DISSENTING OPINION OF JUDGE MORENO QUINTANA

[Translation]

To my sincere regret I am unable to agree with the majority of my colleagues in the decision of this case. It is my firm conviction that sovereignty over the portion of territory of the Temple of Preah Vihear belongs to Thailand. The dissenting opinion which I express hereunder gives the reasons on which it is based. In American international law questions of territorial sovereignty have, for historical reasons, a place of cardinal importance. That is why I could not, as a representative of a legal system, depart from it.

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The present case is concerned with sovereignty over a portion of territory on which are situated the ruins of a temple known as *Preah Vihear*.

Both Cambodia and Thailand claim, by virtue of the initial stipulation of a treaty, to be the *domina terrarum* of the portion in question. This stipulation is that contained in Article 1 of the Treaty concluded on 13 February 1904 between France, which at that time represented Cambodia under a protectorate régime, and Thailand, then the Kingdom of Siam. It provides that the frontier between the two countries at the point at issue "follows the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and the Nam Moun, on the other hand, and joins the Pnom Padang chain, the crest of which it follows eastwards as far as the Mekong". No reference is made to the temple of Preah Vihear.

It is this provision of the treaty which constitutes the legal title of the Parties to sovereignty over the temple area. It is consequently the intertemporal law applicable to this case. The frontier delimitation work prescribed by Article 3 of the treaty and the line shown on maps are no more than its physical implementation and may in consequence be vitiated by error. To take a decision in this case on the basis of assumptions or hypotheses in order to resolve the question at issue would not seem very consistent with the rules of judicial settlement. There has been no conclusive evidence showing any tacit recognition by Thailand of the alleged Cambodian sovereignty over the area in question. It is the facts, clear facts, which must be taken into account.

Cambodia, the applicant in this case, alleges that sovereignty over the Preah Vihear area belongs to it, that it has never abandoned that sovereignty and that Thailand has never performed there

any acts of sovereignty capable of displacing that of Cambodia. Cambodia also asks the Court to provide for the withdrawal of the armed forces stationed by Thailand in the temple ruins since 1954. The respondent, Thailand, in the submissions of its Counter-Memorial, makes a counter-claim asking the Court to declare that sovereignty over the Preah Vihear area belongs to Thailand. It is thus for each Party to furnish proof of its allegation.

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Consequently, the case amounts to interpreting the said Article 1 of the 1904 Treaty according to its natural and ordinary meaning. There is no legal problem basically involved; the rule *Pacta sunt servanda*, which is at the root of international law, is not contested by the Parties. The ensuing situation is a frontier hitherto undetermined at the place in issue. It is governed by a single question of fact: is the temple of Preah Vihear situated south of the line stipulated by the treaty—that is to say, in Cambodian territory—or north of it, which would put the temple in Thai territory? The decisive geographical factor in this case is the line of the watershed or *divortium aquarum* between two river basins. A watershed is not an intellectual abstraction; it is the result of the characteristics of the terrain, and it is always a topographical feature—the crest of a mountain, the ridge of an escarpment or the height of a piece of land—which will form a natural watershed.

The task of the Court in this case is fully compatible with the essential function of declaring the law conferred upon it by Article 38 of the Statute. Under Article 36, paragraph 2 *(a)*, the interpretation of an international treaty is one of the Court's specific functions. This certainly does not mean that, by stating what is the watershed referred to in the said Article 1, the Court takes the place of a delimitation commission, still less that it marks a new frontier line on the ground.

Acting in this way, the Court responds precisely to what the Parties are asking of it. Its decision falls within the limits of its jurisdiction and not outside it. Both Thailand and Cambodia ask it to declare that sovereignty over the Preah Vihear area belongs to them. The Court cannot refuse to discharge its judicial task. It recalled in its Judgment in the Asylum case "the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*I.C.J. Reports 1950*, p. 402). This sound rule is and always has been the basis of the Court's work.

Once the Court has indicated what it considers to be the correct line of the watershed, it will be for the Parties to determine how that line is to be given expression on the ground. The latter task is of a technical nature, and not within the judicial field which belongs to the Court.

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An instrument of later date than the 1904 Treaty—the protocol annexed to the new treaty concluded on 23 March 1907 between France and Siam—approved the frontier line adopted by a Delimitation Commission on 18 January of that year. This line however is not indicated in detail in the minutes of the Commission. It appears only upon a map which Cambodia submits as Annex I to its Memorial and on which, pursuant to some unknown decision, the temple of Preah Vihear is shown on the Cambodian side. This map bears no date and is not signed by any authorized experts, still less by the contracting parties to the new treaty. It was published by Barrère, a Paris geographical publisher, acting apparently on behalf of only one of the two Commissions—the French and the Siamese—which were to survey the frontier line. In the top left-hand corner of the map it is stated that the work on the ground was carried out by two captains of the French colonial army, Captains Kerler and Oum, two technicians, therefore, who represented in principle only one of the Parties concerned and who should at least have had recorded on the map itself the capacity in which they were acting.

