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.