with the individuals within it, and the prevailing articulation of values in it, at a given historical moment; M. Scheler, *L'homme du ressentiment* (1912), Paris, Gallimard, 1933, p. 36, and cf. pp. 48, 55-57, 88-89 and 189-190.

[70] Or, in the other official language of the Court,

> "by protecting cultural property, one is attempting to protect not only monuments and objects, but a people's memory, its collective consciousness and its identity, and indeed the memory, consciousness and identity of all the individuals who make up that people. Ultimately, we do not exist outside of our families and the social frameworks to which we belong.
>
> Close your eyes and imagine Paris without Notre Dame, Athens without the Parthenon, Giza without the Pyramids, Jerusalem without the Dome of the Rock,

Other examples could be referred to the same effect, such as, *inter alia*, e.g., Moscow without the Red Square and St. Basil's Cathedral, Rio de Janeiro without the Statue of Christ the Redeemer, Samarkand without the Registan and the Gur Emir, Guatemala without Antigua and Tikal, Rome without the Coliseum, Peru without Machu-Picchu, and so forth. The examples abound, in every continent, all over the world.

90. The universal value of the Temple of Preah Vihear was brought before the attention of the World Heritage Committee (2007-2008), established by the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage[71]. The Temple of Preah Vihear was inscribed as a UNESCO World Heritage Site on 7 July 2008, at the 32nd Session of the World Heritage Committee, held in Quebec City, Canada (2-10 July 2008). The nomination of the Temple[72] had been before the World Heritage Committee also at its previous 31st Session, held in Christchurch, New Zealand (23 June to 2 July 2007), when it was evaluated[73].

91. The Temple of Preah Vihear was regarded as an outstanding masterpiece of Khmer art and architecture, disclosing the highpoint of a significant stage in human history (in the first half of the eleventh century), and the capacity of the Khmer civilization to make use of that site — one of difficult access — over a long period. Particularly impressive was con-

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the Al-Aqsa Mosque and the Wailing Wall, India without the Taj Mahal, Peking without the Forbidden City, New York without the Statue of Liberty. Would we not all have lost part of our identities?"

F. Bugnion, "La genèse de la protection juridique des biens culturels en cas de conflit armé", 86 *Revue internationale de la Croix-Rouge* (2004), note 854, p. 322.

[71] Article 8 (1). The 1972 Convention expresses its concern with the deterioration of the cultural and natural heritage, "to be preserved as part of the world heritage of mankind as a whole" (preamble, paras. 1-2 and 6). To that effect, it calls for the establishment of "an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis" (preamble, para. 8). The 1972 Convention asserts the duty of co-operation of the international community as a whole (Article 6 (1)). Moreover, each State party undertakes not to take any "deliberate measures" which "might damage directly or indirectly" the cultural and natural heritage "on the territory of other States parties" (Art. 6 (3)). The UNESCO Convention further provides for the establishment of the World Heritage List (Art. 11 (2)), and, in addition, of a list of World Heritage in Danger (as a result of various causes, including, *inter alia*, "the outbreak or the threat of an armed conflict" — Art. 11 (4)). The World Heritage Committee is also to consider requests for international assistance to property forming part of cultural or natural heritage (Art. 13 (1)). The 1972 Convention further provides for the creation of a World Heritage Fund (Art. 15).

[72] Made by Cambodia, though Thailand had sought a joint nomination.

[73] Cf. UNESCO/World Heritage, documents WHC-07/31.COM/8B-8B.1 (2007); and WHC-07/31.COM/24 (2007). For the UNESCO guidelines for the inscription on the World Heritage List and the corresponding monitoring of the properties at issue, cf. UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, document WHC.08/01, of January 2008, pp. 30-53, paras. 120-198.

sidered the position of the Temple on a high cliff edge site, 547 metres above the Cambodian Plain, close to the border with Thailand.

92. At the time I write this separate opinion, shortly before the adoption of the present Order of provisional measures of protection of the Court, there are 34 properties around the world that the World Heritage Committee has decided to include on the List of World Heritage in Danger, in accordance with Article 11 (4) of the 1972 UNESCO Convention. The fact that the Temple of Preah Vihear does not appear in this particular List in no way can be construed as meaning that it does not have "an outstanding universal value for purposes other than those resulting from inclusion" therein, as warned by Article 12 of the 1972 Convention.

93. This provision appears interrelated with that of Article 4 of the 1972 Convention, on the obligation of each State party to secure the protection, conservation and transmission to future generations of the cultural heritage situation in its territory. The prohibition of destruction of cultural heritage of an outstanding universal value and great relevance for humankind is arguably an obligation *erga omnes*[74].

94. The Temple, while being inscribed as a UNESCO World Heritage Site, was seen as inextricably linked to its landscape — the cultural, the spiritual and the natural dimensions appearing together. The three surrounding peaks have been taken to reflect the Hindu divine triad of Vishnu, Shiva and Brahma. The Temple of Preah Vihear was considered to have an outstanding universal value, testifying to the Khmer genius for domesticating the local territory, and adapting the construction on it to the landscape.

95. UNESCO itself has been attentive to the recent hostilities in the zone in the vicinity of the Temple of Preah Vihear. Its Special Envoy for Preah Vihear (Mr. K. Matsuura) recently met Thai and Cambodian authorities, to consider ways to safeguard the World Heritage Site of the Temple of Preah Vihear, during his visits to Bangkok and Phnom Penh between 27 February and 1 March 2011. The Special Envoy stressed the need to set up a lasting dialogue between the two States so as to create the conditions necessary for the safeguarding of the Temple of Preah Vihear, and for establishing long-term sustainable conservation of the Site[75].

XI. Provisional Measures of Protection: Beyond the Strict Territorialist Approach

96. As already pointed out, given the circumstances of the present case of the *Temple of Preah Vihear*, the gravity of the situation, the probability

[74] Cf., to this effect, F. Francioni and F. Lenzerini, "The Destruction of the Buddhas of Bamiyan and International Law", 14 *European Journal of International Law* (2003), pp. 634 and 638, and cf. p. 631.

[75] UNESCO, "*UNESCO Special Envoy for Preah Vihear Meets Thai and Cambodian Leaders*", Paris, UNESCO Press, 2 March 2011, p. 1.

or imminence of irreparable harm, and the resulting urgency, the Court has rightly indicated provisional measures of protection. To that end, it has established a provisional demilitarized zone, in the vicinity of the Temple of Preah Vihear. Yet, though the Court has taken the correct decision in the present Order, it has done so pursuant to a reductionist reasoning. In laying the grounds for its decision to order the provisional measures, the Court was attentive essentially to territory, although the case lodged with it goes well beyond it.

97. Despite the wealth of information placed before it by the Parties concerning the fate and the need of protection of *people in territory*, the Court repeatedly insisted on respect for "sovereignty" and "territorial integrity" (Order, paras. 35, 39 and 42), and on protection of "rights to sovereignty" (*ibid.*, para. 44). Instead of *bringing people and territory together*, expressly, for the purpose of protection, as in my view it should, the Court has preferred to rely on its traditional outlook, utilizing the conceptual framework and the language it is used to, and refusing to behold, and give concrete expression to, any other factors beyond territorial integrity and sovereignty. This is certainly to be regretted, as the Court should be prepared, in our days, to give proper weight to the *human factor*.

98. On an earlier occasion, in the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria) (Order of 15 March 1996*, *I.C.J. Reports 1996 (I))*, as I have already pointed out[76], the Court, faced with the victimization of human beings resulting from armed conflicts of greater intensity, expressly conceded that the rights at issue concerned *also persons* (*I.C.J. Reports 1996 (I)*, p. 22, para. 39). I would say that, in those grave circumstances, they concerned, for the purpose of provisional measures of protection, *mainly persons*, human beings, who were killed.

99. In the present Order of provisional measures in the case of the *Temple of Preah Vihear*, the traditional and unsatisfactory territorialist outlook pursued by the Court leads it to state, e.g., that

> "the rights which Cambodia claims to hold under the terms of the 1962 Judgment in the area of the Temple might suffer irreparable prejudice resulting from the military activities in the area and, in particular, from the loss of life, bodily injuries and damage caused to the Temple and the property associated with it" (Order, para. 55).

Not everything can be subsumed under territorial sovereignty. The fundamental human right to life is not at all subsumed under State sovereignty. The human right not to be forcefully displaced or evacuated from one's home is not to be equated with territorial sovereignty. The Court needs to adjust its conceptual framework and its language to the new needs of

[76] Cf. paragraph 73, *supra*.

protection, when it decides to indicate or order the provisional measures requested from it.

100. If we add, to the aforementioned, the protection of cultural and spiritual world heritage (cf. *supra*), for the purposes of provisional measures, the resulting picture will appear even more complex, and the strict territorialist approach even more unsatisfactory. The *human factor* is the most prominent one here. It shows how multifaceted, in these circumstances, the protection provided by provisional measures can be. It goes well beyond State territorial sovereignty, *bringing territory, people and human values together*.

