

SEPARATE OPINION OF JUDGE CAÑADO TRINDADE

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I. INTRODUCTION

1. I have concurred, with my vote, for the adoption by the International Court of Justice (ICJ), of the present Interpretation of Judgment in the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand). Although I stand in agreement with the Court's decision, not all the considerations that I regard as supporting it are explicitly developed and stated in the present Interpretation of Judgment. Given the great importance that I attach to them, I feel obliged to leave on the records the foundations of my own personal position thereon. I do so moved by a sense of duty in the exercise of the international judicial function.

2. I shall first dwell upon the essence of the resurfaced dispute before the Court, and then proceed to a couple of terminological and hermeneutic precisions. Next, I shall briefly recall the incidents (2007-2011) leading to Cambodia's concomitant requests for Provisional Measures of Protection and for Interpretation of the 1962 Judgment, and the parties' submissions as to the

compliance with the Court's Order on Provisional Measures of Protection. I shall do so on the basis of the parties' submissions to the Court, in the course of the proceedings pertaining to the present Interpretation of Judgment.

3. After recalling the fundamental principles of international law at issue, I shall dwell upon the ineluctable relationship between *motifs* and *dispositif*. To this effect, I shall: first, proceed to an overview of the relevant case-law of the Hague Court (PCIJ and ICJ) on the matter; secondly, I shall refer to the presence of reason and persuasion in the exercise of legal reasoning; and, thirdly, I shall stress the acknowledgment, throughout the centuries, of the relevance of sound legal reasoning, bearing witness to the close relationship between *motifs* and *dispositif*. The way will then be paved, last but not least, to the presentation of my concluding observations.

II. ESSENCE OF THE RESURFACED DISPUTE BEFORE THE COURT

4. To start with, may I point out that the contending parties themselves, in their submissions to the Court, addressed the essence of the resurfaced dispute before the ICJ, in the course of the proceedings pertaining to the present Interpretation of Judgment. Thus, in its oral arguments (of 15.04.2013) before the Court, Cambodia stated, as to the factual context, projected in time, of the dispute opposing it to Thailand, that

[...] "Between 1970 and 2007, it became dormant, first because of the civil war in Cambodia, and then when Cambodians settled peacefully around the Temple and its vicinity without any protest from Thailand except for occasional complaints about pollution. The dispute only re-emerged in 2007-2008 as a result of Thailand's objections to the inscription of the Temple as a World Heritage Site [of UNESCO], and the publication of Thailand's new 'secret' map (...). That map was protested by Cambodia after these incidents"¹.

5. In its *Application Instituting Proceedings* (of 28.04.2011), Cambodia further contended that

"Following the Paris Accords of 1991, the final ending of the conflict with the Khmer Rouge movement in 1998 and the consolidation of an effective, democratic Government in Cambodia able to conduct normal and peaceful relations with its neighbours and beyond, steps were taken to initiate a bilateral process between Cambodia and Thailand which, had it functioned in the way that Cambodia hoped, would have led to a stable situation being established, whereby the implementation of the Court's 1962 Judgment would have been entirely possible. The principal means of achieving that was the process of demarcating the boundary between the two States (...). Had that process been successfully completed, as Cambodia wished, it would have removed *ipso facto* the possibility of a dispute such as that concerning interpretation of the territorial régime in the particular area where the Temple of Preah Vihear is situated. It was only following Thailand's opposition to the process of including the Temple on UNESCO's list of World Heritage sites in 2008 that it became clear to Cambodia that the demarcation process had no realistic chance of being completed without a clear and authorized interpretation from the Court as to the meaning and scope of the 1962 Judgment. Cambodia does not believe that the Court can look unfavourably on the fact that Cambodia explored every bilateral possibility before reaching the conclusion that a fundamentally different interpretation existed between itself and its neighbour as to the meaning and scope of the 1962 Judgment, which could only be settled by means of this request for interpretation"².

¹Public sitting of 15.04.2013, ICJ doc. CR 2013/1, p. 74, para. 86.

²ICJ, *Application Instituting Proceedings*, filed by Cambodia on 28.04.2011, p. 25, para. 30.

6. Both in its *Application*³, as well as in its *Response* (of 08.03.2012)⁴, Cambodia insisted on the point that only from 2007 (with the initiative to have the Temple of Preah Vihear declared a World Heritage Site by UNESCO) and from 2008 (with the inclusion of the Temple in the World Heritage sites) onwards, the present dispute resurfaced; the parties themselves reckoned that they differed in terms of their understanding of the Court's Judgment of 1962. For its part, Thailand, in its *Written Observations* of 21.11.2011⁵, observed that the Court's Judgment of 1962, in deciding the question of sovereignty over the Temple of Preah Vihear, — which it accepted, — created a situation to be taken into account for the process of delimitation and demarcation of its common border with Cambodia, of the area surrounding the Temple.

7. Thailand further pointed out that in 2004 a joint Thai-Cambodian Council of Ministers had met in Bangkok to consider submitting a "joint nomination" to include the Temple on the UNESCO World Heritage List, but, "later that year, without informing Thailand, Cambodia made a unilateral request to UNESCO to list the Temple as a World Heritage Site"⁶. In its *Further Written Explanations* (of 21.06.2012), Thailand added that Cambodia thereby hoped "to extend the meaning of the word 'vicinity'", found in the *dispositif* (para. 2) of the Court's Judgment of 1962, so as to put the Temple on UNESCO's World Heritage List and "to get around the indispensable cooperation of Thailand"⁷.

8. Both Cambodia and Thailand retook their arguments in the oral phase (April 2013) of the proceedings before the Court. Cambodia contended that the registration of the Temple as a UNESCO World Heritage Site was the starting-point for the "acts of armed aggression carried out by Thailand", against "a poorly armed Cambodia"⁸. Thailand, for its part, argued that Cambodia's "unilateral request for inscription of the Temple on the UNESCO World Heritage List in 2007 once again poisoned the situation"⁹.

9. Besides the ICJ, the dispute at issue was also taken to the attention of the U.N. Security Council. It clearly flows from the arguments of the contending parties in their letters of July 2008 to the President of the Security Council (Mr. Le Luong Minh) that their differences were expressed shortly after the inclusion of the Temple of Preah Vihear — upon the initiative of Cambodia — on the list of UNESCO World Heritage Sites. Thus, in its letter of 19.07.2008 to the President of the Security Council, the Permanent Mission of Cambodia to the United Nations complained of the "Thai military provocation" in seeking to create a *de facto* "overlapping area" which "legally does not exist on Cambodia soil", in breach of Cambodia's "sovereignty and territorial integrity"¹⁰.

10. Thailand, for its part, in the letter of its Permanent Mission to the United Nations of 21.07.2008 to the President of the Security Council, after stating that the 1962 ruling of the ICJ "did not in any case determine the location of the boundary between Thailand and Cambodia",

³Paragraphs 12, 15 and 17.

⁴Paragraphs 2.9, 2.23, 2.90-2.91, 2.104 and 4.60.

⁵Paragraphs 4.69, 4.75, 4.110 and 7.1.

⁶Paragraph 1.21.

⁷Paragraph 5.5.

⁸Public sitting of 15.04.2013, ICJ doc. CR 2013/1, pp. 17-18, paras. 7-8. Cambodia further argued that Thailand had "never truly accepted the solution in the 1962 Judgment" of the Court; *ibid.*, p. 18, para. 9.

