

The Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand): The ICJ Orders Sweeping Provisional Measures To Prevent Armed Conflict at the Expense of Sovereignty

I. OVERVIEW 555
 II. BACKGROUND 556
 III. THE COURT’S DECISION 560
 A. *The Majority Opinion, Declarations, and Separate Opinions* 561
 B. *Five Dissenting Opinions* 564
 IV. ANALYSIS 566
 V. CONCLUSION 569

I. OVERVIEW

The territory of the Temple of Preah Vihear, a religious and cultural center for both Thailand and Cambodia, has long been disputed by the two nations due to its location near their shared border.¹ In 1962, the International Court of Justice (ICJ) held that the Temple was situated within Cambodian territory and subject to Cambodian sovereignty.² In addition, the ICJ ruled that Thailand was obliged 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.”³ Following this order, tensions dissipated between the nations for several decades, and the Temple of Preah Vihear was added to the World Heritage Sites’ list of protected cultural and architectural works.⁴ However, in 2008, due to new disputes regarding the sovereignty of the territory in the vicinity of the Temple, several armed incidents took place on the Thai-Cambodian border, which caused damage to the Temple, in addition to loss of life and injuries to soldiers.⁵ These skirmishes increased until Cambodia and Thailand agreed to return to the ICJ in 2011 to request an interpretation of the 1962 judgment.⁶

1. Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures Order/Request for Interpretation of Judgment, 2011 I.C.J. 151, ¶¶ 1-3 (July 18).

2. *Id.*
 3. *Id.* ¶ 2.
 4. *Id.* ¶ 48.
 5. *Id.*
 6. *Id.* ¶¶ 1, 48.

Cambodia asked the ICJ to hold that the Temple region belonged to Cambodia, while Thailand insisted that only the Temple itself was under Cambodian sovereignty, that there was no dispute, and thus, that the ICJ did not have jurisdiction to hear the case.⁷ In addition, Cambodia requested that Thailand be ordered to withdraw all military and police forces from claimed Cambodian territory.⁸ Cambodia also asked the ICJ to order provisional measures pending the final judgment requiring Thai forces to withdraw from the Temple and its surrounding area, to cease all military activity in the area, and to refrain from interfering with Cambodian rights or aggravating the current dispute.⁹ The International Court of Justice *held* that, pending the final judgment, provisional measures were warranted and ordered both Cambodian and Thai forces to withdraw from both the Temple region and a significant portion of undisputed Cambodian territory to create a large demilitarized zone. *Temple of Preah Vihear (Cambodia v. Thailand)*, Provisional Measures Order/Request for Interpretation of Judgment, 2011 I.C.J. 151, ¶ 69 (July 18).

II. BACKGROUND

The Temple of Preah Vihear sits in the eastern sector of the Dangrek mountain range, which serves generally as a natural border between Cambodia and Thailand.¹⁰ Accordingly, depending on where the frontier line was drawn, the Temple could be located in either nation.¹¹ The shrine, although partially in ruins, remains a place of pilgrimage and is artistically and archeologically significant to both Cambodia and Thailand.¹² To determine the sovereignty of the Temple in the 1962 *Temple of Preah Vihear (Cambodia v. Thailand)*, the ICJ looked to the boundary treaty of 1904 between France, which controlled Cambodia until her independence in 1953, and Siam, as Thailand was formerly known, which created a Mixed Commission to map the territorial boundary of the region.¹³

A second Mixed Commission of Delimitation in 1907 created several maps of the region, one of which showed the whole site of the

7. *Id.* ¶¶ 1, 29-30.

8. *Id.* ¶ 6.

9. *Id.* ¶ 11.

10. *Temple of Preah Vihear (Cambodia v. Thailand)*, Final Judgment, 1962 I.C.J. 260, 15 (June 15).

11. *Id.*

12. *Id.*

13. *Id.* at 16.

Preah Vihear Temple as being situated on the Cambodian side.¹⁴ The map was respected for several decades; however, after Cambodia gained independence in 1953, Thai troops occupied and remained in the Temple.¹⁵ Although Cambodia relied on this map in its 1962 territorial claim of the Temple, Thailand claimed the map was not binding and contained material error.¹⁶ The ICJ found that though the map was not binding, Thailand had the power not to comply but did, and as such, the actions of the parties show acquiescence to the boundary line placing the Temple in Cambodia.¹⁷ In its 1962 judgment, the ICJ held that the Temple was under Cambodian sovereignty, and Thailand must withdraw all military or police forces at or in the “vicinity” of the Temple and restore any objects removed from the area.¹⁸ It was the phrase “vicinity on Cambodian territory” that led to the dispute in the noted case and to the creation of a demilitarized zone as a provisional measure.¹⁹

