SEPARATE OPINION OF SIR GERALD FITZMAURICE

Although I am in full agreement with the operational part of the Judgment of the Court, and with its reasoning and language, there are certain matters which I should like to develop futher, and others—not mentioned in the Judgment—which seem to me to require a brief discussion.

Since I have no intention of going over the whole ground again, I shall set out my points *seriatim*, in order of convenience, and without attempting to establish any particular connecting links between them.

The pre-1904 position

The Judgment states that the Court is not called upon to go into the situation as it existed previous to the treaty settlement of 1904; and this is true inasmuch as the rights of the Parties depend on, or flow from, that settlement, or events subsequent to it. There is however one fact, not referred to in the Judgment, which could have been of decisive importance in this case, namely that, previous to the boundary settlements of the period 1904-1908, the Temple of Preah Vihear was situated in territory that was, at that time, under Siamese sovereignty, because a treaty of 15 July 1867 between France (acting on behalf of Cambodia) and Siam (as Thailand was then called) had established a frontier line running well south of the Dangrek range of mountains, across the Cambodian plain. Since the effect of the 1904 treaty settlement was to shift the frontier to the north, and to place it along the general line of the Dangrek range, it follows that, by this settlement, Thailand was giving up territory. As a consequence, there arises a presumption *in favorem ejus qui dat* that Thailand did not relinquish any territory she cannot be proved to have relinquished. This means that in any conflict between a more northerly and a more southerly frontier line in the region of Preah Vihear, the latter line must be held to prevail, unless the former can be established. I agree with the Court that the former (i.e. the more northerly) line can be, and is, established, for the reasons given in the Judgment; but the foregoing considerations require to be stated in order that the significance of the conclusion may be fully apparent.

The matter is brought into relief in another way. Throughout these proceedings Thailand has contended that, there never having been (as she maintains) any effective delimitation of the frontier in the eastern sector of the Dangrek range, as required by Article 3

of the Treaty of 1904, the result (by virtue of Article 1) is automatically to cause the frontier to run along the line of the watershed as ascertained by scientific survey. An interpretation even more favourable to Thailand would however be that, in the absence of the delimitation required by Article 3, in completion of Article 1, the latter provision could not have taken any practical effect, so that no new frontier line under the Treaty of 1904 would have come into existence at all, and the frontier would have remained as it was immediately previous to 1904, with the Temple area in Thailand. Since both these interpretations are favourable to Thailand, and either would have been decisive if the Court had not held that Thailand had in any event, subsequently, and independently, accepted a frontier placing the Temple in Cambodia, it was not necessary to choose between them.

There is another aspect of the pre-1904 situation which is material, namely the considerable evidence in the record of the unsettled state of the frontiers between Siam and French Indo-China (of which Cambodia was then part), which had existed for a long time and was the cause of disturbed relations between France and Siam. This is mentioned towards the end of the Judgment. It is however a point that has to be borne constantly in mind from the start, in assessing what the Parties were really intending to achieve by the frontier settlements of the period 1904-1908, and as indicative of their desire to achieve a settlement that would be definite and durable.

Considerations of a topographical, historical and cultural character

The Court has dismissed these in a sentence, as not being legally decisive. I agree that they are not; but I think it desirable to say why, since these considerations occupied a prominent place in the arguments of the Parties. Such matters may have some legal relevance in a case about territorial sovereignty which turns on the weight of factual evidence that each party can adduce in support of its claim, and not on any more concrete and positive element, such as a treaty. In the present case it is accepted, and indeed contended by both Parties, that their rights derive from the treaty settlement of 1904, and on the subsequent events relative to or affecting that settlement. In consequence, extraneous factors which might have weighed with them in making that settlement, and more particularly in determining how the line of the frontier was to run, can only have an incidental relevance in determining where today, as a matter of law, it does run.

