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# A Retrospect of Critical Assessment of the *Temple of Prah Viharn* Case

## *From Merits to the Request of Interpretation of Judgment (Merits) 1962*

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**ABSTRACT**

*The Temple of Prah Viharn was the only case that Thailand, as a respondent state, went to The Hague Court to defend her territorial sovereignty. Although Thailand lost this case, the court's reasoning and the application of rules of law in accordance with Article 38 of the Statute of the International Court of Justice are questionable. The Temple case has far-reaching implications for formulating rules of international law. Subsequent conduct in the law of treaties is a case in point. Another is the application of the general principle of estoppel and the importance of the legal value of map regardless of the status of said map. Therefore, the Temple case deserves to be carefully examined.This article examines four judgments of the Temple case. The first part deals with the matter of preliminary objection. The second part discusses the merits judgment. The third section involves the judgment of issuing the measure of interim protection. And the last part focuses on the judgment of the interpretation of the Merits Judgment 1962.*

**Keywords:** the Temple of Phra Viharn**,** sources of law, estoppel, boundary treaty, map,

## I. INTRODUCTION

The Temple of Prah Viharn case is a landmark case that legal scholars, diplomats, policy-makers, practitioners and students of international law across the world are quite familiar with. The significance of the Temple case has, at least, two facets. In terms of legal principle, the Temple case becomes a watershed precedent in the jurisprudence of the International Court of Justice. It was the first time in the history of the World Court that it relied mainly on an erroneous map as crucial evidence of territorial sovereignty instead of a boundary treaty concluded between the contracting parties concerned. Also, it may be the first time that the Court recognized the national principle of estoppel or a preclusion. In terms of political impact, the diplomatic relationship between Thailand and Cambodia consequently turned sour and the aftermath of this case resulted in armed clashes along the border.

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In addition, the Temple case involves other branches of public international law. A unilateral act of state is a case in point. In various reports of Special Rapporteur on a unilateral declaration of state, the Temple case is mentioned many times. Also, without doubt, the Temple case somewhat influenced, more or less, the International Law Commission to codify the Vienna Convention on the Law of Treaties 1969.[1] Rules regarding the validity of expressing consent to conclude a treaty, i.e error and a supplementary rule of treaty interpretation derive from the Court's reasoning in the Temple case.

The main argument of this research is that the International Court of Justice, in the Merits Judgment of the Temple case, failed to follow Article 38 of the Statute of the Court relating to sources of law. Also, the Court deviated from its jurisprudence in dealing with the issue of a map as evidence, a principle of estoppels and issuing provisional measures. As to maps prior the Temple case the World Court did not consider a map as crucial evidence in deciding a legal dispute of territorial sovereignty of a state. With regard to an interim protection, the Court has never issuing a provisional measure beyond a disputed area. But in the Temple case, the Court, by exercising incidental jurisdiction, issued an interim protection extended to the Thai territories.

This article consists of five parts. The first part deals with the question of jurisdictional matter, the so-called preliminary objection raised by the Royal Thai government. The second part provides the historical background to this case, focusing on the judgment on the Merits 1962. The third section examines a request of provisional measure filed by the Cambodian government. And the fourth part analyzes the recent judgment of 11 November 2013 concerning the interpretation of the merits judgment of 15 June 1962.

## II. PRELIMINARY OBJECTION: JURISDICTIONAL MATTER

### A. INTRODUCTION

The issue of jurisdiction of the International Court of Justice is very important and delicate not only for the Court, but also for a litigant state especially if the jurisdiction derives from a unilateral declaration and not from a special agreement. In general, a state that does not want to resolve a dispute by judicial means tends to challenge the jurisdiction widely known as preliminary objection. In brief, if a state opposes jurisdiction, the World Court must suspend the case at hand. Then, it must decide on this jurisdictional question before examining the merits. If the Court finds that it lacks jurisdiction, it removes the case from the list. In contrast, if it satisfies itself that it has jurisdiction over the case at hand, it then proceeds with the case.

In the Temple case, Thailand wanted to resolve the international conflict through bilateral talks rather than by a judicial settlement. Therefore, not surprisingly, Thailand as a respondent, strongly challenged the jurisdiction by filing a preliminary objection with the Court.

This is the first judgment relating to the Temple of Prah Viharn. In Thailand, both scholars and laymen do not pay special attention to this decision on jurisdictional matter. Rather, they usually focus on the Merits Judgment because the issue of jurisdiction is technical in nature.

However, it needs to be examined for, at least, two reasons. First, from the perspective of historical reason, this matter involved several top-ranking official persons in the Thai

1 See Humphrey Waldock, Second report on the law treaties, A/CN.4/156 andADD.1-3,1963, the Yearbook of the International Law Commission 1963,vol.II,p.

government at that time. Second, from the viewpoint of international law, the jurisdictional question should be clarified.

## B. An Overview of the Jurisdiction of the World Court

The competent jurisdiction of the International Court of Justice differs from that of a domestic court in that the former derives from the consent of a state while the latter is compulsory in nature contained in procedural rules. In essence, the legal basis of jurisdiction of the World Court is based on the consent of the state concerned. In other words, the Court cannot proceed with a case without the consent of the state expressing an acceptance of jurisdiction. Acceptance or non-acceptance is a matter of political will or the discretionary power of each state. It is a purely domestic sphere of an individual state. Neither the United Nations Charter nor customary international law can compel any state to relinquish its sovereignty to the World Court's jurisdiction against its will.

According to the Statute of the International Court of Justice, a state can express its consent by three ways. The first is by making a special agreement between the parties concerned. When two states agree to settle a legal dispute by the World Court, they conclude a treaty, a so-called Special Agreement or compromise, submitting the case to the World Court.

The second is through issuing a unilateral declaration accepting the jurisdiction contained in Article 34 (2) of the ICJ Statute. In contrast to the Special Agreement, this declaration of acceptance of jurisdiction is a unilateral act of state.

The final method is a treaty which contains a compromissory clause requiring a contracting party to resolve a legal dispute, in case of applying or interpreting a treaty, before the Court. The common element of these channels is consent of a state. Consent is sine qua non for establishing the jurisdiction of the World Court to entertain a case.

## C. Thailand's unilateral declaration of the jurisdiction

Thailand accepted the jurisdiction of the World Court through making a unilateral declaration three times. The first time was singed a declaration of the jurisdiction of the Permanent Court of International Justice (P.C.I.J.) or the Old World Court. The first declaration was on 20th September 1929 signed by Prince .Varnvaidya. The third declaration was signed by Warakan Bancha, acting as the Minister of Foreign Affairs.

With regard to the last declaration, General-Director of the Department of United Nations, Ministry of Foreign Affairs of Thailand, at that time, wrote a note to Colonel Worakarn Bancha (Bunkoed Sutantanon), who served as the Minister of Foreign Affairs. According to this General-Director's understanding, state members of the United Nations usually accepted the competent jurisdiction of the International Court of Justice. Accordingly, he recommended that Thailand as a member of the United Nations should accept the jurisdiction of the World Court. In my view, it is possible for him to believe that Thailand became a member of the United Nations so she had to accept the jurisdiction of the Court, functioning as one of the principal organs of the UN because all members of the UN are ipso facto parties to the Statute of the World Court.[2] Put simply, to join the UN meant to accede to the jurisdiction of the World Court. However, as Prof. Rossense correctly put it, neither the UN Charter nor any international law requires members or non-members of the United Nations to

2 Article 93 (1) of the UN Charter

legally bring a case before the World Court.[3] This misunderstanding paved the way for the defense of Thailand's territorial sovereignty over the Temple at The Hague.

## D. Preliminary Objections of Thailand

Although there is no rule of the Statute that requires a state to challenge the jurisdiction, many cases, in the past have dealt with the matters of jurisdiction. The question of jurisdiction is very complicated and is sometimes a controversial matter. If the parties concerned raise the jurisdictional problem by arguing that the Court lacks jurisdiction to adjudicate on a case, the Court must examine this delicate matter before deciding its merits.

After the Cambodian government filed a lawsuit against Thailand at the International Court of Justice in 1959, Dr. Sompong Sucharitkul, a young diplomat and a brilliant international lawyer of the Ministry of Foreign Affairs, highly recommended that the Thai government must oppose the jurisdiction of the Court by lodging a preliminary objection. By taking such a route, Thailand had more enough time, almost 10 months, to prepare herself by hiring law experts, developed law arguments and providing cogent evidence to defend her rights in accordance with the rules of international law. However, some sources reveal that a senior lawyer, disagreed with Dr. Sompong's idea about raising the preliminary objection.

## E. Court Decision on the Jurisdictional Problem.

Thailand argued that the Old Court was defunct so this declaration was not regarded as accepting the jurisdiction of the New World Court. However, the Court unanimously decided that the Court had jurisdiction over this case. The court disagreed with Thailand's argument by contending that the 20 May 1950 declaration functioned as a renewed declaration of the jurisdiction of the Old Court.

It should be noted that after Thailand lost the Temple case, Thailand had not renewed the declaration. Moreover, Thailand did not have the political will or policy to resort to settle of any legal dispute by the World Court. Also, Thailand made reservations on the jurisdiction of the World Court of any treaty containing compromissory clauses. For example, Thailand joined the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and made a reservation on a settlement of dispute clause by referring a dispute to the I.C.J. Another example is that Thailand ratified the United Nations Convention against Corruption and made a reservation on the jurisdiction of the World Court.

3 Shabtai Rosenne, The World Court: What It is and How it works, (The Netherlands: Martinus Nijhoff Publishers, 1989) , p.81

# III. THE MERITS JUDGMENT 1962

## A. INTRODUCTION

After the World Court unanimously ruled that the Court had jurisdiction over the Temple case, the Court moved forward to the merits of the case. The merits judgment deals directly with legal issue or a claim submitted by a plaintiff state. This chapter provides an overview of the operative parts or dispositif contained in the Merits Judgment 1962. The Operative provision is very crucial for the parties concerned because it is the decision of the Court and they must abide by and comply with it. Therefore, both the plaintiff and respondent must understand the scope and meaning of the operative part. Otherwise, a party concerned may unilaterally request the Court to interpret the operative part if they have a different view on the scope and meaning of the decision.

Moreover, it is not easy for ordinary people to distinguish between what the court decides and what the court does not decide. In principle, any court will examine and adjudicate on a claim submitted by a plaintiff. It means that a court will not decide on a question that a plaintiff does not ask. In this chapter, I will summarize what the court decides and what it does not decide.

In addition, there are some remarks on the Merits Judgment such as the appraisal of the French map and the determination and application of sources of law described in Article 38 of the Statute.

## B. Historical Background of the Temple Case

During Rattanakosin Kingdom especially King Rama VI and V, Siam faced the imperialism and colonialism exerted by several western countries. In the era of King Chulalongkorn, France conducted gunboat diplomacy led to the Franco- Siamese War of 1893. This naval war paved the way for making the Boundary Treaty 1904 between Siam and France acting as a protectorate of Cambodia. According to Article 1 of the boundary treaty 1904, the boundary in the Dangrek Mountain followed the watershed line. Also, Article 3 of the Treaty 1904 recognized the appointment of the Mixed Commission. The Treaty 1904 never mentioned drawing a map. The Boundary Treaty 1907 emphasized the role of the Mixed Commission. Again, the Treaty 1907 never mentioned any map. In other words, both boundary treaties failed to mention a map, let alone placing great value on it. According to the watershed line contained in the Boundary Treaty 1904, the Temple of Prah Viharn located on the top of promontory was situated in Siam.

A controversial map requested by Siam was prepared and published by French authorities. This map illustrated that the Temple of Phra Viharn was located in Cambodian territory. The root of an international standoff and a legal dispute originated from the discrepancy between the Boundary Treaty 1904 and the French map.

After gaining the independence from France in 1953, Cambodia as a full-fledged state instituted legal proceeding against Thailand before The Hague Court in1959. She argued that

the Temple belonged to Cambodia. The Cambodian claim over the Temple was anchored in the French map. Thailand contended that the Temple was under the Thai territorial sovereignty in accordance with the Boundary Treaty 1904 concluded between Siam and France.

## C. What the World Court Decided.

For a better understanding, and before examining the Temple case, some basic ideas about a judgment should be described in brief. Aaccording to the Rules of Court,[4] a judgment must, among other things, consist of the submissions of the parties and operative part. A submission refers to a legal claim argued by a plaintiff state and the requirement of this state for the Court to adjudicate its claim. An operative provision means the Court's decision. The salient feature of the operative part is final and legal biding force. Moreover, an interpretation of a merit judgment is only confined to the operative part or what the Court already decided. The Court cannot interpret what the Court does not decide in the judgment.

Turing to the Temple case, in the operative part of the Merits Judgment, the World Court decided three claims. The first and most important was that the Temple of Phra Viharn is located in the territorial sovereignty of Cambodia. This nature of operative part was the pronouncement of the Cambodian claim over the Temple. It should be noted that, according to the Application Instituting Proceedings signed by Mr. Koun Wick on 30 September 1959 the words were employed "belongs to".[5] However, the Court used the phrase "the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia." In my view, such a phrase is clearer and straightforward than the words "belongs to". However, some legal scholars[6] and Mr. Abhisit Vejjajiva,[7] acting as the Opposition Leader in Parliament at the time, argued that the Temple belonged to Cambodia but the ground under the Temple still belonged to Thailand.

The second was that Thai military and police personnel had to be withdrawn from the Temple or "in its vicinity on Cambodian territory." The problem of this operative part is that the Court failed to define the proper scope of "its vicinity". These words seem like a time bomb exploded almost 50 years has passed since the Merits Judgment 1962 was delivered leading to the Cambodian request of the interpretation of the Judgement 1962 in 2011.

The last decision concerned returning archaeological properties that Thai officials had taken. This operative part was very unclear because the Court failed to specify the historical objects removed by Thai authorities. So it was very difficult, if not impossible, for Thailand to perform this obligation.

## D. What the World Court did not Decide

The World Court neither decided the legal status of the French map nor decided the frontier line between Thailand and Cambodia in accordance with the French map. Although Cambodia attempted to entice the Court to adjudicate on the juridical nature of the French map, Thailand was fully aware of this trap and strongly opposed the late submission of such claim. The Court ruled that the question of the legal status of the French map and the frontier lines between the two states were not included in the operative part or dispositif. In other words, the Court refused to decide on the legal value of the French map. Also, the Court abstained from ruling on any question relating to an international boundary between the two countries.

4 Article 95 of the Rules of Court

5 See Pleadings, Oral Arguments and Documents, Case Concerning the Temple of Preah Vihere Vol. 1 , p.15

6 Interview's Dr. Sompong Sucharitkul, Sarakadee Magazine (in Thai) B.E. 2551

7 This parliamentary debate occurred on 24 June 2551

Therefore, the international boundary line between Thailand and Cambodia had to follow the water-shed line enshrined in the boundary Treaty 1904 and 1907 not based on the French map.

## E. Reappraisal Some legal Substantive Problems

### 1. A Problem of Ascertaining of Sources of Law

As far as the Prah Vihear case is concerned, the legal status and value of maps cannot be found, both in article 38 of the Statute of the International Court of Justice, and precedent of the World Court. Unquestionably, a map is neither an international agreement nor customary international law. And a map is not a general principle of law too.

On the contrary, the Boundary Treaties 1904 and 1907 are bilateral treaties functioning as the first rank of article 38 of the Statute of the International Court of Justice. In determining a source of international law, the World Court must seek a successive order of source of law. This position was discussed in the Advisory Committee of Jurists when the Committe drafted a statute of the Permanent Court of International Justice or the Old World Court. Baron Descamps, as the President, posited that "there was' a natural classification. If two States concluded a treaty in which the solution of the dispute could be found, the Court must not apply international custom and neglect the treaty. If a well known custom exists, there is no occasion to resort to a general principle of law. We shall indicate an order of natural précellence, without requiring in a given case the agreement of several sources."[8] It is clear that Descamps's view reflects a logical and practical application of article 38 to a dispute in hand before the Court.