XII. Final Considerations, *Sub Specie Aeternitatis*

101. When we come to consider cultural and spiritual world heritage, there is still one remaining aspect, which I deem it fit to dwell upon, however briefly, in this separate opinion: I refer in particular to the protection of the *spiritual* needs of human beings. Such protection is brought to the fore by the safeguard of cultural and spiritual world heritage, as raised, *inter alia*, in the present case of the *Temple of Preah Vihear*. Here we come back to timelessness (cf. *supra*), and we are led, ultimately, to considerations from the perspective of eternity *(sub specie aeternitatis)*.

102. In this respect, it may be recalled that the needs of protection of people comprise all their needs, starting with the protection of the fundamental right to life in its wide dimension (i.e., the right *to live* with dignity, e.g., not to keep on being forcefully and suddenly evacuated from one's home), and also including their *spiritual* needs. In this connection, may I further recall that the judgment of 15 June 2005 (merits and reparations) of the IACtHR in the case of the *Moiwana Community* v. *Suriname*, in addressing the massacre of the N'djukas of the Moiwana village and the drama of the forced displacement of the survivors, duly valued the relationship of the N'djukas in Moiwana with their traditional land as being of "vital spiritual, cultural and material importance", also for the preservation of the "integrity and identity" of their culture[77].

103. In my extensive separate opinion appended to that judgment, I recalled what the surviving members of the Moiwana Community pointed out before the IACtHR[78], namely, that the massacre at issue perpetrated in Suriname in 1986, planned by the State, had "destroyed the cultural tradition (. . .) of the Maroon communities in Moiwana" (para. 80). Ever

[77] The Court warned that "[l]arger territorial land rights are vested in the entire people, according to N'djuka custom; community members consider such rights to exist in perpetuity and to be unalienable" (para. 86 (6)).

[78] In the public hearing of 9 September 2004.

since this has tormented them, as they were unable to give a proper burial to the mortal remains of their beloved ones (paras. 13-22). Their suffering projected itself in time, for almost two decades (paras. 24-33). In their culture, mortality had an inescapable relevance to the living, the survivors (paras. 41-46), who had duties towards their dead (paras. 47-59). Duties of the kind — I added in the same separate opinion (paras. 60-61) — were present in the origins of the law of nations itself, as pointed out, in the seventeenth century, by Hugo Grotius in Chapter XIX of Book II of his classic work *De Jure Belli ac Pacis* (1625)[79].

104. In the case of the *Moiwana Community*, I sustained in my aforementioned separate opinion the configuration, beyond moral damage, of a true *spiritual damage* (paras. 71-81), and, beyond the *right to a project of life*, I dared to identify what I termed the *right to a project of after-life*:

> "The present case of the *Moiwana Community*, in my view, takes us even further than the emerging right to the project of life. (. . .) I can visualize, in the griefs of the N'djukas of the Moiwana village, a claim to the *right to the project of after-life*, taking into account the living in the relations with their dead, altogether. International law in general, and the international law of human rights in particular, cannot remain indifferent to the spiritual manifestations of human beings (. . .). There is no cogent reason to remain in the world exclusively of the living. In the *cas d'espèce*, it appears to me that the N'djukas are certainly well entitled to cherish their project of after-life, the encounter of each of them with their ancestors, the harmonious relationship between the living and their dead. Their outlook of life and after-life embodies fundamental values (. . .)." (Paras. 67-70.)

105. I turned next to what I termed the *spiritual damage*, which I sought to elaborate conceptually as:

> "an aggravated form of moral damage, which has a direct bearing on what is most intimate to the human person, namely, her inner self, her beliefs in human destiny, her relations with their dead. This *spiritual damage* would of course not give rise to pecuniary reparations, but rather to other forms of reparation. The idea is launched herein, for the first time ever, to the best of my knowledge. (. . .) This new category of damage — as I perceive it — embodies the principle of humanity in a temporal dimension, encompassing the living in their relations with their dead, as well as the unborn, conforming the future generations. (. . .) The principle of *humanitas* has, in fact, a long historical projection, and owes much to ancient cultures (in particular

[79] Dedicated to the "right to burial", inherent to all human beings, in conformity with a precept of "virtue and humanity"; H. Grotius, *Del Derecho de la Guerra y de la Paz* [1625], Vol. III (Books II and III), Madrid, Edit. Reus, 1925, pp. 39, 43 and 45, and cf. p. 55.

to that of the Greeks), having become associated in time with the very moral and spiritual formation of human beings."[80] (Paras. 71-73.)

106. I further recalled, in my separate opinion, that the testimonial evidence produced before the IACtHR in the *cas d'espèce* indicated that, in the N'djukas cosmovision, in circumstances like those of the present case, "the living and their dead suffer together, and this has an intergenerational projection". Unlike moral damages, in my view, the *spiritual damage* was not susceptible of "quantifications", and could only be repaired, and redress be secured, by means of obligations of doing *(obligaciones de hacer)*, in the form of *satisfaction* (e.g., honouring the dead in the persons of the living) (para. 77)[81]. In fact, the expert evidence produced before the Court indeed referred expressly to "spiritually-caused illnesses"[82]. I then concluded, in my separate opinion, on this particular point, that:

"All religions devote attention to human suffering, and attempt to provide the needed transcendental support to the faithful; all religions focus on the relations between life and death, and provide distinct interpretations and explanations of human destiny and after-life[83]. Undue interferences in human beliefs — whatever religion they may be attached to — cause harm to the faithful (. . .). [S]uch harm (. . .)

[80] G. Radbruch, *Introducción a la Filosofía del Derecho*, 3rd ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 153-154.

[81] It should be kept in mind — I proceeded — that, in the present case of the *Moiwana Community*, as a result of the massacre of 1986,

"the whole community life in the Moiwana village was disrupted; family life was likewise disrupted, displacements took place which last until now (almost two decades later). The fate of the mortal remains of the direct victims, the non-performance of funerary rites and ceremonies, and the lack of a proper burial of the deceased, deeply disrupted the otherwise harmonious relations of the living N'djukas with their dead. The grave damage caused to them, in my view, was not only psychological, it was more than that: it was *a true spiritual damage*, which seriously affected, in their cosmovision, not only the living, but the living with their dead altogether." (Para. 78.)

Moreover,

"the resulting impunity, in the form of a generalized and sustained violence (increased by the sense of indifference of the public power to the fate of the victims) (. . .), has generated, in the members of the *Moiwana Community*, a sense of total defencelessness. This has been accompanied by their loss of faith in human justice, the loss of faith in law, the loss of faith in reason and conscience governing the world." (Para. 79.)

[82] Paragraphs 80 *(e)* and 86 (9) of the IACtHR judgment.

[83] Cf., e.g., [Various Authors], *Life after Death in World Religions*, Maryknoll, N.Y., Orbis, 1997, pp. 1-124.

> is to be duly taken into account, like other injuries, for the purpose of redress. *Spiritual damage*, like the one undergone by the members of the *Moiwana Community*, is a serious harm, requiring corresponding reparation, of the (non-pecuniary) kind I have just indicated. (. . .)
>
> The N'djukas had their right to the project of life, as well as their *right to the project of after-life*, violated, and continuously so, ever since the State-planned massacre perpetrated in the Moiwana village on 29 November 1986. They suffered material and immaterial damages, as well as spiritual damage. (. . .) In sum, the wide range of reparations ordered by the Court in the present judgment in the *Moiwana community* case (. . .) has concentrated on, and enhanced the centrality of, the position of the victims — as well as on devising a wide range of possible and adequate means of redress. In the *cas d'espèce*, the collective memory of the Maroon N'djukas is hereby duly preserved, against oblivion, honouring their dead, thus safeguarding their right to life *lato sensu*, encompassing the right to cultural identity, which finds expression in their acknowledged links of solidarity with their dead." (Paras. 81 and 91-92.)

107. In my following separate opinion in the same case of the *Moiwana Community* (interpretation of judgment, of 8 February 2006), I insisted on the need of reconstruction and preservation of cultural identity (paras. 17-24) of the members of the community, on which the *project of life and of post-life* of each member of the community much depended. In fact, the understanding has been manifested within UNESCO to the effect that the assertion and preservation of cultural identity (including that of minorities) contributes to the "liberation of the peoples"; cultural identity has thus been regarded as "a treasure which vitalizes mankind's possibilities for self-fulfillment by encouraging every people and every group to seek nurture in the past, to welcome contributions from outside compatible with their own characteristics, and so to continue the process of their own creation"[84]. In this new separate opinion, I expressed my own understanding of the pressing need to redress the *spiritual damage* caused to the N'djukas of the Moiwana Community, and to create the conditions for the prompt reconstruction of their cultural tradition (para. 19)[85].

108. In the present case of the *Temple of Preah Vihear* before the ICJ, it is indeed a pity that a temple that was built with inspiration in the first half of the eleventh century, to assist in fulfilling the religious needs of human

[84] J. Symonides, "UNESCO's Contribution to the Progressive Development of Human Rights", 5 *Max Planck Yearbook of United Nations Law* (2001), p. 317.

