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A Legal View of the Case of the Temple Preah Vihear

Sven Mißling

The newly heated conflict between Cambodia and Thailand about the Temple of Preah Vihear does not only have a political dimension and directly causes effects on the local infrastructural, touristic, economic and cultural situation in the area.¹ It also has a severe impact on regional stability. The skirmishes in the area which took place after the inscription of the Temple of Preah Vihear as a contested World Heritage Site in 2008 have ignited the old boundary dispute between Cambodia and Thailand to a larger extent. In the meantime, both states built up troops on the border² and the hostile incidents can even justifiably be qualified as a local armed conflict.³ Therefore,

¹ See the description and evaluation of the conflict, including its historical and cultural background, as well as its impacts on the present conditions of life for the local population in the area by Brigitta Hauser-Schäublin in this volume.

² See: Statement by the Secretary General of the United Nations, Doc. SG/SM/11710, of 21 July 2011, to be found at: <http://www.un.org/News/Press/docs/2008/sgsm11710.doc.htm> <July 28, 2011>.

³ In its application filed in the Registry of the ICJ on 28 April 2011 submitting a Request for interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), the Kingdom of Cambodia, inter alia, states that “[2.] [s]ince 22 April 2011, serious incidents have occurred in the area of the Temple of Preah Vihear [...], as well as at several

the conflict is to be considered as being of potential effect on the international peace in the region.

The potential threat to international peace brings in the dimension of international law. The source of the present conflict is the continuing boundary dispute between Cambodia and Thailand, which historically results from a boundary treaty which was concluded between France, being the former protecting power in Cambodia, and the former Kingdom of Siam (today: Thailand) in 1904⁴ in a typical colonial context.⁵ The temple area of Preah Vihear and the surrounding promontory were posited on Cambodian territory according to the maps which were elaborated by French geographers in order to delimit the frontier from 1905 to 1907. In 1954, Thailand occupied the Temple of Preah Vihear and installed a military presence (Wagner 2009: paragraph 1). After Cambodia gained its independence, the question whether the Temple of Preah Vihear is situated on territory under the sovereignty of Cambodia or Thailand has been a controversial issue between the two states.

The Judgment of the International Court of Justice of June 15, 1962

Being a classical boundary dispute between two states, the conflict about the Temple of Preah Vihear was brought to the International Court of Justice (ICJ) by Cambodia in 1959 for the first time. While having upheld its jurisdiction to adjudicate upon the dispute submitted by a first judgment of 26 May 1961 (ICJ 1961a:17), in its further decision on the merits of 15 June 1962, the ICJ finally decided – by a vote of nine to three – in favour of Cambodia.⁶ It ruled that the Temple of Preah Vihear was located on territory under the sovereignty of Cambodia and that Thailand, therefore, was

under 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.

(ICJ 1962b:37)

locations along that boundary between the two States, causing fatalities, injuries and the evacuation of local inhabitants“ and that “ [4.] [s]erious armed incidents are continuing [...]” See: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=89&case=151&code=ct2&p3=0> <July 28, 2011>.

⁴ Treaty of 3 October 1893, regarding Territorial Boundaries and other Arrangements, signed at Paris, 13 February 1904 / *Traité du 3 Octobre 1893 entre le Siam et la France concernant les territoires et les autres Arrangements, signée a Paris, le 13 février 1904.*

⁵ Cf. Hauser-Schäublin’s chapter “Preah Vihear” in this volume.

⁶ For a deeper analysis of the conflict and the 1962 ICJ judgment, inter alia, see also Wagner (2009).