Furthermore, the Treaties 1904 and 1907 are not an ordinary treaty, rather they are boundary treaties. It is well-established that international law recognizes the uniqueness of a boundary treaty that establishes an objective regime of territorial sovereign erga omnes thereby, creating legal binding force not only between contracting parties but also third states.[9]

In the Temple case, the Court did not take seriously the watershed line as a true intention of the contracting parties contained in article 1 of the Treaty boundary 1904. Instead, the Court paid much attention to a map unilaterally arranged by a French team. Moreover, the Court relied mainly on estoppels or a preclusion regarded as a general principle of law under article 38 of the Statue. In terms of an application of law, a general principle of law is obviously ranked below a treaty or an international agreement. Indeed, when drafting a statue of the World Court, a majority of the Advisory Committee of Jurists agreed, in principle, that the prime purpose of general principle of law was to fill lacunae, enabling the Court to avoid a pronouncement of a non liquet.[10] In the Temple case, the Court did not face the dilemma of determining what is source of law and also there was no problem of a gap in law. Rather, the legal source concerning territorial sovereignty was crystal clear, namely, the watershed line enshrined in article 1 of the Boundary Treaty 1904. However, the Court indifferently skipped the Boundary Treaty to a general principle of law by adopting estoppel. In contrast to the majority of members of justice, Judge Koo followed a successive order of application of legal sources set forth in article 38 of the Statute. He rightly stated that "The essential task, then, in order to decide the case, is to apply or interpret the 1904 Treaty. But where is the true location of the treaty-defined watershed? This is a crucial question, and a correct answer must be

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8 Alain Pellet, Article 38, in The Statute of the International Court of Justice; A Commentary (Edited by Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, and Christian J. Tams), at.773

9 See Shaw, International Law, (USA: Cambridge University Press, 2009, at 495-496;

10 See . Some jurists share the same view. See also Akehurst, Hierarchy , at 279

given."[11] Similarly, Professor O'Connell took the view that the Court focused on "conduct" more than "the terms of the treaties."[12]

It is not necessary for me here to explain why an application of a treaty is better than relying on a general principle of law. In terms of certainty and a burden of proof, a treaty is, no doubt, more convenient and accurate than a general principle of law. I would like to finish this section by quoting the words of two renowned jurists, namely, Professor Alain Pellet and Professor Shaw. Professor Pellet correctly cautioned that "A judgment based on treaty rules is, therefore, likely to be more acceptable to the contesting state than a decision based on other consideration which usually imply a large amount of judge's subjectivity."[13] And Professor Shaw rightly stated that "where the boundary lines as specified in the pertinent instrument is clear. It cannot be changed by a court in the process of interpreting delimitation provisions."[14]

In addition to disregarding the watershed line contained in the boundary treaty 1904, the Court disregarded the principle of pacta sunt servanda, namely that the pact must be observed in good faith. Pacta sunt servanda, without doubt, is one of the most important of the general principles of law under Article 38 of the Statute. Pacta sunt servanda, operating in tandem with the principle of good faith, plays a vital role in the law of treaties. It means that a state shall perform an obligation of a treaty in the manner of good faith. This legal, not moral, obligation is confirmed by the Permanent Court of Arbitration in the North Atlantic Coast Fisheries Case[15] and is also codified in Article 26 of the Vienna Convention on the Law of Treaties1969. It is logical to argue that if the Court strongly adheres to Article 38, then it must apply the watershed line not the Map line, and it must apply the principle of pacta sunt servanda together with good faith instead of estoppel.

The application of the English doctrine of estoppel or preclusion is problematic. The question is why did the Court apply estoppel instead of pacta sunt servanda? Both are considered to be "general principles of law" within the meaning of Article 38 (c). Article 38 (a) (b) (c) does not provide a hierarchy of laws, rather it merely recognizes the application of law in logical order. And Article (c) encompasses a wide range of general principles of law such as pacta sunt servanda, the principle of distinction, sic utere tuo, et alienum non laedas, estoppel etc. The question is why did The Hague Court pick and choose estoppel, ignoring pacta sunt servanda? Professor Pellet rightly remarks that "A judgment based on treaty rules is, therefore, likely to be more acceptable to the contesting States (which will be seen as being the authors of their own fate) than a decision based on other considerations which usually imply a larger amount of judges' subjectivity."[16] The term "judges' subjectivity" reflects personal perception or interpretation rather than objectivity of the rule of law.

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11 Dissenting Opinion Judge Wellington Koo, at 98

12 O'Connell, International Law: Volume 1, (London: Steven & Sons, 1970), at 428

13 Alain Pellet, Article 38, supra note, at 774

14 Shaw, supra note, at 497

15 the North Atlantic Coast Fisheries Case (Great Britain, United States), 7 September 1910, Vol. XI, ,pp.186-188

16 The Statute of the International Court of Justice: A Commentary, Edited by Andreas Zimmermann and Christian Tomuschat, Karin Oellers-Frahm, (Oxford University Press,) para.270

## 2. Treaty Interpretation

The general rule on treaty interpretation laid down in article 31 of the Vienna Convention 1969 gives priority to "the ordinary meaning" expressed in the terms of the treaty operating in tandem with context and its object and purpose.[17] It means that the Court is primarily obliged to carefully examine or interpret words or terms according to their literal or natural meaning. In past jurisprudence of the World Court, the Court considered the ordinary meaning of words or terms used in a boundary treaty. For example, in KasikililSedudu Island (Botswana and Namibia), the World Court attempted to properly construe the two technical terms "main channel" and "Tha1weg" by consulting two special dictionaries.[18]

Although The Hague Court decided the Temple Preah Vihear case before the entry into force of the Vienna Convention 1969 including the judgment of KasikililSedudu Island case, the Court should have focused mainly on the ordinary meaning of the term "watershed" laid down in Article 1 of the boundary Treaty 1904. The recognition of "watershed line" establishing an international border on a mountain range has been fully supported by state practices[19] and scholarly publications[20].

Another important issue is the contradiction between the boundary treaty and the controversial maps. Judge Fitzmaurice ventured the opinion that Thailand should admit that she accepted the maps in order to further argue that in case of discrepancy between the treaty and maps, the former prevails over the latter and the Court must examine this crucial point.[21] Indeed, Professor Henri Rolin acting as a Legal Counsel of Thailand, raised this legal point and it was echoed by Professor Hide also serving as a Legal Counsel of Thailand. Professor Hide remarked that "Professor Rolin has observed that, even if a map is assumed to be the work of a delimitation commission and thus related to a treaty, that map may require judicial interpretation because an error in a matter of description cannot prevail against the clear intent of the parties as contained in the treaty."[22] He further cited a decision of the Supreme Court of the United States as a good example of evidence of the preponderance of boundary treaties over erroneous maps.[23] This statement leads to the key question as to why the World Court overlooked this cogent argument proposed by Thailand. In the judgment of the Court, the Court failed to explain and give sufficient reason on this point.

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17 See Article 31 of the Vienna Convention 1969 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

18 See Kasikilil Sedudu Island (Botswana Namibia,) Judgment, I. C. J. Report.1 999, p. 1045, para 30

19 See Lamb, Alastair, Treaties, Maps and the Western Sector of the Sino-Indian Boundary Dispute, 1965 Aust. YBIL 37 (1965), at 48-49

20 Oppenheim, International Law, op. cit.. vol. 1, p.534.; Omar Abubakar Bakhashab , The Legal Concept of International Boundary, Econ. & Adm., Vol. 9 (1996) , at 43

21 Dissenting Opinion of Judge Fitzmaurice, at 65

22 Minutes of the Public Sittings held at the Peace Palace, The Hague, from 1 to 31 March 1962, and on 15 June 1962, the President, M. Winiarski, presiding, at 277

23 Id.

## 3. A problem of value of maps

### A. Judicial decisions and opinions

#### 1. A Judgment of the World Court

The Permanent Court of International Justice remarked that “It is true that the maps and their tables of explanatory signs cannot be regarded as conclusive proof, independently of the text of the treaties and decisions; but in the present case they confirm in a singularly convincing manner the conclusions drawn from the documents and from a legal analysis of them; and they are certainly not contradicted by any document.”[24]

After the World Court decided the Temple case based only on maps, it seems that the Court get back on the right track by considering maps as complementary evidence. Many later cases, as we will discuss below, show that the Court relies on the traditional view in evaluating the value of maps proposed by the parties concerned. For instance, in Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), both sides adduced almost 100 maps but the Court only considered 6 official maps in order to confirm Malaysia’s position that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.[25] It is interesting to note that the Court based its reasoning on the relevant facts and conduct of the Parties especially by reference to the conduct of Singapore and its predecessors à titre de souverain without mentioning official maps.[26]

#### 2. An Individual Opinion of a Judge

Many learned judges of the International Court of Justice made meaningful remarks about the value of maps as evidence in the context of a territorial dispute. Generally speaking, the World Court has always carefully examined a border treaty operating in tandem with other documentary evidence. In essence, learned judges of the World Court hesitate to rely exclusively upon maps, either public or private maps, and, accordingly, only admit maps as documentary evidence under specific conditions. Three judges of the World Court are skeptical about a reliance on maps as evidence appearing in a judicial opinion. First and foremost, Judge Levi Carneiro in the Minquiers and Ecrehos case refused to take account of any maps because they were not a decisive factor in determining the legal dispute of territorial sovereignty.[27]

24 Question of Jaworzina (Polish-Czechoslovakian Frontier), Advisory Opinion of 6 December 1923, P.C.I.J., Ser. B., No. 8 (1923), at 33

25 Para. 272

26 Para. 276

27 Judge Levi Carneiro opined that “I know that such evidence is not always decisive in the settlement of legal questions relating to territorial sovereignty. It may however constitute proof of the fact that the occupation or exercise of sovereignty was well known…..At any rate, maps do not constitute a sufficiently important contribution to enable a decision to be based on them. I shall not take the evidence of maps into consideration See Individual Opinion of Judge Levi Carneiro in Minquiers and Ecrehos (France/United Kingdom) (1953) ,at 105

Similarly, Judge Moreno Quintana[28] and Judge Armand-Ugon[29] in Sovereignty over Certain Frontier case disregarded the probative value of maps. It is interesting to note that The Hague Court decided the Minquiers and Ecrehos case and the Sovereignty over Certain Frontier case before deciding the Temple case. But in the latter case, the World Court departed from its precedent without any satisfactory explanation. Three judges of the World Court in the Temple case vigorously defended their stance in opposition to reliance only on maps without careful consideration of the "watershed line" enshrined in the border treaty. Judge Quintana regarded sketches, photographs, account of journeys, record-cards as a complementary value lacking legal value.[30] Also, Judge Koo questioned the accuracy of maps on the scale of 1:200,000 that were too small to pinpoint the Temple located at the top of an escarpment of the Phanom Dong Rak mountain range.[31] And the last judge, Sir Spender vehemently criticized the value of map Annex I because of two fundamental flaws. First, map Annex I was not an outcome of the task of the Mixed Commission and it was never recognized as an integral part of the Boundary Treaty 1904 and 1907.[32] Second and more importantly, the map Annex I was not fully

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28 Judge Moreno Quintana took the view that "the said map, or any other document, which might be the consequence of a mistake in numbering, would be of highly doubtful value. See Dissenting Opinion of Judge Moreno Quintana in Sovereignty over Certain Frontier Land (1959) (Belgium/Netherlands), at 254

29 Judge Armand-Ugon remarked that ".....This map should be considered as a whole and not in one of its parts alone; the probative value of this map is not conclusive. Moreover, the map annexed to the Minutes of the Boundary Commission of 5 September 1887 does not show the disputed plots as being Belgian territory (Counter-Memorial, Annex XLVI) On the other hand, the well-established and conclusive legal facts relied upon below are in complete disagreement with what is shown on the map in question. Such a circumstance deprives the map of any probative value. What appears on the Belgian military staff map of 1871 does not have the importance attributed to it in the present case, since it has not been shown that the Netherlands authorities had knowledge of it (Memorial, Annex XIII, p. 31). On this map, the attribution to Belgium of the disputed plots constitutes no more than a repetition of the mistake already indicated in the Communal Minute inserted in Article 90. What is shown on the map cannot be regarded as having any effect with regard to sovereignty; nor can one attribute to it the value of an act of sovereignty" See Dissenting Opinion of Judge Armand-Ugon in Sovereignty over Certain Frontier Land (1959) (Belgium/Netherlands), at 246-247

30 Judge Quintana observed that "…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 officia1 Thai services, on which Preah Vihear is shown in Cambodian jurisdiction. These maps do not appear at al1 conclusive, being based upon the Annex 1 map which is not authoritative and does not show the true watershed line. It is possible to recognize expressly or tacitly a given de lure 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." See Dissenting Opinion of Judge Moreno Quintana, I.C.J. Report 15 June 1962 Case Concerning Temple Preah Vihear, at 71

31 Judge Koo stated that "Moreover, the Annex 1 map was drawn on the scale of I : 200,000, which means that the distance of 500 metres on the ground lying between the alleged frontier line and the Temple area is represented on the map by a width of only 2.5 millimetres. And because the Temple is perched on the summit of the promontory of Preah Vihear, the mark indicating the Temple is buried in a tangle of contour lines in a small part of the map. Even if one looks specially for the mark, it is by no means easy to find it. The alleged reason, far from constituting a legal basis for the presumption of Siam's acceptance of the Annex 1 map, is no more than a conjecture." See Dissenting Opinion of Judge Koo, I.C.J. Report 15 June 1962 Case Concerning Temple Preah Vihear, at 84

32 See Dissenting Opinion of Judge Spender, I.C.J. Report 15 June 1962 Case Concerning Temple Preah Vihear, at 132

congruent with the "watershed line" specified in the Boundary Treaty 1904 coupled with Treaty 1907 that regulated the international border between Siam and Cambodia.[33]

## B. Academic's Views

The scholarly works of distinguished jurists support the view that maps per se are not regarded as cogent evidence, depending on several factors and, accordingly, a judge and an arbitrator have to examine and evaluate the accuracy, correctness, and credibility of maps with extreme caution. The first leading commentator, who plainly disregarded the value of maps, was Professor Charles C. Hyde. He stated that "Arbitrators, advocates, and publicist have long perceived and uttered salutary warnings respecting the danger of reliance upon maps of which the authors were themselves ignorant of essential topographical facts, as a means of deriving correct conclusion concerning the exact location of boundaries that might be in dispute. In so doing they have been inclined to accentuate the insufficiency of the older maps at a time when erroneous supposition of cartographers touching particular areas were notorious."[34] Additionally, Professor James Nevins Hyde, an eminent international lawyer and a son of Charles Cheney Hyde, reiterated his father's legal opinion. He argued, during Oral Proceeding stage in the Temple case, that "the well-recognized juridical principle, a map at best… is a doubtful basis on which to rest the decision of an international tribunal."[35]

In addition to both Hyde, father and son, many scholars champion careful consideration of maps under specific circumstances. These scholars oppose any reliance upon maps alone, especially when maps clearly contradict a boundary treaty provision concluded between the parties concerned. Let's start with Professor Durward Sandifer, a prominent expert on international law on evidence. In his famous treatise entitled "Evidence Before International Tribunals", many of his pages mirror a distrust and uncertainty of maps as documentary evidence. He dubbed maps as hearsay evidence. [36] Likewise, Oye Cukwurah disinclined to accept the role and significance of maps as evidence.[37] Also, Professor Ian Brownlie, a former

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33 Ibid., at 133. Judge Spender clearly stated that "The line shown on Annex 1 is beyond doubt not the line of the watershed, in particular it is not that line in the critical vicinity of the Temple. On the basis that Annex 1 is, or represents, a delimitation of the Dangrek by the Mixed Commission it is evident that the line in Annex 1 is not established in accordance with the criterion laid down in the Treaty."

34 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPREATED AND APPLIED BY THE UNITED STATES 494-495 (1945).