⁹Public sitting of 17.04.2013, ICJ doc. CR 2013/3, p. 63, para. 26.

¹⁰ICJ, *Application Instituting Proceedings*, filed by Cambodia on 28.04.2011, Annex 2, pp. 42-43.

argued that “the issue before the ICJ in this case was limited solely to the question of the sovereignty over the region of the Temple of Preah Vihear” and that “the location of the boundary line in the area adjacent to the Temple of Preah Vihear is still to be determined by both countries in accordance with international law”¹¹.

11. It ensues, from the position of the two contending parties (cf. also *infra*), that the present case of the *Temple of Preah Vihear* is not a case of delimitation, nor of demarcation, of frontier, but rather a case of territorial sovereignty. The ICJ Judgment of 15.06.1962 speaks indistinctly of “sovereignty over the region of the Temple of Preah Vihear”¹², of “sovereignty over the Temple area”¹³, or else of “sovereignty over the Temple”¹⁴ itself. The 1962 Judgment reiterates the interchangeable use of the terms “disputed region”, “sovereignty over Preah Vihear”, and “the Temple or Temple area”¹⁵. One cannot avoid the impression that a couple of terminological and hermeneutic precisions are called for (cf. *infra*).

12. Before turning to that, may I just add that, in my perception, this is a case of territorial sovereignty to be exercised to secure the safety of local populations under the respective jurisdictions of the two contending States, in the light of basic principles of international law, such as those of peaceful settlement of international disputes and of the prohibition of the threat or use of force (cf. section VII, *infra*); it is, furthermore, a case of territorial sovereignty to be exercised by the State concerned, in cooperation with the other State concerned, as parties to the World Heritage Convention, for the preservation of the Temple at issue as part of the world heritage (reckoned as such in the UNESCO List), to the (cultural) benefit of humankind.

III. A COUPLE OF TERMINOLOGICAL AND HERMENEUTIC PRECISIONS

13. At this stage, may I briefly dwell upon a couple of terminological and hermeneutic precisions, to clarify further the essence of this resurfaced dispute before the Court, which appears to defy the passing of time. In the *dispositif* of its Judgment of 15.06.1962, the Court found that “the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia” (para. 1); it further found, in consequence, 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” (para. 2)¹⁶.

14. The first resolutive point of the *dispositif* leaves it clear that the dispute before it concerns territorial sovereignty, rather than delimitation or demarcation of frontier. As to the second resolutive point of the *dispositif*, one might have hoped that it would not have been somewhat vague, as it appears in the use of the term “vicinity”, in indicating wherefrom Thai troops had to withdraw. Yet, this may have been done on purpose by the Court half a century ago.

15. The Court may well have decided to use a term not too narrowly circumscribed. Had the Court held the obligation to withdraw military troops or police forces precisely only as to the ground where the Temple, or its “ruins”, stood, this could have led to a stricter interpretation that Thai troops could still be stationed right outside, or around, the walls of the Temple. This would

¹¹*Ibid.*, Annex 4, p. 86. Thailand added that “the inscription of the Temple of Preah Vihear on the World Heritage List shall in no way prejudice Thailand’s rights regarding her territorial integrity and sovereignty as well as the survey and demarcation of land boundary in the area and Thailand’s legal position”; *ibid.*, p. 88.

¹²Last paragraph of page 14 of the Judgment.

¹³First paragraph of page 17 of the Judgment, and cf. also first paragraph of page 29 of the Judgment.

¹⁴Second paragraph of page 21 of the Judgment.

¹⁵Three paragraphs of page 36 of the Judgment.

¹⁶*ICJ Reports* (1962) pp. 36-37.

have been impracticable, in hindering the access to the Temple of Cambodian non-military personnel. Thus, in my perception, while in its 1962 Judgment the Court did not precisely define the scope of the “vicinity” of the Temple, it seems important that the term “vicinity” be understood to comprise what is essential to guarantee the free access in and out of the Temple itself, the freedom of movement in and out of the Temple of non-military Cambodian personnel.

16. Furthermore, it seems likewise relevant that the term “vicinity”, used in the second resolutive point of the *dispositif*, be understood also to describe the scope of the obligation to withdraw troops or police force in pursuance, on the part of both parties, of the fundamental principle of the prohibition of the threat or use of force, in the Temple itself, or in its “vicinity”. It is somewhat ironical that it was the inscription by UNESCO of the Temple of Preah Vihear in the World Heritage list that led to the conflicts provoking the resurfacing of the present dispute before the ICJ, centred on the term “vicinity” as well as the obligation of “withdrawal” of military or police forces.

17. The etymological origins of the verb “*to withdraw/se retirer*” go back to the late XIIth and the XIIIth centuries (from the Latin *retrahere*, to retract/*se retirer*). From then onwards, the verb is recorded to have been used in the sense of “to remove oneself from”, or “to draw oneself away from”, a place or a position¹⁷; the verb came to be used in respect of distinct situations, among which that of territorial sovereignty, — not delimitation or demarcation of territory, — as in the present resurfaced dispute before the Court, opposing Cambodia to Thailand. This is corroborated by the *dispositif* of the 1962 Judgment of the ICJ in the case of the *Temple of Preah Vihear* (*supra*).

18. In the present Interpretation of Judgment, the ICJ has rightly pondered that “[o]nce a dispute regarding territorial sovereignty has been resolved and uncertainty removed, each party must fulfil in good faith the obligation which all States have to respect the territorial integrity of all other States. Likewise, the Parties have a duty to settle any dispute between them by peaceful means” (para. 105). In this connection, the Court has taken note that Thailand has commendably accepted that it has a *continuing obligation* to respect the integrity of Cambodian territory (paras. 51 and 105), including that of the promontory of Preah Vihear.

IV. THE INCIDENTS (2007-2011) LEADING TO CAMBODIA’S REQUESTS FOR PROVISIONAL MEASURES OF PROTECTION AND FOR INTERPRETATION OF THE 1962 JUDGMENT

19. A series of incidents, which took place in the period of 2007-2011 and prompted Cambodia’s requests for provisional measures of protection and for interpretation of the 1962 Judgment of the ICJ, are reported in its *Application Instituting Proceedings*, of 28.04.2011. On 17.05.2007 the Thai Prime Minister protested at Cambodia’s zoning plan (issued on 10.11.2006) as part of its proposal to declare the Temple a UNESCO World Heritage site. With the opening of discussions within UNESCO to have the Temple declared a World Heritage site, there followed a deterioration in relations between the two States concerned. As from 15.07.2008, “large numbers of Thai soldiers crossed the border and occupied an area of Cambodian territory near the Temple, on the site of the Keo Sikha Kiri Svava Pagoda”¹⁸.