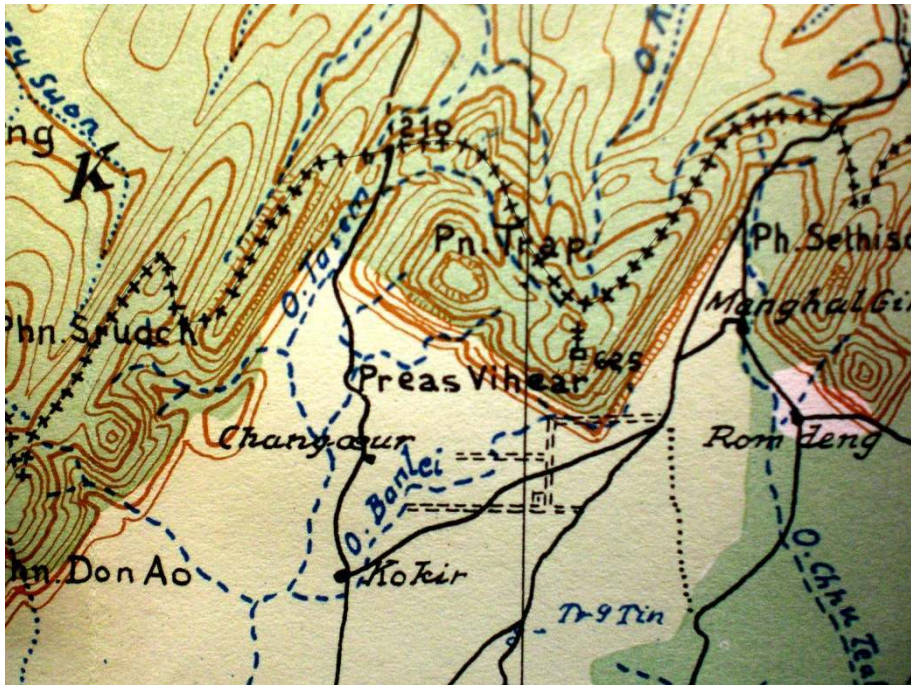


Fig. 1: “Annex I map” of Preah Vihear (source: ICJ 1962a).

Furthermore, by a vote of seven to five, the Court obliged Thailand

to restore to Cambodia any objects of the kind specified [...] which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

(ICJ 1962b:37)

The Court based its decision on the interpretation of the Franco-Siamese boundary treaty of 1904 and a related map, the so-called “Annex I map” (see Fig. 1), which was published, together with a set of ten other maps, by French geographers in Paris in 1907 and communicated to the Siamese Government (ICJ 1962b:20-21).

Generally speaking, Article 1 of the 1904 boundary treaty stated that in the area in question where the Temple of Preah Vihear is located, the frontier follows “the watershed line”.⁷ In addition to that, Article 3 of the same boundary treaty provided that there should be

⁷ Article 1 one of the treaty reads in English (Translation by the Registry of the ICJ): “The frontier between Siam and Cambodia starts, on the left shore of the Great Lake, from the mouth of the river Stung Roluos, it follows the parallel from that point easterly direction until it meets the river Prek Kompong Tiam, then, turning northwards, it merges with the meridian from that meeting-point as far as

a delimitation of the frontiers between the Kingdom of Siam and the territories making up French Indo-China [the later Cambodia]. This delimitation will be carried out by Mixed Commissions composed of officers appointed by the two contracting countries. The work will relate to the frontier determined by Articles 1 and 2, and the region lying between the great Lake and the sea.

(ICJ 1962b:16)

In its judgment, the Court found that a Mixed Commission, as referred to in Article 3 of the treaty, was indeed set up in 1905, in due course started its work and fully intended to delimit the frontier according to the treaty's provision. The Court also came to the conclusion that the frontier between the two territories was surveyed and fixed by that Mixed Commission. However, due to a lack of minutes or any other written testimony of the results of the Commission's work, the ICJ could find no answer to the question of what that frontier was (ICJ 1962b:18).

In contrast, Cambodia drew up its claim upon the so-called "Annex I map", a map which was elaborated by French geographers at the request of the Siamese Government in 1907 and on which was traced a frontier line purporting to be the outcome of the work of delimitation. It showed the whole Preah Vihear promontory, including the temple area, as being on the Cambodian side (ICJ 1962b:21). Thailand put into question that this map was consistent with the written provisions of the 1904 boundary treaty and denied that it had any legal binding character because of different reasons (ICJ 1962b:21-22). The bottom line of this debate was that the ICJ also came to the conclusion that the map was not a work of the Article 3 Mixed Commission and that, therefore, "in its inception and at the moment of its production, it had no binding character" (ICJ 1962b:21).

