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.

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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.)

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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".

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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

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> 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

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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 al1 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.

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