Moreover, for these factors to have any serious influence, it would at least be necessary that they should all point in the same

direction, and furnish unambiguous indications. This is not the case here. As the Judgment of the Court points out, no certain deduction can be drawn from the desire of the Parties for natural and visible frontiers—the Dangreks in themselves furnished that, and would, in a general way, have done so, whether the line along the Dangreks was a crest, a watershed or an escarpment line. Equally, it is difficult to draw any certain deduction from the siting of the Temple. It overlooks the Cambodian plain: but it faces in the direction of Thailand. Its main access is from the latter direction; but there is also access from the Cambodian side—and this access, because steep and hard, must—precisely for that reason—have been contrived deliberately and of set purpose, *contra naturam* as it were, since it involved a climb of several hundred metres. Yet difficulty of access is not—or was not—all on one side: there is much evidence in the documentation of the case that the thickness of the jungle on the northern (Thai) side of the Temple had the consequence that visits had to be specially prepared, by the clearing of paths and the blazing of trails. This particular difficulty was much less prominent on the Cambodian side: but what remains certain is that if, though for different reasons and in different ways, access was not easy from either side, it was feasible from both, and was also achieved from both, at varying times and in varying degrees.

As to the Khmer origins of the Temple—this factor (put forward by Cambodia) operates in an equally neutral way, since it seems to be admitted that there are and were, in these regions, populations of Khmer race on both sides of the frontier.

The proceedings of the Mixed Commission under the Treaty of 1904

Although I do not dissent from what the Judgment says under this head, I think many of the facts are so conjectural that it is exceedingly difficult to draw any sure conclusions from them. Various inferences may be more or less reasonable and warranted, but when all is said and done the only certain thing is that the Annex I map was produced in Paris by French topographical officers in November 1907, and was never, *as such*, seen (much less approved or adopted) by the Mixed Commission, which indeed appears to have ceased to function entirely after about February of that year—or at any rate it did not, after January, hold any meeting of which there is any record. Whether the map was based on any instructions that the Commission had given, or on rough sketches approved by it, must, in the absence of any evidence, remain a matter of surmise. It seems to me therefore that Thailand succeeds on this part of the case, about which it is hardly necessary to say more than that, however respectable the

provenance of the map was, it must be held to have been a purely unilateral production, not in any way binding on Thailand at the moment of its communication to her, and subject entirely, at that time, to her acceptance or rejection, either in whole or in part.

Thailand's acceptance by conduct of the Annex I line

Had the matter ended with the production of the map; or if the map had never been officially communicated to Thailand; or had been communicated in such a way, or in such circumstances, that no adverse conclusion could be drawn from her failure to react; or had been communicated but rejected, either as a whole, or in relation to Preah Vihear; then Thailand would, in my opinion, have been entitled to a finding in her favour, since I personally consider that there is little reasonable doubt that, in this particular region, the true line of the watershed runs, and ran in 1904, along the line of the escarpment. (Moreover, I could not myself regard the deviation from the line of the watershed at Preah Vihear as being covered by any discretionary powers of adaptation which the Mixed Commission might have possessed; but this matter is not in any event material, since it was not the Mixed Commission as such which made or approved the map.)

The crucial issue in this case is therefore whether Thailand, by her conduct in 1908, and thereafter, in fact accepted the Annex I map line as representing the outcome of the work of delimitation provided for by the Treaty of 1904, knowing how it had been produced; or, more simply, whether Thailand just accepted the line as being the frontier line, accepting also the risk of its possible inaccuracy.

The Judgment of the Court answers these questions in the affirmative, on grounds in which I fully concur. In doing so, I am not unmindful of the fact that acceptance by conduct alone, of an obligation in the nature of a treaty obligation, is not lightly to be presumed; especially where a frontier is in question; and even more so where the frontier line thus said to be accepted involves a departure from the delimitary criterion indicated by the relevant treaty. But if the plea of error or misapprehension is excluded, as I think it has to be (see below), I can place no other interpretation on Thailand's conduct, considered as a whole, than that she accepted this particular line as representing the frontier in this region. Moreover, even negative conduct—that is to say failure to act, react or speak, in circumstances where failure so to do must imply acquiescence or acceptance—is, in my opinion, quite sufficient for this purpose, if the facts are clear.