¹⁷Cf. *Dictionnaire Historique de la langue française* (ed. Alain Rey), 3rd ed., Paris, Dictionnaires Le Robert, 2000, p. 1921; *The Oxford English Dictionary* (eds. J.A. Simpson and E.S.C. Weiner), 2nd ed., vol. XX, Oxford, Clarendon Press, 1989, p. 450; *Barnhart Dictionary of Etymology* (eds. R.K. Barnhart and S. Steinmetz), N.Y., H.W. Wilson Co., 1988, p. 1241; *Dictionnaire étymologique et historique du français* (eds. J. Dubois, H. Mitterand and A. Dauzat), Paris, Larousse, 2007, p. 717; *The New Shorter Oxford English Dictionary on Historical Principles* (ed. L. Brown), vol. 2, Oxford, Clarendon Press, 1993, p. 3704; *Legal Thesaurus* (ed. W.C. Burton), N.Y./London, MacMillan Pubs., 1980, p. 514; *Vocabulaire juridique* (ed. G. Cornu), 8th ed., Paris, Association H. Capitant/PUF, 2007, pp. 827-828; *Black’s Law Dictionary* (ed. B.A. Garner), 9th ed., St. Paul/Mn., West/Thomson Reuters, 2009, p. 1739.

¹⁸ICJ, *Application Instituting Proceedings*, filed by Cambodia on 28.04.2011, pp. 13 and 15, paras. 13-16.

20. Thailand, likewise, in its *Written Observations* of 21.11.2011, acknowledged the occurrence of those incidents as from 2007¹⁹. Thailand contended that there was no evidence of non-compliance on its part of the Court's Judgment of 1962. In its perception,

“(…) The border incidents that have occurred over recent years result from Cambodia seeking to assert authority over an area much greater than they have been content with in the past”²⁰.

21. The controversy over territorial sovereignty had indeed reemerged, and this time reached the U.N. Security Council on 21.07.2008²¹. In his letter of that date to the President of the U.N. Security Council (Mr. Le Luong Minh), the Permanent Representative of Thailand to the United Nations stated that the issue that had originally been brought before the ICJ for its Judgment of 1962 had been “limited solely to the question of the sovereignty over the region of the Temple of Preah Vihear”, and not the determination of the boundary line in the “area adjacent to the Temple”; this latter still remained “to be determined by both countries in accordance with international law”²².

22. Three months later, the President of the Security Council was informed by Cambodia's representative at the United Nations that “Thai troops [had] once again crossed the frontier at three locations” (Keo Sikha Kiri Svava Pagoda, Veal Intry and the hill of Phnom Trap, “inside Cambodian territory”), and had “opened fire on Cambodian soldiers”, causing the death of two of them and injuries in two others (incident of 15.10.2008)²³. Another armed incident of the kind occurred on 03.04.2009 (in Phnom Trap, Tasem and Veal Intry), in “the immediate vicinity of the Temple”, causing damage in “the area around the Temple”, including the stairway leading to it²⁴.

23. In the following year, the U.N. Secretary-General (Mr. Ban Ki-moon) offered (on 20.08.2010) his help to resolve the dispute between Cambodia and Thailand²⁵, but unfortunately, from 04 to 07.02.2011, Thai troops, using “heavy artillery and fragmentation shells”, caused “many casualties among the Cambodian armed forces and civilians”, as well as “material damage to the Temple itself”, — leading to the Security Council's urging of a “permanent ceasefire” on 14.02.2011; the applicant State draws particular attention to the Security Council's statement of that date²⁶. That U.N. Press Release was issued by the President of the Security Council (Mrs. Maria Luiza Ribeiro Viotti) on 14.02.2011, containing the following statement on the Cambodia/Thailand border situation:

“Les membres du Conseil de sécurité ont entendu un exposé sur la situation à la frontière entre le Cambodge et la Thaïlande, présenté par le Secrétaire général adjoint, M. Lynn Pascoe, et par le ministre des affaires étrangères de l'Indonésie et président de l'Association des nations de l'Asie du Sud-Est (ANASE), M. Marty Natalegawa.

Les membres du Conseil ont également entendu le vice-premier ministre et ministre des affaires étrangères du Cambodge, M. Hor Namhong, et le ministre des affaires étrangères de la Thaïlande, M. Kasit Piromya.

¹⁹Thailand referred to facts going back to 2004-2005; cf. ICJ, *Written Observations of the Kingdom of Thailand*, of 21.11.2011, pp. 13-14, paras. 1.26-1.27.

²⁰*Ibid.*, p. 15, para. 1.30.

²¹Cf. ICJ, *Application Instituting Proceedings*, *op. cit. supra* n. (18), p. 21, para. 25.

²²Cf. *ibid.*, Annex 4, p. 86, para. 4.1.

²³*Ibid.*, p. 27, para. 33.

²⁴*Ibid.*, p. 27, para. 34.

²⁵Cf. U.N. Press Release of that date, *in ibid.*, Annex 8, p. 151.

²⁶*Ibid.*, p. 27, para. 34.

Les membres du Conseil se sont dits très préoccupés par les affrontements armés qui ont opposé récemment le Cambodge et la Thaïlande.

Les membres du Conseil ont demandé aux deux parties de faire preuve de la plus grande retenue et d'éviter toute action qui pourrait aggraver la situation. Ils ont en outre engagé les parties à déclarer un cessez-le-feu permanent et à le respecter scrupuleusement, et à régler la situation par des moyens pacifiques dans le cadre d'un dialogue constructif.

Les membres du Conseil ont dit appuyer l'action résolue que l'ANASE mène à cet égard et ont invité les parties à continuer de coopérer avec l'organisation. Ils ont accueilli favorablement la prochaine réunion des ministres des affaires étrangères de l'ANASE qui se tiendra le 22 février²⁷.

24. In its *Application Instituting Proceedings*, Cambodia referred to the incidents of early February 2011 as "a serious threat to peace and security in the region", as again stressed by the U.N. Secretary-General (Mr. Ban Ki-moon)²⁸. The concern of UNESCO, for its part, expressed in the Report of 26.05.2009 of the UNESCO World Heritage Committee, was with strengthening "the protection and management of the World Heritage property" (cf. Annex 12). As further reported by Cambodia in its *Application*,

"In these various incidents between 2008 and 2011, architectural features of the Temple have been damaged, leading to inquiries and reports by the UNESCO authorities, which have recommended the convening of an international co-ordinating committee, as envisaged in the decision to list the site. (...) Following the serious incidents in early February 2011, the Director-General of UNESCO, Mrs. Irina Bokova, decided to send a mission to the site, together with a special envoy in the person of the former UNESCO Director-General, Mr. Koïchiro Matsuura"²⁹.

UNESCO's initiative, — among others³⁰, — purported to assess *in loco* the state of the Temple of Preah Vihear.

²⁷U.N. Press Release reproduced in *ibid.*, Annex 9, p. 153. [English official translation:]

"The members of the Security Council were briefed by Under-Secretary-General B. Lynn Pascoe and by the Minister for Foreign Affairs of Indonesia, and Chair of the Association of South-East Asian Nations (ASEAN), Marty Natalegawa, on the situation on the border between Cambodia and Thailand.

The members of the Security Council also heard from the Deputy Prime Minister and Minister for Foreign Affairs of Cambodia, Hor Namhong, and Minister for Foreign Affairs of Thailand, Kasit Piromya.

The members of the Security Council expressed their grave concern about the recent armed clashes between Cambodia and Thailand.

The members of the Security Council called on the two sides to display maximum restraint and avoid any action that may aggravate the situation. The members of the Security Council further urged the parties to establish a permanent ceasefire, and to implement it fully and resolve the situation peacefully and through effective dialogue.