[85] To that end — I added —, the delimitation, demarcation, issuing of title and return of their traditional land were essential. This was "a question of survival of the cultural identity of the N'djukas, so that they may conserve their memory, at personal as well as collective levels. Only thus one will be duly giving protection to their fundamental right to life *lato sensu*, comprising their cultural identity." (Para. 20.)

beings, and which is nowadays — since the end of the first decade of the twenty-first century — regarded as integrating the world heritage of humankind, becomes now part of the bone of contention between the two bordering States concerned. This seems to display the worrisome frailty of the human condition, anywhere in the world, in that individuals appear prepared to fight each other and to kill each other in order to possess or control what was erected in times past to help human beings to understand their lives and their world, and to relate themselves to the cosmos.

109. Such relationship, by the way, is what is conveyed by the very term *religion* (deriving from the Latin *re-ligare*), assisting each human being in attaining his connection with the cosmos he barely understands, so as to find peace for himself. This leads to yet another aspect of the *cas d'espèce*, as I perceive it, to be referred to herein, in relation to the context of the Order which the Court adopts today, 18 July 2011. Religions are a complex matter, deserving of close and respectful attention; it has been suggested some decades ago that, from a social perspective, they are more complex than scientific knowledge[86].

110. The relationship, in its distinct aspects, between different religions of the world and the law of nations *(le droit des gens)* itself, has been the object of constant attention throughout the last nine decades[87]. There have been studies focused on the influence of theology in the evolution of international legal doctrine[88]. The interest on the relationship between religions and the law of nations has remained alive lately. Some recent essays look back in time, focusing on the relationship between inter-

[86] Cf. Bertrand Russell, *Science et religion* (*Religion and Science*, 1935), Paris, Gallimard, 1957, p. 8.

[87] As attested, e.g., by the thematic courses devoted to the subject by the Hague Academy of International Law, with its universalist and pluralist outlook; cf., e.g., A. Hobza, "Questions de droit international concernant les religions", 5 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1924) pp. 371-420; G. Goyau, "L'Eglise catholique et le droit des gens", 6 *RCADI* (1925), pp. 127-236; M. Boegner, "L'influence de la réforme sur le développement du droit international", 6 *RCADI* (1925), pp. 245-321; J. Muller-Azúa, "L'œuvre de toutes les confessions chrétiennes (Eglises) pour la paix internationale", 31 *RCADI* (1930), pp. 299-388; K. N. Jayatilleke, "The Principles of International Law in Buddhist Doctrine", 120 *RCADI* (1967), pp. 445-563; H. de Riedmatten, "Le catholicisme et le développement du droit international", 151 *RCADI* (1976), pp. 121-158; P. Weil, "Le judaïsme et le développement du droit international", 151 *RCADI* (1976), pp. 259-335; P. H. Kooijmans, "Protestantism and the Development of International Law", 152 *RCADI* (1976), pp. 87-116; M. Charfi, "L'influence de la religion dans le droit international privé des pays musulmans", 203 *RCADI* (1987), pp. 329-454.

[88] Cf., e.g., Association internationale Vitoria-Suárez, *Vitoria et Suárez — Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 7-170; A. García y García, "The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights", 10 *Ratio Juris*, University of Bologna (1997), pp. 27-29; L. Getino (ed.), *Francisco de Vitoria, Sentencias de Doctrina Internacional. Antología*, Madrid, Ediciones FE, 1940, pp. 15-130; C. A. Stumpf, *The Grotian Theology of International Law — Hugo Grotius and the Moral Foundations of International Relations*, Berlin, W. de Gruyter, 2006, pp. 1-243.

national law and religions in times past[89]. Others look forward in time, centering attention on the role of religions in the progressive development of international law[90]. Still others concentrate on topical aspects of that relationship[91].

111. Here we are taken back to timelessness again. In his inspiring essay of 1948 titled *Civilization on Trial*, Arnold J. Toynbee pondered that the works of artists and men of letters have outlived the deeds of soldiers, businessmen and statesmen; statues, poems and philosophical works have counted for more than the texts of laws and treaties, and the teachings of religious prophets and saints (of distinct religions of the world) have outlasted them all, as lasting benefactors of humankind[92].

112. Toynbee beheld a "unified world", working its way towards "an equilibrium between its diverse component cultures", resulting from the "encounters" between them as well as the religions of the world[93]. He was attentive to what he wisely termed the *encounters*[94] of civilizations (and religions), and he recalled, as examples in this connection:

> "Judaism and Zoroastrianism, which sprang from an encounter between the Syrian and Babylonian civilizations; Christianity and Islam, which sprang from an encounter between the Syrian and Greek

[89] Cf., e.g., D. J. Bederman, "Religion and the Sources of International Law in Antiquity", *Religion and International Law* (eds. M. W. Janis and C. Evans), Leiden, Nijhoff, 2004, pp. 1-26; V. P. Nanda, "International Law in Ancient Hindu India", *ibid.*, pp. 51-61; H. McCoubrey, "Natural Law, Religion and the Development of International Law", *ibid.*, pp. 177-189.

[90] Cf., e.g., M. Veuthey, "Religions et droit international humanitaire: histoire et actualité d'un dialogue nécessaire", *Religions et droit international humanitaire* (Colloque de Nice, June 2007; ed. A.-S. Millet-Devalle), Paris, Pedone, 2008, pp. 9-45; P. Tavernier, "La protection de l'exercice des religions par le droit international humanitaire", *ibid.*, pp. 105-118; M. C. W. Pinto, "Reflections on the Role of Religion in International Law", *Liber Amicorum In Memoriam of Judge J. M. Ruda* (eds. C. A. Armas Barea, J. A. Barberis *et alii*), The Hague, Kluwer, 2000, pp. 25-42.

[91] Cf., e.g., T. J. Gunn, "The Complexity of Religion and the Definition of 'Religion' in International Law", *Religion and Human Rights — Critical Concepts in Religious Studies* (ed. N. Ghanea), Vol. IV, London/N.Y., Routledge, 2010, pp. 159-187; T. van Boven, "Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs", *bid.*, pp. 469-481; K. Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States*, Leiden, Nijhoff, 2008, pp. 135-265 (on protection of religious minorities, and rights of the child); [Various Authors], *The Religious in Responses to Mass Atrocity* (eds. T. Brudholm and T. Cushman), Cambridge University Press, 2009, pp. 1-263.

[92] A. J. Toynbee, *Civilization on Trial*, Oxford University Press, 1948, pp. 4-5, 90 and 156.

[93] *Ibid.*, pp. 158-159.

[94] Rather than "clash", as some post-moderns say in our hectic days, without giving much thought to the matter, and with their characteristic and regrettable shallowness and prejudice.

civilizations; the Mahayana form of Buddhism and Hinduism, which sprang from an encounter between the Indian and Greek civilizations."[95]

Those were just a couple of examples of religions, in a long-term perspective, which appeared within the last 4000 years. Toynbee repeatedly referred to the "historically illuminating" *encounters* between civilizations, to "the time-span" of such "encounters between civilizations", with their "long-term religious consequences", seeking to bring improvement to "the conditions of human social life on Earth"[96].

113. Cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension, that the Court is used to. I have made this point also on other occasions, in the adjudication of distinct cases lodged with the Court. For example, two weeks ago, in the Court's Order of 4 July 2011 in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy)* (intervention of Greece), I sustained, in my separate opinion, that rights of States and rights of individuals evolve *pari passu* in contemporary *jus gentium* (*I.C.J. Reports 2011 (II)*, pp. 506-530, paras. 1-61), to a greater extent than one may prima facie realize or assume.

114. In any case, beyond the States are the human beings who organize themselves socially and compose them. The State is not, and has never been, conceived as an end in itself, but rather as a means to regulate and improve the living conditions of the *societas gentium*, keeping in mind the basic *principle of humanity*, amongst other fundamental principles of the law of nations, so as to achieve the *common good*. Beyond the States, the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole.

115. As it can be inferred from the present case of the *Temple of Preah Vihear*, we are here in the domain of superior *human values*, the protection of which is not unknown to the law of nations[97], although not sufficiently worked upon in international case law and doctrine to date. It is beyond doubt that the States, as promoters of the *common good*, are under the duty of co-operation between themselves to that end of the safeguard and preservation of the cultural and spiritual heritage. I dare to nourish the hope that both Thailand and Cambodia, with their respectable, ancient cultures, will know how to comply jointly with the provisional measures of protection indicated by the Court in the Order it has just adopted today.

116. Half a century ago, the Court's Judgment of 15 June 1962 in the case of the *Temple of Preah Vihear* expressly stated, in its *dispositif*

[95] A. J. Toynbee, *op. cit. supra* note 92, p. 159.
[96] *Ibid.*, pp. 159, 215, 218-220 and 251.
[97] Cf., over half a century ago, e.g., S. Glaser, "La protection internationale des valeurs humaines", 60 *Revue générale de droit international public* (1957), pp. 211-241.

(para. 2), that "Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory". The Temple is and remains the reference to "its vicinity" (from Latin *vicinitas*). The *zone* set up by the Court for the purpose of the provisional measures of protection indicated in the present Order, of 18 July 2011, encompasses the territory neighbouring (*vicinus* to) the Temple.