I would only add to the views expressed in the Judgment, that

I cannot accept the plea so eloquently urged on behalf of Thailand that any adherence to the Annex I line would have involved a departure from a solemn treaty obligation. This surely begs the question; for as the Judgment says, it is always open to governments, in their bilateral relations, to agree on a departure of this kind, provided they do so knowingly, or (as I think was Thailand's case here) in circumstances in which they must be held to have accepted, and as it were discounted in advance, the risks or consequences of lack, or possible lack, of knowledge. In the present case, the conduct of each Party, over what was an important matter of common concern to both, was, in my opinion, evidence of, or amounted to, a mutual agreement to accept a certain line as the frontier line. What seems to me therefore really to have occurred was not in the legal sense a departure from the treaty provision concerned, but the mutual acceptance of a certain result as being its actual outcome, irrespective of the precise conformity of that outcome with the treaty criterion.

I think it desirable here to mention a point of detail, but one nevertheless liable to give rise to some confusion. Another of the maps communicated to the Siamese authorities covered the Pnom Padang range of mountains which prolongs the Dangrek range eastwards to the river Mekong, and showed a frontier line apparently running along the crest of the Pnom Padang. This was because the Treaty of 1904, while prescribing a watershed line for the Dangreks, prescribed a crest line for the Pnom Padang, and the actual delimitation was carried out by the Mixed Commission set up under that Treaty. The subsequent boundary Treaty of March 1907, however, prescribed a watershed line for the Pnom Padang as well as for the Dangreks. But already in the meantime, the first (1904) Mixed Commission had (see minutes of its meeting of 18 January 1907) adopted the crest line (though the Commission seems in this region to have regarded the crest and watershed lines as coinciding). As far as I can understand the matter, the result was that although it was strictly part of the task of the second (1907) Mixed Commission to delimit the frontier along the Dangrek and Pnom Padang ranges, it only delimited the western Dangrek sector (the eastern sector being the task of the first Commission), and did not delimit the Pnom Padang at all. The crest line delimitation carried out by the first Commission in the Pnom Padang region therefore stood. There seems thus to have been a tacit understanding between the Governments that the relevant provisions of the 1907 Treaty would to this extent be ignored, since a delimitation, even though not the one provided for in this latter Treaty, had already been carried out. Here again, therefore, the Governments accepted the map line as being the line of the frontier, even though it did not correspond

with the latest treaty provision on the subject. This is a minor matter, but it illustrates very aptly how the Governments did not consider themselves as necessarily tied down to the treaty criteria in what they finally accepted as the frontier line.

The question of error

The Court has dealt very fully with this matter, but it is so central to the whole issue in this case that I desire to make some additional remarks about it.

In the interests of the stability of contracts, the principle of error as vitiating consent is usually applied somewhat strictly; and I consider that this approach is also the correct one in international law, in the interests of the stability of treaties, and of frontier lines established by treaty or other forms of agreement. That there was (as I think) an error in the map by reference to the true watershed line does not necessarily mean that Thailand was herself under any misapprehension, nor that, if she was, she can, in law, now plead the fact. The Siamese authorities, in 1908 and thereafter, cannot possibly have failed to realize that the Annex I map showed Preah Vihear as being in Cambodia, since it so clearly did; and for the reasons given in the Judgment of the Court, the fact that, at this time, the Siamese authorities may have attached no importance to the Temple, or may have failed to realize the importance it would eventually assume for them, is legally quite irrelevant. This could never, *per se*, be a legal ground for claiming frontier rectification.

The sole remaining question therefore is whether the Siamese authorities, if (as the Judgment holds) they accepted that Preah Vihear should be attributed to Cambodia (as part of French Indo-China), did so in the mistaken belief—and (as Thailand alleges) only on the basis of such a belief—that the line on the map corresponded to the watershed line.

Even if the Siamese authorities of that date were under such a misapprehension, there are, in my opinion, two decisive reasons why Thailand cannot now rely on or plead the fact. The first arises as follows.