The members of the Security Council expressed support for ASEAN's active efforts in this matter and encouraged the parties to continue to co-operate with the organization in this regard. They welcomed the upcoming Meeting of Ministers for Foreign Affairs of ASEAN on 22 February" (*in ibid.*, p.152).

²⁸*In ibid.*, p. 29, para. 34.

²⁹Cf. *ibid.*, p. 29, para. 35; and cf. *ibid.*, Annex 12, pp. 161-173.

³⁰E.g., the European Parliament, likewise, adopted a resolution, on 17.02.2011, on the border clashes between Thailand and Cambodia; cf. *ibid.*, Annex 13, pp. 175-179.

25. Another U.N. Press Release, of 23.04.2011, expressed the grave concern of the U.N. Secretary-General (Mr. Ban Ki-moon) with the new clashes between Cambodia and Thailand along their “common border”:

“Le Secrétaire général des Nations Unies, Ban Ki-moon, est préoccupé par les informations faisant état de nouveaux combats ces deux derniers jours entre des troupes cambodgiennes et thaïlandaises à la frontière entre les deux pays, qui auraient fait plusieurs morts des deux côtés, a déclaré samedi son porte-parole.

‘Il avait été encouragé par les signes initiaux de progrès dans les efforts régionaux pour renforcer les mécanismes bilatéraux destinés à gérer le différend entre les deux voisins’, a ajouté le porte-parole. ‘Le Secrétaire général appelle les deux parties à exercer le maximum de retenue et à prendre des mesures immédiates pour mettre en place un cessez-le-feu effectif et vérifiable’.

Ban Ki-moon ‘estime également que le différend ne peut pas être résolu par des moyens militaires et appelle le Cambodge et la Thaïlande à entamer un dialogue sérieux pour trouver une solution durable’.

Selon la presse, des accrochages ont fait six morts vendredi à la frontière entre la Thaïlande et le Cambodge en dépit d’un cessez-le-feu négocié en février. Trois soldats thaïlandais et trois soldats cambodgiens ont trouvé la mort dans ces affrontements et dix-neuf autres — treize Thaïlandais et six Cambodgiens — ont été blessés.

Thaïlande et Cambodge se sont rejeté la responsabilité de cette fusillade, qui a eu lieu autour des temples de Ta Moan et Ta Krabei, à quelque 150 km au sud-ouest du temple de Préah Vihéar où un conflit armé avait fait onze morts il y a deux mois, du 4 au 7 février”³¹.

26. The situation brought to the knowledge of the Court on 28.04.2011 (for interpretation of its 1962 Judgment) was thus clearly that of a dispute, in my perception concerning mainly the *withdrawal* of forces from the Temple or its vicinity, in the light of general principles of international law, such as those of the prohibition of the threat or use of force, and of peaceful settlement of international disputes. The Cambodian request for interpretation is ineluctably intermingled with the Cambodian request for provisional measures, both having been prompted by the events which have occurred (as from 2007, and culminating in early 2011) in the Temple area and its vicinity.

³¹U.N. Press Release reproduced in *ibid.*, Annex 11, p. 158. [English official translation:]

“United Nations Secretary General Ban Ki-moon is troubled by reports of renewed fighting in the past two days between Cambodian and Thai troops along the two countries’ common border, which has reportedly claimed numerous lives from both sides, said his spokesperson on Saturday.

‘He had been encouraged by the initial signs of progress in regional efforts to strengthen bilateral mechanisms for dealing with the dispute between the two neighbours’, the spokesperson added. ‘The Secretary General calls on both sides to exercise maximum restraint and to take immediate measures to put in place an effective and verifiable ceasefire’.

Mr. Ban ‘also believes the dispute cannot be resolved by military means and urges Cambodia and Thailand to engage in serious dialogue to find a lasting solution’.

According to reports, six people died on Friday as a result of fighting along the border between Thailand and Cambodia, despite the ceasefire negotiated in February. Three Thai and three Cambodian soldiers lost their lives in these clashes and a further 19 — 13 Thais and six Cambodians — were injured.

Thailand and Cambodia hold each other responsible for the gunfire, which took place close to the temples of Ta Moan and Ta Krabei, some 150 km south-west of the Temple of Preah Vihear, where armed clashes claimed 11 lives two months ago, between 4 and 7 February” (*ibid.*, p. 159).

27. Those incidents are to be much regretted. As I pondered in my Separate Opinion, in the Court's Order (of 18.07.2011) of provisional measures of protection in the *cas d'espèce*,

“In the present case of the *Temple of Preah Vihear* before the ICJ, it is indeed a pity that a Temple that was built with inspiration in the first half of the XIth century, to assist in fulfilling the religious needs of human beings, and which is nowadays — since the end of the first decade of the XXIst century — regarded as integrating the world heritage of humankind, becomes now part of the bone of contention between the two bordering States concerned. This seems to display the worrisome frailty of the human condition, anywhere in the world, in that individuals appear prepared to fight each other and to kill each other in order to possess or control what was erected in times past to help human beings to understand their lives and their world, and to relate themselves to the cosmos” (para. 108).

V. THE PROVISIONAL MEASURES OF PROTECTION OF THE ICJ OF 2011

28. As a consequence of the eruption of armed hostilities between Thailand and Cambodia (*supra*), the ICJ convened public sittings on 30 and 31.05.2011, and shortly afterwards issued its Order of Provisional Measures of Protection, on 18.07.2011. In the present Interpretation of Judgment that the Court has just issued, it expressly refers (para. 35) to its Order of Provisional Measures of 18.07.2011, related as it is to Cambodia's request for Interpretation of the 1962 Judgment, even though delivered without prejudice to the ICJ's present Interpretation of Judgment. The two requests were lodged together with the Court by the applicant State. In the present Interpretation of Judgment, the ICJ has taken note of its Order of Provisional Measures (paras. 29 and 35-36), in order to address the request for Interpretation; it has thus made it clear that the two concomitant requests cannot make abstraction of each other.

29. In its Order of Provisional Measures of 18.07.2011, the Court determined, as from the basic principle of the prohibition of the threat or use of force, enshrined into the U.N. Charter, the creation of a “provisional demilitarized zone” around the Temple of Preah Vihear and in the proximities of the frontier between the two countries, and the immediate withdrawal of their military personnel, and the guarantee of free access to the Temple of those in charge of supplies to the non-military personnel present therein. It further determined the retaking and pursuance of negotiations between them, aiming at the peaceful settlement of the dispute, so as not to allow its aggravation.

30. In my Separate Opinion, I endorsed the correct determination by the ICJ of the unprecedented creation of a “provisional demilitarized zone”, whereby it seeks to protect, in my understanding, not only the territory at issue, but also the populations that live thereon, as well as the set of monuments found therein, conforming the Temple of Preah Vihear. This latter integrates, as from 2008, — by decision of the World Heritage Committee of UNESCO, — its World Heritage List, which constitutes the cultural and spiritual heritage of humankind (paras. 66-95).

31. Beyond the classic territorialist outlook, — I proceeded in my Separate Opinion, — lies the *human factor*, calling for the protection, by the measures indicated or ordered by the ICJ, of the rights to life and personal integrity of the members of the local population, as well as the cultural and spiritual heritage of human kind (paras. 96-113). Underlying this jurisprudential construction, — I added, — is the *principle of humanity*, orienting the search for improvement of the conditions of living of the population and the realization of the common good (paras. 114-115), in the ambit of the new *jus gentium* of our times (para. 117)³². In situations of the kind, one cannot consider the territory making abstraction of the local populations (and their cultural and spiritual heritage), who, in my view, constitute the most precious component of statehood.