117. For the issue of the supervision of compliance by the States concerned with the present provisional measures of protection, the Court's Order, with the demilitarized *zone* set forth herein, encompasses, in my understanding, to the effect of protection, the people living in the said zone and its surroundings, the Temple of Preah Vihear itself, and all that it represents, all that comes with it from time immemorial, nowadays regarded by UNESCO as part of the cultural and spiritual world heritage. Cultures, like human beings, are vulnerable, and need protection. The universality of international law is erected upon respect for cultural diversity. It is reassuring that, for the first time in the history of this Court, provisional measures of protection indicated or ordered by it are, as I perceive them, so meaningfully endowed with a scope of this kind. This is well in keeping with the *jus gentium* of our times.

(Signed) Antônio Augusto CANÇADO TRINDADE.

DISSENTING OPINION OF JUDGE XUE

I am in agreement with the Court's decision to indicate provisional measures in the present case, but with serious reservation to its defining of a provisional demilitarized zone (the PDZ) as stated in the operative paragraph 69 (B) (1) of its Order. I will explain my position on the reservation.

In paragraph 61, the Court states that "the Court considers it necessary, in order to protect the rights which are at issue in these proceedings, to define a zone which shall be kept provisionally free of all military personnel". For that purpose, in paragraph 62, it defines a zone to be delimited by straight lines connecting four points with specific co-ordinates. On the sketch-map (p. 553), it shows that the zone, as thus drawn up, disregards the boundary lines as claimed respectively by the Parties, but exceeds well beyond the territories where the claims of the Parties overlap in the present proceedings. In other words, the PDZ covers undisputed territories of the Parties.

Based on the existing jurisprudence of the Court, this measure is unprecedented in the sense that the Court has never before indicated provisional measures ordering the Parties to withdraw troops or personnel from their undisputed territories. This measure, in my view, is excessive in light of the current situation between the Parties and puts into question the proper exercise of the judicial discretion of the Court in indicating provisional measures, both under the law and by the jurisprudence of the Court.

Article 41 (1) of the Statute of the Court provides that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

Further, Article 75 (2) of the Rules of Court provides, that "the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request".

By virtue of these provisions, the Court possesses the power to indicate provisional measures that it deems appropriate and necessary under the relevant circumstances and independently of the requests submitted by the parties to the extent as required by the relevant circumstances (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 397, para. 145; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000,*

I.C.J. Reports 2000, p. 128, para. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 22, para. 46; *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 18).

The purpose of exercising such discretion is to prevent the aggravation or extension of the dispute between the Parties and preserve the rights that the Parties seek for protection in the main proceedings. So far, in all the cases that either directly involve territorial disputes or bear territorial implications, the Court, in indicating provisional measures, has invariably confined such measures to the disputed territories and never gone beyond such areas (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, pp. 24-25, para. 49; *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, pp. 11-12, para. 32). In the case of peaceful settlement procedure by the third party, unless otherwise requested by the parties or the relevant circumstances so require, it is questionable that the Court should exercise the discretionary power in such a liberal way that provisional measures would extend to undisputed territories.

Theoretically, under Article 41 (1) of the Statute of the Court, the Court has the power to indicate "any" measure that it deems necessary, but the term "any" does not mean such power is unlimited. It should be restricted by the factual evidence that the circumstances on the ground require that such measure ought to be taken, otherwise, irreparable prejudice would be caused to the rights of either of the parties which would be adjudicated subsequently in the main proceedings.

With the evidence presented by both Parties, the Court is in a position to ascertain that the circumstances on the ground are grave enough for the indication of provisional measures as evidence shows that serious armed incidents in the area of the Temple of Preah Vihear between the Parties have resulted in the damage to the Temple, loss of life and bodily injury, and the evacuation of local inhabitants. As such armed clashes may recur in the area of the Temple, there indeed exists a risk of aggravation of the dispute and irreparable prejudice to the rights of either Party.

In consideration of the possible provisional measures, the Court has to decide on, in light of the factual circumstances, the measures that ought to be taken.

I regret that the Court did not give sufficient reasons for the adoption of the PDZ as one of the provisional measures, particularly upon what

considerations such extraordinary measure is warranted. When factual circumstances constitute the only ground for the Court to consider the form and the extent of provisional measures independently of the requests of the Parties, the necessity of delimiting a provisional demilitarized zone should be sufficiently explained on the part of the Court, especially why factual circumstances require so excessive a measure that it even includes undisputed territories of the Parties.

Cambodia, at the end of its Application, requests the Court to adjudge and declare:

> "The obligation incumbent upon Thailand to 'withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory' (second paragraph of the operative clause) is a particular consequence of the general and continuing obligation to respect the integrity of the territory of Cambodia, that territory having been delimited in the area of the Temple and its vicinity by the line on the Annex I map, on which the Judgment of the Court is based." (Application instituting proceedings, p. 37, para. 45.)

Obviously, Cambodia's request for the interpretation of the 1962 Judgment bears territorial implications. As an incidental proceeding, the Court at this stage should not pronounce on the merits of the case (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 11, para. 30; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 13, para. 44; *Legal Status of the South-Eastern Territory of Greenland, Orders of 2 and 3 August 1932, P.C.I.J., Series A/B, No. 48*, p. 285). As the Court points out in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*,

> "the Court, in the context of the proceedings concerning the indication of provisional measures, cannot make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments, if appropriate, in respect of the merits, must remain unaffected by the Court's decision" (*Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 23, para. 43).

In the previous paragraphs of the present Order, the term "the area of the Temple" is consistently and repeatedly referred to by the Parties in their pleadings as well as by the Court in its own reasoning. When the relationship between the two terms "the area of the Temple" and "the PDZ" is not clarified, the specificity of the zone with its co-ordinates in place does not necessarily render the latter more easily for the implementation of the Order. Because the Court draws the PDZ without adequate

knowledge of the ground situation in the territories of the Parties respectively, the defining of a PDZ, albeit provisional, on a flat map may cause unpredictable difficulties in reality to the detriment of the legitimate interests of the Parties.

This precaution not to intuitively draw any territorial line between the parties to a dispute in the indication of provisional measures was exercised by the Court in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case between Burkina Faso and Mali, where the Chamber ordered the parties to work out a separation line first between themselves. It ordered:

> "Both Governments should withdraw their armed forces to such positions, or behind such lines, as may, within twenty days of the date of the present Order, be determined by an agreement between those Governments, it being understood that the terms of the troop withdrawal will be laid down by the agreement in question and that, failing such agreement, the Chamber will itself indicate them by means of an Order." (*Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 12, para. 32 (1) (D.)

In the present case, first of all, I am of the view that it would be sufficient for the Court to just order the Parties to refrain from any military activities in the area of the Temple. Since this is a case concerning interpretation of the Court's judgment, at this stage there is no real need for the Court to identify an area for demilitarization. So far as the protection of the Temple is concerned, securing no military actions from both sides in the area of the Temple would suffice to preserve the rights of the Parties in the main proceedings.

Otherwise, the Court could still have, in my opinion, indicated a similar provisional measure, as in the *Burkina Faso/Republic of Mali* case, by asking the Parties in the present case, with the co-operation of the Association of Southeast Asian Nations (ASEAN), to determine first by themselves the positions to which their armed forces should be withdrawn. Failing such agreement, the Court could then, if necessary, draw such lines by means of an order.

The Court has so far followed the jurisprudence that, in indicating provisional measures, there must be a link between the rights which form the subject of the main proceedings on the merits and the measures requested, and the Court must be concerned to preserve by such provisional measures the right which may subsequently be adjudicated by the Court to belong to either party (see, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 54; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 118; *Request for Interpretation of the Judgment of*

31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 327, para. 58; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34). Likewise, the provisional measures as thus indicated should logically relate to the rights concerned. The PDZ as indicated in the operative paragraph 69 (B) (1) fails to maintain this necessary link within reasonable bounds.

(Signed) XUE Hanqin.

DISSENTING OPINION OF JUDGE DONOGHUE

Agreement with the Court that the case should not be removed from the General List — Dissent as to the provisional measures, which exceed the Court's jurisdiction under Article 60 of the Statute of the Court — Unclear whether the Statute of the Court contemplated provisional measures in an Article 60 case — In any event, particular measures imposed today go beyond jurisdiction to decide dispute as to interpretation under Article 60 — Expression of concern that today's Order will chill the willingness of States to consent to the Court's jurisdiction.

I. Introduction

1. Cambodia and Thailand have both presented evidence to this Court about recent conflict in their border region, including the area around the Temple of Preah Vihear. The evidence before the Court raises concerns about risk to life and damage to property, including a temple of cultural importance. This Court, however, has no jurisdiction over this present-day conflict. Its jurisdiction is limited to interpreting the words of a judgment that it issued in 1962 (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6 (hereinafter, the "1962 Judgment")).

2. Without a doubt, the Court hopes that the measures that it indicates today will defuse a tense situation and thus will protect lives and property. This is a laudable goal, but it cannot overcome a lack of jurisdiction to impose the measures contained in today's Order. Accordingly, I have voted against those measures.