It was the Siamese Government itself which, with the assent, and actually at the suggestion of the Siamese members of the Mixed Commission, formally requested that the work of preparing the maps of the frontier areas should be carried out by the French topographical officers. It was the same in connection with the work of the second Mixed Commission under the Treaty of 1907. In the

eastern Dangrek sector moreover, the Siamese authorities did not even cause the French officers doing the survey work to be accompanied by a Siamese officer, as they could have done, and as was in fact done in other cases (and it was actually a French officer of Cambodian race who did the survey work in the eastern Dangrek sector, as the Siamese members of the Mixed Commission perfectly well knew). The despatch from the Siamese Minister in Paris enclosing the series of maps, of which the Annex I map was one, also stated in the clearest possible terms that they were the maps produced by the French officers in response to "the Siamese Commissioners" request. The maps were then communicated to the Siamese members of the Mixed Commission, who of course equally knew this, and further would have known how far, if at all, the maps were based on work done or approved, or on instructions given by, the Commission itself.

It is apparent, therefore, that no one on the Siamese side could have been under any misapprehension as to the provenance of these maps. Furthermore, is is evident that the Siamese authorities deliberately left the whole thing to the French elements involved, and thus accepted the risk that the maps might prove inaccurate in some respects. Consequently, it was for them to verify the results, if they wished to do so, in whatever way was most appropriate in the circumstances, e.g. by consulting neutral experts. If they did not (for whatever reasons) wish to do this, then they had to abide by these results. The formal request for extra copies for the use of the provincial Governors shows that, in any event, the case was not one of a mere passive reception of these maps by the Siamese authorities.

The explanation of all this, there can be no reasonable doubt, is that, in effect, everyone on the Siamese side relied on the skill and good faith of the French topographical officers producing the maps. There can equally be no doubt that the latter acted in complete good faith, used all their skill, and fully believed that the watershed in the Preah Vihear region ran as indicated by the Annex I line. One may sympathize with Siam's lack of topographical and cartographical expertise at this time, but one is dealing with sovereign independent States to whom certain rules of law apply; and it remains the fact that, in the absence of any question of lack of good faith, the legal effect of reliance on the skill of an expert is that one must abide by the results—in short, a principle akin to that of *caveat emptor* is relevant. This is so in all walks of life. A man who consults a lawyer, doctor, architect, or other expert, is held (in the absence of fraud or negligence—not here in question) to accept the possibility that the expert may be mistaken in the advice he gives, or less than perfect in the work he does. Like all human beings, he is fallible. Except in cases in which the doctrine of "absolute" risk or liability prevails, the law

as a general rule affords no remedy against errors made in good faith and without negligence by duly qualified experts. The dangers of giving expert advice could not otherwise be accepted. The French officers in this case were of course fallible. They for instance (and both Parties were agreed about this) made an error over the course of the O'Tasem stream, which must have affected the whole question of how the watershed line ran in the Preah Vihear region. The authorities of French Indo-China were unaware of this error. They accepted the map as correct. Equally, the Siamese authorities, knowing the character and provenance of the map, being in a position to consult their Commissioners who had received it, or experts of their own choice, made no objection, and raised no query, in relation to a line which was clearly intended to represent and constitute the line of the frontier in this region, and which anyone looking at it must have seen at once placed Preah Vihear on the Cambodian side of the line. Today Thailand says the map was erroneous and that she was under a misapprehension about it. But the Siamese authorities of that date plainly accepted the risk that just such an error as this might in time be discovered: and whoever does that, must be held thereby also, and in advance, to have accepted such errors as do in fact eventually come to light.

The other decisive reason why it is not possible to receive Thailand's plea that she mistakenly believed the Annex I line to correspond to the line of the watershed, and that she only on that basis accepted the siting of Preah Vihear in Cambodia, is, as the Judgment of the Court points out, that this plea is totally inconsistent with her attitude over her "acts on the ground", which she puts forward as evidence that she considered herself to have sovereignty over Preah Vihear and had never accepted the Annex I line; for if this was so, she must have regarded the map line as erroneous, and the map as showing Preah Vihear in Cambodia for that reason only. It does not make any difference that the Court has found that Thailand's acts on the ground did not in fact suffice to demonstrate her non-acceptance of the map line. The inconsistency with the plea of mistaken belief lies in the very contention that they did.