35 Cited by Guenter Weissberg, Maps as Evidence in International Boundary Disputes: a Reappraisal, 57 American Journal of International Law 1963 Maps As Evidence, 1963, at 796

36 Professor Sandifer wrote: "Tribunals, on the other hand, have admitted maps indiscriminately, rarely stating that only "primary or original or official maps would be considered acceptable, if available. They have, however, probably applied severer tests in evaluating maps than almost any other kind of evidence. This practice is due to the fact that maps are in most instance, at best, secondary evidence and frequently hearsay in character." He further stated that "Even in these instances the map can seldom, if ever, be taken as conclusive in the determination of disputes that may arise concerning the location of the boundary." And he finally concluded that "…maps falling short of the status of primary evidence must be scrutinized with extreme care when advanced in support of a claim to sovereignty over a given territory….It is put forward as evidence of the position of a boundary as defied in existing conventional and statutory law with reference to fixed geographical features." See DURWARD SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 229,230, 239 (1975)

37 Cukwurah was of the opinion that " The nature of the mistrust often felt about details in maps, especially those of ancient date, which parties produce in evidence, is properly reflected in the general rule according to which, in the event of discrepancies between the text of a boundary treaty and a map annexed to it, the text is regarded as final and as embodying the intention of the parties" See A. O. CUKWURAH, THE SETTLEMENT OF BOUNDARY DISPUTTES IN INTERNATIONAL LAW 225 (1967)

Chichele Professor of Public International Law at Oxford University, summarized the potentiality of relying on maps under a strictness of particular requirements.[38] In the same vein, Keith Highet expressed doubts about the credibility of maps and he opined that in more recent cases the World Court and the Chamber did not pay close attention to maps.[39] Moreover, one commentator strongly opposed paying too much attention to controversial maps, particularly when the delimitation described in a boundary treaty manifestly contradicted inaccurate maps. The legal provision of boundary treaty, naturally, outweighs such maps.[40] Aside from the renowned international lawyers mentioned earlier, several technical experts on topographic surveys share the same view. Dr. Stephen B. Jones, an American specialist in geography, expressed the view that a boundary treaty takes precedent over maps. He wrote: "A treaty of delimitation should be illustrated by a map of scale appropriate to the case, but this map should not be considered a substitute for precision in the text.....In most boundary document, the text overrules the map in case of contradiction. This rule should be stated in the treaty..."[41] Similarly, Dennis Rushworth cautions about an accuracy of maps.[42]

Now let us turn our attention to an evaluation of value of map Annex I in the Temple case. In my view, as will be discussed below, there are several reasons to demonstrate why such map is devoid of legal value.

First and foremost, as with Judge Spender's view, Siam and France did not incorporate the map Annex I into the Treaties 1904 and 1907 at the time of conclusion of such treaties. Moreover, after the conclusion of such treaties, both contracting parties never, either directly or indirectly, annexed the map Annex I into the Treaties 1904 and 1907 too. In principle, a map that is made an integral part of a boundary treaty is a preponderance of legal value.[43] There are ample examples of the binding force of maps appended to a boundary treaty. The classic example of the probative value of maps annexed to a boundary treaty is the Simla Accord, a tripartite agreement concerning the status of Tibet signed by representatives of the Republic of China, Tibet and Great Britain.[44]Another example of this kind of map is the map of the Zambezi River. This map was arranged by a Joint Boundary Commission composed of representatives of the Union of South Africa and Northern Rhodesia. After successfully preparing and making the map, both sides agreed to incorporate such map into the Exchange of Notes.[45]

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38 Professor Brownlie categorizes maps as evidence into eight groups. See more details in IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS 156-160 (1998)

39 Keith Highet Evidence, the Court, and the Nicaragua Case, 81 Am. J. Int'l 1,1987, at 19

40 Maluwa posited that "In several early boundary disputes, court and tribunals were often presented with maps of doubtful authenticity and origin which, in many instances, were found to bear inaccurate relationship to the geographical conditions they purported to portray." She further suggested that "…This is especially the case where the demarcation of the boundary is in any case expressly governed by treaty provisions and is not left to be determined simply on the basis of consideration of acquiescence, estoppels, good faith and customary usage." See Tiyanjana Maluwa, Disputed Sovereignty over Sidudu (or Kasikili) Island (Botswana-Namibia): Some Observations on the International Legal Aspects, 5 Afr. J. Int'l & Comp. L. 113 (1993), at 134, 137

41 STEPHEN JONES, BOUNADARY-MAKING: A HANDBOOK FOR STATESMEN,TREATY EDITORS AND BOUNDARY COMMISSIONERS 64 (1971)

42 He stated that "Even with good topographic maps it is quite possible for diplomats or lawyers to make a similar mistake today if they do not either visit the ground or take advice from those who have." See Dennis Rushworth, Mapping in Support of Frontier Arbitration: Delimitation and Demarcation, IBRU Boundary and Security Bulletin Spring 1997, at 64. This document is available at https://www.dur.ac.uk/resources/ibru/publications/full/bsb5-1_rushworth.pdf

43 See SANDIFER, supra note, at 230

44 See more details in L. C. Green, Legal Aspects of the Sino-Indian Border Dispute, 3 China Q. 42 (1960), at 50; Alastair Lamb, Treaties, Maps and the Western Sector of the Sino-Indian Boundary Dispute, Aust. YBIL 37 (1965), at 43

45 See more details in Sakeus Akweenda. The Legal Significance of Maps in Boundary Questions: A Reappraisal with Particular Emphasis on Namibia. B.Y.I.L, Vol. 60 (1989), at 209

In contrast, Siam and France never concluded any kind of international agreement, even an Exchange of Notes, in order to integrate the map Annex I into a part of the Treaty 1904 or the Treaty 1907. Consequently, the map Annex I lacked any legal effect and probative value.

Second, to be able to place special emphasis on maps as convincing evidence, it is generally accepted that maps must be well prepared by a neutral and professional institution.[46] More importantly, maps produced by a government department do not always create a legal binding force on contracting parties.[47] Unquestionably, the map Annex I did not qualify as an official map because this map was unilaterally prepared "under the general direction of Colonel Bernard"[48] and also published in France without any collaboration from Siam officials. Put differently, the entire process of technical preparation, including publication, of the maps lay entirely in the hands of French teams, and therefore, this map was not a product of the Mixed Commission.[49] Although Siam authorities requested the French experts to prepare the map Annex I, such a request per se did not mean an implied endorsement or ratification of such maps. More importantly, Siam never officially or explicitly endorsed this map as well.

Third, in the case of a contradiction between a boundary delimitation described in a treaty and geographical terrains shown in maps, the first, without doubt, overrides the latter.

Lastly, maps alone, either public or private, cannot establish an international boundary regime between states concerned and they are unable to constitute obligations erga omnes in international law. In contrast, a legal title to territorial sovereignty and jurisdiction is anchored in a boundary treaty. This proposition is bolstered by the I.C.J's pronouncements[50] and publicist views.[51]

The prevailing opinions, as we have seen, lead to the definitive conclusion that maps per se are, as a rule, considered as a complementary value and the credibility of maps depends so much on several key factors. In actual practice, it is very difficult, if not impossible, to prepare an impeccable map, that was particularly the case for archaic maps produced over two or three hundred years ago. These antique maps usually fail to show real landscapes and precise locations. They often deviate from a treaty on boundary delimitation. In the case of an incongruence between the original and genuine intentions of the parties concerned reflected in a boundary treaty and maps, the paramount of a boundary treaty prevails. The present author supports the position that the obligation of party concerned is to rectify, not to repeat, any geographical mistakes appearing in maps. And the important task of a court or an arbitrator

46 VITOR PRESCOTT and GILLIAN TRIGGS, INTERNATIONAL FRONTIES AND BOUNDARIES: LAW POLITICS AND GEOGRAPHY 200 (2008).

47 Canada and Newfoundland Boundary dispute cited by VITOR PRESCOTT and GILLIAN TRIGGS, at 200-201

48 The World Court stated that "The French Government duly arranged for the work to be done by a team of four French officers, three of whom, Captains Tixier, Kerler and de Batz, had been members of the first Mixed Commission. This team worked under the general direction of Colonel Bernard, and in the late autumn of 1907 it completed a series of eleven maps covering a large part of the frontiers between Siam and French Indo-China, including those portions that are material in the present case. The maps were printed and published by a well-known French cartographical firm, H. Barrcre." See I.C.J. Report, Case Concerning Temple of Preah Vihear (Cambodia v. Thailand) (1962), at 20

49 Professor Hyde ventured the opinion that "Professor Rolin has demonstrated that this map was not the work of, or in any way authorized or approved by, the Mixed Commission created by the Treaty of 194, that it was not and could not have been what our opponents have repeatedly characterized as an authoritative delimitation." See Minutes of the Public Sittings held at the Peace Palace, The Hague, from 1 to 31 March 1962, and on 15 June 1962, the President, M. Winiarski, presiding, at 272

50 The Frontiers Disputes, ICJ Report…., para. 54 The World Court stated that "….

51 VITOR PRESCOTT and GILLIAN TRIGGS, supra note, at 203

should refuse to perpetuate international strife and tension along the border of states concerned by relying on a border treaty concluded by contracting parties instead of on erroneous maps.[52]

## 4. The French Map: False or Fraud

The most controversial and crucial problem of the Temple case is the legal value of the French map. In my view, the juridical and value of this map is clearly problematic and unreliable. First, the undisputable fact that this map was unilaterally prepared, produced and published by French authorities without Thai participation. Moreover, the Mixed Delimitation Commission never officially adopted this map because the Commission was defunct before completing the map. This is why Thailand dubbed it "the apocryphal document".[53]

Second, the map line, a consequence of unilateral preparation of French technicians, was manifestly contrary to the watershed line, which had already been agreed on by both Siamese and French authorities. The vexing issue was that the map line deviated from the watershed line enumerated in the Boundary Treaty 1904 was a false or a fraudulent act. This question was never raised in the Temple pleading and was never discussed in scholarly works. Two learned judges of this case expressed the view that the map line was an erroneous act or good faith. In the dissenting opinion of Judge Spender, miscalculation of O Tasem river occurred during the delineation of the map. In other words, the map line that did not reflect the true watershed line was an erroneous act by French authorities. Moreover, in the separate opinion of Fitzmaurice, he opined that French experts delineated the map line with bona fide intention.

However, it is possible and tantalizing to think that the drawing of the map line was a deceptive act. Perhaps, the French team experts deliberately delineated the map line by disregarding the watershed line. Of course, it is not easy to find conclusive evidence to prove that the unilateral drawing map line was fraudulent because there were no agreed minutes of the later meeting on 2 December 1906.[54] However, the author has some grounds to suggest that the mapping drawn away from the water shed line was, indeed an act of deceit, thereby excluding the Temple from Siamese territory.

First, some scholarly works illustrate that the deceitful practice by preparing faked maps can be found in old colonial boundary treaties.[55] In my view, this finding is possible in the Temple case. During the era of imperialism period in Indo-China, France, as a colonizing power, was obsessed with the cultural ideology or value so called Orientalism. French teams composed of public servants, historian experts, topographic surveyors, technicians etc. were fascinated with archaic objects found in Southeast Asia. It is possible to think that when the Bernard team surveyed the Temple area alone without Siamese involvement, they saw it located on top of the promontory. No doubt, they fully realized that if they sketched the map line in congruence with the watershed line enshrined in the Boundary Treaty 1904, the Temple would be clearly placed in Siamese territory because the watershed line around the Temple area near the cliff, a natural feature, was manifest. Therefore, it was conceivable that, the Bernard team deliberately drew the map line departing from the watershed line. By so doing, the Temple was located in the Cambodian territory. The motivation of behind this mapping

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52 In American history, minor map mistakes caused several waging wars. The first war was The Toledo War between Ohio and Michigan. The second fighting was The Pig War: United States vs. Great Britain. And the last war was Missouri and Iowa.

53 See Counter-Memorial of the Royal Government of Thailand, 29September 1961,p.180

54 Case Concerning the Temple of Preah Vihere (Cambodia v. Thailand),Merits, Judgment of 15 June 1962,I.C.J Report 1962,p.18

55 Robert Kolb, The Law of Treaties: An Introduction, (U.S.A.: Edward Eglar Publishing Ltd,2016),p.99

departing from the watershed line was to possess the Temple of Prah Viharn which had great aesthetic and archaeological value.

Second, during the colonization era, French teams stole many historical sculptures, religious statutes and monuments belonging to the Khmer Empire Nowdays they are found in the Gimlet Museum. In two papers written by Mr. Krairoek Nana, a Thai historian interested in Thai history during colonization era, he showed that French team of explorers were enchanted with the Khmer civilization. They planned to send cultural sculptures back to museums and royal palaces in France.[56]

In addition, the arbitrators, in the North Atlantic Coast Fisheries Case, emphasized that a state has a duty to perform a treaty obligation in bona fide.[57] In the Temple case, it is questionable whether the two French experts, Captains Kerler and Oum, undertook the drawing of the map in good faith because the map line did not reflect the reality of the watershed line contained in Article 1 of the boundary treaty 1904. The watershed line in the area of the Temple was naturally visible because it was located near or along the crestline or the escarpment. But the drawn line on the French map appropriated Thai territories and simultaneously annexed the Temple. The map line was thus obviously wrong. Therefore, it is reasonable to question the honesty of the two French technicians in their construction of the map line.

## 5. Lacking Consideration of the Exercise of Sovereignty by Siamese Authorities

At the outset, it should be emphasized that one of the well-established principles concerning title to territory is a manifestation of exercise of sovereignty or effective control over a disputed territory. In the context of territorial claims, the principle of exercising sovereignty over disputed territory has been affirmed by jurisprudences of The Hague Court[58] and scholarly publications.[59] Put it simply, a territorial claim over a disputed area depends much on the degree of the exercise of sovereignty wielded by public authorities. Examples of the exercise of territorial sovereignty reflected in physical activities are various: the collection of taxes, the construction of public roads etc.

However, the World Court departed from its precedent and international practices because it failed to painstakingly examine the degree of the exercise sovereignty in the Temple and its vicinity demonstrated by Siamese officials. The Court merely observed that acts of administrative task performed by Siamese officials were regarded as routine work carried out by local and provincial authorities in contrast to the attitude of the central Siamese authorities.[60] This statement lacks an adequate and satisfactory explanation and it seems that the Court

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56 See Art & Culture Magazine (in Thai),vol. 5 April,2019,pp.143-169

57 The North Atlantic Coast Fisheries Case,7 September 1910, Vol. XI, pp.186-187

58 See The Palmas case, at. 869; Eastern Greenland Case; Minquiers and Ecrehos (France/United Kingdom) , Judgment of 17 November 1953, at 65-69 ; the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), (Judgment, Merits, I.C.J. Reports 2001),para. 197;Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia /Malaysia), Judgment, I. C. J. Reports 2002, at para 126-149; Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgement of 23 May 2008, para 118-260

59 Andrew F. Burghardt, The Bases of Territorial Claims, Geographical Review,Vol. 63, No. 2 (Apr., 1973), p.229;Yehuda Blum, Historic Titles in International Law, (The Netherlands: Martinus Nijhoff Publisher,1965), pp.110,118

60 I.C.J. Report, The Temple Preah Vihear case, at 30

reversed its precedent. In Minutiers and Ecrehos (France/United Kingdom), the Court weighed the value of evidence of effective control performed by local administration. The Court stated that "Jersey authorities took, during the subsequent period, action in many ways in respect of the islets. Of the manifold facts invoked by the United Kingdom Government, the Court attaches, in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation."[61] (emphasis added)

In addition, the Court failed to carefully discuss a wide range of relevant and cogent evidence concerning the exercise of sovereignty by Siamese officials. In Counter-Memorial of the Royal Government of Thailand, the Thai Royal government presented an array of evidence to demonstrate that Thailand exercised territorial sovereignty over the Temple of Phra Viharn and its adjoining region. This evidence can be divided into six main categories. The first is "General Administrative Control" consisting of hygiene measures, tax collection, survey and census, road repairs. The second is Forestry and Elephant Catching. The third is security measures. The fourth is Visits by Persons of Importance to Phra Viharn. The fifth is Archaeological Survey and Registration. And the last one is a guardian appointed for Phra Viharn.[62] To sum up, according to the present writer's view, the evidence of the exercise of sovereignty by public agents of Siam is both legal in nature and intense in degree.