The ICJ derives its power to implement provisional measures from the Statute of the International Court of Justice (ICJ Statute), a part of the U.N. Charter.²⁰ Article 60 of the ICJ Statute gives the ICJ jurisdiction to interpret a previous judgment at the request of any party if a dispute concerning the operative clause of the judgment exists.²¹ In addition, article 41 of the Statute gives the ICJ the subjective power to require provisional measures to preserve the rights of either party pending a final decision.²² The ICJ has established three elements to determine when provisional measures can be instituted in compliance with article 41 of the ICJ Statute.²³ The ICJ will institute such measures when there is (1) a “[p]lausible character of the rights whose protection is being sought,” (2) a “[l]ink between the rights whose protection is being sought and the measures requested,” and (3) a “risk of irreparable prejudice and urgency.”²⁴ Thus, before the ICJ renders a final decision, the ICJ must

14. *Id.* at 19-21.

15. *Id.* at 31-32.

16. *Id.* at 21. Thailand argued that the map was not binding because it was not completed by the original 1904 Commission, that the frontier line was not the true watershed line in the vicinity, and if this error were fixed, the Temple would be placed in Thailand. *Id.*

17. *Id.* at 23. Further, the ICJ held that Thailand could not plead error because the country was put on notice by the maps and took no action to change them. *Id.* at 25-26.

18. *Id.* at 36-37.

19. Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures Order/Request for Interpretation of Judgment, 2011 I.C.J. 151, ¶ 27 (July 18).

20. U.N. Charter, Statute of the International Court of Justice arts. 36, 41, June 26, 1945.

21. *Id.* art. 60.

22. *Id.* art. 41.

23. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures Order, 2011 I.C.J. 150, ¶¶ 53-69 (Mar. 8).

24. *Id.* ¶¶ 55, 60, 63.

find that the rights over which protection is sought derive from the judgment in question, that the provisional measures might protect those rights, and that there is “a real and imminent risk that irreparable prejudice may be caused to the rights in dispute.”²⁵

In determining the plausibility of rights and their connection to the provisional measures and the urgency of the situation, the ICJ evaluates essential values delineated in the Charter of the United Nations.²⁶ Article 2, sections 3 and 4, of the U.N. Charter espouse the international values of life, specifying that all member states “shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered” and “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”²⁷

However, other values are also at play concerning the principle of sovereignty.²⁸ Article 2 of the U.N. Charter iterates that the U.N. is based on the principle of “sovereign equality” of all members.²⁹ Further, article 51 of the Charter grants, “Nothing . . . shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member”³⁰ In addition, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) support the value of self-determination and territorial integrity free from external influence.³¹ Such principles are echoed in the Charter of the Association of Southeast Asian Nations (ASEAN).³² Article 2 of the ASEAN Charter champions the importance of “respect for the independence, sovereignty, equality, territorial integrity and national identity”; “reliance on peaceful settlement of disputes”; and “non-interference in the internal affairs of ASEAN Member States.”³³

25. *Id.* ¶ 64.

26. U.N. Charter art. 2, paras. 3-4.

27. *Id.*

28. *Id.* art. 2, para. 1.

29. *Id.*

30. *Id.* art. 51.

31. International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976, and ratified by the United States June 8, 1992) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

32. Charter of the Association of Southeast Asian Nations, Nov. 20, 2007, *available at* <http://aseansec.org/ASEAN-Charter.pdf> [hereinafter ASEAN Charter].

33. *Id.* art. 2, para. 2.

Finally, the protection of culture constitutes an important consideration for the ICJ.³⁴ The ICESCR recognizes the universal rights to freely pursue cultural development and to “take part in cultural life.”³⁵ To further such cultural protection for present and future generations, the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) established the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).³⁶ Article 4 of the World Heritage Convention recognizes the duty of every party to ensure the “identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage.”³⁷

Such principles of the protection of life, the peaceful resolution of disputes, sovereignty, self-determination, nonintervention, the right to self-defense, and the safeguard of culture reflect specific international laws that the ICJ has taken into account when determining whether or not to implement provisional measures in the past.³⁸ In the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the ICJ, pending its final decision on the coordinates of the border between the two nations, ordered provisional measures requiring both governments to “withdraw their armed forces to such positions, or behind such lines, as may, within twenty days of the date of the present Order, be determined by an agreement between those Governments.”³⁹ Analogously, in the *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, the ICJ issued a provisional measures order for both the governments of Cameroon and Nigeria to cease all hostilities pending a decision regarding the sovereignty of the Bakassi Peninsula and not to extend military presence beyond the positions that they were in a month prior to the judgment.⁴⁰

In the same vein, in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, the Democratic Republic of Congo (DRC) claimed Uganda was conducting illegal military activities within DRC territory, while Uganda claimed

34. ICESCR, *supra* note 31, art. 15.

35. *Id.* arts. 1, 15.

36. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention].

37. *Id.* art. 4.

38. Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicar.*), Provisional Measures Order, 2011 I.C.J. 150, ¶¶ 32-33 (Mar. 8).

39. Frontier Dispute (*Burk. Faso/Repub. Mali*), Provisional Measures Order, 1986 I.C.J. 518, ¶ 12 (Jan. 10).

40. Land and Maritime Boundary Between Cameroon and Nigeria (*Cameroon v. Nig.*), Provisional Measures Order, 1996 I.C.J. 675, ¶ 24 (Mar. 15).

that it had an agreement with the DRC to exercise armed activities across the border to control anti-Ugandan rebels.⁴¹ The DRC asked the ICJ to provisionally require Ugandan cessation of military activity in and troop withdrawal from DRC territory pending a final judgment.⁴² The ICJ's provisional order required both parties to refrain from armed action that might prejudice the rights of either party, to take all necessary measures to comply with international law, and to respect human rights.⁴³

Although not involving active hostilities, in the *Certain Activities Carried Out by Nicaragua on the Border Area (Costa Rica v. Nicaragua)*, Costa Rica asked the ICJ to determine that Nicaragua had violated Costa Rica's sovereignty by dredging the San Juan River, which Costa Rica claimed, felling trees in Costa Rican territory, and occupying Costa Rican territory in connection with the building of a canal on the San Juan River.⁴⁴ In order to halt Nicaragua's destruction of primary forests and fragile wetlands claimed by Costa Rica, Costa Rica asked the ICJ to issue provisional measures requiring Nicaragua to withdraw troops and cease dredging, construction, and felling projects in the disputed regions.⁴⁵ The ICJ's order required both parties to refrain from sending any personnel into the disputed territory but allowed Costa Rica to dispatch civilians to protect the environment in the disputed region to the extent it was "necessary to avoid irreparable prejudice" to the integrity of the disputed wetlands.⁴⁶ In issuing such provisional orders, the ICJ in the past has attempted to balance principles of sovereignty with the prevention of conflict in ways the ICJ feels will protect vital rights immediately at risk.⁴⁷

III. THE COURT'S DECISION

In the noted case, the ICJ issued a sweeping order for provisional measures to quell the conflict on the Cambodian-Thai border.⁴⁸ The ICJ rejected Thailand's request to remove the case due to lack of jurisdiction and ordered both parties to "immediately withdraw their military

41. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Provisional Measures Order, 2000 I.C.J. 780, ¶¶ 13, 18, 23-24 (July 1).

42. *Id.* ¶ 13.

43. *Id.* ¶ 47.

44. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Provisional Measures Order, 2011 I.C.J. 150, ¶¶ 3-5 (Mar. 8).

45. *Id.* ¶¶ 15, 18-19.

46. *Id.* ¶ 86.

47. *Id.* ¶¶ 53, 59-62, 65-66.

48. *Temple of Preah Vihear (Cambodia v. Thailand)*, Provisional Measures Order/Request for Interpretation of Judgment, 2011 I.C.J. 151, ¶ 69 (July 18).

personnel currently present in the provisional demilitarized zone . . . and refrain from any military presence within that zone and from any armed activity directed at that zone.”⁴⁹ In addition, the ICJ required that Thailand not obstruct Cambodia’s access to the Temple of Preah Vihear or its provisions of supplies to its nonmilitary actors there, maintained that both parties continue to resolve their dispute by allowing ASEAN-appointed observers access to the demilitarized zone, and instructed both parties to refrain from aggravating the dispute.⁵⁰ The ICJ further decided that each party should inform the court regarding compliance with the provisional measures and that the court would remain seized of the matter pending final judgment.⁵¹

A. *The Majority Opinion, Declarations, and Separate Opinions*

The majority began by reviewing the request of Cambodia, the Applicant, for the ICJ to confirm that the Temple of Preah Vihear and its surrounding area were located on Cambodian territory, although Thailand believed only the Temple itself and not its surrounding area was Cambodian, and to order the immediate withdraw of all Thai forces in the region.⁵² The ICJ then addressed Cambodia’s request for provisional measures to oblige Thailand to withdraw all military forces pending a final decision in the case to ensure a halt to the damage caused to the Temple, the loss of life, and human suffering.⁵³ Next, the ICJ gave a brief history of the proceedings and Thailand’s request to have the case removed from the General List due to lack of jurisdiction.⁵⁴

Accordingly, in the next section entitled, “Dispute as to the meaning or scope of the 1962 Judgment and jurisdiction of the Court,” the ICJ based its jurisdiction in article 60 of the ICJ Statute that states all judgments are final; however, this was supplemented by article 98 of the Rules of the Court, allowing the ICJ to interpret a previous judgment at the request of either party if a dispute exists.⁵⁵ Furthermore, article 60 allowed the ICJ to entertain such a request even if the basis of jurisdiction in the original case lapsed.⁵⁶ The ICJ proceeded to answer the

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* ¶¶ 1-3.