However, the Court in its judgment, furthermore underlined that it was the essential question of the case whether the parties did *adopt* the "Annex I map" and the line indicated on it as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character (ICJ 1962b:22).

The Court found that Thailand was bound by the "Annex I map" because the Siamese Government, which had asked for its elaboration, never disagreed or objected to the outcome of the work of the French geographers. In 1907, the "Annex I map" and the ten other maps associated were "printed and published by a well known French cartographical firm" and "in due course communicated to the Siamese Government, as being the maps requested by the latter" (ICJ 1962b:20). The ICJ argued that the behaviour of the Siamese Government, which, in the view of the

the Phnom Dang Rek mountain chain. From there it follows the watershed between the basins of Nam Sen and the Mekong, on the one hand, and the Nam Moun, on the other hand, and joins the Phnom Padang chain the crest of which it follows eastwards as far as the Mekong. Upstream from that point, the Mekong remains the frontier of the Kingdom of Siam, in accordance with Article 1 of the Treaty of 3 October 1893" (ICJ 1962b:6, 16).

Court, said nothing at all “to suggest that the map did not represent the outcome of the work of delimitation or that it was in any way inaccurate” (ICJ 1962b:24) had undoubtedly to be considered as being “acknowledgement by conduct” and, thereby, must be held to be acquiesced (ICJ 1962b:23).

According to the legal principle “*Qui tacet consentire videtur si loqui debuisset ac potuisset*”⁸, the ICJ ruled that Thailand was bound by the delimitation of the frontier as fixed in the “Annex I map” because it had kept silent although it knew very well that this map was not consistent with Articles 1 and 3 of the 1904 boundary treaty, and also had the opportunity to disagree and object to it. It is a principle of international law that a State is held to be bound to the expectations it arouses by its own behaviour and on which other States can, according to the principle of *bona fide*, rely (so-called “estoppel”).

As to the plea of error, which was also brought forward by the Thai side as far as it concerns the disputed area of Preah Vihear and the discrepancy between the watershed line and the frontier line in the “Annex I map”, the ICJ also argued that it was

an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error.

(ICJ 1962b:26)

To sum up, one can say that although in its judgment the Court accepted, in general, Thailand’s view that the temple area would have belonged to Thailand if the border line had been drawn in strict accordance with the wording of Article 1 of the 1904 boundary treaty and, therefore, had followed the geographical watershed line in the area (see Kahn 1996:98), the majority based its decision on the principles of “estoppel” and “acquiescence” to “resolve the dispute in an equitable manner” (Wagner 2009: paragraph 4). On the other hand, it also has to be said that the application of the “estoppel” principle according to a very broad notion of the term, as it was proposed by Cambodia and accepted by the majority in the present case (see Rustemeyer 1981:274)⁹, has often been criticized on the basis of a well-founded judicial argumentation, not only by the separate and dissenting opinions,¹⁰ but also by a number of scholars.¹¹

⁸ “He who keeps silent is held to consent if he must and can speak.”

⁹ As to the critique on the application of the principle in the present case, also see Wagner (2009: paragraph 4-7).

¹⁰ See separate opinions of vice-president Alfaro (ICJ 1962b:39) and Sir Gerald Fitzmaurice (ICJ 1962b:52) as well as dissenting opinions of judge Moreno Quintana (ICJ 1962b:67), judge Wellington Koo (ICJ 1962b:75) and Sir Percy Spencer (ICJ 1962b:101).

¹¹ For an in-depth overview and further critique, see Wagner (2009: paragraph 4-7). Also see Kahn (1996:98-100).