Thailand's "acts on the ground"

If Thailand's attitude respecting her acts on the ground debars her from pleading error over the watershed question, she remains fully entitled to put them forward as evidence of a belief on her part that she had sovereignty over Preah Vihear, and did not accept

the Annex I line in that region. But like the Court, I do not find these acts really convincing in that sense. Thailand has, I know, produced an impressive volume of evidence of local administrative activity relative to Preah Vihear; but it is not clear to me just what legal value can be attached to it. I have already drawn attention to the fact that previous to the 1904 treaty settlement, the Preah Vihear region (not in isolation of course, but as part of the eastern Dangrek sector) was, and had since 1867 been, under Siamese sovereignty, because the frontier at that time ran south of the whole Dangrek range. In view of this, it was perhaps to be expected (and would not in itself signify greatly) that in this rather remote region, and because of the difficulties of communication with Bangkok which must then have existed, the local officials and authorities of Khukhan province should, for a time, have continued, at and near Preah Vihear, to perform those acts and carry out those activities which they had been accustomed to perform and carry out for some time past. If this was the position, no very positive inference can be drawn from it. It is true that the Siamese authorities did take steps to make the frontier changes known locally; but, in this region, realization of them may have been slow to come through. There may for a time have been an element of fluidity in the local situation; but the real attitude of Siam as a State must, for the reasons given in the Judgment of the Court, be taken to be that evinced in the course of, and following upon, the visit of Prince Damrong in 1930—by far the most significant incident in this part of the case. To me it seems to have constituted a tacit recognition of Cambodian sovereignty over Preah Vihear, and the existence of possible reasons why Siam did not protest cannot, in law, alter the fact.

I also could not help being struck by the evidence of one of Thailand's own expert witnesses—a patently honest and reliable one, it seemed to me—to the effect that, in the course of a visit to this region in July 1961, during which he spent eleven days in carrying out a survey of the Temple area, he saw no sign of the inhabitants, rice cultivations, or forestry or other activities, that figure so prominently in the evidence furnished by Thailand respecting the period following on the treaty settlements of 1904-1908. This witness, when cross-examined on behalf of Cambodia, was asked whether he saw any people living between Preah Vihear and the nearest village on the Thai side—a distance of 10-15 kilometres—and he answered "No, there is [sc. he saw] nobody living there". When asked whether he saw any people on Mount Preah Vihear itself, he said that, apart from the Thai police post, and one guard at the Temple, he saw "occasionally a few visitors ... or tourists". When asked whether he saw any people cultivating rice, he said

"No. This area is covered by jungle forests and there is no rice cultivation". Asked whether he saw any woodcutters or foresters about, he replied "During the eleven days I stayed there I did not see anybody". In re-examination on behalf of Thailand, no questions were put to the witness on these points.

It is obviously not permissible from this evidence, particularly on the basis of so short a stay, to draw any definite conclusion as to the situation existing at the earlier period. But even in eleven days it is possible to see if, in a restricted area, there are any habitations, cultivations, forestry work in progress, and so on. It seems therefore reasonable to infer—taking the scale of Siamese activity in this area, in the period following on the treaty settlement, to have been as indicated in the evidence furnished by Thailand—that it must since have undergone a notable diminution.

The Treaties of 1925 and 1937

These Treaties, the bearing and effect of which was much discussed in the written and oral proceedings, have, in my opinion, only a limited, though weighty significance in this case, namely as indicative of the importance the Parties attached to having stable and durable frontiers. This was shown by the fact that frontier revision was, in terms, excluded from the revisionary processes which were otherwise one of the main objects of these Treaties. The Court has made this fact the basis of a finding, with which I fully agree, that it is reasonable to assume from this feature of the Treaties that, by the boundary settlements of the period 1904-1908, the Parties were equally seeking stability and durability, and that this factor should therefore prevail in resolving any doubts in favour of, or against, a part of the frontier the validity of which is now called in question.