53. *Id.* ¶¶ 5, 9.

54. *Id.* ¶¶ 12-18.

55. *Id.* ¶¶ 19-20.

56. *Id.* ¶ 21.

question as to whether a prima facie dispute existed.⁵⁷ Such a dispute must concern the operative clause of the judgment in question and “cannot concern the reasons for the judgment except in so far as these are inseparable from the operative clause.”⁵⁸ Cambodia related that a dispute existed in relation to the operative clause, which demarcates the “vicinity” of the Temple as Cambodia, and Thailand maintained that no dispute existed because it recognized that the Temple itself stood on Cambodian land.⁵⁹ The ICJ found that this difference of opinion regarding the sovereignty of the territory around the Temple revealed the existence of a prima facie dispute.⁶⁰

Next, in the section “Plausible character of the alleged rights in the principal request and link between these rights and the measures requested,” the ICJ examined the requirements for the implementation of provisional measures.⁶¹ The three elements included a “[p]lausible character of the alleged rights in the principal request,” a “[l]ink between the alleged rights and the measures requested,” and a “[r]isk of irreparable prejudice [and] urgency.”⁶² Regarding the first element, the ICJ found that the right for which Cambodia sought protection, respect of sovereignty, related to the 1962 judgment and was plausible.⁶³ Because Cambodia precisely sought the protection of sovereignty over the area it claimed as a result of the 1962 judgment, a link existed between the protection of this right and the provisional measures requiring withdrawal of Thai military forces from the region.⁶⁴ Finally, after recounting the armed conflict around the Temple, the ICJ found an “imminent risk of irreparable prejudice” to the rights of sovereignty claimed by Cambodia and found urgency in the situation.⁶⁵

57. *Id.* ¶¶ 21-22. The meaning of an article 60 dispute “must be understood as a difference of opinion or views between the parties as to the meaning or scope of a judgment rendered by the Court.” *Id.* ¶ 22.

58. *Id.* ¶ 23 (citing *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.)*, Preliminary Objections (*Nig. v. Cameroon*), 1999 I.C.J. 723, ¶ 35 (Mar. 25); *Avena & Other Mexican Nationals (Mex. v. U.S.)*, Provisional Measures Order, 2008 I.C.J. 940, ¶ 323 (July 16)).

59. *Id.* ¶¶ 27-29.

60. *Id.* ¶ 32.

61. *Id.* ¶¶ 33-34.

62. *Id.* ¶¶ 34-50.

63. *Id.* ¶ 40.

64. *Id.* ¶¶ 44-45.

65. *Id.* ¶ 56. The ICJ described several incidents in 2008 that caused damage to the Temple, which is a UNESCO World Heritage Site, and resulted in loss of life. *Id.* ¶¶ 48-50. In 2011, the U.N. Security Council called for a permanent ceasefire and supported the efforts of ASEAN to find a solution, but Cambodia claimed that the ceasefire failed because Thailand would not agree to amenable conditions, and further incidents occurred. *Id.* ¶ 48. Thailand disagreed about the situation and cited the existence of ASEAN observers from Indonesia created

Introducing the provisional measures order, the ICJ cited its power under article 75 of the ICJ Statute “to indicate measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request.”⁶⁶ Accordingly, the ICJ instituted a temporary demilitarized zone much larger than the disputed region that fell upon undisputed Cambodian territory where armed forces from neither nation were permitted.⁶⁷ In announcing the order, the ICJ affirmed that the provisional measures did not prejudice any question the ICJ might encounter when making its final judgment regarding the 1962 decision.⁶⁸

Two declarations and one separate opinion accompanied the majority opinion. In his declaration, Judge Koroma affirmed the majority and emphasized that the demilitarized zone was temporary and did not prejudge the outcome of the pending judgment.⁶⁹ Judge Koroma compared the measures used to those ordered in *Cameroon v. Nigeria*, where both parties were required not to extend military forces beyond their contemporary position.⁷⁰ In addition, Judge ad hoc Guillaume issued his own declaration supporting the creation of the large demilitarized zone and recounting the guarantees given by the ICJ to Cambodia in the original judgment concerning its sovereignty and Thailand’s obligation not to hinder Cambodia’s free access to the Temple.⁷¹

In a separate thirty-three page and twelve-part opinion, Judge Cançado Trindade declared that he felt the Temple of Preah Vihear case was “transcendental,” and he wished to leave the foundations of his personal positions on the issues.⁷² He explored the history and cultural

to monitor the military situation. *Id.* ¶ 52. However, the ICJ determined the situation on the ground was fragile and at risk of aggravation. *Id.* ¶ 49.