It should be noted that although Judge Fitzmaurice voted in favor of Cambodia, he admitted that the Thai government adduced copious evidence that demonstrated the assertion of local administrative activities relative to Preah Vihear. But, unfortunately, in the eyes of Judge Fitzmaurice, these activities were viewed as devoid of legal value.[63] By contrast, Judge Quintana[64] and Judge Koo[65] firmly asserted that the exercise of territorial sovereignty over Phra Viharn and its precinct by Siamese authorities was conducted more intensely degree than on the Cambodian side. This can be compared to Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia /Malaysia), where the Court grounded its reasoning in the principle of effectivités, by considering only two administrative measures, namely, "regulating and controlling the collecting of turtle eggs" and "the establishment of a bird reserve."[66] Accordingly, the Court ruled that "Malaysia has title to Ligitan and Sipadan on the basis of the effectivités referred to above."[67] Clearly, in the Temple case, Thailand, formerly known as Siam, was able to adduce a larger variety of compelling evidence more than Malaysia in Sovereignty over Pulau Ligitan and Pulau Sipadan. Accordingly, The Court in the Temple case should fully explain why the Court dismissed evidences adduced by Thailand.

Moreover, many professors of international law have provided examples of "effective control" as a means to assert a territorial claim. Important evidence includes tax levies, the building of public roads, the maintenance of public order.[68] Applying such criteria to the Preah Vihear case leads to the definite conclusion that the exercise of sovereignty, or administrative control by the Siamese authorities in the location where the Temple Preah Viharn is situated was more effective and continuous than Cambodia's assertion.

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61 The Minquiers and Ecrelzos case, Judgment of November 17th, 1953 : I.C. J. Reports 1953,at 65

62 Counter-Memorial of the Royal Government of Thaïland, 29 September 1961, para 62-69

63 Separate Opinion of Sir Gerald Fitzmaurice, at 60

64 Separate Opinion of Judge Quintana,p.70

65 Separate Opinion of Judge Wellington Koo,pp.90-93

66 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), (Indonesia /Malaysia), Judgment, I. C. J. Reports 2002, para. 145

67 Ibid. at 149

68 IAN BROWNLIE, supra note, at 154

## 6. The Problem of Application of the Principle of Estoppels

### A. During the PCIJ Period: Eastern Greenland

Although the World Court never used the terms estoppel in a judgment, many jurists usually considered the Eastern Greenland case as an example of adopting estoppel as a general principle of law.[69] Some international lawyers took the view that the Court relied on estoppels as a general principle of law in the Eastern Greenland case.[70] In contrast, some legal scholars remarked that the Court applied a unilateral declaration stated by Mr. Ihren as a source of international obligation[71] or refused to characterize the "Ihlen Declaration" as a type of estoppels.[72] Additionally, Skubiszewski explained that the Ihren declaration constituting a legal biding force was based on intention.[73] Because the Court never specifically employed the term estoppel, Brown posited that the judgment in Eastern Greenland created more confusions than clarification of the juridical status of estoppels in international law.[74] In my view, the Ihren declaration constitutes per se international legal binding force without resorting to a doctrine of estoppels.

### B. During The I.C.J Period

#### 1) The Temple Case

Like the Eastern Greenland case, some scholars are of the opinion that the Court ground its decision in estoppels, although the Court never used the term "estoppels" or other similar words such as "acquiescence" and "preclusion."[75] Chiristopher Brown remarked that neither arties nor the Court referred to estoppels.[76]

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69 Megan Wagner, Jurisdiction by Estoppel in the International Court of Justice, 74 Calif. L. Rev. 1777, 1986 ,at1785; Christopher Brown, A Comparative and Critical Assessment of Estoppel in International Law, 50 U. Miami L. Rev. 369,1995 ,at 389

70 Lautherpacht, The Development of International Law by International Court of Justice, (USA: Freerick A. Praeger, 1958), at 169-170; Alexander Ovchar, Estoppel in the Jurisprudence of the I.C.J A Principle Promoting Stability Threatens to Undermine It, Bond Law Review: Vol. 21, 2009, at 7

71 Degan viewed such declaration as a unilateral promise. See V.D Degan, Sources of International Law, (The Netherlands: Martinus Nijhoff Publishers, 1997), at 295; D.W. Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence, 33 Brit. Y.B. Int'l L. 176, 1957, at 185,189; Arthur Watts, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, Recueil des Cours Vol. 247, 1994, at 116

72 J.K.T Chao, The Legal Status of Eastern Greenland Case: a Note on its Legal Aspect, at 199. This document is available at http://nccuir.lib.nccu.edu.tw/bitstream/140.119/11287/1/292.pdf

73 Skubiszewski, at 231

74 Christopher Brown, supra note, at 390

75 Megan Wagner, supra note, at 1785

76 Christopher Brown, supra note, at 390

## 2) Gulf of Maine

In Gulf of Maine case, Canada relied on a principle of acquiescence and estoppels to support her argument. Interestingly, Canada admitted that a doctrine of estoppels is still developing.[77]

In summary, after delivering the judgment in the Temple case, it seems that The Hague Court refused or hesitated to place great weight on the common law doctrine of estoppel. Moreover, some international lawyers trenchantly criticized the uncertainty of application of estoppel by the Court.[78] At least two eminent international jurists, Judge Jennings[79] and Sir Ian Sinclair[80], warned international lawyers about relying on estoppel. In Particular, Judge Robert Jennings agreed with Judge Spender's view appeared in the last paragraph in his dissenting opinion[81] by rightly stating that "This is indeed an impressive warning of the dangers of too facile an acceptance of estoppels as a device for the determination of title…Then, as it seems to me, although the case confirms that estoppels may assist…it still remains true to say that estoppels is not itself a root of title."[82]

## 7. A Visit of Prince Damrong to the Temple of Prah Viharn

Aside from the controversial map, The Hague Court placed great emphasis on Prince Damrong's visit to the Temple. In the eyes of the majority of the members of the World Court, the fact the the King of Siam gave Prince Damrong permission to visit the Temple that constituted a quasi-official character.[83] Accordingly, this visit was tantamount to "a tacit recognition by Siam of the sovereignty of Cambodia over Preah Vihear…"[84] It seems that this reason would be truncated.

First, I query regarding the permission of the King of Siam specified by the Court because Cambodia failed to adduce concrete evidence to demonstrate that the Siamese King (Rama VII) publicly authorized Prince Damrong to visit the Temple. In contrast, he was not officially mandated by the Siamese government to visit the Temple. Instead, his visit was a private one acting in his personal capacity, thereby it did not, explicitly or impliedly, constituted an international recognition of the Temple.

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77 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America),

Judgment, I.C.J. Reports 1984, p. 305, para. 129

78 Alexander Ovchar, supra note, at 33; Christopher Brown, supra note, at 411; Phil Chan, Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited, 3 Chinese J. Int. L. 421,2004, at 434, 439

79 Robert Jennings, The acquisition of territory in international law, Great Britain: Manchester University Press, 1963), at 41

80 Ian Sinclair, Estoppel and Acquiescence, in Fifty years of the International Court of Justice Essays in Honour of Sir Robert Jennings (Vaughan Lowe, Malgosia Fitzmaurice (ed.), (USA: Cambridge University Press,1996), at 120

81 In the last paragraph of his dissenting opinion, Judge Spender wrote that "With profound respect for the Court, I am obliged to say that in my judgment, as a result of misapplication of these concepts and inadmissible extension of them, territory the sovereignty n which, both by treaty and by decision of the body appointed under treaty to determine the frontier line, is Thailand's, now becomes vested in Cambodia.", at 146

82 Robert Jennings, supra note, at 51

83 I.C.J.Report, at 30

84 Id.

Second, indeed, during his visit to the Temple, Prince Damrong did not serve as a Minister for the Interior or any other Ministers such as Foreign Minister who can represent Siam on the international plane.[85] Rather, he served as President of the Royal Institute of Siam engaging in national library and archaeological studies.[86] Obviously, this position did not involve, directly or indirectly, in a political task or external relations. Moreover, Judge Koo rightly pointed out that Prince Damrong's visit to Preah Vihear site was in his capacity as President of the Royal Institute.[87] This is in sharp contrast to Mr. Ihlen in the Eastern Greenland case. Mr. Ihren served as a Minister for Foreign Affairs of Norway and any conduct, either oral or written, done by Mr. Ihren was likely to legally bind Norway on the international plane.

The World Court has several opportunities to explain the crucial role and importance of the Minister for Foreign Affairs in conducting foreign relations with other states.[88] The Eastern Greenland case,[89] the Nuclear Test case[90] and the Warrant case[91] springs to mind. In these instances, the Court emphasized that the Minister for Foreign Affairs, in officio, represents a state and deals with foreign affairs entailing a legal binding force on the international level. In contrast, again, Prince Damrong never acted as Minister of Foreign Affairs of the Royal Kingdom of Siam. At the time of his visit to the Temple, he did not perform any official duties or act on the behest of Siam.

Third, the sole purpose of this private visit was for a purely academic study of history and archeology. As Judge Koo remarked, the Prince said that "he had come to see the Temple and had nothing to do with politics."[92] Accordingly, such a private visit could not, and should not, symbolize recognition of the sovereignty of Cambodia over Preah Vihear. The French reception arranged by the French Resident was nothing more than a matter of courtesy.

Fourth, we should not decide a crucial problem of territorial sovereignty by relying so much on a private photograph. Such a picture was not a diplomatic correspondence or an official letter. Accordingly, the Court should not infer the recognition of territorial claim by indirect means. Compared to Gulf of Maine, the Court stated that to be able to create international effect, it was necessary for the Canadian Department of External Affairs to send a diplomatic communication to the United States Department of State.[93] Canada attempted to cite a "Hoffman letter" written by Mr. Hoffman who worked at the Bureau of Land Management in USA. Canada argued that Hoffman acknowledged using a median line by sending the Hoffman letter.[94] But the United States argued that Mr. Hoffman had no authority to define international boundaries or take a position on behalf of their Government on foreign

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85 It is generally accepted that a Minister for Foreign Affairs represents a state at international level. Any act done by a Minister for Foreign Affairs tends to constitutional a legal binding force.

86 Judge Koo was the only one judges who placed emphasis on the status of Price Damrong during visit the Temple. See Dissenting Opinion of Wellington Koo, at 90

87 Dissenting Opinion of Wellington Koo, at 90

88 There are many scholar works explaining the role and importance of Minister of Foreign Affairs in dealing with external relations. See Joanne Foakes, The Position of Heads of State and Senior Officials in International Law; Francis Deak, Organs of State in Their External Relations: Immunities and Privileges id States Organs and the State in Max Sorensen (ed.), Manual of Public International Law, (USA: St Martin's Press,1968);

89 Legal Status of Eastern Greenland (Denmark. v. Norway.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr.5)

90 Nuclear Tests Case (Australia v. France), I.C.J. Report,1974

91 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (2002)

92 Dissenting Opinion of Judge Wellington Koo, at 90

93 Para. 131

94 Para 132

claims in this field.[95] After hearing arguments from both sides, the Chamber of the World Court rebutted the Canadian argument by stating that "the terms of the "Hoffman letter" could not be invoked against the United States of America.

In the Temple case, however, both Siam and Cambodia, including France as a protectorate, never sent any diplomatic correspondence relating to the status of the Temple. We cannot, and should not, classify "Prince Damrong's snapshot" as "Ihren's declaration". To the contrary, the status of Prince Damrong's snapshot was the same as "Hoffman's letter."

### 8. The Political Context of Conclusion of Boundary Treaty 1904: Consent or Coerce

The majority of the members of The Hague Court turned a blind eye to international Realpolitik pushed by France as a master colonized power at that time. It was a notorious fact that France planned to extend it political influence to Southeast Asia. Of course, Siam was no exception. During the reign of Rama V, Siam was faced with French imperialism employing a Gunboat Diplomacy. To put pressure on the Siamese King Chulalongkorn, the French government ordered three French warships named Inconstant Comete, Lutin to blockade Siamese territories and also to fire Siamese fort. This naval armed forces was widely known as the Paknam Incident.

It is conceivable that the Boundary Treaty 1904 was an outcome of coercion by the French government rather than a genuine consent.

## IV. A REQUEST OF PROVISIONAL MEASURES

### A. INTRODUCTION

The power of granting a provisional measure or an interim protection is regarded as an incidental jurisdiction of a court. In the sphere of domestic law, in principle, a constitution or a procedural law vests a court with the power of granting interim protection. The International Court of Justice is no exception. In case of emergency, the World Court has the authority to issue a provisional measure to secure a legal right of the state concerned.

This chapter focuses on the provisional measure requested by Cambodia. Before examining the judgment relating to the provisional measure, a general view on this incidental jurisdiction should be described.

### B. The Purpose of Provisional Measures

There are, by and large, two main purposes of indication of provisional measures. The first is to preserve the respective rights relating to the main claims before deciding the merits

95 Para 133

of the case.[96] The primary function of interim relief is to maintain the status qua[97], or restitution in integrum.

The second, and more important, is to maintain the integrity of the ultimate judgment of the Court, or arbitral awards[98]. According to Jiminenez de Arechaga, a former President of the ICJ: "The essential object of the provisional measures is to ensure that the execute of a future judgment on the merits shall not be frustrated by the actions of one party pendent lite…[99]"

## C. The Criteria of Provisional Measures

In analyzing the conditions to render interim protection, a close careful study of the practices of orders of the Court concerning a request for indication of provisional measures is indispensable. With regard to the role and importance of provisional measures as provided by Article 41, although most international lawyers take the view that its statute denies the concept of stare decisis as a result of article 59[100] of the Statute of the Court[101], case law shows that the power of indication of interim protection was not arbitrary, but rather it was consistent with previous orders regarded as authoritative decisions. Moreover, both applicant States and respondent States rely heavily upon previous cases in order to further frame and develop their requests for indication of interim protections. However, in some borderline cases, learned judges do not share the same view on the issues of interim protection. As a general rule, there are sine qua non three interrelated conditions in order to issue interim protections of rights in dispute of the parties.[102] The next paragraphs devote more attention to each criterion.

### 1. Urgency

Clearly, an urgent situation, or an imminent jeopardy, plays a distinctive role in determining the provisional measures so as to protect the rights of the parties concerned. The requirement of urgency cannot be found in article 41 of its Statute. Instead, the Rules of Court stating that a request for indication of interim protection is primarily considered as the first priority,[103] is considered to connote the notion of urgency. This means that, argumentum

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96 See Aegean Sea Continental Shelf case, I.C.J. Rep 1976, para. 25; Diplomatic and Consular Staff in Tehran Case, I.C.J. Rep 1979, para. 36;

97 See Bernard H. Oxman, Jurisdiction and the Power to Indication Provisional Measures, in Lori F. Damrosch (ed), The International Court Justice at a Crossroads 328 (1987).

98 See Lawrence Collins, Essays in International Litigation and the Conflict of Laws 12 (1994).

99 See I.C.J. Rep, Aegean Sea Continental Shelf Case (Greece v. Turkey) (1976), pp.15-16

100 Article 59 states that "The decision of the Court has no biding force except between the parties and inn respect of that particular case."

101 However, on this point, Judge Shahabuddeen thinks that such an article is not concerned with the question of precedents. Article 59 only underscores the juridical force of a decision, qua decision, that binds only the parties to the particular cases. But it does not mean that a previous decision bars the Court from viewing it as a correct legal position. See MOHAMES SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 63 (1996).

102 It should be noted that Professor Bowett expresses the view that there are only two factors, namely jurisdiction on the merits and the degree of urgency and risk of irreparable damage, for the Court to grant the interim measures of protection. See PHILIPPE SANDS and PIERRE KLEIN, supra note 2, at 360.