3. I have doubts about a key premise of today's Order — that the Statute of the Court contemplates the imposition of provisional measures in an Article 60 interpretation proceeding. Even accepting this premise, however, I believe that the measures imposed today exceed the Court's jurisdiction, which is predicated solely on Article 60. The Court's power under Article 60 to settle a "dispute" ("contestation" in French) over the "meaning or scope" of a judgment is narrower than the Court's jurisdiction under Article 36 of the Statute of the Court to adjudicate and to provide remedies in respect of the broad range of differences of fact and law that can fall within the ambit of a "dispute" ("différend" in French) in a contentious case. Cambodia has asked the Court to clarify the 1962 Judgment as to three specific points: the meaning and scope of the phrase "vicinity on Cambodian territory"; whether the Judgment did or did not recognize with binding force the line shown on the Annex I map

as representing the frontier between the Parties; and whether the obligation to withdraw certain personnel was of a continuing or instantaneous character (Order, para. 31). The request for provisional measures is incidental to this limited and specialized Article 60 proceeding. This limitation on jurisdiction has important implications in the present Article 41 proceeding, because incidental provisional measures are intended to preserve rights that will be adjudicated in the main case.

4. The measures imposed by the Court today include, *inter alia*, restrictions on the military forces of both Parties that extend beyond areas at issue in the main Article 60 case, by encompassing areas unquestionably belonging to one of the Parties within the "provisional exclusion zone" and by including in that zone the Temple of Preah Vihear itself, which both Parties recognize to belong to Cambodia. I do not see the jurisdictional basis for such expansive measures and the Court offers none. The Order goes beyond the one prior case in which the Court ordered provisional measures in an Article 60 case, *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008* (hereinafter, *"Avena Request for Interpretation"*), and also is expansive in comparison to prior orders imposing provisional measures incidental to contentious cases arising out of border disputes.

5. There is another way to protect the rights of parties pending a decision in an interpretation case, while staying within the limits of the Court's jurisdiction. Instead of imposing provisional measures, the Court could avail itself of the streamlined procedure for Article 60 cases that are contained in the Rules of Court.

II. Points of Agreement with the Order

6. I note at the outset some points on which I agree with the Order:

— Article 60 is not time-limited.

— The Court's jurisdiction to interpret the Court's 1962 Judgment survives the expiration of the declaration that Thailand made in 1950

pursuant to Article 36, paragraph 2, of the Statute of the Court.

— There appears, prima facie, to exist a dispute between the Parties as to the meaning or scope of the 1962 Judgment in respect of the three points summarized in paragraph 31 of the Order.

Thus, I voted to reject Thailand's submission requesting the Court to remove this case from the General List.

III. The Court's Lack of Jurisdiction to Indicate the Measures Contained in the Order

A. Article 60: Long in Duration but Narrow in Scope

7. I begin by examining the basis for the Court's jurisdiction to interpret the 1962 Judgment. Article 60 of the Statute of the Court provides: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." There is no requirement that a State consent separately to an Article 60 proceeding. Instead, a State's consent to jurisdiction over a contentious case implicitly incorporates its consent to a future Article 60 interpretation proceeding. This constructive consent affords a basis for jurisdiction to interpret a judgment even after the underlying title of jurisdiction has lapsed and even if (as is the case here) there is no other relevant jurisdictional basis for the Court's consideration of a matter. Because there is no time-limit in Article 60, once a State has consented to the Court's jurisdiction over a contentious case, it appears that such a State is subject indefinitely to the Court's jurisdiction to interpret a judgment in that case. It has no means to withdraw its consent to Article 60 jurisdiction, for any reason or at any time. Thus, Article 60 jurisdiction has unusual indelibility and durability.

8. On the other hand, as noted above, the scope of the Court's jurisdiction under Article 60 is specialized and circumscribed. In particular, the authority to interpret a judgment under Article 60 is not a power to enforce a judgment or to oversee its implementation. Article 60 "does not allow [the Court] to consider possible violations of the Judgment which it is called upon to interpret" (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 20, para. 56). As the Permanent Court of International Justice observed, the Court, in rendering an interpretation, has no scope to consider facts subsequent to the judgment. To the contrary, "[t]he interpretation adds nothing to the decision . . . and

can only have binding force within the limits of what was decided in the judgment construed" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 21). This Court has taken the same approach: "[i]nterpretation can in no way go beyond the limits of the Judgment" (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Judgment, I.C.J. Reports 1950*, p. 403). Accordingly, in the main Article 60 proceeding in the present case, the Court has no scope to apply the 1962 Judgment to present-day conduct or to decide whether a Party bears State responsibility for such conduct. It has no power to impose a remedy on the Parties. It may not delimit a boundary or decide on the respective sovereignty of the Parties. All it may do is to clarify the "meaning and scope" of the 1962 Judgment.

9. The Rules of Court reflect the very circumscribed nature of such an interpretation proceeding, in line with the "relatively summary and expeditious character intended for interpretation and revision proceedings" (Shabtai Rosenne, *Interpretation, Revision and other Recourse from International Judgments and Awards*, p. 183). Thus, Article 98 of the Rules of Court provides for a single round of written observations, unless the Court decides that additional proceedings are necessary. By contrast, Article 74 of the Rules of Court requires a hearing in response to a request for provisional measures. This dissimilarity undermines the logic of imposing provisional measures in an Article 60 case. If the Court considers it especially important to protect the rights of one or both parties in an Article 60 proceeding, it can do so by expediting the interpretation proceeding itself. Absent unusual circumstances, the Court should be able to settle a dispute over interpretation at least as quickly as it can complete a provisional measures proceeding that requires it to examine both law and evidence.

B. Provisional Measures in an Article 60 Case: the Avena Request for Interpretation *Proceeding*

10. The present proceeding is my first opportunity to consider the relationship between Article 60 and Article 41, as I was not on the Court during *Avena Request for Interpretation* and played no role in that case. As is suggested above, I have doubts that the Statute contemplates the use of Article 41 procedures in an interpretation case. Nonetheless, the Statute does not preclude such measures and the Court has issued one such Order, in *Avena Interpretation*, to which I now turn.

11. The Order in *Avena Request for Interpretation* appears to assume, without explanation, that provisional measures can be imposed in an Article 60 proceeding[1]. The absence of analysis is unfortunate, particularly given that — as in the present case — the title of jurisdiction that was the basis for the underlying judgment had lapsed prior to commencement of the Article 60 proceeding, so any jurisdiction to impose provisional measures could be found only in Article 60.

12. Starting from the premise that Article 41 proceedings may be brought in an Article 60 case, it follows that any provisional measures imposed in such a case must meet the requirements both of Article 60 and of Article 41. From Article 60 comes the limitation of jurisdiction to resolve only a dispute about interpretation and the requirement that the interpretation proceeding may not go beyond the scope of the underlying judgment. From Article 41 (as interpreted by the Court) comes a set of requirements, including prima facie jurisdiction, urgency, irreparable harm, the plausibility of the asserted rights and the link between those rights and the requested provisional measures.

13. The requirement of a link between the provisional measures and rights at issue in the main case flows from the wording of Article 41, which refers to measures that "preserve the respective rights of either party". The Court has repeatedly stated that such rights are to be preserved "pending the final decision of the Court" (case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 230, para. 452). Thus, "a *link* must . . . be established between the provisional measures requested and the rights which are the subject of the proceedings before the Court as to the merits of the case" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56). (The role of such a link in the context of non-aggravation measures is discussed below.)

[1] The format of provisional measures orders may have obscured the Court's reasoning. In addition, the Respondent in *Avena Request for Interpretation* challenged the Court's power to impose provisional measures on the ground that there was no dispute, without engaging broader questions related to the indication of provisional measures in an Article 60 case (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 319).

14. These, then, were the constraints that the Court faced in the request for provisional measures in *Avena Request for Interpretation*. There, the underlying judgment required, *inter alia*, that the United States provide "by means of its own choosing, review and reconsideration of the conviction and sentences" of Mexican nationals who had been found to be deprived of their rights under the Vienna Convention on Consular Relations (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 73, para. 153 (11)). Mexico contended that the parties disagreed about the interpretation of this requirement. The United States argued that the Court lacked jurisdiction because it agreed with Mexico's interpretation of the requirement, although it had "fallen short" in meeting that requirement (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 320, para. 36). In its Order indicating provisional measures, the Court found the existence of a dispute, a conclusion that evaporated when the Court arrived at the main Article 60 proceedings (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*).

15. For the purposes of this analysis only, I take as a given the Court's conclusion in 2008 that there was a dispute between Mexico and the United States, in order to examine other aspects of the Court's 2008 Order imposing provisional measures. Given that assumption, I can see how the Court could fit its 2008 Order into the requirements of both Article 60 and Article 41. The provisional measures Order did not go beyond the scope of the judgment to be interpreted. Indeed, it largely mirrored that judgment. The Court rejected the contention of the United States that the requested provisional measures went beyond the scope of the interpretation proceeding, noting that Mexico sought an interpretation of the operative paragraph requiring "review and reconsideration" and "hence of the rights which Mexico and its nationals have on the basis of [that] paragraph" (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 328, para. 63). As to the requirements of Article 41, the link between the pending interpretation (assuming a dispute) and the measures requested was also clear to the Court: an execution prior to its interpretation decision would render it impossible to order the relief sought in the interpretation proceeding (*ibid.*, p. 330, para. 72).