Further, the expert investigations carried out by both Parties (see in particular the D.A.I. Report of 23 October 1961 submitted by Cambodia) agree to the effect that the Annex I frontier line departs considerably from the watershed line. Geography is not however a subject which is open to divergent interpretations. It reflects one and the same reality. Moreover the closest possible scrutiny of the minutes of the meetings of the Mixed Franco-Siamese Delimitation Commissions held between 1905 and 1907 does not yield any result as regards which side of the frontier Preah Vihear is situated on.

Now, territorial sovereignty is not a matter to be treated lightly, especially when the legitimacy of its exercise is sought to be proved by means of an unauthenticated map. As was said by Max Huber in his Arbitral Award in the Island of Palmas case: "... only with the greatest caution can account be taken of maps in deciding a question of sovereignty... If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be ... a map affords only an indication—and

that a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of rights" (see U. N., *Reports of International Arbitral Awards*, vol. II, pp. 852, 853, 854).

In the present case, Annex I to the Memorial is not the valid annex to the protocol which approved the Cambodian-Siamese frontier line in the Dangrek region. Above all, its being signed was an indispensable condition of its validity, since, as appears from its minutes, the Mixed Delimitation Commission stipulated at its second meeting on 7 February 1905: "According to the procedure proposed by Commandant Bernard at the first meeting, the Commission should first carry out a general reconnoitring, gather information of various kinds which would make it possible to fix on the spot the points through which the frontier passed, then mark that frontier on the map and finally, if necessary, discuss whether it was correct and make any essential modifications. As soon as agreement was reached, the frontier line would have been finally determined by the members of the two Commissions signing the map on which the frontier had been marked" (see Annex 12 *(a)*, Thai Counter-Memorial, p. 58).

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It has been contended that Thailand's silence with regard to the publication of the Annex I map implied recognition of the line fixed by that map. But silence has consequences in law only if the party concerned is under an obligation to make its voice heard in response to a given fact or situation. It would thus have been necessary to show that Thailand was under such an obligation in respect of an act devoid in itself of legal significance. A well-established rule was moreover embodied in Article 29 of the Treaty of Versailles of 28 June 1919. This rule states that, when there is a discrepancy concerning a frontier delimitation between the text of a treaty and maps, it is the text and not the maps which is final. This being so, and until conclusive evidence establishes where Preah Vihear is situated, Article 1 of the 1904 Treaty, which stipulates the watershed as the territorial boundary of the two countries, supports the interpretation of Thailand equally as well as that of Cambodia. The same can be said of clause I of the protocol annexed to the 1907 Treaty, which likewise makes no reference to Preah Vihear, but mentions the watershed.

Other considerations adduced by the Parties must be evaluated by an international tribunal at their correct significance. These considerations relate to the maps belonging to one or other of the Parties and the sketches, photographs, accounts of journeys,

record-cards and other material. As evidence they have only a complementary value which is in itself without legal effect. This applies especially to the maps put in by Cambodia and which had been drawn up by official Thai services, on which Preah Vihear is shown in Cambodian jurisdiction. These maps do not appear at all conclusive, being based upon the Annex I map which is not authoritative and does not show the true watershed line. It is possible to recognize expressly or tacitly a given *de jure* or *de facto* situation, but not a situation vitiated by a technical error. An error remains an error and cannot by repetition make good acts of later date that are based upon that error. That is the only significance that should be attached to the question of error in the present case, where it does not have the significance of vitiation of consent, the existence of which is possible in a legal instrument but not in a map.

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Nor is it necessary to consider international instruments of later date than 1904 and 1097, since they make no special reference to Preah Vihear and Thailand has not questioned them. These include the Franco-Siamese Treaties of 14 February 1925 and 7 December 1937 and the Settlement Agreement of 17 November 1946 which restored the frontier *status quo* prior to the Tokyo Convention of 9 May 1941 adjusting the frontier between Thailand and Cambodia. On the other hand, any acts that may have been carried out either by Cambodia or by Thailand in the exercise of their sovereignty over the portion of territory in question could be important having regard to the doubt created by this case. Their legal value is indicated by sufficiently well-established precedents.

An analysis of these acts need not go back to the historical origins of the building of the temple of Preah Vihear nor need it take account of the religious role which the temple is said to have played for both the Siamese and the Cambodian peoples. The question to be decided does not arise before 1904, the date of the treaty which fixed the disputed frontier. Thailand says that the elevated situation of the temple, built upon a plateau, makes it difficult of access from the plain situated to the south and on the Cambodian side of the chain, while it is far more easily accessible from the north, where Thailand is situated. This contention seems to be correct. It is based on a geographical fact which is clearly in favour of the exercise of territorial sovereignty by the country having easy access and not by the country which has not such access. Having regard to the topography of the frontier area, the very suggestion that the Preah Vihear area lies within Cambodian jurisdiction is really contrary to sense. It is in conflict with the principle of natural frontiers which was apparently adopted by the Mixed Delimitation Commission. Apart from this presumption, however, there is not

adequate evidence in support of the acts of sovereignty allegedly performed at Preah Vihear by either Party.