³²And cf., for a comprehensive study, A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd ed., The Hague, Nijhoff/The Hague Academy of International Law, 2013, pp. 1-726.

32. In its aforementioned Provisional Measures of Protection, the ICJ took into due account not only the territory at issue, but, jointly, the people on territory, i.e., the *protection of the population on territory*. In my aforementioned Separate Opinion, I pondered that, beyond the States, are the human beings who compose them (para. 114). In a case of this kind, seemingly only territorial, there is epistemologically no inadequacy to extend protection also to human life, and to the cultural and spiritual world heritage (the Temple of Preah Vihear), thus avoiding a *spiritual damage* (para. 66), — as I sought to conceptualize this latter in 2005, within the Inter-American Court of Human Rights (IACtHR), in my Separate Opinion in the case of the *Moiwana Community versus Suriname* (Judgment of 15.06.2005).

33. In my Separate Opinion in the Court's Order of 18.07.2011 in the present case of the *Temple of Preah Vihear*, I deemed it fit to warn that, in effect, not everything in the *cas d'espèce* can be subsumed under territorial sovereignty (para. 99), as the provisional measures indicated by the Court encompassed the human rights to life and to personal integrity, as well as cultural and spiritual world heritage. In sum, the Court's Order went "well beyond State territorial sovereignty, bringing territory, people and human values together" (para. 100), well in keeping with the *jus gentium* of our times (paras. 115 and 117).

VI. THE PARTIES' SUBMISSIONS AS TO THE COMPLIANCE WITH THE ORDER OF THE ICJ ON PROVISIONAL MEASURES OF PROTECTION

34. As I have already mentioned, in my perception the requests for provisional measures of protection and for interpretation of the 1962 Judgment appear interrelated (para. 28, *supra*). In all likelihood the request for interpretation would not have been lodged with the Court if the aforementioned armed hostilities between Thailand and Cambodia had not occurred. Such armed hostilities form the factual context which originated the request for interpretation as well as the request for provisional measures of protection, and rendered necessary the adoption of those measures by the Court.

35. As from the Court's Order of 18.07.2011, the contending parties were faced with the duty to comply with it, binding as such protective measures are. It should not pass unnoticed that, in the course of the proceedings before the ICJ as to the request for interpretation, both Thailand and Cambodia deemed it fit to present to the Court their views concerning compliance with the Court's provisional measures³³. The preparedness of the parties to do so is commendable, and significant, and should have been so acknowledged by the Court in the present Judgment in the case of the *Temple of Preah Vihear*, that the Court has just adopted.

36. The oral arguments of the two parties, in the course of the proceedings of mid-April 2013 on the request for interpretation, are revealing. Thailand expressed its understanding that the "most important purpose" which led to the adoption by the Court of its Order on provisional measures of protection was

"to prevent a recurrence of the loss of human life which unfortunately had taken place in the area. The Order also noted allegations of damage to property. Since the adoption of the Order, the ceasefire in the area, which Thailand and Cambodia had adopted before the Order, has continued. There has been no recurrence of armed incidents or loss of life; and there has been no damage to property. [...T]he situation on the ground is consistent with the purposes of the Order"³⁴.

³³They did so in compliance with resolatory point (C) of the ICJ's Order of 18.07.2011, in their correspondence sent to the Court, after its Order, from July 2011 until July 2012.

³⁴Public sitting of 17.04.2013, ICJ doc. *Compte rendu* [CR] 2013/3, pp. 22-23, para. 39.

37. Cambodia stated that it ascribed to the decision (on interpretation) that the Court was to render much importance, as it would condition “the relations between the two States”, on which “depend [the] peace and security in the region”³⁵. Thailand reiterated the “reality on the ground”, after the Court’s Order of provisional measures of protection, “is that the border is peaceful and calm, consistent with the intent of the Court’s Order”³⁶. Cambodia, for its part, submitted a different version of the facts, in pointing out that

“les négociations bilatérales sur le retrait des troupes de la zone démilitarisée provisoire conformément aux mesures conservatoires décidées par votre juridiction le 18 juillet 2011 n’ont pas abouti (...). En conséquence, il n’a pas été possible de mettre en place des observateurs indonésiens chargés, sous les auspices de l’ASEAN, de contrôler le retrait des troupes de la zone du temple en attendant votre jugement définitif”³⁷.

VII. THE STATES’ DUTIES TO REFRAIN FROM THE THREAT OR USE OF FORCE AND TO REACH A PEACEFUL SETTLEMENT OF THE DISPUTE AT ISSUE

38. I have already pointed out that, in the *cas d’espèce*, the dispute opposing Thailand to Cambodia concerns mainly the *withdrawal* of forces from the Temple or its vicinity, keeping in mind the general principles of international law of the prohibition of the threat or use of force, and of peaceful settlement of international disputes (para. 26, *supra*). In its present Interpretation of Judgment, that the Court has just adopted, it rightfully draws attention to *the principles of the Charter of the United Nations* (para. 106), in particular those of importance in the present case of the *Temple of Preah Vihear* (cf. section VII, *supra*).

39. In fact, on other recent occasions the ICJ has likewise asserted, e.g., the State’s duty of co-operation and peaceful settlement, in its Judgments in the case concerning *Pulp Mills on the River Uruguay* (of 20.04.2010, para. 281) opposing Argentina to Uruguay; in the *A.S. Diallo* case (merits, of 30.11.2010, paras. 163-164) opposing Guinea to D.R. Congo; and in the case of the *Application of the 1995 Interim Accord* (of 05.12.2011), opposing the Former Yugoslav Republic of Macedonia to Greece. In this last case, the ICJ *emphasized* that

“the 1995 Interim Accord places the Parties under a duty to negotiate in good faith under the auspices of the Secretary-General of the United Nations pursuant to the pertinent Security Council resolutions with a view to reaching agreement on the difference described in those resolutions” (para. 166).

40. Such duty of peaceful settlement grows in importance in face of threats of, or actual recourse to, the use of force, in breach of a fundamental principle enshrined into Article 2(4) of the U.N. Charter. The ICJ is “the principal judicial organ of the United Nations” (Article 92 of the Charter, and Article 1 of the Statute). Its Statute forms an *integral* part of the U.N. Charter. The ICJ is thus bound to make sure, in the settlement of inter-State disputes lodged with it, that the contending parties abide by the fundamental principles enshrined into the U.N. Charter, such as those of non-use of force (Article 2(4)) and of peaceful settlement of international disputes (Article 2(3)).

³⁵Public sitting of 18.04.2013, ICJ doc. CR 2013/5, p. 48.

³⁶Public sitting of 19.04.2013, ICJ doc. CR 2013/6, p. 51.

³⁷Public sitting of 15.04.2013, ICJ doc. CR 2013/1, pp. 18-19 [cf.], para. 10. Cambodia further argued that the armed incidents by the border were “provoked” by Thailand as “reprisals to the inscription of the Temple in the World Heritage List of UNESCO”; *ibid.*, pp. 23-24, para. 6.