16. As compared to the provisional measures Order in *Avena Request for Interpretation*, today's Order strays further from the underlying judgment that is the subject of interpretation. The Court today imposes binding measures that find no precursor in the 1962 Judgment and that extend beyond the future interpretation proceeding. Also, although the Court today states that it requires a link between the rights at issue in the proceeding on the merits and the provisional measures to be indicated, the measures imposed today stretch beyond the preservation of rights to be adjudged in the Article 60 proceeding. The sketch-map attached to the Order (p. 533) illustrates the overreach by the Court when it is compared to the Parties' competing interpretations of the 1962 Judgment. There is no dispute about interpretation in respect of sovereignty over the Temple of Preah Vihear itself, so there are no "rights" as to the Temple that must be preserved pending a decision in the Article 60 case. The same must be said with respect to the areas within the territory of each Party that fall within the Court's "provisional demilitarized zone" but that are not in dispute in the Article 60 proceeding. Nonetheless, the Court imposes measures that extend to those areas, without explanation.

C. A Comparison to Provisional Measures Imposed in Article 36 Boundary Dispute Cases

17. In today's Order, the Court relies upon past orders imposing provisional measures in the context of border disputes in Article 36 proceedings. The Court goes on to impose a range of measures that bear resemblance to these past orders, without confronting the distinct procedural posture of this case. The measures imposed today also push the limits of the Court's jurisprudence in provisional measures cases, both in the extension of the measures to territory not in dispute and in the approach taken to non-aggravation measures.

18. It is instructive to compare the jurisdiction of the Court in today's case to its jurisdiction in one of the cases cited by the Court — *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*. In *Cameroon* v. *Nigeria*, jurisdiction was a consequence of declarations by both parties pursuant to Article 36, paragraph 2, of the Statute of the Court. The Applicant asked the Court to resolve disputes over sovereignty and to delimit boundaries. It alleged violations of international law and claimed that the Respondent's international responsibil-

ity had been engaged, for example, because it had failed to respect the Applicant's sovereignty, included through military occupation of a region. Thus, when the Court reached the merits, it delimited boundaries, resolved sovereignty and imposed remedies that included the ordering of the withdrawal of the troops of each party from the territory judged to be within the sovereignty of the other (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria; Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 454-458, para. 325).

19. By contrast, in the case before the Court today, the present-day conflict between the Parties may be the impetus for the institution of an Article 60 proceeding, but the Court has no jurisdiction over it. It has no jurisdiction to delimit a boundary, to decide on sovereignty, to decide on State responsibility, to order the movement of military personnel or to impose any other remedy. It has jurisdiction only to answer legal questions that will resolve a dispute — a contestation — over three aspects of the meaning or scope of a prior judgment within "the limits of what was decided" in 1962 (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 21).

20. As in *Cameroon* v. *Nigeria*, Thailand's consent to the Court's jurisdiction in its 1950 declaration gave the Court full scope to exercise its jurisdiction over a contentious case. Such a declaration gives the Court the authority not only to interpret the law, but also to apply it, to decide on matters of State responsibility and to impose remedies, including binding orders constraining the conduct of the parties. As between these Parties, however, that title of jurisdiction ended when Thailand let the 1950 declaration lapse without renewal. Article 60 may be long in duration, but it does not breathe life into a declaration that no longer is in force. This gap between the Court's powers in a contentious case and those in which its jurisdiction rests solely on Article 60 is not trivial, nor can it be dismissed as formalism. To the contrary, precisely because Article 60 jurisdiction persists indefinitely, the Court must take particular care to analyse its jurisdiction in an interpretation case that is based solely on the constructive consent that flows from Article 60.

21. The Court's lack of attention to the bounds imposed by the title of jurisdiction is at odds with its prior recognition that its power to indicate measures under Article 41 is limited by the scope of its jurisdiction in the main case. Thus, in the *Genocide* case *(Bosnia* v. *Serbia and Montenegro)*, the Court limited its provisional measures to those that fell within the scope of the Genocide Convention, which it found to be the sole basis for prima facie jurisdiction:

> "[T]he Court, having established the existence of a basis on which its jurisdiction might be founded, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction; whereas accordingly the Court will confine its examination of the measures requested, and of the grounds asserted for the request for such measures, to those which fall within the scope of the Genocide Convention." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 35; see also the case concerning the *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 70, para. 26, dismissing an application for provisional measures because "the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case".)

Just as the Court's authority to impose provisional measures in the *Genocide* case was limited by the title to jurisdiction in the main case, so, here, its jurisdiction in the main case — that is, its jurisdiction under Article 60 — limits the scope of the provisional measures that it has the authority to impose.

22. The Court could have circumscribed today's Order to take account of its more limited jurisdiction in this proceeding, along the lines of its Order in *Avena Request for Interpretation.* An order that stayed within the bounds of the 1962 Judgment and imposed measures linked to matters in dispute in the interpretation proceeding would have been more defensible. Instead, however, the Court goes in quite the opposite direction, reaching beyond the approach that it has applied most recently to order provisional measures in Article 36 cases arising out of border conflicts. This is illustrated by a comparison to the most recent such Order, in *Costa Rica* v. *Nicaragua (Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I))*. There, the Court limited provisional measures to "the disputed area", rather than imposing measures that extended to other territory, as it does today.

23. Today's Order also includes language on "non-aggravation" that is standard in form but that raises new questions when imposed in an Article 60 case. (There is no similar subparagraph in the 2008 provisional measures Order in *Avena Request for Interpretation*.)

24. Cambodia based its request for a non-aggravation measure on the situation on the ground in the border region, referring to a precarious ceasefire and to the risk of fresh incidents. The Court embraced the request but applied the measure to both Parties, ordering them to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (Order, para. 69 (B) (4)). In support of the measure, both Cambodia and the Court cite past Article 36 cases in which the conflict that formed the predicate for provisional measures bore similarities to the conflict in the border region of these two Parties. Thus, the non-aggravation measure imposed today appears to be directed not at the non-aggravation of the dispute over interpretation that is before the Court, but rather at the non-aggravation of the underlying conflict, as to which the Court has no jurisdiction. Moreover, the Court today does not suggest any linkage between its non-aggravation measure and the rights at issue in the proceedings, in contrast to its most recent provisional measures Order in *Costa Rica* v. *Nicaragua* (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21, para. 62). As a result, the non-aggravation measure imposed today appears to move the Order even further away from the narrow dispute over which the Court has jurisdiction under Article 60[2].

25. There are sound reasons for including non-aggravation measures in a provisional measures order imposed in the context of an Article 36 dispute. Indeed, the objective of preventing the aggravation of the dispute has resonance beyond the standard non-aggravation subparagraph that appears in the Court's orders. The concept of non-aggravation may also provide a rationale for other measures in an order, even when such measures have a more attenuated link to a dispute before the Court. Thus, for example, in an Article 36 case regarding a region of disputed sovereignty, particularly where there is a risk to life, the concept of non-aggravation lends credence to the extension of provisional measures beyond the perimeter of the territory in dispute, despite the more attenuated link to the dispute over territory.

[2] It has been suggested that there is a role for non-aggravation measures that is independent of the preservation of rights *pendente lite*, in light of the language in Article 41 permitting the Court to indicate provisional measures when "circumstances" so require (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*; declaration of Judge Buergenthal, pp. 24-25, para. 11). Because the Court has not embraced that view, it seems unlikely that it provides the rationale for the non-aggravation measure imposed today.

26. Because I am troubled by the Court's extension of today's measures to areas that are not the subject of the interpretation dispute between the Parties, I have considered whether, in a similar vein, the concept of non-aggravation might justify the application of today's measures to such areas. In view of my conclusion that the Court's jurisdiction in this proceeding is limited to the resolution of a dispute regarding interpretation of the 1962 Judgment, however, I cannot see how the idea of non-aggravation could support measures that go beyond that dispute. Put another way, the conduct of the Parties in the border region would not "aggravate" the narrow and limited dispute about the meaning or scope of the words in a judgment. Thus, I do not find a jurisdictional basis for the inclusion of the standard non-aggravation clause in today's Order, nor do I see how the concept of non-aggravation could explain the decision of the Court to extend today's measures beyond the areas that are the subject of the dispute over interpretation in the Article 60 proceeding.

IV. Conclusion

27. Whatever jurisdictional basis this Court had to address the conflict between these two Parties in the border region ended when Thailand allowed its 1950 declaration to lapse without renewal. With that, this Court lost the jurisdiction to make new determinations of international law, to settle the boundary, to decide questions of sovereignty, to adjudge State responsibility or to order the Parties to conduct themselves in specified ways. Instead, when the Court reaches the merits of the Article 60 proceeding, it will have scope only to tell the Parties what it meant in the 1962 Judgment. Today, however, by grafting Article 41 onto Article 60 and then indicating measures that are not bounded by the 1962 Judgment or linked to the Article 60 interpretation proceeding, the Court issues a binding order that, *inter alia*, limits the movement of the armed forces of two States, including in areas of unquestionable sovereignty. Even assuming that provisional measures have some place in interpretation cases, I believe that today's measures exceed the Court's jurisdiction.