66. *Id.* ¶ 58 (citing *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Provisional Measures Order, 2011 I.C.J. 150, ¶ 76 (Mar. 8)).

67. *Id.* ¶ 62. The coordinates included “point A, situated at latitude 14° 23’ N and longitude 104° 41’ E; point B, situated at latitude 14° 24’ N and longitude 104° 38’ 15” E; point C, situated at latitude 14° 25’ N and longitude 104° 38’ 40” E; and point D, situated at latitude 14° 25’ N and longitude 104° 42’ 20” E.” *Id.* ¶ 62. An attached map showed that the disputed territory occupied only the bottom corner of the huge demilitarized zone that largely encompassed undisputed Cambodian territory. *Id.* ¶ 62, sketch-map.

68. *Id.* ¶ 68.

69. *Id.* ¶ 1 (declaration of Koroma, J.).

70. *Id.* ¶ 2 (citing *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.)*, Provisional Measures Order, 1996 I.C.J. 675, ¶ 15 (Mar. 15)). Judge Koroma specifically mentions heavy shelling that has occurring in the vicinity of the Temple. *Id.* ¶ 3.

71. *Id.* (declaration of Guillaume, J., ad hoc).

72. *Id.* ¶ 1 (separate opinion of Cançado Trindade, J.). Judge Cançado Trindade divides his opinion into the following parts: The Passing of Time: The *Chiaroscuro* of Law; The Density of Time; The Temporal Dimension in International Law; The Search for Timelessness; From

significance of the Temple of Preah Vihear.⁷³ Judge Cançado Trindade further noted that provisional measures are meant to be anticipatory, ceasefires are only temporary, and that the protection of people in territory, the prohibition of force, and the protection of cultural world heritage were the ultimate goals in the case.⁷⁴ Advocating the extension of the provisional measures beyond their past inadequacies, he praised their importance “not only to the territorial zone at issue, but also . . . to the life and personal integrity of human beings who live or happen to be in that zone or near it, as well as to the Temple of Preah Vihear itself.”⁷⁵ Further, he acknowledged that the territory covered by the provisional measures goes well beyond that in dispute.⁷⁶ Judge Cançado Trindade found it “reassuring that, for the first time in the history of this Court, Provisional Measures of Protection indicated or ordered by it are . . . so meaningfully endowed with a scope of this kind. This is well in keeping with the *jus gentium* of our times.”⁷⁷

B. Five Dissenting Opinions

President Owada, Judge Al-Khasawneh, Judge Xue, Judge Donoghue, and Judge ad hoc Cot each submitted a dissenting opinion in the case.⁷⁸ Although President Owada agreed with the establishment of a demilitarized zone in his dissenting opinion, he did not approve of its concrete delimitation and felt the scope of the zone went beyond that of the dispute in the case, which should be an inherent limit.⁷⁹ Referencing the three cases in which the ICJ issued provisional measures to withdraw troops, *Frontier Dispute (Burkina Faso/Mali)*, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, President Owada found that in none of those cases had the ICJ created a “‘Provisional Demilitarized Zone’ . . . which comprises part of the territories that indisputably belong to the

Timelessness to Timeliness; The Passing of Time: The *Chiaroscuro* of Existence; Time, Legal Interpretation, and the Nature of Legal Obligation; From Time to Space: Territory and People Together; The Effects of Provisional Measures of Protection in the *Cas d'Espèce*; Provisional Measures of Protection: Beyond the Strict Territorialist Approach; and Final Considerations, *Sub Specie Aeternitatis*. *Id.*

73. *Id.* ¶¶ 18-21.

74. *Id.* ¶ 62.

75. *Id.* ¶ 66.

76. *Id.* ¶ 96.

77. *Id.* ¶ 117.

78. *Id.* (Owada, Pres., dissenting); *id.* (Al-Khasawneh, J., dissenting); *id.* (Xue, J., dissenting); *id.* (Donoghue, J., dissenting); *id.* (Cot, J., ad hoc, dissenting).