41. The Court not only has an *inherent* faculty to do so, in the exercise of its functions; in effect, it is *bound* to do so, to secure compliance by States with the general principles of international law. May it be recalled that, almost four decades ago, the ICJ pondered, in its Judgment of 20.12.1974 in the *Nuclear Tests* case (Australia *versus* France), that

“The Court possesses an inherent jurisdiction enabling it to take such action as may be required (...). Such inherent jurisdiction (...) derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded”³⁸.

42. As to the significance of the general principles of international law, of prohibition of use or threat of force and of peaceful settlement of disputes, enshrined into the U.N. Charter (Article 2(4) and (3)), suffice it here, in the present Separate Opinion, to refer to my considerations already developed in my previous Separate Opinion in the Court’s Order (of 18.07.2011) in the present case of the *Temple of Preah Vihear*³⁹. Earlier on, on six other occasions so far, I have likewise drawn attention to the relevance of general principles⁴⁰. The necessary attention to those principles brings us closer to the domain of superior *human values*, to be safeguarded, not sufficiently worked upon in international case-law and doctrine. It is, ultimately, those principles that inform and conform the applicable norms, and ultimately any legal system.

VIII. THE INELUCTABLE RELATIONSHIP BETWEEN *MOTIFS* AND *DISPOSITIF*

43. Another particular issue that comes to the fore in the *cas d’espèce* is the relationship of the resolutive points of a judgment (in the *dispositif*) with the corresponding *motifs*. May it be recalled that, in its Judgment of 15.06.1962 in the present case of the *Temple of Preah Vihear*, the ICJ stated:

“Referring finally to the Submissions presented at the end of the oral proceedings, the Court, for the reasons indicated at the beginning of the present Judgment, finds that Cambodia’s first and second Submissions, calling for pronouncements on the legal status of the Annex I map and on the frontier line in the disputed region, can be entertained only to the extent that they give expression to grounds, and not as claims to be dealt with in the operative provisions of the Judgment. It finds on the other hand that Thailand, after having stated her own claim concerning sovereignty over Preah Vihear, confined herself in her Submissions at the end of the oral proceedings to arguments and denials opposing the contentions of the other Party, leaving it to the Court to word as it sees fit the reasons on which its Judgment is based.

In the presence of the claims submitted to the Court by Cambodia and Thailand, respectively, concerning the sovereignty over Preah Vihear thus in dispute between these two States, the Court finds in favour of Cambodia in accordance with her third Submission. It also finds in favour of Cambodia as regards the fourth Submission concerning the withdrawal of the detachments of armed forces” (p. 36).

³⁸ICJ Reports (1974) pp. 259-260.

³⁹Paragraphs 72-81 and 114-115.

⁴⁰Namely, in my Separate Opinion (paras. 8-113 and 191-217) in the case of the *Pulp Mills* (Judgment of 20.04.2010); in my Separate Opinion (paras. 177-211) in the Advisory Opinion on the Declaration of Independence of Kosovo (of 22.07.2010); in my Separate Opinion (paras. 93-106) in the *A.S. Diallo* case (merits, Judgment of 30.11.2010); in my Dissenting Opinion (paras. 79-87) in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Judgment of 01.04.2011); in my Separate Opinion (paras. 28-51 and 82-100) in the Advisory Opinion on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against IFAD* (of 01.02.2012); and in my Separate Opinion (paras. 74-76) in the *A.S. Diallo* case (reparations, Judgment of 19.06.2012).

44. The Court then found that: 1) “the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia”; and, in consequence, that: 2) “Thailand is under an obligation to withdraw any military or police forces, or other guards of keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory” (...) (pp. 36-37). Before laying down the resolutive points, the ICJ made a cross-reference to the reasons which led it to decide the way it did. This is not the first time that the relationship between such reasons and the resolutive points comes to the fore.

1. Overview of the Case-Law of The Hague Court (PCIJ and ICJ) on the Matter

45. In fact, already in its time, the Permanent Court of International Justice (PCIJ) dwelt upon the matter at issue. Thus, in the case of the *Chorzów Factory — Interpretation of Judgments* *nos. 7 and 8* (of 16.12.1927), opposing Germany to Poland, the PCIJ observed that a difference of opinion should exist between the contending parties as to the points, “decided with binding force”, in the judgment at issue, for a request for interpretation be lodged with it under Article 60 of the Statute. Having said so, the PCIJ added:

“That does not imply that it must be beyond dispute that the point the meaning of which is questioned is related to a part of the judgment having binding force. A difference of opinion as to whether a particular point has or has not been decided with binding force also constitutes a case which comes within the terms of the provision in question, and the Court cannot avoid the duty incumbent upon it of interpreting the judgment in so far as necessary, in order to adjudicate upon such a difference of opinion” (pp. 11-12).

46. In other words, the Court is not to restrict itself only to the operative part of the judgment, making abstraction of all its reasoning which led to it and supports it. The Court is to bear it in mind, and take it into account whenever needed. Only in this way it can produce a proper interpretation clarifying — as it said — “the true meaning and scope” of its judgment at issue (p. 14). *Motifs* and *dispositif* cannot simply be dissociated from each other; they go together, the former setting the grounds on which the latter was established. Already at the time of the PCIJ, in the late twenties, this was the prevailing understanding on this particular point.

47. Years later, the ICJ, in its Judgment of 27.11.1950 on Request for Interpretation in the *Asylum* case, opposing Colombia to Peru, stated that a request for interpretation of a judgment must aim solely at obtaining clarification on “the meaning and the scope of what the Court has decided with binding force” (p. 402). In my view, if the operative part is not clear enough, the Court, in providing the interpretation requested, has to take into account the reasons set forth in the corresponding *motifs*.

48. The Court had the occasion to do this, half a century later, in its Judgment of 25.03.1999, on the Request for Interpretation in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*. The Court identified the reasons, set forth in the motifs (in two paragraphs of the previous judgment) which provided the grounds for the operative part of the judgment at issue, and were thus “inseparable” from that operative part (para. 11). The ICJ had warned that any request for interpretation (under Article 60 of the Statute) “must relate to the operative part of the judgment” and can only concern “the reasons for the judgment” in so far as “these are inseparable from the operative part” (para. 10).

49. Earlier on, in its Judgment (of 10.12.1985) on the Application for Revision and Interpretation in the case concerning the *Continental Shelf (Tunisia versus Libya)*, the ICJ recalled (para. 46) the *célèbre obiter dictum* of the PCIJ in the *Chorzów Factory* (Interpretation) case (*supra*). Recently, in its Judgment of 19.01.2009 on the Request for Interpretation in the case of

Avena and Other Mexican Nationals (Mexico versus United States), the ICJ referred to its *jurisprudence constante* (*supra*) in respect of requests for interpretation of judgments (para. 21). In sum, in my perception, there is indeed an ineluctable relationship between *motifs* and *dispositif*. Such relationship has not passed unnoticed in expert writing along the years⁴¹.