28. Those who are frustrated by the Court's consent-based system of jurisdiction may welcome this combination of enduring Article 60 jurisdiction and binding provisional measures as a new-found tool whereby

the Court can protect human lives and property. I worry, however, that today's Order will not enhance the Court's scope to contribute to the peaceful resolution of disputes, but instead will chill the appetite of States to consent even in a limited way to the Court's jurisdiction, e.g., in a special agreement, through a compromissory clause or through a declaration that contains some limitations. If States cannot be confident that the Court will respect the limits of its jurisdiction, they may be unwilling to expose themselves to that jurisdiction.

(Signed) Joan E. DONOGHUE.

DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

Conditions for granting provisional measures — Application for interpretation — Dispute as to both the operative clause of the 1962 Judgment and parts of the reasoning — Reasoning having binding force — Jurisdiction.

Creation of a demilitarized zone — Situation of the Temple of Preah Vihear in this zone — Guarantees given to Cambodia.

1. The Kingdom of Cambodia submitted to the Court an Application for interpretation of its Judgment of 15 June 1962 in the case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)*. It accompanied this Application with a request for the indication of provisional measures, with a view to safeguarding the rights which it deems to derive from that Judgment. Thailand maintained that Cambodia's Application in fact sought revision or enforcement of the 1962 Judgment and should accordingly be removed from the Court's List as being clearly inadmissible. The Court unanimously rejected those submissions and went on to ascertain whether the conditions required to grant provisional measures were satisfied in this case.

2. The Court first recalled that it had jurisdiction to entertain a request for interpretation based on Article 60 of the Statute, provided there was a "dispute as to the meaning or scope" of a judgment rendered by it (Order, para. 21). It made clear that Article 60 did not impose any time-limit on requests for interpretation (*ibid.*, para. 37). However, it added that it "may indicate provisional measures in the context of proceedings for interpretation of a judgment only if it is satisfied that there appears prima facie to exist a 'dispute' within the meaning of Article 60 of the Statute" (*ibid.*, para. 21). Such a dispute may relate to the operative clause of the judgment or to the reasons, to the extent that these are inseparable from the operative clause (*ibid.*, para. 23).

3. In this case, the Court quite rightly pointed out the existence of three disputes. It noted first of all that the Parties were in disagreement on two aspects of the meaning and scope of the second paragraph of the operative clause of the 1962 Judgment regarding Thailand's evacuation from the vicinity of the temple. It further noted that they were in disagreement over "the question of whether the Judgment did or did not recognize with binding force the line shown on the Annex I map as representing the frontier between the two Parties" (*ibid.*, para. 31). It recalled in this connection that "a difference of opinion as to whether a particular point has or has not been decided with binding force . . . constitutes a case which comes within the terms of Article 60 of the Statute" *(ibid.)*.

4. This key question having been settled, it remained for the Court to ascertain whether the other conditions required for granting provisional

measures were satisfied. In this connection, the Court had no difficulty in recognizing as "plausible" the rights invoked by Cambodia on the basis of the interpretation it gave to the 1962 Judgment. Nor did it have any difficulty in finding that the urgency attaching to the grant of provisional measures was present.

5. I fully subscribe to these various findings of the Court which, to my mind, will enable it to pronounce in due course on all of the submissions presented by Cambodia.

6. On the other hand, it was not easy for the Court to determine the provisional measures to be adopted, in the light of the data available to it on the armed forces present. Moreover, these measures must clearly not prejudge the merits. They therefore had to be aimed at both Parties and could have regard to neither the frontier recognized in the reasoning of the 1962 Judgment nor to Thailand's claims, which, moreover, had varied over time.

7. This explains why the Court decided to establish a relatively extensive provisional demilitarized zone. This zone includes the sectors lying between the frontier recognized in 1962 and the lines claimed by Thailand. But it also includes territories over which Thai sovereignty is not disputed by Cambodia and Cambodian sovereignty is not disputed by Thailand. It has in fact been delimited with the sole aim of preventing the resumption of military activity within or directed at the zone.

8. This explains why the Temple itself is included in the demilitarized zone. Cambodia may nevertheless continue to station in the sectors under its sovereignty, and in particular in the Temple, the personnel required to ensure the security of persons and property (paragraph 61 of the Order), whether it be police personnel or guards or keepers. The latter must of course have the necessary weapons and ammunition. Finally, Thailand "shall not obstruct Cambodia's free access to the Temple . . . or Cambodia's provision of fresh supplies to its non-military personnel" who will remain there (*ibid.*, para. 69 (B) (2).

9. I would personally have preferred the Temple itself to be excluded from the demilitarized zone. However, I felt that the most important consideration was to establish such a zone, provided the rights of Cambodia over the Temple were guaranteed. In my view, that condition has been satisfied: the Court's Order recalls Cambodia's sovereignty over the Temple, ensures it free access to the Temple and allows it to station personnel there, in particular the police personnel necessary to ensure the security of persons and property therein.

(*Signed*) Gilbert GUILLAUME.

DISSENTING OPINION OF JUDGE *AD HOC* COT

[Translation]

I. Preliminary Observations

1. I regret that I am unable to concur in the decision adopted by the majority of the Court on the request for the indication of provisional measures submitted by Cambodia in the case concerning the Temple of Preah Vihear *(Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand))*. I applaud the efforts of the Court to give a balanced decision which does not prejudge the principal proceedings. However, I differ on some aspects of the reasoning put forward by the Court and believe that the principal provisional measure indicated is not appropriate.

2. The indication of provisional measures is always an exceptional measure, since the Court limits the free exercise of the parties' rights before ruling on its own jurisdiction, that is, before satisfying itself that it has the consent of the parties to the proceedings. This power must be exercised wisely and with discretion under the circumstances.

3. This general observation is all the more pertinent when the Court is seised of an application for the indication of provisional measures in connection with a request for interpretation under Article 60 of the Statute. The Court has exercised this power only once, in connection with the request for an interpretation in the *Avena* case (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 311). However, the circumstances were very different. The lives of men sentenced to death and awaiting execution were at stake. The aim of the provisional measures decided by the Court was to ensure that the judgment concerned by the request for interpretation should not be emptied of all content as a result of the disagreement between the Parties as to its interpretation. The present proceedings concern a request for interpretation of a judgment rendered half a century ago, and which was applied without any problems for a good 40 years. The Court's original basis of jurisdiction disappeared long ago. Admittedly, a request for interpretation is not subject to any time-limit. However, as provisional measures significantly limit the exercise of territorial sovereignty, they should be indicated in such a case only after strict verification of the basis of the Court's jurisdiction and of the conditions required for the application of Article 60 of the Statute.

II. The Object of the Request

4. The request submitted by Cambodia in the principal proceedings is presented as a request for interpretation of the Judgment of 15 June 1962. Thailand contests this characterization. It considers that the true object of Cambodia's request concerns either enforcement of the Judgment or its revision.

5. In Thailand's view, in so far as Cambodia is seeking the withdrawal of Thai civilian and military personnel from the disputed area, the proceedings relate to enforcement of the Judgment, a matter which for many years has not posed any problem. As we know, the Court does not have jurisdiction to "follow up" its judgments. It falls to the Security Council to intervene if necessary, under Article 94, paragraph 2, of the Charter.

6. As regards the part of the request relating to the status of the frontier, Thailand regards this as an application for revision of the 1962 Judgment, which should have been based on Article 61 of the Statute and not on Article 60. The request in effect contradicts the Court's clear ruling in 1962, which rejected Cambodia's first two submissions at the time.

7. In its final submissions, read at the hearing of 20 March 1962, Cambodia states:

> "May it please the Court:
>
> 1. To adjudge and declare that the map of the Dangrek sector (Annex I to the Memorial of Cambodia) was drawn up and published in the name and on behalf of the Mixed Delimitation Commission set up by the Treaty of 13 February 1904, that it sets forth the decisions taken by the said Commission and that, by reason of that fact and also of the subsequent agreements and conduct of the Parties, it presents a treaty character;
>
> 2. To adjudge and declare that the frontier line between Cambodia and Thailand, in the disputed region in the neighborhood of the Temple of Preah Vihear, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam (Annex I to the Memorial of Cambodia) . . ." (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 11.)

8. The Court responds to these submissions in very precise terms, in two parts. At the beginning of its 1962 Judgment, the Court notes:

> "Accordingly, the subject of the dispute submitted to the Court is confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear. To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States in this sector. Maps have been submitted to it and various considerations have been advanced in this connection. The Court will have regard to each of these only to such extent as it may find in them reasons for the decision it has to give in order to settle the sole dispute submitted to it, the subject of which has just been stated." (*Ibid.*, p. 14.)