103 Pursuant to article 74 (1) of the Rules of Court 1978, it states that "A request for the indication of provisional measures shall have priority over all other cases."

contrario, the Court and the Tribunal can repudiate a request for the indication of interim measures of protection if they find that the imminent danger does not exist or is too remote. To put it simply, the Court is able to decline to indicate interim protections if the relevant circumstances are devoid of urgency. The jurisprudences of the Court demonstrate that a requirement of urgency has been well established.

In the history of case law of the present Court, there are only three cases where requests for indication provisional measures were dismissed by the I.C.J on the grounds of lacking the situation of urgency. In the Interhandel case, the Court rejected a request for interim protections asked by the Swiss on the grounds of lacking urgency.[104] Several decades later, the Court had an opportunity to closely examine such a requirement in the Great Belt case between Finland and Denmark in 1991. In this case, Finland requested indicating interim measures, banning further construction of a bridge built by Denmark. After a careful examination of such a request, the Court refused to indicate interim measures on the account of a lack of urgency. In this case, the Court found that the bridge had not been built before 1994 and the Court had rendered a judgment before that time[105].

Almost ten years later in the Arrest Warrant case, the Court reiterated the same line of reasoning as to why a request for indication of interim protection should be dismissed. To be able to understand the reasoning given by the Court, the historical background of this case should be briefly considered. In the case concerning the Arrest Warrant between the Democratic Republic of the Congo, or formerly Zaire, and Belgium, a Belgian investigating judge issued and circulated an international arrest warrant for Mr. Abdulaye Yerodia who acted as the Minister for Foreign Affairs of the Congo, because he was charged with crimes against humanity. Several months later after the Belgium judge issued the arrest warrant, the Congo submitted a request for indication of provisional measures to the Court on 17 October 2000, thereby annulling the international arrest warrant. Later, Mr. Yerodia was replaced as the Minister for Foreign Affairs as a result of a Cabinet reshuffle and appointed as the Minister of Education. The Court relied on, among other things, two principal reasons for rejecting the request.

First, and most importantly, the Minister of Education in comparison with the Minister for Foreign Affairs has few chances to conduct international affairs, thereby involving less frequent trips aboard[106]. Accordingly, two necessary requirements, condition sine qua non, namely a matter of urgency and a principle of irreparable prejudice, were not established, thereby dismissing such requests submitted by the Congo.

Second, in the stage of oral arguments, the Court found that the Parties were willing to make diplomatic efforts to mend fences, resolving the international row by peaceful means.[107] The Court, therefore, decided that the circumstances did not require the indication of provisional measures as recognized by article 41 of its Statute. The Court was both wisely and rightly committed to promoting pacific settlements of disputes, if possible, rather than responding to the claims of the Parties without taking into account other amicable solutions.

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104 See Interhandel Case Concerning Request for the Indication of Interim Measures of Protection (Switzerland v. United States of America), I.C.J. Rep. 24 October 1957.

105 Great Belt Case, I.C.J. Rep, 1991. p. 18, 27

106 See Order with regard to A Request for the Indication of Provisional Measures in the Case Concerning Arrest Warrant (Democratic Republic of the Congo v. Belgium) on 8 December 2000, para. 72.

107 Id. para. 74,75,76.

## 2. Irreparable prejudice

In order to achieve a request for interim protection, it is necessary for the Parties, either plaintiff or offender to demonstrate that actual jeopardy will occur if the Court or the Tribunal do not issue the provisional measures. This means that such a request will be dismissed by the Court if the Parties fail to prove an existence of the actual loss. In other words, actual damages must not be too remote.

Basically, interim protection is a matter of discretion[108]. It means that the right in disputes of a requesting State can be compensated in the final decision on the merits of the case.

## 3. Right in issues

Besides the two key elements mentioned above, a concept of rights in issue is a sene qua non to render the indication of provisional measures. If the Court finds that a request for indication of interim protection is not closely relevant to the merits of the case in hand, such a request, of course, is denied. It should be also noted that any legal rights claimed must be based upon existing laws, or lex lata not lex ferenda, i.e. conventions, customary international law or general principle of law. It follows that it is incumbent on a requesting State to demonstrate that international law recognizes her rights in disputes which are violated by a respondent State.

In the Arbitral Award in 1989 (Guine-Bissau v. Senegal), Guine-Bissau requested interim measures but the Court dismissed the request on the grounds that "the alleged rights sought to be made the subject of provisional measures are not the subject of the proceeding before the Court on the merits of the case; and whereas any such measures could not be subsumed by the Court's judgment on the merits[109]. In this case, the main argument was exclusively concerned with the validity of the arbitral award concerning the maritime frontier. Such a request did not directly involve the issue of the validity of the arbitral award concluded between the two states. By contrast, the request per se dealt with maritime activities. With respect to the third criteria, Professor Collins pointed out clearly that "The…provisional measures are designed to protect right in issue and not other rights[110]". The element of rights in dispute was highlighted by Judge Shahabuddeen in the Passage through the Great Belt Case (Finland v. Denmark). According to Judge Shahabuddeen's view[111], the requesting State must demonstrate the existence of the particular right claimed seeking protection.

It should be noted that an issue of jurisdiction on the merits is not deemed to be a necessary element to indicate provisional measures. According to Judge Arechaga[112], a former

108 See J.G. Merrills, Interim Measures of Protection in The Recent Jurisdiction of The International Court of Justice, 44 International and Comparative Law Quarterly 90, 109 (1995);

109 See ICJ Report (Order in Case of Concerning the Arbitral Award of 31 July 1989 (Guinea – Bissau v. Senegal) 29 I.L.M. 626 (1990)

110 Lawrence Collins, supra not, p.75

111 See Separate Opinion of Judge Shabuddeen in the Passage through the Great Belt case (Finland v. Denmark)

112 See Separate Opinion of Judge Arechaga in Order on Request by Greece for the Indication of Interim Measures of Protection in the Aegean Sea Continental Shelf case (Greece v. Turkey). Also, Judge Shahabuddeen adopted a similar view. He pointed out that jurisdiction over the merits is merely one element which the applicant must establish in order to succeed in the substantive case. See Separate Opinion of Judge Shahabuddeen in Order With Regard to Request for the Indication of Provisional Measures in the Case Concerning Passage through the Great Belt (Finland v. Denmark)

President of the I.C.J, the possibility of jurisdiction over the merits is, inter alia, only one relevant condition. The Court, therefore, must take into account other elements i.e. urgent circumstances, legal rights claimed.

To sum up, in order to successfully issue provisional measures as provided by Article 41 of the Statute of the International Court of Justice, three criteria, as we have seen, must always be met. Argumentum contrario, the Court can refuse to issues such measures if one of the three elements of indication of provisional measures is absent.

More interestingly, however, these criteria, well established in the case-law of the ICJ, were challenged in the Lockerbie case. In this case, the crux of the problem was the relationship between the power of the Court to indicate interim measures and the legal effect of resolutions granted by the Security Council. A majority of the judges voted against a request for indication of provisional measures submitted by Libya, whilst five judges who voiced dissenting opinions, voted in favour of such a request. The main reason why the Court refused to indicate interim measure was that the resolution issued by the Security Council prevailed over the right in dispute claimed by Libya under the Montreal Convention as a result of article 103 explicitly contained in the United Nations Charter.[113]

## D. Some Problems of Provisional Measures

### 1. The Problem of Provisional Measures and Jurisdiction

#### 1.1 The practice of International Court of Justice

One of the most controversial issues widely discussed among international scholars is whether the jurisdiction of the World Court is deemed to be a prerequisite for indicating interim measures. With regard to this point, legal opinions can be divided into two camps. The first group, which has been well established by the jurisprudences of the I.C.J, together with a number of individual judges who delivered separate opinions[114], including leading commentators[115], does not consider the jurisdiction on the merit of the case in hand as a basis for issuing the provisional measures.The jurisprudences of The Hague Court have firmly recognized a prima facie test as appropriate grounds for granting interim protections.[116] The

113 Article 103 provides that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail."

114 See Separate Opinion of Judge Hersch Lauterpacht in the Interhandel Case (Switzerland v. United States of America); Separate Opinion of Judge Acechaga in the Aegean Sea Continental Shelf (Greece v. Turkey). And Judge Elias shared the same view in the same case.; See also Separate Opinion of Judge Evensen in The Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal). In his separate opinion, Judge Evensen put it clearly "I likewise agree with the finding of the Court that the Court need not finally establish that it has jurisdiction on the merits of the case before deciding whether or not to indicate such measures."

115 See M.H. Mendelson, Interim Measures of Protections in Case of Contested Jurisdiction, The British Yearbook of International Law, 306, 308, 320 (1972-1973); Leo Gross, The Case Concerning United States Diplomatic and Consular Staff in Tehran, 74 the American Journal International Law 395, 400 (1980).

116 See Nuclear Test case (Austria v. France), Interim Protection, I.C.J Rep. 1973, para. 13; Request for the Indication of Provisional Measures in Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Rep. 1980, para.15; Request for the Indication of Provisional Measures in Case Concerning Military

prima facie test means that the Court is able to indicate such measures if, prima facie, the Court does not manifestly lack jurisdiction, that is to say, a request for indication of interim protection does not obviously fall outside a jurisdiction over the case. In other words, the power of the I.C.J. to render such measures does not primarily predicate upon the jurisdiction of the I.C.J. over the case in question. The problem of the relationship between the jurisdiction and the power to indicate provisional measures was first revealed in the Anglo-Iranian Oil Co. in 1951.[117] The Court took the view that the Court, prima facie, had jurisdiction over the case.

It should be added that the subject matter of jurisdiction is most crucial to the Court, equally to an applicant and a respondent. Thus, the I.C.J has always borne in mind that the indication of provisional measures should not prejudge the question of the jurisdiction of the Court, which requires an individual judge to carefully scrutinize this issue again after the applicant institutes legal proceedings against the respondent, including any relevant issues pertaining to the merits of the case. This concern was markedly reflected in the Nicaragua Case. After issuing provisional measures under Article 41 of the Statue of the Court in tandem with Article 73 and 74 of the Rules of the Court, the Court observed that "Whereas the decision given in the present proceeding in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relation to the merits themselves."[118]

In addition, some jurists adopted the view that a source of indicating interim measures coming from Article 41 is independent from a source of jurisdiction over a merit of dispute arising from Article 36 (1) or (2), widely known as compulsory jurisdiction[119].

In contrast, the second group expressing a minority view, which can be found in several dissenting opinions, took a different position in that the power to issue interim measures was only anchored in the jurisdiction of the main claim. It follows that the power to indicate such measures presupposes jurisdiction on the merit of the dispute. It sounds like a convincing argument. In the Anglo- Iranian Oil Co, Judge Winiarki, a Polish judge, and Judge Badawi, an Egyptian judge, had the opportunity to deliver dissenting opinions with meaningful reasons. The latter put it this way: "The question of interim measures of protection is linked, for the Court, with the question of jurisdiction; the Court has power to indicate such measures only if it holds, should it be only provisionally, that it is competent to hear the case on its merits"[120] Apart from these two learned judges, several judges, in later cases, opposed the indication of provisional measures before considering the issue of the jurisdiction. In the Fisheries Jurisdiction Case, Judge Padilla Nervo, confirmed the opinions of Judge Winiaski and Badawi Pasha. According to Judge Padilla Nervo's view, the Court should not indicate measures of

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and Paramilitary Activities and against Nicaragua (Nicaragua v. United States of America), I.CJ. Rep.1984, para. 24.; Order in case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), I.C.J. Rep. 1990, para.20; Order with Regard to Request for the Indication of Provisional Measure in the Case Concerning Passage through the Great Belt (Finland v. Denmark), I.C.J. Rep.1992, para. 14.; Order regard to Request for the Indication of Provisional Measures in the Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America) on 9 April 19981, para. 23; Order with regard to Request for the Indication of Provisional Measures in the Case Concerning the Vienna Convention on Consular Relations (Germany v. United States Of America), on 3 March 1999,para.13; Order with regard to Request for the Indication of Provisional Measures in the Case Concerning the Arrest Warrant (Democratic Republic of the Congo v. Belgium), on 8 December 2000, para.67,68.

117 I.C.J. Rep, 1951,p.93

118 See Military and Paramilitary In And Against Nicaragua (Nicaragua v. United States of America) Request for The Indication of Provisional Measures, 1984, para. 40

119 See J.G. Merrills, Interim Measures of Protection in The Recent Jurisdiction of The International Court of Justice, 44 International and Comparative Law Quarterly 90, 91 (1995);

120 ICJ Report, 1951,p.96

protection because the question pertaining to the jurisdiction of the Court had not been fully explored[121].

In addition, one year later, in the Nuclear Test Case, Judge Andre Gros, a French jurist, and Judge Foster shared the same view that appeared in dissenting opinions. By the same token, Judge Nagendra Singh was deeply concerned about the prima facie test as a legal basis for indication of interim protections. The line of his argument is very interesting and convincing. He put it this way "The burden on the Court to satisfy itself about its own competence becomes much more important if in such circumstance it wishes to contemplate the granting of interim measures of protection. The Court must then feel a higher degree of satisfaction as to its own competence than can be derived from the positive but cursory test of "prima facie" jurisdiction or the negative test of "no manifest lack of jurisdiction"[122]. [emphasis added] Judge Morozov further expressed more juristic reasoning, in his separate opinion, an opinion with which the present author concurs, on the question of the competence of the Court to entertain the merits as provided by Article 36 and the power to indicate interim measures under article 41 of the Statute.[123] By way of interpretation, Judge Morozov, moreover, advanced his arguments by looking at the structure of the Statue of the International Court of Justice together with the Rules of Procedure. After carefully considering both, Judge Morozov stated that "Article 41 and 48 of the Statute are to be found in Chapter III of the Statute under the title "Procedure". This means that provision of that Chapter cannot be regarded as something which may be separated from Chapter II of the Statue". After explaining the relationship between the jurisdiction on the merits and the power to grant such measures, he went on to conclude that "It is however important to stress that the Court has no right to consider the question of interim measures of protection, before it has satisfied itself that it has jurisdiction in accordance with Article 36 and 37 of the Statute". Before ending his separate opinion, Judge Morosov emphasized that "Thus neither the Statute nor the Rules of the Court contain any provisions which provide that the request for interim measures of protection has any priority over the question of jurisdiction".

In the Nicaragua Case, an Agent of the United States of America adopted a similar view by contending that the Court lacked jurisdiction relating to the merits and, then, a fortiori, became devoid of jurisdiction to indicate the provisional measures requested by Nicaragua. Thereby the Court shall remove the case from the list.[124] Unfortunately, the Court disagreed with the United States' claims and, subsequently, found that the jurisdiction on the merit might be justified. By a unanimous decision, the Court granted the provisional measures, rejecting the request asked for by the United States of America that was strongly opposed to the indication of provisional measures.

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121 See Dissenting Opinion of Judge Padilla Nervo pp.38-39, Fisheries Jurisdiction Case (United Kingdom v. Iceland) and (Republic of Germany v. Iceland) (Requests for the Indication of Interim Measure of Protection) I.C.J. Rep.1972 , and I.C.J. Rep. 30 (Order of August 17,1972)

122 See Separate Opinion of Vice-President Nagendra Singh in Order on Request by Greece for the Indication of Interim Measures of Protection in the Aegean Sea Continental Shelf Case (Greece v. Turkey), I.C.J. Rep.1976.

123 See Separate Opinion of Judge Morozov in Order on Request by Greece for the Indication of Interim Measures of Protection in the Aegean Sea Continental Shelf Case (Greece v. Turkey), I.C.J. Rep.1976.

124 See See Military and Paramilitary in and against Nicaragua (Nicaragua v. United States of America) Request for The Indication of Provisional Measures, 1984, para. 6

## 2. Humanitarian Concerns as Grounds for Indication of Interim Protection

Several years ago, the Court voted in favour of a request for interim protections of human rights in order to postpone the execution of two individuals, namely Mr. Breard and Mr. La Grand; both of whom had been found guilty of murder by the Virginia Court and Arizona Court, respectively. This was not the first time in its history that the World Court employed provisional measures, as provided by Article 41 of its Statute, to protect the rights of civilians. In the Tehran case, or the Hostage case, such measures were used by the Court, without hesitation, because the plight of hostages was at stake. The Court stated that " Whereas continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm."[125] And in this case, the Court exercised its primary function by granting the interim protections in order to save the rights of Nicaraguan citizens to live.