2. Reason and Persuasion

50. Half a decade ago, in another international jurisdiction, I had the occasion, in my Separate Opinion appended to the Interpretation of Judgment of 02.08.2008 of the Inter-American Court of Human Rights (IACtHR), in the case of the *Prison of Castro-Castro versus Peru*, to ponder that *reason and persuasion* go together with the verdict. Resolatory points cannot be dissociated from the Court's reasoning which provides their foundations. Already in Aeschylus's *Eumenides* (458 b.C.), Athenea felt the need — in announcing the creation, forever, of the *Areios Pagos* — to provide explanation for judicial decisions and to persuade as to their rightness. All international tribunals of our times devote their labour also to reason and persuasion in respect of their own judgments; the *meaning* and *extent* of their decisions can only be properly appreciated in the light of their reasoning, — which brings to the fore the ineluctable subjective element of the judges' thinking (paras. 38-39, 41-42, 44 and 46).

51. The ICJ has been faced with this matter in the present Interpretation of Judgment, which it has just delivered, in the case of the *Temple of Preah Vihear*. In my understanding, the reasons which substantiate a resolatory point reached at by an international tribunal are regularly expounded in the *motifs* of its judgment at issue. There would be no sense in attempting to "separate" such *motifs* from the corresponding *dispositif*, and taking into account only this latter. The two go together. Is there any judgment where the operative part stands on its own? Not at all; this latter is regularly supported by the *motifs*. In saying what the Law is (i.e., in exercising its *juris dictio*), an international tribunal is bound to determine the applicable law, and to expound its own understanding of the applicable law and of its application in the *cas d'espèce*. We are here, once again, faced with *reason and persuasion*.

3. The Everlasting Acknowledgment of the Relevance of Sound Legal Reasoning

52. The relevance of sound legal reasoning has been duly acknowledged since ancient times. In effect, the exercise of legal reasoning (i.e., the elaboration of the *motifs/la motivation*) has historical roots which go back, e.g., to ancient Roman law. In his fragments, Ulpian (circa 170-228 A.D.) took *juris-prudencia* (from the verb *providere*) as referring to the *knowledge of what is just and unjust*; in dispensing justice, *jurisprudencia* was understood as teaching how justice was to be realized, besides showing that the procedure had been well followed⁴². His writings altogether, undertaken in the period 211-222 A.D., are believed to have considerably contributed to Justinian's *Digest* (the main volume of his *Corpus Juris Civilis*, 529-534)⁴³, providing not less than a third of its contents.

⁴¹Cf., e.g., L. Cavaré, "Les recours en interprétation et en appréciation de la légalité devant les tribunaux internationaux", 15 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1954) p. 488; E. Zoller, "Observations sur la révision et l'interprétation des sentences arbitrales", 24 *Annuaire français de Droit international* (1978) p. 343; E. Decaux, "L'arrêt du 10.12.1985 de la Cour Internationale de Justice sur la demande en révision et en interprétation de l'arrêt du 24.02.1982 en l'affaire du *Plateau continental*", 31 *Annuaire français de Droit international* (1985) p. 338; P. Dumberry, "Le recours en interprétation des arrêts de la Cour Internationale de Justice et des sentences arbitrales", 13 *Revue québécoise de droit international* (2000) pp. 213 and 220; S. Rosenne, *Interpretation, Revision and Other Recourse from International Judgments and Awards*, Leiden, Nijhoff, 2007, pp. 94-95, 98-100 and 108-111.

⁴²J.-P. Andrieux, *Histoire de la jurisprudence — Les avatars du droit prétorien*, Paris, Vuibert, 2012, pp. 11, 13-14, 19, 23 and 161, and cf. pp. 241, 263, 281 and 284.

⁴³Cf. T. Honoré, *Justinian's Digest: Character and Compilation*, Oxford, Oxford University Press, 2010, pp. 5, 53, 74, 103, 119 and 142.

53. As from Ulpian's teaching, the *Digest* rendered certain maxims widespread, such as "*justitia est constans et perpetua voluntas suum cuique tribuere*" ("justice is the constant and perpetual will to give every one his due"); or else, "*honeste vivere, alterum non laedere, suum cuique tribuere*" ("to live honourably, to harm no one, to give each one his due"). *Jurisprudencia* developed, elaborating on general principles; it started arousing attention, having assumed a certain creative (praetorian) role. Legal reasoning kept on attracting increasing attention in modern times, amidst widespread acknowledgment of its relevance.

54. The elaboration of sound legal reasoning, for its part, sought coherence and harmony, so as to avoid contradictions. It did not amount to a syllogism, nor did it exhaust itself in the simple identification of the applicable norms. It went further than that, encompassing interpretation, and recourse to sources of law (including principles, doctrine, and equity), bearing in mind human values⁴⁴. Prudence played its role, in *juris-prudencia*. In such elaboration of sound legal reasoning, we are faced, once more, with reason and persuasion.

55. One can speak of the object of a judicial decision in two senses, namely: in a strictly procedural sense, it amounts to what has actually been decided (the *dispositif*); and in a material or substantial sense, it encompasses also what formed the matter of the *contentieux*. The judgment itself, in my understanding, encompasses not only the decision reached by the international tribunal (the *dispositif*), but also the reasoning of this latter, the indication of the sources of law it resorts to, the fundamental principles it relies upon, and other considerations that it deems fit to develop (the *motifs*). In effect, to my mind, *motifs* and *dispositif* form an organic, inseparable whole.

56. The issue became object of special attention in the legal doctrine of the XIXth century, which upheld the view that the *dispositif* is to be approached together with the reasoning (the *motifs*) which give support to it. This understanding then prevailed in civil procedural law (in countries of that legal tradition), before being transposed into the international legal procedure. According to an account of one of its exponents,

"According to the well-known teaching of Savigny, the judgment is a sole and inseparable whole; there is, between the foundations and the *dispositif*, a relationship so intimate that ones and the other can never be dismembered if one does not wish to denaturalize the logical and juridical unity of the decision. This was the dominant idea in the last century (...)"⁴⁵.

57. With the passing of time, however, under the influence of legal positivism, a more simplistic view came to prevail, to the effect that only the *dispositif* forms the object of a judicial decision⁴⁶. This argument sought to shift attention onto the terms of a judgment which were binding; it overvalued them, making abstraction of the other parts of the judgment. It was as if the operative part of a judgment could be severed from the other parts of it, and become binding by itself, independently of the whole reasoning developed by the tribunal in its support. It is not surprising that this superficial view became widespread, as it did not require much thinking.

58. Positivists, for example, tend characteristically to be very dogmatic in stating and insisting that the binding effect of a judgment attaches only to its operative part, i.e., its resolutive points, and does not extend to its reasoning. This is a strictly formalistic approach. The *res judicata* is thus brought into the picture, minimizing the reasoning supporting it. This is what, —

⁴⁴Cf. [Various Authors,] *Le raisonnement juridique* (ed. P. Deumier), Paris, Dalloz, 2013, pp. 25, 31, 33, 75, 95-98, 101, 109-110, 240, 246 and 268.

⁴⁵E.J. Couture, *Fundamentos do Direito Processual Civil*, São Paulo, Saraiva, 1946, pp. 354-355; E.J. Couture, *Fundamentos del Derecho Procesal Civil*, 4^a ed., Montevideo/Buenos Aires, Edit. B de F, 2002, p. 347 [my own translation].