79. *Id.* ¶¶ 2-4 (Owada, Pres., dissenting).

sovereignty of one or the other of the parties.”⁸⁰ He dissented from the artificial manner in which the ICJ demarcated the demilitarized zone without legitimate justification.⁸¹

In his dissent, Judge Al-Khasawneh also disagreed with the ICJ’s establishment of a provisional demilitarized zone and prohibition of both parties from the zone.⁸² He reflected that the aim of protecting Cambodia’s right to sovereignty from the risk of irreparable prejudice could have been accomplished by prohibiting military activity in and around the Temple.⁸³ Additionally, the ICJ used no “discernible criterion” in imposing the demilitarized zone, which left the order “infinitely open to accusations of arbitrariness.”⁸⁴ Similarly, although Judge Xue agreed with the necessity of provisional measures, she had grave reservations regarding the “unprecedented” and “excessive” measures ordered because the ICJ had never “indicated provisional measures ordering the parties to withdraw troops or personnel from their undisputed territories.”⁸⁵ She also lamented the lack of reasoning for such a large demilitarized zone.⁸⁶ Like Judge Al-Khasawneh, Judge Xue saw no reason to prohibit military activity beyond the Temple.⁸⁷ She further suggested a solution similar to the *Burkina Faso/Mali* case where the parties were asked to determine for themselves, with the help of ASEAN, to which locations their armed forces should be withdrawn.⁸⁸

Further, Judge Donoghue felt the provisional measures “exceed[ed] the Court’s jurisdiction” under article 60 of the ICJ Statute.⁸⁹ She attempted to justify the measures with the idea of nonaggravation to avoid loss of life, but she could not accept that rationale because of the already limited nature of the dispute.⁹⁰ Judge Donoghue also feared that if states lose confidence that the ICJ will respect its jurisdictional limits, they might not be willing to open themselves up to that jurisdiction.⁹¹

80. *Id.* ¶¶ 5-7 (citing Frontier Dispute (Burk. Faso/Repub. Mali), Provisional Measures Order, 1986 I.C.J. 518, 12 (Jan. 10); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), Provisional Measures Order, 1996 I.C.J. 675, ¶ 15 (Mar. 15); Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Provisional Measures Order, 2011 I.C.J. 15, ¶ 86 (Mar. 8)).

81. *Id.* ¶ 9.

82. *Id.* (Al-Khasawneh, J., dissenting).

83. *Id.*

84. *Id.*

85. *Id.* (Xue, J., dissenting).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* ¶ 3 (Donoghue, J., dissenting).

90. *Id.* ¶¶ 25-26.

91. *Id.* ¶ 28.

Finally, Judge ad hoc Cot described that it was remarkable that the ICJ would impose provisional measures regarding a request for interpretation.⁹² Not only do the provisional measures impinge on sovereignty, but also the parties were given no details of topographical or strategic data.⁹³ Judge ad hoc Cot accused the ICJ of implementing “stratégie de chambre,” or armchair strategy, which may not function in reality.⁹⁴ He too would have preferred a self-imposed zone similar to the provisional measures ordered in the *Burkina Faso/Mali* case.⁹⁵

IV. ANALYSIS

In its order for provisional measures in the noted case, the ICJ focuses on the rights and obligations of U.N. member states delineated by the U.N. Charter, but clearly favors certain values over others.⁹⁶ The ICJ “recalls that United Nations Member States are also obliged to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”⁹⁷ Yet, the ICJ does not evaluate the effect of the provisional measures on Cambodia’s sovereignty, despite the U.N. Charter’s reliance on the “sovereign equality” of all member states as the foundation for the organization.⁹⁸ Illogically, the ICJ does not address this issue despite the fact that all five dissenting judges worry that the provisional measures sacrifice Cambodia’s right to sovereignty.⁹⁹ By prohibiting Cambodia from military access to a large portion of its undisputed land, the ICJ bypasses the guarantees of sovereignty and self-determination embodied in the ICCPR and ICESCR.¹⁰⁰ Instead, the ICJ places paramount importance on the “loss of life, bodily injuries and damage caused to the Temple [a UNESCO World Heritage Site] and the property associated with it” that may occur if armed clashes continue.¹⁰¹ As Judge Xue noted in her dissent, the ICJ gave no reasoning for the extent of the demilitarized zone nor did it indicate that such a large zone was the only

92. *Id.* ¶¶ 2-3 (Cot, J., ad hoc, dissenting).

93. *Id.* ¶ 21.

94. *Id.* ¶ 22.

95. *Id.* ¶ 24 (citing *Burk. Faso/Mali*, 1986 I.C.J. 518 at 12).

96. *Id.* ¶ 66 (majority opinion).

97. *Id.*

98. U.N. Charter art. 2, para. 1.

99. *Id.* ¶ 9 (Owada, Pres., dissenting); *id.* (Al-Khasawneh, J., dissenting); *id.* (Xue, J., dissenting); *id.* ¶ 19 (Donoghue, J., dissenting); *id.* (Cot, J., ad hoc, dissenting).