In the Hostage case, the World Court, that has a duty to resolve international disputes between states by issuing interim protections, properly functioned as the principal organs of the United Nations. This interim measure might minimize international tension between parties, upholding the respective rights of the parties. The Court‘s decisions were deservedly highly commendable.

In contrast to the Hostage case, in the Breard and La Grand cases, the Court indicated interim protections in order to prolong the stay of execution of individuals, actions which have been criticized by some commentators[126] even by a judge who voted in favour of the Court's Order. For a better understanding of the issue of humanitarian reasons as grounds for granting interim protections, the basic facts of such cases should be briefly mentioned. For the former case, Mr. Angel Francisco Breard was Paraguayan who was charged with manslaughter and rape. After being found guilty, he was sentenced to death under the law of Virginia. In the latter case, Karl and Walter La Grand held German nationality and had lived in America for many years. They were indicted for committing heinous crimes, murdering a bank manager, robbing a bank and kidnapping two employees. Ultimately, they faced the same fate as Breard, namely, capital punishment under the law of Arizona. In essence, a salient feature of the two cases was that the American government had breached the right of the nationals to communicate with their consular office manifestly enshrined in Article 36 (1) of the Vienna Convention on Consular Relations 1963 widely considered as international customary law and accepted as a binding erga omnes.

In both the Breard and La Grand case, Judge Shigeru Oda, the well known dissenter, appended a declaration to the Order of the Court. Although he voted in favour of a stay of execution of such persons with great hesitation, he considered that the request for the indication of provisional measures should have been dismissed[127]. Before ending his declarations, he

125 See Order with regard to a Request for Interim Measures in Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Rep. 1980, para. 42.

126 See Alison Duxbury, Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights, 31 California Western International Law Journal 141 (2000).

127 See a declaration of Judge Oda with regard to a Request for the Indication of Provisional Measures in the case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America) on 9 April 1998. See also a declaration of Judge Oda with regard to a Request for the Indication of Provisional Measures in case Concerning the Vienna Convention on Consular Relations ( German v. United States of America), on 3 March 1999.

accepted that he voted in favour of the Order, in both cases, for humanitarian reasons.[128] Moreover, he did not shrug off his own responsibilities as he expressed his deep concern about the main functions of the Court that is primarily responsible for resolving international conflicts among states rather than intervening directly in the plight of a private person.[129] Although his line of legal reasoning was correct, his separate opinion was strongly criticized by Michale Addo who said that "Judge Oda is clearly swimming against the tide[130]."

It seems to me that Michale Addo jumped to the conclusion that the Breard case and the La Grand case were justified by the reason of the Court's Order enumerated in the Tehran case and the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case[131]. His proposition is that life is life. Any destruction of human beings is contrary to the rights of the individual. His arguments may be flawed. From both my legal and moral standpoint, we cannot equate the lives of Mr. Breard and the La Grand brothers, who committed serious crimes, with the lives of innocent people, in the Tehran and the Nicaragua cases. We cannot, and should not, compare the lives of Breard, Karl and Walter La Grand with the lives of scores of innocent people in the Tehran case, let alone systematic annihilation tens of thousands of innocent civilians, the so called ethnic cleansing, in the Application of the Convention on the Prevention and Punishment of the Crime of The Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) case.[132] Three criminal lives pale into insignificance when considering the massacres, tortures and extermination that took place in Bosnia and have done in many parts of the world such as Syria, Libya .

One might feel that the execution of a person per se violates the value of life with a capital L. Nowadays, it has become a cliché to describe the death penalty as a breach of international human rights, a view particularly supported by non-governmental organizations, widely known as NGOs and also by some in academic circles.[133] A modern concept of human rights, on a global scale, has now been thrust into the limelight. Although the prime objectives of this essay are not primarily involved with the death penalty under international law, the author would like to touch upon this issue.

Many countries have manifestly recognized capital punishment in their criminal law, even some states in U.S.A such as Texas or in other parts of the world countries such as, China and Thailand[134], a Buddhist nation. If the death penalty is contrary to international law on human rights, the criminal law of many countries per se is inconsistent with international legal norms, possibly leading to responsibility of state on the international level. But this cannot hold because the legal status of the legality of death penalty in the context of international law of human rights is vague. Up to the present time, a lot of prisoners worldwide have been executed by injection, hanging or shooting. It is generally accepted that, in principle, the criminal procedures, from jurisdictions, investigations, litigations, punishments to judicial reviews, are primarily regarded as a domestic affair without interference from other nations. But this does

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128 Id.

129 Id.

130 See Michael K. Addo, Vienna Convention on Consular Relations (Paraguay v. United States of America) ("Breard") and La Grand (Germany v. United States of America, Applications for Provisional Measures, 48 International and Comparative Law Quarterly 673, 680 (1999).

131 Id.

132 See Order Provisional Measures in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), on 8 April 1993.

133 The most authoritative work in this field is the Prof. Schabas's book. See WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (1997).

134 See Article 19 of the Thai Criminal Code. It clearly stipulates that "Any person sentenced to death shall be shot to death."

not mean that the present author agrees with the inappropriate manners of the American government, violating consular assistances in the La Grand case. In my scholarly view, in this case, there are two issues that must be separately examined. The first is the legality of death penalty. The second is the violation of article (1) of the Vienna Convention on Consular Relations. The second question is not contingent upon the first question. It follows that although Breard and La Grand contacted their consular at the time of arrest or detention behind bars, the final outcome was not considerably different, that is to say, the sentencing of such culprits to death.

## 3. Types of Interim Measures

Typically, the power of the Court and the Tribunal to grant interim protections is very broad, allowing the Court to use delicate discretion to indicate such measures in case by case.

In the precedents of the World Court, the Court had several opportunities to indicate such measures to protect rights in dispute. There are various kinds of interim protections, depending upon the circumstances required. For example, The Court can granted provisional measures on the grounds that the conduct of the respondent State resulted in irreparable injuries, like nuclear testing or military activities, ethnic cleansing and genocide. The Court can also alleviate international confrontations between the parties, particularly legal disputes of maritime boundaries. In these situations, the Court and the Chamber usually render interim protections in the form of ordering such respondents to immediately desist from any kinds of military operations[135], release innocent hostages[136], prevent and refrain from any armed conflict[137].

## 4. The Legal Status of Interim Measure: Moral or Legal Binding Force

The vexing problem of the legal status of interim relief has been discussed among commentators because the Statute uses the word "indicate", connoting merely recommended opinion and lacking mandatory force. According to Bowett's view, the question of the legal effect of provisional measures indicated by the I.C.J. remains an open question.[138] Also, many international lawyers express the view that interim measures of protection are deemed to be of an advisory character[139] requiring the Parties to consider such measures in bona fide, rather than legally comply with the provisional measures.

This problem was explained when the Agent of United States of America, in the Breard and La Grand cases in relation to a delay of the execution of the two foreigners who lived in America, contended that an interim relief granted by the Court lacked legal force, and thereby was not binding on the United States of America and could not furnish a basis for judicial relief.[140] However, the Court disagreed with the United States argument.

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135 See Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua. United Sates of America) (Request for the Indication of provisional measures) , para. 41 B (1).

136 See Case Concerning United States Diplomatic and Consular Staffs in Tehran (United States of America v. Iran) (Request for the Indication of Provisional Measures), para. 47.

137 See Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Request for the Indication of provisional measures) para. 47; Case Concerning the Frontier Dispute (Burkina Faso/Mali) (Request for the Indication of Provisional Measures), para.32.

138 PHILIPPE SANDS and PIERRE KLEIN, supra note 2, at 360

139 SHABTAI ROSENNE, supra note 1, at 149-150.

140 See La Grand Case (Germany v. United States) 40 I.L.M. 1069 (2001), para. 94.

## 5. Final Thoughts

As far as international law and the function of The Hague Court are concerned, interim measure of protection granted by the Court is primarily designed to preserve the legal rights of the Parties and, hopefully, lessen international tensions between states. The practice of the World Court regarding issuing interim relief upholds the principal responsibility of the Court, namely reducing international conflicts.

The World Court, as the principal and judicial organ of the United Nations, functions as the legal machinery for adjudicating upon international legal matters[141], not political problems, on an international scale between sovereign states. To be able to reach this goal, the power to grant interim protections, which is inherent to the Court, is indispensable.

In recent years, the International Court of Justice, a successor of the Permanent Court of Justice, has opportunities to employ interim relief to protect private persons in the context of human rights, for example in the Hostage Case, the Nicaragua Case, the Yugoslavia Case etc, or even in the life of an individual person such as in the Breard Case and La Grand Case. In the distant past, classic international law was much more concerned with the relationship between modern states in the sense that only sovereign states were regarded as the principal subject of international law, precluding private persons from the sphere of public international law in terms of application. But now international law has gradually involved private interests, especially in the context of humanitarian concerns and environmental problems. These cases mentioned in the forgoing paragraphs are the par excellent of the role of the World Court in relation to protecting international human rights through ordering provisional measures. Hopefully, interim measures, which are employed as interlocutory proceeding, operating in tandem with shuttle diplomacy as opposed to the previous gunboat diplomacy, will be properly exercised in order to pacify international disputes that have occurred in regional areas around the world.

## 6. The Request of granting provisional measures in the Temple Case

### 6.1 Cambodian's request

The international tension between Thailand and Cambodia ignited again after the Cambodian government nominated the Temple of Phra Viharn as a UNESCO World Heritage Lists. For Thailand, the Nomination File which attached a map illustrating the boundary line and the buffer zone clearly encroached on the territorial sovereignty of Thailand.[142] Thailand strongly protested this nomination and attempted to bring this stalemate to bilateral talks. Unfortunately, diplomatic efforts were a cul-de-sac, and an international tension mounted around the Temple area. Finally, both sides decided to deploy military soldiers to defend their own territory. Both sides deployed artilleries and exchanged fire, resulting in tragic loss of life and collateral damage.

Cambodia tried to bring this conflict to global attention. The border incident came into limelight when Cambodia sent a letter to the President of the Security Council, alleging that Thailand had violated the sovereignty of Cambodia.[143] Interestingly, this letter attached the

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141 See PHILIPPE SANDS and PIERRE KLEIN, *supra* note 2, at 338.

142 See more details in the White Paper prepared by the Ministry of Foreign Affairs of Thailand B.E.2551

143 S/2008/470, 18 July 2008

French map and described that the World Court had used this map and it indicated the "boundary line".[144] In fact, The Hague Court had never decided the juridical status or any legal value of the French map, let alone illustrated the boundary line. The attachment of the French map with the letter was nothing more than the indication of hidden agenda.

In addition to sending a letter to the Security Council, Cambodia filed a request with The Hague Court to issue a measure of interim protection.[145] Cambodia requested three considerations. The first was a withdrawal of military forces. The second was a prohibition of military activity in the Temple area. And the last request was that Thailand must desist from any act that would lead to deterioration of the situation.

## 6.2 Court Order

The judgment contained several orders. The first and most important ruled that both Parties had to withdraw their military soldiers from the provisional demilitarized zone (PDZ) delineated by the Court. And both sides had to desist from any military activities within this zone. The second was that Thailand shall not block Cambodia's free access to the Temple of Preah Vihear. The third was that both sides had to resort to ASEAN as a regional forum to observe access to the PDZ. The fourth was that both states had to avoid any act leading to aggravation of the dispute. And the last order concerned the obligation of both Parties to inform the Court about their compliance with the Order.

## 6.3 An Analysis of the Court Order

Although the provisional measures were manifestly based on humanitarian concerns, from the perspective of the Court's precedent this power indicating interim protection, these measures were problematic. It is undeniable that the granting of the interim protection was Samaritan purpose. But good intentions alone are not enough. The Court should follow its precedents relating to the issuance of provisional measures. In the past, when a legal dispute was concerned with a territorial sovereignty of a state concerned, the Court indicated a provisional measure that was confined to only the disputed area. By contrast, in this case, the Court extended such interim measure by depicting the DMZ to undisputed areas. The designated DMZ encroached on Thai territory for many acres, which is no dispute over this area, more than Cambodia territory. This DMZ extention to undisputed area was not necessary and it was irrelevant. The measure of withdrawal of military soldiers around the Temple area operating in tandem with a cease-fire was enough to protect civilian life and properties.

There are some reasons why this Order should not set a new precedent for a future case. First, no doubt, this provisional measure deviates from the Court's jurisprudence. Second, an indicating DMZ is technical in nature that experts are needed to delineate a line. In this case, the Court accepted that the DMZ was an imaginary line.

144 See the Letter p. 4
145 See the Letter on 28 April 2011 signed by Deputy Prime Minister and Minister of Foreign Affairs

# IV. THE REQUEST OF INTERPRETATION OF JUDGMENT ON THE MERTIS 1962

## A. INTRODUCTION

In addition to the power to grant a measure of interim protection, another incidental jurisdiction of the World Court is the power to interpret its own judgment. On 28 April 2011, Cambodia made a request for an interpretation of the 1962 Merits Judgment in accordance with Article 60 of the Statute of The Hague Court. The main issue of this request centered around the scope and meaning of "vicinity" which appeared in the operative paragraph two of the 1962 Judgment. The Cambodian's request provokes several legal problems: Does the Court has jurisdiction to interpret the Judgement? What about the barbed wire unilaterally installed by Thai officers? Why does Cambodia wait so long?

This section focuses on some issues relating to Cambodia's request for an interpretation of a judgment contained in Article 60 of the Statute of the International Court of Justice.

## B. The Obligation of Withdrawal of any Military Forces in its Vicinity on Cambodian Territory: An Obligation of Conduct or Obligation of Result?

In the request of interpretation of the 1962 Judgment, the issue that really needed to be clarified was the meaning of "vicinity". According to the operative provision of the second paragraph, the Court ruled that "Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory." However, the Court failed to define the scope of its vicinity. In addition, the last operative provision paragraph stated that "Thailand is under an obligation to restore to Cambodia any objects….." Again, the Court failed to specify which objectst Thailand had an obligation to return to Cambodia. The words "any objects" were unclear. Therefore, it is not surprising that the 1962 Merits Judgment was considered vague.[146]

Now let us turn our attention to the issue of types of obligations in the context of state responsibility under international law. In principle, there are two kinds of obligation of a state: an obligation of conduct or means and an obligation of result. A lucid explanation of such two obligations provided by Professor Wolfum can be very helpful here. He explainedthat "".…They distinguished between two kinds of international obligations, namely obligation of conduct and obligation of result. The former were defined as obligations that must be implemented through conduct, i.e means specifically determined by the international obligational itself which is not true for the obligation of result. With "obligation of result" the ILC means an international obligation that requires the State to ensure the obtainment of a

146 John D. Ciorciari, Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), The American Journal of International Law, Vol. 108, No. 2 (April 2014), p.264

particular situation – specified result- and leave it for that State to achieve such a situation or result by means of its own choices."[147]

The question is whether the obligation to "withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory." is an obligation of conduct or an obligation of result, or both. It seems that the operative provision of the second paragraph constitutes a combination of an obligation of conduct and an obligation of result. An obligation to withdraw any military or police forces, or other guards or keepers was clearly an obligation of conduct. The specific conduct of Thailand was to withdraw any military or police forces. But how they moved from "its vicinity" was an obligation of result, leaving Thailand free to withdraw by any means of its own choice. . To achieve a certain result in the operative provision of the second paragraph was to limit any forces in the vicinity of the Temple on Cambodian territory. Therefore, to achieve such result, the Royal Thai Government decided to erect a barbed wire fence in order to mark the vicinity of the Temple.

## C. Implementation or Interpretation

In principle, after the World Court completes its decision on a case in hand, the next step, known as the post-adjudicative stage, consists of several procedural acts such as implementation or compliance, interpretation and revision. However, these post-adjudicative acts are not the same. The present author argues that the Temple case was only concerned with an implementation of the 1962 Judgment, not an interpretation.