⁴⁶E.J. Couture, *Fundamentos do Direito...*, *op. cit. supra* n. (45), pp. 355 and 358; E.J. Couture, *Fundamentos del Derecho...*, *op. cit. supra* n. (45), pp. 348 and 350.

to recall but one illustration of this outlook, — Judge Anzilotti upheld in his Dissenting Opinion in the aforementioned case of the *Chorzów Factory — Interpretation of Judgments ns. 7 and 8* (1927); yet, as a learned jurist, Dionisio Anzilotti, after so asserting, conceded:

“When I say that only the terms of a judgment are binding, I do not mean that only what is actually written in the operative part constitutes the Court’s decision. On the contrary, it is certain that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part and above all to ascertain the *causa petendi*” (p. 24, para. 2).

59. The reasoning or the *motifs* of a judgment can be freely resorted to, in the interpretation of any point or passage of the *dispositif* which requires clarification; in fact, it will be hardly possible to determine the exact scope of a *dispositif* without taking into account the reasoning (the *motifs*). They may indeed appear inseparable from each other, and there are even the *dispositifs* that deem it fit to make express cross-references to corresponding paragraphs of the *motifs*⁴⁷. In the present Interpretation of Judgment, for example, resolutive point n. 2 of the *dispositif* expressly refers to paragraph 98 of the *motifs*.

60. Legal reasoning is not simply an intellectual output (of logic), as the search for justice is also moved by experience and social equity. As already indicated, the function of the judge is not reduced simply to produce syllogisms, far from it: jurisprudential construction goes further than that, it resorts to all available sources of law, it has a latitude of choice, it matches the facts with the applicable norms, and it tells what the Law is, in the exercise of *juris dictio*. Legal reasoning counts on the subjective element of the judge’s thinking.

61. In this respect, over half a century ago Piero Calamandrei used to recall that *sententia* derives from *sentiment*, as indicated by etymology. He further warned that the subjects of law (*sujets de droit*) are not transformed into a *dossier* (as hinted by bureaucratic indifference), but remain “living persons”. In legal reasoning, electronic machines will never replace human beings. The requisite of providing the *motifs* (*la motivation*) appears as the “rationalization of the sense of justice”⁴⁸. The reasoning (*motifs*) of a judgment is thus important, besides being pedagogical: it “serves to demonstrate that the judgment is just, and why it is just”⁴⁹. *Sententia* emanates from human conscience, moved by the sense of justice.

IX. CONCLUDING OBSERVATIONS

62. I have now come to my concluding observations. It is not my intention to reiterate here the considerations I developed, in my Separate Opinion in the ICJ’s Order of Provisional Measures of Protection, of 18.07.2011, on the perennial issue of *time and Law*⁵⁰. In the present Separate Opinion, I now limit myself to refer to my reflections developed therein, with only one additional point. We all live and work *within time*, and the acceptance of the passing of time is one of the greatest challenges of human existence. In the present Interpretation of Judgment, the Court addressed with timidity (para. 75) the effects of facts subsequent to the original judgment upon the requested Interpretation of Judgment. This requires, in my perception, a clarification.

⁴⁷E.J. Couture, *Fundamentos do Direito...*, op. cit. supra n. (45), pp. 357 and 360; E.J. Couture, *Fundamentos del Derecho...*, op. cit. supra n. (45), pp. 349 and 351.

⁴⁸P. Calamandrei, *Proceso y Democracia*, Buenos Aires, Edic. Jurídicas Europa-América, 1960, pp. 67, 80-81 and 125.

⁴⁹*Ibid.*, pp. 116-117, and cf. p. 81.

⁵⁰I have also dwelt upon this issue in my Dissenting Opinion (paras. 46-64 and 74-77) in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Order of 28.05.2009), followed by my Separate Opinion (paras. 145-157) in the same case (merits, Judgment of 20.07.2012).

63. In its present Interpretation of Judgment in the case of the *Temple of Preah Vihear*, the ICJ has repeatedly taken note of the facts, subsequent to its original Judgment of 1962 in the *cas d'espèce*, which have been brought to its attention by the contending parties⁵¹. And it could not have done otherwise. Having done so, it undertook the exercise of providing the requested Interpretation of the original 1962 Judgment, focusing on its *dispositif* together with the corresponding *motifs*. It stated that, in determining the meaning and scope of the resolutive points (or the *dispositif*) of the original 1962 Judgment, it had regard to the corresponding *motifs*, to the extent that its own pertinent reasoning shed light on the *dispositif* (para. 68). It then clarified the meaning of the “vicinity” of the Temple of Preah Vihear (paras. 97-98).

64. Already in its Provisional Measures of Protection indicated in its Order of 18.07.2011 in the present case of the *Temple of Preah Vihear*, the Court, — as I pointed out in my previous Separate Opinion, — *brought together territory, people and human values*, well in keeping with the *jus gentium* of our times (paras. 100, 114-115 and 117). And today, 11.11.2013, it does so again in the present Interpretation of Judgment, wherein it has deemed it fit to assert that

“(…) As is clear from the record of both the present proceedings and those of 1959-1962, the Temple of Preah Vihear is a site of religious and cultural significance for the peoples of the region and is now listed by UNESCO as a world heritage site (...). In this respect, the Court recalls that under Article 6 of the [1972] World Heritage Convention, to which both States are parties, Cambodia and Thailand must co-operate between themselves and with the international community in the protection of the site as a world heritage. In addition, each State is under an obligation not to ‘take any deliberate measures which might damage directly or indirectly’ such heritage” (para. 106)

65. In a proper inter-temporal dimension, the Court, in my perception, has thus endorsed the on-going process of *humanization* of international law, — to which I have been endeavouring to contribute, successively within two distinct international jurisdictions, since the mid-nineties⁵². A parallel between the Judgment of 1962 and the present Interpretation of Judgment of 2013 in the case of the *Temple of Preah Vihear* gives clear testimony of that. By giving its due to the preservation of world cultural heritage, parallel to the safeguard of territorial sovereignty, the Court is contributing to the avoidance of a *spiritual damage* (cf. paras. 32-33, *supra*).

66. It does so at the same time that it draws attention to the relevance of *general principles of international law*, such as of prohibition of use or threat of force and of peaceful settlement of disputes (paras. 38-39, *supra*). The necessary attention to those principles brings us closer to the domain of higher *human values*⁵³, shared by the international community as a whole. It is, ultimately, those principles that inform and conform the applicable norms. Without them, there is ultimately no legal system at all; hence their utmost importance, at both international and domestic levels.

⁵¹Cf., to this effect, paragraphs 25, 39-40, 43-44 and 106 of the present Interpretation of Judgment.

⁵²For an account of my endeavours in this respect, in the international case-law, from 1997-1998 onwards, cf. A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Edit. Ad-Hoc, 2013, pp. 163-185; and cf., earlier on, e.g., A.A. Cançado Trindade, “A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado”, 6/7 *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro* (1998-1999) pp. 425-434; A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 3-409.

⁵³I have further dwelt upon the importance of fundamental *human values* in my Dissenting Opinion (paras. 32-40) in the case of the *Jurisdictional Immunities of the State* (Judgment of 03.02.2012).

67. After all, it is the fundamental principles that confer cohesion, coherence and legitimacy, and the ineluctable axiological dimension, to every legal system. In effect, general principles permeate the whole international legal order; they conform their *substratum*, being consubstantial to it. They give expression to the idea of an *objective justice*, above the will of individual States. They indicate, at last, the *status conscientiae* reached by the international community as a whole.

(Signed) Antônio Augusto CANÇADO TRINDADE.