100. ICCPR, *supra* note 31; ICESCR, *supra* note 31.

101. *Cambodia v. Thail.*, 2011 I.C.J. 151, ¶ 55.

or best way to preserve lives and the Temple.¹⁰² However, in his separate opinion, Judge Cançado Trindade praised the extent of the provisional measures as a reflection of the evolving nature of international law.¹⁰³

Perhaps the provisional measures in the noted case so inspired Judge Cançado Trindade because they go further than any previous ICJ order.¹⁰⁴ In 1986, in the *Burkina Faso/Mali* case, the ICJ ordered a demilitarized zone but charged the parties to create the zone.¹⁰⁵ Ten years later, in *Cameroon v. Nigeria*, the ICJ ordered all military activities to stop and for the parties not to extend past their current positions.¹⁰⁶ Similarly, in *D.R.C. v. Uganda* in 2000, the ICJ simply ordered both parties to cease active hostilities and respect international law pending a final decision.¹⁰⁷ Those three cases remain the only prior instances where the ICJ issued provisional measures ordering the withdrawal of troops.¹⁰⁸ However, in 2011, the ICJ in *Costa Rica v. Nicaragua* issued rather broad provisional measures ordering both parties to withdraw all personnel from the disputed and environmentally valuable territory, only allowing Costa Rican civilians tasked with protecting the environment to enter.¹⁰⁹ This order reveals a general trend where the ICJ has become more “prescriptive” in its issuance of provisional measures.¹¹⁰

Thus, in the noted case, the ICJ expanded the use of its power to issue provisional measures under the ICJ Statute by calling for Cambodia to withdraw its troops from not only disputed but also from undisputed territory.¹¹¹ Accordingly, Judge Donoghue posits that the ICJ has

102. *Id.* (Xue, J., dissenting). It is possible that the ICJ thought the ordered provisional measures were the only way of preserving the rights at issue in the case by ensuring effective withdrawal through the specific coordinates that the court chose. Dapo Akande, *Recent Developments with Regard to ICJ Provisional Measures*, EUR. J. OF INT’L L. BLOG (July 21, 2011), <http://www.ejiltalk.org/recent-developments-with-regard-to-icj-provisional-measures/>. However, Judge ad hoc Cot emphasized that the ICJ had no instrumental knowledge of the topography of the region and could not have known if the situation would work on the ground. *Cambodia v. Thailand*, 2011 I.C.J. 151 (Cot, J., ad hoc, dissenting).

103. *Id.* ¶ 117 (separate opinion of Cançado Trindade, J.).

104. *Id.* ¶¶ 5, 7 (Owada, Pres., dissenting) (citing *Frontier Dispute (Burk. Faso/Repub. Mali)*, Provisional Measures Order, 1986 I.C.J. 518, 12 (Jan. 10); *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.)*, Provisional Measures Order, 1996 I.C.J. 675, ¶ 15 (Mar. 15); *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Provisional Measures Order, 2011 I.C.J. 15, ¶ 86 (Mar. 8)).

105. *Burk. Faso/Mali*, 1986 I.C.J. 518, ¶¶ 11-12.

106. *Cameroon v. Nig.*, 1996 I.C.J. 675, ¶ 24.

107. *Dem. Rep. Congo v. Uganda*, 2000 I.C.J. 780, ¶ 129.

108. *Cambodia v. Thailand*, 2011 I.C.J. 151, ¶ 5 (Owada, Pres., dissenting) (citing *Burk. Faso/Mali*, 1986 I.C.J. 518, ¶ 12; *Cameroon v. Nig.*, 1996 I.C.J. 675, ¶ 15; *Costa Rica v. Nicar.*, 2011 I.C.J. 150, ¶ 86).

109. *Costa Rica v. Nicar.*, 2011 I.C.J. 150, ¶ 86.

110. Akande, *supra* note 102.

111. *Cambodia v. Thailand*, 2011 I.C.J. 151 (Xue, J., dissenting).

exceeded its jurisdictional limit under article 60 of the ICJ Statute because the Statute specifically requires that a request for interpretation of a previous judgment must concern the operative clause of the judgment.¹¹² The provisional measures applied in the noted case reach not only the Temple and its vicinity, as referenced in the operative clause of the 1962 Judgment, but also an extensive amount of Cambodian territory never referred to in the original case.¹¹³ The ICJ did not balance the cessation of armed conflict with the right of sovereignty, but instead blatantly disregarded sovereignty. The question remains: is this what Judge Cançado Trindade would call an evolution of international law, or is this a corruption of it?