9. It then adds, in the paragraphs preceding the operative clause *stricto sensu*:

> "Referring finally to the Submissions presented at the end of the oral proceedings, the Court, for the reasons indicated at the beginning of the present Judgment, finds that Cambodia's first and second Submissions, calling for pronouncements on the legal status of the Annex 1 map and on the frontier line in the disputed region, can be entertained only to the extent that they give expression to grounds, and not as claims to be dealt with in the operative provisions of the Judgment." (*I.C.J. Reports 1962*, p. 36.)

10. To the extent that Cambodia, in its submissions, could be said to be asking the Court to reconsider the said decision and "[t]o adjudge and declare that the frontier line between Cambodia and Thailand, in the disputed region in the neighborhood of the Temple of Preah Vihear, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam (Annex I to the Memorial of Cambodia)" (*ibid.*, p. 11), it would appear that its Application concerns not the interpretation of the Judgment (Article 60 of the Statute), but the revision of the said Judgment (Article 61 of the Statute).

11. The two arguments relating to the nature of the request implicitly raise the question of abuse of process. Is this not an attempt, 50 years after the delivery of the 1962 Judgment, to submit new claims by grafting them onto a so-called dispute as to the interpretation of the Judgment, in order to ensure a basis of jurisdiction which would otherwise be lacking? It would be advisable for the Court to reconsider the question during the main proceedings, with a view to discouraging this type of action, which calls into question the fundamental principle of the consent of the Parties to the proceedings.

12. I recognize that Cambodia's Application is ambiguous in respect of these questions and should be clarified in the main proceedings. However, I regret that the Court did not deem it necessary to respond to these arguments, which are at the basis of Thailand's request for the Application to be removed from the List *in limine litis*, and that it merely offered a partial response in the course of its reasoning.

III. Dispute as to the Meaning or Scope of the 1962 Judgment

13. In paragraph 22 of the Order, the Court considers that

> "a dispute within the meaning of Article 60 of the Statute must be understood as a difference of opinion or views between the parties as to the meaning or scope of a judgment rendered by the Court; and [that] the existence of such a dispute does not require the same criteria to be fulfilled as those determining the existence of a dispute under Article 36, paragraph 2, of the Statute".

14. The distinction between a dispute within the meaning of Article 60 of the Statute ("contestation" in French) and a dispute as referred to in Article 36, paragraph 2, of the Statute ("différend" in French), which is not apparent in the English text, where the term "dispute" is used in both cases, would have merited a few words of explanation. The two concepts do not entail the same procedural requirements. A State which submits an application for interpretation under Article 60 of the Statute is not obliged to exhaust all diplomatic channels beforehand. However, the wording used in paragraph 22 bothers me in so far as it seems to imply a lower threshold for the actual content of the notion of a dispute under Article 60 ("contestation") than for one under Article 36 ("différend").

15. Of course, it is a matter of prima facie appraisal in this case. The Court does not have to establish definitively the existence of a dispute ("différend") in the sense of Article 36. However, the notions of "contestation" and "différend" have at least two points in common. First, it is for the Court to determine the existence of a dispute ("contestation"). The Court recalled this in the *Avena* case cited above: "It is for the Court itself to decide whether a dispute within the meaning of Article 60 of the Statute does indeed exist." (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 13, para. 29.) It is not enough for a party to invoke a dispute ("contestation") for it to be established. Secondly, there must be "an actual controversy involving a conflict of legal interests between the parties" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34).

16. But the Court states in paragraph 31 that

> "this difference of opinion or views appears to relate, next, to the nature of the obligation imposed on Thailand, in the second paragraph of the operative clause of the Judgment, to 'withdraw any military or police forces, or other guards or keepers', and, in particular, to the question of whether this obligation is of a continuing or an instantaneous character".

17. For my part, I cannot see how the alleged obligation asserted by Cambodia can be distinguished from the general obligation under international law to respect territorial integrity and refrain from occupying, with armed elements or civil administration personnel, territory under the sovereignty of a neighbouring State. Cambodia itself concurs in this. In its Application, it declares:

> "The obligation incumbent upon Thailand to 'withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory' (second paragraph of the operative clause) is a particular consequence of the general and continuing obligation to respect the integrity of the territory

of Cambodia, that territory having been delimited in the area of the Temple and its vicinity by the line on the Annex I map, on which the Judgment of the Court is based." (Application instituting proceedings, p. 37, para. 45.)

18. Both Parties agree on this principle and are committed to respecting it. It makes no difference whether the obligation laid down in 1962 is of a "one-off" or permanent nature. The dispute as to the interpretation of the 1962 Judgment relates to the geographical areas under the respective sovereignty of Thailand and Cambodia, but does not concern the consequences that arise from the exercise of sovereignty over the territory thus defined. I can see no disagreement on a point of fact or of law which could constitute a dispute within the meaning of Article 60 of the Statute. To me this appears, as Judge Anzilotti put it, to be incompatible "with the existence of any dispute coming within the terms of Article 60 of the Statute as interpreted above, and reduces the divergence between the views of the two Governments to a question of words" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*; dissenting opinion of Judge Anzilotti, pp. 24-25).

19. Nevertheless, I concur with the Court that a difference of views does exist between the Parties as to the meaning or scope of the phrase "vicinity on Cambodian territory", as used in the second paragraph of the operative part of the 1962 Judgment, and that "there is a sufficient basis for the Court to be able to indicate the provisional measures requested by Cambodia, if the necessary conditions are fulfilled" (paragraph 32 of the Order).

IV. Provisional Measures Indicated

20. My main point of contention with the Order concerns the operative part and, more precisely, the principal measure indicated, whereby a provisional demilitarized zone is created, whose co-ordinates are provided in paragraph 62 of the Order, which is shown in the annexed sketch-map (p. 553).

21. The Parties submitted a very limited amount of cartographic material to the Court. The only relatively accurate map available to the Court is the Annex I map, prepared in 1907. Notwithstanding its qualities, this map does not represent a reliable technical reference source and does not show developments subsequent to its preparation, in particular the access routes to the Temple. The file lacks a basic recent topographical map showing the exact position of the localities cited by the Parties, etc. Moreover, the Parties provided no information on the nature and positions of the military forces present.

22. Given the information currently available to us, it is unwise for the Court to define a provisional demilitarized zone based on the information it has. An "armchair strategy", which is not based on accurate data, may

lead to the indication of provisional measures that are inapplicable on the ground.

23. The Court rejected Cambodia's request in the terms in which it was formulated, as it considered it to be too one-sided. It establishes a provisional demilitarized zone which includes the disputed territory, and at the same time extends over areas of territory that are unquestionably under the sovereignty of Cambodia or of Thailand. However, for all that the Court's decision is balanced, it does not seem to me to be appropriate. If, as I fear, the Parties were to find the measure to be inapplicable on the ground, the situation would deteriorate instead of calming down. Far from preserving the rights of each Party, such provisional measures would complicate the principal proceedings, a good part of which would be taken up with mutual accusations of non-compliance with the measures indicated. The Parties might thus find it difficult to accept the Court's decision in the principal proceedings regarding the definition of the perimeter of the "vicinity" falling under Cambodian sovereignty.

24. For my part, I would have liked the Court to have based itself on the Order rendered by the Chamber in 1986 in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. The Chamber noted at the time in the Order:

> "Whereas the measures which the Chamber contemplates indicating, for the purpose of eliminating the risk of any future action likely to aggravate or extend the dispute, must necessarily include the withdrawal of the troops of both Parties to such positions as to avoid the recrudescence of regrettable incidents; whereas, however, the selection of these positions would require a knowledge of the geographical and strategic context of the conflict which the Chamber does not possess, and which in all probability it could not obtain without undertaking an expert survey." (*Frontier Dispute (Burkina Faso/Republic of Mali), Order of 10 January 1986, I.C.J. Reports 1986*, pp. 10-11, para. 27.)

25. This is not to say that the Court should refrain from indicating provisional measures. In a statement dated 14 February 2011, the President of the Security Council, to which the armed incidents had been reported, considered that the dispute should be dealt with at regional level. It called on the two sides to establish a ceasefire and expressed support for the active efforts of ASEAN and the regional organization's Indonesian Presidency to restore peace in the Dangrek sector. The Court supports this effort and asks for the active and immediate co-operation of the Parties.

26. In this case, both Parties asked the Indonesian Presidency of ASEAN to deploy Indonesian observers on both sides of the frontier in question, in order to monitor the Parties' compliance with their commitment to avoid any further armed incidents. The informal meeting of the ASEAN Foreign Ministers on 22 February 2011 welcomed the Parties' commitment and mandated the Indonesian Presidency to implement the decision.

27. However, the Parties are taking a long time to agree on the practical arrangements for implementing the plan and in particular for positioning the observers. The Court urges the Parties to cease any hostile action in the area of the Temple immediately and to agree, without delay, on the deployment of the observers proposed by the Indonesian Presidency. This concrete measure, which is liable to ease the tension and avert the danger of irreparable damage being caused to persons and property, results from the operative clause. I fully endorse it.

(Signed) Jean-Pierre COT.