Cambodia relies on the exercise of territorial powers by France in regard to the Preah Vihear area. It refers to official visits, administrative tours, archaeological expeditions, elephant hunting, the taking of photographs, the despatch of letters, the upkeep of the temple, etc. But these sporadic displays of activity at a spot which was unguarded and consisted of ruins, even it they took place as described by the applicant, would have only a very relative significance so far as territorial sovereignty is concerned. In its turn, Thailand alleges the collection of taxes—which would indeed be a manifestation of sovereignty—but furnishes evidence consisting only of affidavits by officials. The respondent offers evidence of the same kind in regard to other activities carried out by the Thai authorities. Assuming that these manifestations by the two Parties were as described, they would only serve to show the Court that there was a performance of concurrent and reciprocally unnoticed administrative activities. Even if known, these activities would have been the subject of objection or of different interpretations. All this gives the impression that both Cambodia and Thailand lived for more than half a century without being particularly certain of their sovereign rights over the temple area. For this reason the correct application of the 1904 Treaty is the main goal which the Court must seek in this case, by locating on the basis of an adequate expert opinion the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and the Nam Moun on the other hand.

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This expert evidence was furnished more particularly by Thailand, which, although in principle the respondent State, took the initiative in the matter. Cambodia also played a part in connection with the expert opinion by cross-examining the experts and witnesses of the other Party. From the point of view of the settlement of the case this lends appreciable weight to the results of the investigations of the experts. There are four written reports relating thereto—two by Professor W. Schermerhorn, acting for the *International Training Center for Aerial Survey* (I.T.C.) of Delft, dated 8 september 1961 and 11 January 1962, and two other reports by Messrs. Doeringsfeld, Amuedo and Ivey (D.A.I.), a private firm established at Denver (Colorado), United States of America, these being dated 23 October 1961 and 21 February 1962. In the course of the hearings the witnesses or experts were closely examined by both Parties. They were M. Suon Bonn, former governor of the

Cambodian province of Kompong Thom; Professor Schermerhorn, well-known in Holland and elsewhere for his work on aerial surveying; Mr. Ackermann, who has a high reputation as a topographer, also attached to the Delft Center, and lastly Mr. Verstappen, a well-known geologist and likewise a member of the Center. It was Mr. Ackermann's special merit that he carried out the work of frontier reconnaissance, a task which is described in the *Dictionnaire de la Terminologie du droit international* published in 1960 by eminent jurists as "checking on the spot that the boundary marks of a frontier are in fact at the points indicated in the boundary treaties or conventions and shown on the maps annexed to those treaties or conventions" (see p. 514). This Court has also, in its Judgment in the Corfu Channel case, stressed the value of an expert investigation carried out by a procedure similar to that followed in the present case. The Judgment said: "The Court cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information" (*I.C.J. Reports 1949*, p. 21).

A layman in the matters with which the opinion of the experts was concerned as a judge generally is, he has to draw a legal conclusion from a piece of technical work which seems to carry conviction. In general, the opinions of the experts and witnesses for Thailand impressed by their technical precision and the logical nature of their reasoning. Moreover, the official character of the Center, which is connected with the Netherlands Government, confers upon its opinion an objectivity and an authority perhaps greater than could attach to the work of a private firm. However a question is raised by the possibility that, in a critical area which was described, there might be an alternative watershed line to that indicated by Professor Schermerhorn's report. That question is answered by the topographical work carried out on the spot by Mr. Ackermann. The true line of the watershed was indeed the one indicated in the report. Even if the alternative line had been the true line it would still not have left the temple area in Cambodian territory. And it is the question of the sovereignty over the temple that is put to the Court, and no other. The waters of a river basin may run down from a promontory like one on which the temple is situated, but they can never rup up it. That is obvious.

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What has been said above leads to the following conclusions:

(1) the essential question to be settled by the Court—since neither Party has conclusively proved its exercise of sovereignty over the temple area—is the interpretation of Article 1 of the Treaty of 13 February 1904 between France and Thailand;

(2) this interpretation follows from the determination of the watershed between the two river basins which is specified to be the frontier between Cambodia and Thailand in the Dangrek region;

(3) the technical evidence supplied by Thailand, largely contributed to by Cambodia's cross-examination, is by its precision and abundance conclusive in establishing that the watershed follows the edge of the cliff of the promontory on which the temple is situated;

(4) this result decides the case in the sense that the portion of territory on which the temple stands is situated in Thai territory.

(Signed) Lucio M. MORENO QUINTANA.