The World Court had an opportunity to clarify the meaning of implementation in the Interhandel case. The Court succinctly said that "to implement a decision is to apply its operative part.[148] Thailand fully implemented the Judgment 1962 for almost half a century. The Royal Thai Government erected the barbed-wire fence around the Temple area in order to implement the second operative part. Also, Thai authorities placed wooden signs to declare that this barbed-wire fence showed the vicinity of the Temple. Simultaneously, it has represented where the international boundaries of both countries begin and end. Moreover, Thai authorities removed the Thai national flag located at the Temple without flying it at half-mast. This was an express act demonstrating full implementation of the Merits Judgment. Later, Prince Norodom Sihanou who served as Head of State of Cambodia, announced that he planned a pilgrimage to the Temple. On 5 January 1963 he visited the Temple area amid much fanfare.. If the single conduct of Prince Damrong was construed as an implied recognition of French sovereignty, then similarly it is fair to say that Prince Sihanou's conduct must be construed as an implied recognition of Thailand's implementation of the 1962 Merits Judgment.

Moreover, Cambodia accepted that from when the Court delivered the 1962 Judgment up until 2007 Thailand did not make any claims over the Temple area. The Cambodian government stated that: "After 1962, and until the events following the process of including the Temple on UNESCO's list of World Heritage sites in 2007, no official claims were made

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147 Rudiger Wolfrum, Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations in Looking to the Future: Essays on International Law in Honor of W. Michael Reisman, (The Netherland: Brill, 2010),p. 364; For more details see James Crawford, Special Rapporteur, Second report on State responsibility, DOCUMENT A/CN.4/498 and Add.1–4,17 March, 1 and 30 April, 19 July 1999, para. 52-80

148 Interhandel Case, Judgment of March 21st, Ip59 : I.C. J. Reports I959, p.28

by Thailand in the area of the Temple….”[149] This Cambodian statement clearly demonstrated that Thailand did not assert any title or claim over the Temple, including n the area surrounding it. It also implied that both states did not dispute the area around the Temple. To reassert, Cambodia admitted that Thailand made no claim to any area of the Temple from 1962 to 2007.

In addition, a Note to the Secretary-General of the United Nations on 6 July 1962 delivered by The Minister of Foreign Affairs of the Kingdom of Thailand clearly stated that "….in deciding to comply with the decision of the International Court of Justice in the Case concerning the Temple of Phra Viharn,…" This Note employed the term "decision" that isequated with "operative provision" or "dispositive"[150] . It means that Thailand had fully implemented the whole operative part of the 1962 Merits Judgment already. And on circulation of this Note, it could be seen that no member of the United Nations, including Cambodia, protested or objected to such Note. Moreover, this Note referred to Article 94 of the United Nations as a legal basis for implementing the decision. And Article 94 (1) constitutes a legal obligation, [151] not a moral or political obligation.

In contrast, if Cambodia had considered the Thai conduct mentioned above as non-compliance or partial compliance with the 1962 Judgment, Cambodia could then have invoked Article 94 (2) of the UN Charter by initiating a request for issuing recommendations or measures to the Security Council. But Cambodia never resorted to this mechanism to enforce the 1962 Decision.

## D. Good Faith and the Right to Interpretation of a Judgment: Abuse of Rights?

The principle of good faith, as a general principle of law, is a backbone of international law. It is interesting to note that neither the UN Charter nor the Statute of The Hague Court defines the function, meaning and scope of such principle. Perhaps it could be regarded as a catchall term. However, the principle of good faith can be spelled out in more detail. It includes a wide range of principles such as pacta sunt servanda, abuse of rights and abuse of discretion[152] etc. In my view, the principle of good faith, in its relevance to Cambodia's request, is an abuse of rights. An action or a conduct of state is considered as an abuse of rights when the exercise of such rights "….is unreasonable, and pursued in an arbitrary manner, without due consideration of the legitimate expectations of the other states."[153] And Cambodia's request for an interpretation of the 1962 Judgment after almost 50 years had passed, was unreasonable considering the amount of time that had passed and was contrary to the legitimate expectations of Thailand.

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149 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), Application Instituting Proceedings,28 April 2011,para.12

150 Shabtai Rosenne, The Law and Practice of the International Court: Vol Two, (The Netherlands: A.W. Sijthoff-Leyden,1965) p.601

151 Shabtai Rosenne, The Law and Practice of the International Court: Vol One, (The Netherlands: A.W. Sijthoff-Leyden,1965) p.123

152 Steven Reinhold, Good Faith in International Law, UCL Journal of Law and Jurisprudence; Robert Kolb, Principles as Sources of International Law (With Special Reference to Good Faith), Netherlands International Law Review, 2006, p.24

153 Lauterpacht,p.345

In 2011, Cambodia felt that the meaning and scope of that 1962 judgment was unclear or ambiguous. Therefore, Cambodia sent a request to the World Court, composed now of all new members, for an interpretation of the original Judgment of 1962. According to the Statute of the Court, there are two essential conditions for interpretation. First, an interpretation of a judgment begins when a respondent state and a complaining state have a legal dispute about the meaning and scope of the judgment. In other words, both sides have different views on the meaning and scope of the decision. Second, an interpretation must be confined to dispositiv or an operative part of a judgment. No doubt, the two conditions must be sine qua non.

Of course, it does not make any sense that a request for interpretation of a judgment occurs after a respondent state has complied with a judgment for almost five decades. It is a long enough time for both sides to understand the scope and meaning of a judgment. After the World Court delivered the 1962 Merits Judgment, Thailand decided to comply with the said judgment without delay. The interesting question is why did Cambodia not send a request for interpretation at that time or a few years later? Cambodia should have resorted to Article 60 if it thought that Thailand had failed to comply with the decision. But she did not. Cambodia waited for a very long time, almost 50 years, to request an interpretation before the World Court.

Cambodia did not try to rely on Article 94 (2) of the UN Charter to enforce the decision and also did not resort to Article 60 of the Statute within a reasonable time. Although Article 60 has no time limit[154], an exercising of this right is not absolute or arbitrary. The time element might be used to evaluate the reasonableness of requesting interpretation initiated by a party. Professor Shabtai Rossenne rightly states that "….this step should be taken as soon as possible when it is clear that the parties are contesting the meaning or scope of the judgment in question."[155] Therefore, reasonable time should be relevant to exercising an interpretation of a judgment. Sending a request for interpretation too late or too soon, prima facie, possibly reflects the exercising of such right in bad faith and an abuse of rights.

For example, In the Asylum case, the International Court of Justice delivered the Merits Judgment on 20 November 1950 and Colombia made a request for an interpretation of the 1950 Judgment on the same day. The Court said that "…but the very date of the Colombia Government's request for interpretation shows that such a dispute could not possibly have arisen in any way whatever."[156] In the Asylum case, it was too quick to make a request because both parties had not enough time to study the whole judgment with care and, of course, divergent views on matter of law or fact could not have occurred so soon. Although the Court did not consider the Colombia's request as an abuse of right, the motivation of making such a request may be questionable.

In contrast, regarding the Temple case, it was too late to make a request for an interpretation of the 1962 Judgement in 2011. Why did Cambodia wait almost half a century for the Hague Court to clarify the meaning of "vicinity" ? Cambodia couldn't invoke an internal conflict as a justification for her conduct.[157] It is evident that the Application Instituting Proceeding on 28 April 2011 for interpretation was made in mala fide. The true intention of the request of interpretation of the operative paragraph two was nothing more than an attempt

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154 See Dissenting Opinion of Judge Donoghue, 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), Judgment, I.C.J. Reports 2013, p. 281, p.615; Shabtai Rosenne, Interpretation, Revision and Other Recourse from International Judgments and Awards, (The Netherlands: Martinus Nijhoff Publishers,2007),pp.66,170

155 Shabtai Rosenne, Interpretation, Revision and Other Recourse from International Judgments and Awards, (The Netherlands: Martinus Nijhoff Publishers,2007),p 170

156 Request for interpretation of the Judgment of November 2oth, 1950, in the asylum case, Judgment of November 27th, 1950 : I. C. J. Reports 1950, p. 395,p. 403

157 Response of the Kingdom of Cambodia, 8 March 2012,para.2.7

to obtain more Thai territory and endorse the Annex I or the Map line as a boundary line under the cloak of an interpretation of the 1962 Judgment.

## E. The Issue of Composition of Judges

The composition of the Bench was discussed occ in Thai academic circles and among diplomats. Most Thai international lawyers believed that the composition of the World Court at that time lacked the authoritative power to interpret the original 1962 Merits Judgment because none of the original judges who had decided the 1962 Temple Case were still alive. They felt it made no sense to for those who had not participated in the legal proceedings at the time to interpret the original judgment.

This argument is understandable. If we look at the Statute of the World Court, it is silent about this procedural matter.[158]

However, in practice, it is quite possible that the composition of the judges deciding the original judgment and the composition of the judges interpreting or revising the original judgment are not the same. the Chorzow Factory Case was a case in point.

Another case where the Chamber deciding the original judgment consisted of different members was the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduran: Nicaragua intervening) and the Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras). The members of the first Chamber were Sette-Camera, President of the Chamber; President Sir Robert Jennings; Vice-President ODA; Judges ad hoc Valticos Bernarde. The members of the latter Chamber, however, were Judge Guillaume, President of the Chamber; Judges Rezek , Judge Buergenthal; Judges ad hoc Torres Bernardez, Paoljllo.

# V. SOME REMARKS ON THE JURIDICAL STATUS OF THE STATEMENT OF RESERVATION, THE JOINT COMMUNIQUE, AND TWO PRINCESS'S VISITS

## A. INTRODUCTION

In addition to the merits of the case, the problem of the legal status of two international instruments has never been rarely discussed in academic circle. The first is the reservation issued by the minister of Foreign Affairs, Dr. Thanat Khoman. Dr. Thanat Khoman sent a written statement of reservation to the UN Secretary-General after the World Court delivered the merits judgment. In essence, this statement of reservation reflected the commitment of Thailand to regain the Temple again in the future in line with international law. One day in the future, many Thai people are sanguine about reclaiming the Temple because they rely mainly on this statement of reservation. Until now, the Thai public still are haunted by this statement

158 Shabtai Rosenne, Interpretation, Revision and Other Recourse from International Judgments and Awards, (The Netherlands: Martinus Nijhoff Publishers,2007),p.176

although it was announced by the Minister of Foreign Affairs almost five decades ago. Interestingly, Thai people never question the legal status of this reservation, let alone discuss it at length.

Another international instrument that needs to be clarified is the joint communique 2008 made by Minister of Foreign Affair of Thailand, Mr. Noppadon Pattama and Deputy Prime Minister of Cambodia, Mr. Sok An. This joint communique was drafted because the Thai government, at that time, feared that the buffer zone of the World Heritage nominated site of the Temple of Phar Viharn was likely to encroach on Thai territorial sovereignty. Therefore, the Minister of Foreign Affairs of Thailand negotiated with Cambodia as well as UNESCO to express his concern over that area. The joint communique was signed by both governments. According to number 5 contained in the joint communique, this communique was not concerned with the territorial issues between the two countries. The JBC had the sole power and authority to cope with any territorial matters.

This chapter will analyses the legal status of the statement of reservation through the lens of the guiding principle of a unilateral declarations of state prepared by the International Law Commission of the United Nations (I.L.C). Although this UN Guiding Principles does not constitute a legal binding force as a treaty, it reflects the jurisprudence of the International Court of Justice (I.C.J.), and states practices and academic views on unilateral acts of states. Thus, the UN Guiding Principles provides a good benchmark for evaluating the legal status of this reservation.

Furthermore, the present author will examine the juridical nature of this communique under international law and judicial practice of the World Court.

## B. What is The Legal Status of The Reservation Delivered by Dr. Thanat Khoman?

Losing the Temple case in the World Court was completely unacceptable result immensely, shocked both public and government. The Royal Thai government led by Marshall Sarit Thanarat reacted furiously to the merits judgment by delivering a statement of reservation made by Dr. Thanat Khoman who served as the Minister of Foreign Affairs at that time. In essence, this letter showed two international commitments. The first is Thailand, as a member of United Nations, complied with the judgment. The second is Thailand had a sheer determination to repossess the Temple of Phra Vihan again in accordance with rules of international law. The second is very controversial because this reservation has ignited Thai people's hopes that one day in the future the Thai government will regain the Temple.

This reservation has two meaningful aspects. The first is that making a joint communique signed by the two Ministers of Foreign Affairs of Thailand and Cambodia was tantamount to the relinquishment of the right to retrieve the Temple. In addition, for Thailand, to appear before the International Court of Justice was equivalent to renouncing her reservation.

We cannot deny the fact that this reservation had a tremendous impact on Thai public. Although many decades have passed, Thai society is still haunted by this reservation. Many Thais believe that one day Thailand will exercise its sovereignty over the Temple again. However, the problem of the juridical status of such reservation has never been seriously questioned in Thai academic circles.

In my opinion, the legal status of the statement of reservation signed by Dr. Thanat Khoman, Minister of Foreign Affairs of Thailand, is a unilateral act of state under international law. For a better understanding of this reservation, a legal analysis of its status should adhere to the Guiding Principles applicable to unilateral declarations of States capable of creating legal

obligations prepared by the International Law Commission. In essence, this Guiding Principle sets a benchmark for evaluating any unilateral declaration made by representatives of states on international plane.

First, according to Guiding Principle section 4,[159] as in a conclusion of a treaty, making a unilateral declaration must be delivered by the Big Three, namely, the Heads of State, the Heads of Government and the Ministers for Foreign Affairs. Other public agents cannot issue a unilateral declaration alone without formal authorization from the Big three. Obviously, the letter of reservation of Thailand to Mr. U Thant, U.N. Acting Secretary-General, satisfied the criteria contained in section 4 because the Minister of Foreign Affairs of Thailand signed this unilateral statement.

Second, according to Guiding Principle section 5, a state can formulate a unilateral declaration either verbally or in written form. It is generally accepted that international law does not require any official formality in concluding an international instrument and making a unilateral act unlike the law of contract. It is easy to show that making the letter of reservation of Thailand meet section 5 because the letter of 6 July, B.E. 2505 (1962) was signed by Mr. Thanat Khoman.

Third, section 6 of Guiding Principle stipulates that a unilateral declaration can be communicated to the international community or to a particular state. The intention of the Royal Thai government was to send a strong signal to the international community through U.N. Acting Secretary-General. In this note of protest, it stated that "…This Note be circulated to all Members of the Organization." Clearly, the purpose of circulation of this Note to the General Assembly is not only confined to Cambodia but also to the entire community of states. Therefore, circulation of this Note of protest meets the requirement contained in section 6.

Fourth, according to section 8, a unilateral declaration, like a treaty, must be void if it is contrary to jus cogens. The concept of a peremptory norm plays a prominent role in the law of treaties. A peremptory norm is a supreme norm and any international agreement that is at variance with it must be null and void. By analogy, a unilateral act of state shall not conflict with jus cogens. Looking at the Note, it stated that " … His Majesty's Government desires to make an express reservation regarding whatever rights Thailand has, or may have in future, to recover the Temple of Phra Viharn by having recourse to any existing or subsequently applicable legal processes" Without doubt, any effort pushed by the Thai government must be guided by rules of international law either by diplomatic or legal channels. The key words are "legal processes". It means that Thailand should not and cannot make an effort to regain the Temple by use of military force because the principle of non-use of force is one of the most important of international peremptory norm. So this Note is not contrary to section 8.

## C. Comparison Between the Korman Declaration and the Ihlen Declaration

Most, if not all, international lawyers are quite familiar with the Ihlen declaration and they consider it an archetype of a unilateral act of state producing an international obligation under international law. Although the two such declarations are unilateral acts, the fundamental nature of the two declarations are not the same.

According to legal scholars, generally speaking, there are four kinds of unilateral declarations under international law: recognition, promise, protest and waiver. Recognition

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159 Section 4 states that "A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations**."**

refers to an act of acceptance or approval of legal situation or a conduct. A promise means a unilateral declaration made by a state committing itself to doing something or not to doing something in the future. A protest refers to an expression of preserving rights or a denial of an existence of certain acts or situations. A waiver is a relinquishment of a legal claim, right or title.