It is a general principle of law, which has been applied in many contexts, that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence—in relation to the same or a closely connected matter—of his attitude, state of mind or intentions at an earlier date also; provided of course that there is no direct evidence rebutting the presumption thus raised. Similarly—and very important in cases affecting territorial sovereignty—the existence of a state of fact, or of a situation, at a later date, may furnish good presumptive evidence of its existence at an earlier date also, even where the later situation or state of affairs has in other respects to be excluded from consideration (Judge Huber in the *Island of Palmas* case, *Reports of International Arbitral Awards*, Vol. II, at p. 866; and see also the separate Opinion of

Judge Basdevant in the *Minquiers and Ecrehos* case, *I.C.J. Reports 1953*, at p. 76 ff.).

Cambodia however claimed another effect for the Treaties of 1925 and 1937, namely that by confirming the frontiers as already established, they imparted a new and independent treaty basis to the Annex I line, thereby validating it, even if it was not valid before. I do not think this contention well-founded. Such a confirmation of the existing frontiers no doubt implied that frontiers did exist, and possibly also that they existed and were complete at all points of contact between the two countries; but this could not, by itself, say anything at all as to what these frontiers were, or how exactly they ran. A confirmation only confirms what is; it cannot *per se* alter, add to, or detract from the latter, which must be ascertained *ab extra*—in this case by reference to the previous treaty settlements and the events relevant to them. The confirmation was evidence of the importance the Parties attached to the frontiers, but otherwise it left matters as they were, whatever they were.

The principle of preclusion and estoppel

The Court has applied this principle in the present case to the effect that even if there could be any doubt as to whether Thailand did originally accept the Annex I map and line, so as to become bound by it, she is precluded by her subsequent conduct from now asserting her non-acceptance. With this conclusion I agree (it being postulated, for reasons already given, that no error or misapprehension can be pleaded). But the Court only glances at the matter, which needs a good deal of development.

The principle of preclusion is the nearest equivalent in the field of international law to the common-law rule of estoppel, though perhaps not applied under such strict limiting conditions (and it is certainly applied as a rule of substance and not merely as one of evidence or procedure). It is quite distinct theoretically from the notion of acquiescence. But acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect (see the cases, and the quotation from an Opinion of the British Law Officers, cited in Dr. D. W. Bowett's article, *"Estoppel before international tribunals and its relation to acquiescence"*, in the *British Year Book of International Law* for 1957, at pp. 197-201; and see also Lord McNair's *Law of Treaties*, 1961, p. 488). On that basis, it must be held in the present case that Thailand's silence, in circumstances in which silence meant acquiescence, or acted as a representation of acceptance of the map

line, operates to preclude or estop her from denying such acceptance, or operates as a waiver of her original right to reject the map line or its direction at Preah Vihear.

However, in those cases where it can be shown that a party has, by conduct or otherwise, undertaken, or become bound by, an obligation, it is strictly not necessary or appropriate to invoke any rule of preclusion or estoppel, although the language of that rule is, in practice, often employed to describe the situation. Thus it may be said that A, having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to "blow hot and cold". True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence. In other words, if the denial can be shown to be false, there is no room or need for any plea of preclusion or estoppel. Such a plea is essentially a means of excluding a denial that might be *correct*—irrespective of its correctness. It prevents the assertion of what might in fact be *true*. Its use must in consequence be subject to certain limitations. The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound.

The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have "relied upon" the statements or conduct of the other party, either to its own detriment or to the other's advantage. The often invoked necessity for a consequent "change of position" on the part of the party invoking preclusion or estoppel is implied in this. A frequent source of misapprehension in this connection is the assumption that change of position means that the party invoking preclusion or estoppel must have been led to change its own position, by action it has itself taken consequent on the statements or conduct of the other party. It certainly includes that: but what it really means is that these statements, or this conduct, must have brought about a change in the *relative* positions of the parties, worsening that of the one, or improving that of the other, or both.

The same requirement, that a change or alteration in the relative positions of the parties should have been caused, covers also certain

other notions usually closely associated with the principle of preclusion or estoppel, such as for instance that the one party must have "relied" on the statements or conduct of the other; or that the latter must, by the same means, have "held itself out" as adopting a certain attitude; or must have made a "representation" of some kind. These factors are no doubt normally present; but the essential question is and remains whether the statements or conduct of the party impugned produced a change in relative positions, to its advantage or the other's detriment. If so, that party cannot be heard to deny what it said or did.