However, from a legal point of view, it has to be put forward that only the interpretation given by the ICJ, which understands the “Annex I map” of 1907 as being an integral part of the boundary settlements the Parties agreed upon in 1904, allowed the Court to come to a legal interpretation of the delimitation of the frontier and the discrepancy between the provisions of Article 1 of the 1904 boundary treaty (“watershed line”), on the one hand, and the frontier line as it is marked on the 1907 “Annex I map” on the other, applying the established rules of interpretation, as they are, for example, codified in Article 31 of the Vienna Convention on the Law of Treaties (VCLT) (Kahn 1996:99). Otherwise, it would not have been possible to argue, as the ICJ did in its 1962 decision on the Temple of Preah Vihear, that a post-contractual map could delimit a frontier in a way which obviously differs from or even stands against the explicit wording of the substantive provision of the underlying boundary treaty, if it had not become integral part of the substantive provisions agreed (Kahn 1996:99).

Although the ICJ judgment of 15 June 1962 gave a clear answer to the question whether the Temple of Preah Vihear was situated on territory under the sovereignty of Cambodia or Thailand, and that it was Cambodia which had sovereign rights on the temple, it has to be said that the judgment did not lead to a stable solution of the underlying political conflict at all (see Hauser-Schäublin’s chapter “Preah Vihear” in this volume).

The Ambiguity of the 2008 UNESCO World Heritage Inscription: Towards a New Escalation of the Conflict and UNESCO’s Twofold Responsibility

As already been mentioned above, the inscription of the Temple of Preah Vihear by the UNESCO World Heritage Committee (WHC), which took place in 2008, led to a new escalation of the conflict.¹² The decision process of the WHC had been accompanied by protests from the Thai side and, as a direct consequence of the inscription of the temple as an “authentic and unique masterpiece of Khmer architecture” (UNESCO 2008:221), new skirmishes arose in the temple area with several people killed on both sides. Since this time, the conflict has kept on smouldering and recently escalated to a real local armed conflict in the spring of 2011.

Having in mind the effects caused, the act of inscription of the Temple of Preah Vihear as a World Heritage Site in 2008 is quite ambiguous from a purely legal point of view: On the one hand, according to the provisions of the 1972 World Heritage Convention, UNESCO has an explicit responsibility for the safeguarding and the preservation of cultural heritage sites which have an outstanding universal value for humanity (Francioni 2008:3-7; Yusuf 2008:28-31). Sections III to VII of The World Heritage Convention provide a range of different measures to be taken on the

¹² See above. Furthermore, see Mißling and Watermann (2009:251).

international level by UNESCO and its organs together with the States Parties to the convention to assure the preservation of the World Heritage Sites once inscribed on the World Heritage List (Article 11 paragraph 1–3 of the convention) (see Francioni 2008). On the other hand, Article 1 paragraph 1 of the 1945 UNESCO Constitution stating that

[t]he purpose of the Organization is to contribute *to peace and security* by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.

(emphasis added)

This also obliges UNESCO and its organs, in taking political and/or judicial measures according to the international instruments, i.e. the UNESCO conventions and other instruments adopted by UNESCO, to contribute to a maximal extent to international peace and security (Mißling and Watermann 2009:252). In the case of the inscription of the Temple of Preah Vihear as a World Heritage Site, the “twofold responsibility of UNESCO” has become, to a certain extent, a sort of political dilemma (see Mißling and Watermann 2009).

With regard to the effects caused by the inscription, it can be said that UNESCO today seems to be somewhat helpless in de-escalating the situation in the area. As in February 2011, it was reported to the public that troops on both sides had exchanged fire resulting in the loss of life and also some damage to the temple building itself, the UNESCO Director-General expressed her deep concern at the escalation and called

upon both sides to exercise restraint for the sake of the preservation of the Temple of Preah Vihear and open direct channels of communication at the highest levels to defuse the tension.

(UNESCO 2011c)

Furthermore, she sent a “Special Envoy on the Preah Vihear Temple” who travelled to Bangkok and Phnom Penh between 25 February and 1 March to discuss the safeguarding of the World Heritage Site with the Thai and Cambodian Prime Ministers in order to examine with both sides ways of reducing tension and promoting dialogue around the preservation of the temple (UNESCO 2011d).