The implications of this recent order remain unclear. Currently, the two nations have stated they will adhere to the ICJ's provisional measures order, and the new Thai foreign minister, Surapong Tovichakchaikul, felt relations between Cambodia and Thailand would not worsen as a result of the provisional measures.¹¹⁴ In fact, on the day the order came out, Thailand's previous foreign minister, Kasit Piromya, was satisfied that the ICJ directed its order to both countries, and Hor Namhong, Cambodia's foreign minister, felt the ruling was a victory and "tantamount to the cessation of aggression of Thailand against Cambodia."¹¹⁵ As of September 5, 2011, Cambodia made seven separate troop withdrawals.¹¹⁶ The withdrawals have been accompanied by an ease in military tension resulting from the election in July of a new Thai prime minister more amenable to diplomatic solutions.¹¹⁷ Accordingly, the provisional measures issued in the noted case have forestalled violence for the moment and may indicate an increase in regional stability.

However, it is possible that Cambodia has only agreed to comply with the order to curry favor with the ICJ when it makes its final judgment regarding the sovereignty of the Temple region. In addition, the issue of whether the provisional measures instated will conform to their purpose and protect the rights of Cambodia from prejudice remains

112. *Id.* ¶ 3 (Donoghue, J., dissenting).

113. *Id.* ¶ 4.

114. *Surapong Praises Cambodian Relations*, BANGKOK POST, Sept. 26, 2011, 12:00 AM, <http://www.bangkokpost.com/news/politics/258265/surapong-praises-cambodian-relations>.

115. *ICJ Issues Provisional Ruling on Cambodia-Thailand Temple Case*, MENAS BORDERS BLOG (July 18, 2011, 8:32 AM), <http://menasborders.blogspot.com/2011/07/icj-issues-provisional-ruling-on.html> (internal quotation marks omitted).

116. *Cambodia Makes 7th Troop Withdraw from Border with Thailand*, GLOBAL TIMES, Sept. 5, 2011, <http://www.globaltimes.cn/NEWS/tabid/99/ID/674077/Cambodia-makes-7th-troop-withdraw-from-border-with-Thailand.aspx>.

117. *Id.*

unclear. In the noted case, Cambodia requested provisional measures to protect its sovereignty of the Temple region, but the magnitude of the issued provisions seems to strike a blow to Cambodia's sovereignty in its undisputed territory.¹¹⁸ Will this sacrifice of sovereignty in the short term become a slippery slope leading to a lessening of the importance of sovereignty when balanced against other issues deemed more important by an international court?

Another possible negative implication of the noted case concerns U.N. member states' willingness to submit to ICJ jurisdiction.¹¹⁹ In fact, Judge Donoghue wonders in her dissent whether the "Order will not enhance the Court's scope to contribute to the peaceful resolution of disputes, but instead will chill the appetite of States to consent even in a limited way to the Court's jurisdiction."¹²⁰ In addition, while both parties in the case were able to begin implementing the order, issuing similar provisional measures to another member state might conflict with that state's domestic laws and decrease the likelihood of compliance.¹²¹

V. CONCLUSION

The ICJ's order for provisional measures exceeds the scope of previous similar orders, and possibly its jurisdiction. The order sacrifices sovereignty in a seemingly unnecessary way. Had the ICJ simply prohibited military forces from both Cambodia and Thailand in the immediate vicinity of the Temple of Preah Vihear, the order would have conformed to previous judgments and raised no concerns. However, not only did the ICJ broaden its reach in the noted case, but also gave no reason for doing so. Such action may confirm fears of nations skeptical of submitting to ICJ jurisdiction in apprehension of suffering blows to sovereignty.

Yet, the noted case speaks to the effectiveness of the ICJ, not only regarding whether or not it inspires confidence from U.N. member states, but also in relation to quelling international conflict in ways no domestic court could. Despite glaring issues regarding sovereignty, both Thailand and Cambodia have declared their intentions to adhere to the order

118. *Cambodia v. Thail.*, 2011 I.C.J. 151 (Al-Khasawneh, J., dissenting).

119. *Id.* ¶ 28 (Donoghue, J., dissenting).

120. *Id.*

121. For example, in the United States, not all ICJ judgments and orders are considered self-executing, and thus, Congress must choose to implement the judgment in the form of a statute. See *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (holding that article 94 of the U.N. Treaty requiring members to "undertake to comply" with ICJ judgments was non-self-executing and had not been implemented by Congress in the form of a statute). If Congress does not take statutory action, the states and citizens are under no obligation to comply. *Id.*

pending a final judgment. Accordingly, the order averted future violence and destruction and caused no current backlash from either nation. This reaction may demonstrate the future potential for the ICJ in weighing competing international principles with an international bias that can be respected and not feared.

Kate Shulman*

* © 2012 Kate Shulman. Katherine Shulman is a second-year law student at Tulane Law School and a member of the Tulane Journal of International and Comparative Law and the Jessup International Appellate Moot Court Team. Katherine attained a B.A. from the University of Pennsylvania in Political Science with a concentration in International Relationships and a minor in Hispanic Studies. She plans to pursue public interest and public international law. Katherine would like to thank the members of her journal and moot court team for encouraging her passion for international law.