Applying this test to the circumstances of the present case, there can be little doubt that Cambodia's legal position was weakened by the fact that (although a striking assertion of her sovereignty had been manifested on the occasion of Prince Damrong's visit in 1930) it was not until 1949 that any protest on the diplomatic level was made about local acts of Thailand in violation, or at any rate in implied denial, of that sovereignty. But France (exercising the protectorate) was entitled to assume from the conduct of the central Siamese authorities that the latter accepted the frontier as mapped at Preah Vihear. On that basis, but on that basis only, France could safely ignore the activities of local Siamese authorities, and (the war period being ruled out, as I think it must be in this case) confine her diplomatic action, as she seems to have done, to cases clearly involving the central Siamese authorities.

Similarly, it was only on the basis of a justifiable assumption of Thailand's acceptance of the frontier line as mapped that a comparatively low level of administrative activity on the part of France and Cambodia at Preah Vihear would have been compatible with the upkeep of sovereignty. It is an established principle of international law that, especially in wild or remote regions, comparatively few acts are necessary for that purpose where the title does not primarily depend on the character or number of those acts themselves, but derives from a known and independent source, such as a treaty settlement. On the basis therefore of the acceptance of the map line by Thailand, as part of the treaty settlement, there would, in the upkeep of Cambodian title, have been no need (in respect of such a locality as that of the Temple area) to perform any but the most minimal and routine acts of administration. Clearly, if Thailand could now be heard to deny this acceptance, the whole legal foundation on which the relative inactivity of France and Cambodia in this region was fully explicable would be destroyed.

In addition to the foregoing considerations, it may be useful to recall a deliberately non-technical statement of the matter given

by a former Judge of the Court (writing in another capacity), as follows:

> "A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppel or the more generally conceived requirement of good faith. The former is probably not more than one of the aspects of the latter." (Lauterpacht, *Report on the Law of Treaties*, U.N. Document A/CN.4/63 of 24 March 1953, p. 157.)

The question of interpretation—watershed clause versus *map line*

The Court has dealt fully with this matter, although indicating in effect that, given the main basis of the Judgment, it does not strictly arise, because the Parties themselves resolved any possible conflict when they accepted the map line as being the outcome of the work of delimitation even if it might not in all respects follow the watershed line. I think the Court was nevertheless right to consider how any conflict should, as a matter of ordinary treaty interpretation, be resolved, for the following reason.

It would have been open to Thailand in the present proceedings to have adopted a different course from the one she in fact followed. Instead of denying, she might have admitted acceptance of the map as representing the outcome of the work of delimitation, and also that the map became part of the treaty settlement. Having admitted that, however, it would still have been open to Thailand to contend that, precisely because the map had become part of the settlement, any conflict arising between it and a clause of the Treaty must fall to be resolved by the ordinary processes of treaty interpretation, and that Thailand must be entitled to the benefit of those processes, just as would be the case if an inconsistency were discovered between two provisions of the Treaty itself. On that basis, even if Thailand admitted her acceptance of the map, it was open to her to argue that in a conflict between a treaty clause that says "watershed" and a map that says something different, the former must prevail. It was therefore necessary for the Court to deal with the matter on that basis.

There is of course no general rule whatever requiring that a conflict of this kind should be resolved in favour of the map line, and there have been plenty of cases (some of which were cited before the Court) where it has not been, even though the map was one of the instruments forming part of the whole treaty settlement (as here), and not a mere published sheet or atlas page—in which case it would, in itself, have no binding character for the parties. The question is one that must always depend on the interpretation of

the treaty settlement, considered as a whole, in the light of the circumstances in which it was arrived at. So considered in the present case, I agree with the Court that, in this particular instance, the question of interpretation must be resolved in favour of the map line.

The course of the watershed line

According to the basis adopted for the Judgment of the Court (with which basis I agree), it becomes unnecessary to consider how the watershed line really runs at Preah Vihear. I nevertheless desire to say that the expert evidence on this subject, written and oral, convinced me personally that the watershed line runs (and ran also in the period 1904-1908) as contended for by Thailand.

(Signed) G. G. FITZMAURICE.