However, besides these political efforts, the purely legal measures UNESCO can undertake to de-escalate the conflict in the present situation are very few and quite limited (see Mißling and Watermann 2009:253-255). The sharpest measure possible in the ongoing armed conflict is to take the option of Article 11 paragraph 4 of the World Heritage Convention and to put the temple on the “List of World Heritage in Danger”, if the conflicting Parties continue to cause damage to the substance of the

temple building and other monuments in the temple area. Such an act would indeed oblige Thailand and Cambodia, both still being States Parties to the Convention at the moment,¹³ even more than today and in addition to the already existing obligations by Articles 4 and 5 to abstain from any further act which could endanger the status of the preservation of the temple building.¹⁴

A measure of last resort could finally consist of the deletion of the Temple of Preah Vihear from the World Heritage List. However, the deletion of the temple by UNESCO would mean doing a disservice to the purpose of the preservation of the site, as well as to contributing to the de-escalation of the ongoing conflict between Thailand and Cambodia, because UNESCO would thus miss the chance of keeping further influence on the preservation of the heritage site, as well as on a possible solution of the conflict by negotiation.

Recent Developments: Cambodia's Request for Interpretation of the 1962 ICJ Judgment 2011

The conflict between Thailand and Cambodia has not yet come to an end. As the armed hostilities at the temple area exploded again in the very early spring of 2011, Cambodia finally submitted a request to the ICJ on 28 April 2011 for interpretation of the judgment rendered by the Court on 15 June 1962.¹⁵

In this document, Cambodia asked for an interpretation on the merits of the 1962 judgment according to Article 60 of the "Rules of the Court". Furthermore, it requested the court to indicate, as provisional measures and due to the gravity of the situation, as a matter of urgency,

- an immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory situated in the area of the Temple of Preah Vihear;
- a ban on all military activity by Thailand in the area of the Temple of Preah Vihear;

and finally,

¹³ Taking into account that during the 35th Session of the World Heritage Committee in June 2011, the Thai Minister Suwitt Kunkhiti expressed the intention of Thailand to denounce the 1972 World Heritage Convention and the Thai delegation left the WHC session, it has nonetheless to be held that Thailand is still a State Party to the convention up to the present.

¹⁴ As to the states parties' obligations concerning the measures to preserve listed World Heritage Sites and listed World Heritage Sites in Danger according to the convention, inter alia, see Carducci (2008:103-145); Buzzini and Condorelli (2008:175-199).

¹⁵ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Request by the Kingdom of Cambodia for the Indication of Provisional Measures, to be found at <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=89&case=151&code=ct2&p3=1> <September 11, 2011>. Also see Press Release – Unofficial – No. 2011/14 of 2 May 2011 (UNESCO 2011e).

- that Thailand refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings.
(Request by the Kingdom of Cambodia April 28, 2011: paragraph 8)

Article 60 of the “Rules of the Court” is a procedural rule of international law which can apply when difficulties arise in the process of complying with a decision of the ICJ (Rosenne 2006:1611). Article 60 says that

[t]he judgment [of the ICJ] is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

The proceeding of interpretation has to be distinguished from the revision of a judgment according to Article 61 of the “Rules of the Court”, because they concern different constellations and different requirements have to be fulfilled. The distinction between interpretation and revision is subtle and sometimes even perplexing (Zimmermann and Thienel 2006:1282).