It is generally accepted that the Ihren declaration is viewed as both an act of recognition and an international promise.[160] The Ihren is a recognition in the sense that it recognizes Danish claims over Eastern Greenland. Also, the Ihren declaration is an act of promise because it constitutes a commitment to solving any difficulties or any future legal claims relating to Greenland.

The Korman declaration functions as both a protest and a promise on the international level. Clearly, it protested against the Merits Judgement of the World Court 1962 by reiterating that "In an official communique dated July 3, 1962, His Majesty's Government made a public announcement, expressing its disagreement with the above-mentioned decision of the Court…"[161] In the eyes of the Royal Thai Government and the Thai people, this decision was unfair because it was manifestly at variance with the boundary treaties of 1904 and 1907. This declaration further stated that "the decision goes against the express terms of the relevant provisions of the 1904 and 1907 Treaties and is contrary to the principles of law and justice,…" And finally, it clearly emphasized the desire "to register a protest against the decision of the International Court of Justice awarding the Temple of Phra Viharn to Cambodia." To sum up, the unilateral statement signed by the Minister of Foreign Affairs of Thailand sent a strong message about the Merits Judgment to the World Court.

At the same time, the Korman declaration made a promise to recover the Temple of Phra Viharn, one day in the future. The third paragraph of the Korman declaration stated that "… to make an express reservation regarding whatever rights Thailand has, or may have in future, to recover the Temple of Phra Viharn by having recourse to any existing or subsequently applicable legal process.." Without doubt, Thailand has explicitly committed itself to regaining the Temple through legal means. In other words, Thailand will undertake a unilateral obligation to reclaim her title over "the lost territory" contained in the Korman declaration.

In addition, the Ihren declaration differs from the Korman declaration in that while the former recognized Danish sovereignty, the latter has failed to recognize Cambodian sovereignty over the Temple. The Korman declaration merely echoed Thailand's compliance with the decision of The Hague Court in line with Article 94 of the UN Charter. Moreover, while the former renounced Norway's claim over Eastern Greenland, the latter never denounced Thailand's right to regain the Temple again in the future.

## D. The Sarit Thanarat's Speech Delivered by Head of Government

Aside from the Korman Declaration, Field Marshal Sarit Thanarat delivered a nationalistic and passionate speech about Thailand's disappointment over the Temple case. Of course, Thanarat's speech is a unilateral act of state under international law. At that time, Field Marshal Sarit Thanarat served as head of government, the Prime Minister of Thailand, and his competence to formulate a unilateral declaration on the international plane was unchallenged. Therefore, his speech on the position of Thailand toward the decision of the International Court of Justice is seen as a unilateral statement.

160 Victor Rodriguez, Fourth report on unilateral acts of States, Doc.A/CN.4/519, 2001,p.125

161 See a formal letter No. (0601) 22239/2505 dated July 6, B.E. 2505 (1962)

Like the statement made by the King of Jordan on 31 July 1988, the Thanarat's speech addressed not only all Thai people but also the entire international community through the public radio stations of Thailand.

However, unlike the King of Jordan's speech waiving Jordan's claim over the West Bank territories, Thanarat's speech clearly refused to waive Thailand's rights over the Temple area. Thanarat's speech reflected a sheer determination to reclaim the Temple of Phra Viharn in the future in accordance with legal means.

## E. What is the Legal Status of the Joint Communique?

After the UNESCO World Committee (WHC) voted in favour of the inscription of the Temple as a World Heritage Site nominated by the Cambodian government in 2008, this incident triggered both national protests and armed clashes between the two countries. The root of this border conflict stemmed from the fact that the "the buffer zone" contained in the inscription included Thai territories beyond the Temple area. Mr. Noppadon Pattama, who acted as the Minister of Foreign Affairs at that time, feared that this inscription was likely to annex some portions of Thai territory. To find a proper solution for these concerns, the Thai government decided to negotiate with Cambodia, paving the way for the Joint Communique. The Joint Communique signed on June 18, 2008 was prepared by the UNESCO. It was composed of four Parts. The first is introductory note. The second part, which is the main part, consists of six sections. The third part was a signature paragraph. And the final part was the attached plan.

After this Joint Communique was signed by tripartite participants, the wrath of many Thai people, especially extremely right wings group, felt that the Thai government led by Mr. Samak Sundaravej as a Prime Minister ceded some portions of Thai territories to Cambodia. To many Thai peoples, it seemed that this Communique had been shrouded in secrecy without any public participation. The Senate and the House of Representatives of Thailand filed a constitutional complaint with the Constitutional Court. They contended that the signing of such Joint Communique without parliamentary approval violated article 190 of the Thai Constitution B.E. 2550. According to article 190, there are many types of international agreements that require parliamentary approval before the Cabinet can express its consent to be bound under the Vienna Convention on the Law of Treaty 1969. One of these treaties is an international treaty that modifies Thai territorial sovereignty. Another example is a treaty which affects social or economic stability on a large scale. In the eyes of the Members of Parliament, the Joint Communique was classified as a treaty changing Thai land boundaries and a treaty effecting on social an economic stability with wide-reaching implication.

Before considering whether the signing of the Joint Communique needs parliamentary ratification under the Thai constitution, the Constitutional Court had to adjudicate on the problem of the legal status of the Joint Communique. If the Court considered the Communique as a treaty under Article 190, then, the Court had to move on to the next question of parliamentary approval. After looking at the Vienna Convention on the Law of Treaties 1969, the Court ruled unanimously that the Joint Communique met the benchmarks contained in the Vienna Convention and, thus, concluded that it was a treaty.

Indeed, it is understandable to question about legal reasoning not the outcome of the judgment. In principle, to be able to rule a case before hand correctly, a court must make an effort to take into account various relevant documents before arriving at its conclusion.

However, the Constitutional Court failed to consider two relevant international documents. The first is the diplomatic correspondence between two Ministries of Foreign Affairs of Thailand and Cambodia. This diplomatic correspondence clearly showed that both

countries have a common understating on the legal status of this Communique. The diplomatic correspondence stated with very clear terms that "It is not a treaty. "[162] This international instrument singed by two Ministry of Foreign Affairs is relevant and crucial value because it reflected the true and real intention of both countries. It is very clear that both side did not want to conclude an international agreement constituting legal binding force. In my view, the Joint Communique is a political statement or so-called a gentleman's agreement.

The second document, which the Court should have considered but it ignored, was the judgment of the World Court. The first case is Aegean Sea Continental Shelf case (Greece v. Turkey) 1978. On the issue of jurisdiction of the World Court, both sides had different views on the legal status of the joint communique of Brussels of 31 May 1975, as a legal basis for determining the Court's jurisdiction. Whereas the Turkish government argued that the joint communique lacked any particular characteristics of a treaty under international law, the Greek government contended that such joint communique contained key elements of a treaty.[163]

Before adjudicating on the juridical nature of such joint communique, the World Court affirmed that we cannot decide whether a joint communique is or is not an international agreement. In determining this issue, terms contained in the text and relevant contexts during the making of the communique must be taken into account with caution. The Court said "…it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement….. Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form-a communiqué-in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above al1 to its actual terms and to the particular circumstances in which it was drawn up."[164] After The Hague Court examined the text of joint communique and relevant circumstances, the Court concluded that the Court's jurisdiction could not be based on the Brussels Communique to entertain a case.[165]

Another case was Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain 1994. On the question of jurisdiction and admissibility, the Court had to examine the legal nature of the Minutes of 25 December 1990. Both countries did not share the same view on the legal status of the Minutes. Bahrain held the view that the Minutes functioned as a record of negotiations during the meeting and they, by their nature, lacked the basic elements constituting a treaty, Qatar disagreed with Bahrain's view. This is a crucial point in establishing the Court's jurisdiction. The Court closely took into account terminologies and the relevant context in making the Minutes. The Court ruled that the value of the Minutes was not as evidence of the meeting but was a treaty creating international obligation under international law.[166]

What can we learn from the two cases mentioned above? First, we cannot judge what is or is not a treaty by merely looking at the name or formality of an agreement. According to the Vienna Convention of the Law of Treaties 1963 as a legal benchmark for determining basic elements of a treaty, a treaty can be called by a different name in different circumstances. Quite simply, no matter what it is called as long as an international agreement governed by international law results in a legal relationship between parties, it can be categorized as a treaty.

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162 See diplomatic correspondence signed by H.E Hor Namhong

163 Aegean Sea Continental Shelf case (Greece v. Turkey), I.C.J Report,1978, para.95

164 para.96

165 Para.107

166 Maritime Delimitation and Territorial Questions Between (Jurisdiction and Admissibility),I.C.J Report,1994,para.25-30

Second, in determining the legal status of any international instrument, the World Court places great emphasis on terminologies or the words contained in a text as well as relevant circumstances at the time of drafting an international instrument.

Turing back to the decision of the Constitutional Court, the Court based its decision on three reasons. First, the Court considered the signature signed by the Deputy Prime Minister of Cambodia and the Ministers of Foreign Affairs of Thailand. According to the Court's opinion, the legal validity of a joint communique depends mainly on the signatures of the party concerned. If the party did not intend to create legal rights and duties between parties, they would choose to refuse to sign a communique. In contrast, if they wanted to produce an international legal binding force, a communique had to be signed by both sides.

On this matter, in my view, the Courts's reasoning is problematic. In international practice, there are myriads of joint communiques signed by parties that have not produced legal relations or international commitments under international law. Therefore, the signing of joint communiques is not the decisive factor to determine whether a joint communique is categorized as a treaty. Moreover, the two cases mentioned earlier do not consider whether a joint communique or Minutes are signed by the parties concerned.

Second, the Constitutional Court focused principally on "the management plan of these areas". The Court interpreted the management plan as a legal obligation between two states. However, the Court's reasoning is questionable because terms connoting any legal obligation, duties, commitment or other words cannot be found in the Joint Communique. In contrast, the Communique employs the phrases "the management plan of these areas will be prepared.." and "…Such management plan will be included …and ..to be submitted to the World Heritage Centre.…". These words do not signify any existing rights and duties or legal obligations under international law. In fact, this Joint Communique is nothing more than an international political statement.

Third, the Constitutional Court ruled that because the Communique failed to specify a domestic law as an applicable law clause, it must then be governed by international law. Accordingly, this Communique was a treaty. It seems that no rules of international law, international jurisprudences and scholarly works support this opinion. In general, a joint communique is a political or moral commitment. It means that it is not subject to national law and international law.

## F. Two Princes Visited to the Temple: Prince Damrong and Prince Sihanouk

In the eyes of the majority of its members, the World Court decided that Prince Damrong's visit was tantamount to an implicit recognition of French sovereignty over the Temple area.[167]

It is also worth remarking on Prince Sihanouk's Pilgrimage to the Temple. First, Prince Sihanouk's Pilgrimage to the Temple was a unilateral conduct of a state constituting an international obligation on the international plane. Prince Sihanouk, at the time of visiting the Temple, served as Head of State, who held an authoritative position and power to commit Cambodia to an international obligation in foreign affairs. In contrast, as Judge Koo pointed out correctly, Prince Damrong's visit the Temple was a private visit not an official or public visit because he did not serve as Minister of the Interior.[168] At the time of visiting, he acted as

167 "Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 1.5 June 1962: I.C. J. Reports 1962,pp.28-29

168 Dissenting Opinion of Judge Wellington Koo, para. 32

President of the Royal Institute of Siam. Therefore, his conduct by visiting the temple area could not constitute any unilateral lateral act of state or any international binding commitment on the behest of the Siamese government. Put it differently, Prince Damrong's visit did not give rise to any legal effect under international law for either Siam or France. We cannot interpret his private visit as an exercise in the sovereignty of Siam over the Temple and, for the same reason, we cannot construe his conduct as an implied recognition of French sovereignty over the Temple as well.

Second, it is possible to interpret Prince Sihanouk's Pilgrimage as conduct producing international legal implications. If the World Court construed Prince Damrong's visit as implied recognition then, consequently, Thailand cannot be denied her recognition on the basis of estoppel, I cannot see any reason why the principle of estoppel is not applicable to an implied recognition of Thai sovereignty marked by the barbed-wire.[169] According to Engers's Note, it stated that "Prince Sihanouk's visit to the Temple at Preah Vihere on 5 or 6 January presents possibilities of a border incident of a major sort…….as long as Prince Sihanouk and his suite, which may now include more than a few members of the Diplomatic Corps, remain strictly within what the Thai authorities consider to Cambodian territory (marked by bared wire.)[170]

Third, the purpose of the two Princess's visits to the Temple is quite different in nature. The only purpose of Prince Damrong's visit was for historical studies; it was nothing more than that. It is generally accepted that Prince Damrong was interested in history and he has been hailed as the Father of Thai History. In 1924 before visiting the Temple, he travelled Cambodia and visited Angkor Wat. One year later, he delivered his speech concerning Angkor Wat entitled "Angkor from A Siamese Point of View".[171] Moreover, he wrote a book entitled "Niraht Angkor Wat". In his poem, he described the cultural monuments and sanctuary places in Cambodia that he saw. This illustrated that Prince Damrong was very interested in archaeology and history. Similarly, Prince Damrong's visit to the Temple of Phra Viharn remains the same, namely academic purposes with no political intentions. In contrast, Prince Sihanouk's visit to the Temple was clearly political by nature.

## VI. CONCLUSION

The root of the international dispute over the Temple of Prah Viharn between Thailand and Cambodia is, of course, the application of the French map instead of the Boundary Treaty 1904 by the International Court of Justice. If the Court strongly adhered to Article 38 of the State by applying the watershed line contained in the Boundary Treaty 1904, the Temple of Prah Viharn would have belonged to Thailand. If the Court applied pacta sunt servanda instead of estoppel, it would have remained in Thai territory. In the Temple case, the World Court applied acquiescence or estoppel as general principles of law. The present author fully agrees with Professor Pellet's opinion. He views general principles of law as a "transitory source' of international law" and "subsidiary or additional source of international law".[172] In the Temple

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169 According to an interview with Prof. Dr. Prasit Ekabutr, he opined that the bared- wire represents the international border between Thailand and Cambodia.

170 J.F Engers, Note to Mr. Gussing, 9 January 1963 and Second report by the personal representative of the Secretary-General, 2 January 1963,p.6

171 See H.R.H Prince Damrong Rajanubhar, Angkor from A Siamese Point of View, Journal of Siam Society Vol. 19, 1925,pp.141-152

172 See Pellet in The Statute of the International Court of Justice: A Commentary, (Edited by Andreas Zimmermann, Karin Oellers-Frahm, Christian J. Tam) (Oxford University Press,2012), para.289-290

case, the unusual role of general principles of law superseded, instead of supplementing, the boundary treaty.

Also, the current dispute over 4.6 kilometers is anchored in this map too. Metaphorically, the author regards the French map as a Trojan Horse undermining territorial stability and the international relationship between Thailand and Cambodia.

Although we do have not a time machine to travel to rectify the wrong past, the author wants to illustrate that a conclusion of the Boundary Treaty 1904 was a duress act and the French map was a fraudulent act. Unfortunately, The Hague Court failed to consider these behaviours. Furthermore, The Court gave priority to territorial stability and finality over justice and pacta sunt servanda at the expense of Thai territorial sovereignty.

However, life must go on. It is desirable to see the Temple as a monument of an international cooperation between Thailand and Cambodia. An obsession with the past is useless but look ahead will be useful. Both Thailand and Cambodia are Buddhist countries so I am thinking about the dispute over the Rohini River by two clans namely Sakya and Koliya and they fought for it. The Lord Buddha acted as a merciful mediator in order to avoid bloodshed. Lord Buddha asked that between blood and water in the River which one more worth. The words of Lord Buddha galvanized the consciousness of both clans. They can peacefully exploit the River together without waging war. I regard the Temple of Prah Viharn as the Rohini River. Both countries can maintain the Temple as a cultural heritage of mankind and live in peace with harmonious way.