In brief, the proceeding of interpretation aims at an act of clarification of a judgment given, respecting the decision on the merits, while the proceeding of revision aims at the correction of substantive errors by reopening proceedings under special circumstances (see Geiss 2002:167, 172, 174; Zimmermann and Thienel 2006:1282-1284; Zimmermann and Geiss 2006:1305-1308). In the proceeding of interpretation, according to Article 60 of the “Rules of the Court”, the Court cannot go beyond the previous *res judicata*, which means that it cannot go beyond the limits of the judgment given (Rosenne 2006:1612; Zimmermann and Thienel 2006:1284). Contrary to that, the concept of revision (Article 61) adversely affects the principle of *res judicata* (Geiss 2002:167, 172). Thereby, being capable of impairing the stability of jural relations (Rosenne 2006:1671), the proceeding of revision requires the fulfilment of very strict preconditions. In particular, it necessitates the discovery of new facts (see Geiss 2002:167, 174-181).¹⁶ To sum up, one could say that, on the one hand, interpretation cannot consider new facts which already existed at the time of the judgment, but which were unknown to the Court and the respective party, and, on the other hand, revision can only be based on new facts of a decisive nature (Zimmermann and Thienel 2006:1284).

As to the case of the Temple of Preah Vihear, a proceeding of revision according to Article 61 of the “Rules of the Court” would have had no success at all, because none of the Parties could state that new facts concerning the frontier and its delimitation in 1907 had been found in the meantime.

Conversely, the recent Cambodian request for interpretation of the judgment of 15 June 1962 concerning the Thai obligations resulting from it could be more successful.

¹⁶ For an in-depth analysis, see also Kaufmann (2005) and Reisman (1971).

In the current proceeding of interpretation of the 1962 judgment, Cambodia seems to want the ICJ to clarify that, complying with the decision on the merits given by the Court in 1962, which was based on the interpretation of the 1904 boundary treaty, as well as of the “Annex I map” of 1907, (1) Thailand is even today still under obligation to withdraw all its forces from the territory under the sovereignty of Cambodia, which especially includes the Temple of Preah Vihear and its area; (2) that Thailand is also under obligation to refrain from any military action in the temple area; and finally (3), as a matter of urgency, that Thailand is under obligation to refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings.

In this regard, the current request of Cambodia for interpretation of the 1962 judgment is to be understood as a sort of “enforcement measure” concerning the 1962 judgment which was undoubtedly in favour of the Cambodian position in the boundary conflict.

The ICJ recently unanimously rejected Thailand’s request to remove the case from the General List of the Court in its order of 18 July 2011, and furthermore indicated the following provisional measures:

[...]

(1) By eleven votes to five,

Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at that zone¹⁷;

(2) By fifteen votes to one,

Thailand shall not obstruct Cambodia’s free access to the Temple of Preah Vihear or Cambodia’s provision of fresh supplies to its non-military personnel in the Temple¹⁸;

(3) By fifteen votes to one,

Both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone¹⁹;

(4) By fifteen votes to one,

¹⁷ In favour: Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge ad hoc Guillaume; against: President Owada; Judges Al-Khasawneh, Xue, Donoghue; Judge ad hoc Cot.

¹⁸ In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; Judges ad hoc Guillaume, Cot; against: Judge Donoghue.

¹⁹ In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; Judges ad hoc Guillaume, Cot; against: Judge Donoghue.

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve²⁰.

(ICJ Order of July 18, 2011:19)

Outlook: Could the Conflict be Solved by International Law?

The case of the Temple of Preah Vihear remains on the General List of the ICJ until the Court renders its judgment of interpretation after the principal proceedings. Therefore, the conflict will also remain on the agenda of international politics for a while.

But even if the ICJ comes to an interpretative judgement in due course, it is not at all understood that this judicial decision of the Court will pacify the conflict between the two States. It seems that, in the present case, the potency of international law to resolve a long-existing conflict between two States is quite limited, and that a definite and sustainable solution which could be accepted by both of the parties and, therefore, lead to real peace instead of appeasement, necessitates a political solution more than a judicial one.

Therefore, hopes should be placed on the resumption of political negotiations between Thailand and Cambodia after elections, which recently took place in Thailand, even more than in the ruling of the ICJ. In this context, it is also the question whether the status of the Temple of Preah Vihear as a contested World Heritage Site under the 1972 World Heritage Convention and the efforts of UNESCO will be again successful in bringing the two States into a peaceful and constructive political dialogue.

²⁰ In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; Judges ad hoc Guillaume, Cot; against: Judge Donoghue.