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## Cambodia v. Thailand: A Case Study on the Use of Provisional Measures to Protect Human Rights in International Border Disputes

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# CAMBODIA V. THAILAND: A CASE STUDY ON THE USE OF PROVISIONAL MEASURES TO PROTECT HUMAN RIGHTS IN INTERNATIONAL BORDER DISPUTES

## INTRODUCTION

The Temple of Preah Vihear (“Temple”) was constructed during the reign of the Khmer Empire<sup>1</sup> as a dedication to Shiva, the Hindu god of destruction.<sup>2</sup> Internationally recognized for its architectural complexity, stone ornamentation, and religious value as a modern day place of pilgrimage, the Temple holds sacred value to local residents and tourists alike.<sup>3</sup> However, due to its location on a highly contested portion of the Thai-Cambodian border, the Temple sits vulnerably at the center of a longstanding territorial dispute.<sup>4</sup> Despite a 1962 ruling

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1. The Khmer Empire ruled over present day Cambodia as well as parts of Laos, Thailand, and Vietnam from the 9<sup>th</sup> – 15<sup>th</sup> century C.E. *Khmer Empire*, NEW WORLD ENCYCLOPÆDIA, [http://www.newworldencyclopedia.org/entry/Khmer\\_Empire](http://www.newworldencyclopedia.org/entry/Khmer_Empire) (last visited Sept. 23, 2012).

2. *Temple of Preah Vihear*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION: WORLD HERITAGE CONVENTION, *available at* <http://whc.unesco.org/en/list/1224> (last visited Sept. 28, 2012). King Yasovarman I founded the Temple in the 9<sup>th</sup> century C.E., and its construction was carried out over the next 300 years by successor kings. The remote location atop a 525-meter cliff provides exquisite views and has allowed the Temple to remain largely intact, despite being a source of conflict and land mines during the Cambodian Civil War and the invasion of the Khmer Rouge from 1975-1998. The Temple remains a source of national pride for both Cambodia and Thailand due to its historical, cultural, and religious significance. *Id.*; *Khmer Empire*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/Khmer\\_Empire](http://www.newworldencyclopedia.org/entry/Khmer_Empire) (last visited Sept. 23, 2012).

3. *Temple of Preah Vihear*, *supra* note 2.

4. The Temple is located on a plateau in the eastern sector of the Dangrek mountain range, which constitutes the border between Thailand and Cambodia. *Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, 1962 I.C.J. 6, 15 (June 15) [hereinafter *Cambodia v. Thai.*, Judgment]. “Questions of sovereignty are complicated by the Temple’s location at the top of a 1,640-foot cliff. It is almost inaccessible from Cambodia, but it is reachable through Thailand by a comfortable drive over a paved road.” Seth Mydans, *Thai-Cambodian Temple Standoff Continues*, N.Y. TIMES (July 21, 2008), <http://www.nytimes.com/2008/07/21/world/asia/21cambodia.html#>.

by the International Court of Justice (“Court”) that the Temple “is situated in territory under the sovereignty of Cambodia” and that Thailand is obligated to withdraw any military forces stationed “at the Temple, or in its vicinity on Cambodian territory,” questions of territorial sovereignty remain unresolved and armed conflicts surrounding the Temple have resulted in fatalities, injuries, and evacuations of local civilians.<sup>5</sup>

The most recent outbreak of armed violence occurred after Cambodia nominated the Temple as a UNESCO<sup>6</sup> World Heritage site.<sup>7</sup> Thailand responded to the nomination in two ways, first by deploying troops to occupy the area around the Temple and then by publicly asserting ownership over 4.6 square kilometers of land adjacent to the Temple.<sup>8</sup> Although Thailand concedes that the Temple is situated in Cambodian territory, Thailand asserts that the 1962 judgment did not effectively delineate the entire frontier line<sup>9</sup> and that its obligation to withdraw military forces from the Temple was not a permanent order and therefore, as it applied only to the 1962 altercation, is no longer in effect.<sup>10</sup> On April 28, 2011, Cambodia brought the case before the Court in hopes of bringing peace to the conflict-

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5. *Cambodia v. Thai.*, Judgment, 1962 I.C.J. 6, ¶ 53; Mydans, *supra* note 4.

6. The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) is a specialized agency of the United Nations that encourages sustainable development and the promotion of peace. UNESCO seeks to “encourage identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity.” This is embodied in the Convention Concerning the Protection of the World Cultural and Natural Heritage, an international treaty adopted by UNESCO in 1972. *About World Heritage*, UNESCO WORLD HERITAGE CENTER (Aug. 10, 2012, 1:33 PM), <http://whc.unesco.org/en/about/>.

7. Interpretation of Temple of Preah Vihear (*Cambodia v. Thai.*), Application Instituting Proceedings, ¶¶ 12–14 (Apr. 28, 2011), *available at* [www.icj-cij.org/docket/files/151/16470.pdf](http://www.icj-cij.org/docket/files/151/16470.pdf) [hereinafter *Cambodia v. Thai*, Application Instituting Proceedings].

8. *Id.* ¶ 14.

9. “A ‘boundary’ denotes a line whereas a ‘frontier’ is more properly a region or zone having width as well as length and, therefore, merely indicates, without fixing the exact limit, where one State ends and another begins.” A. O. CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW* 11 (1967).

10. Interpretation of Temple of Preah Vihear (*Cambodia v. Thai.*), Provisional Measures Order, ¶¶ 29–30 (July 18, 2011), *available at* <http://www.icj-cij.org/docket/files/151/16564.pdf> [hereinafter *Cambodia v. Thai*, Provisional Measures Order].

ed region and of finally resolving the longstanding border dispute.<sup>11</sup>

Though consent by both parties is generally required to invoke the Court's jurisdiction, Article 60 of the Statute of the International Court of Justice ("Statute") authorizes parties to unilaterally seek clarification of prior judgments.<sup>12</sup> Accordingly, despite Thailand's jurisdictional objections,<sup>13</sup> Cambodia requested an interpretation of the 1962 Judgment to clarify whether "Thailand's obligation to withdraw its military forces goes beyond a withdrawal from only the precincts of the Temple itself and extends to the area of the Temple in general" and whether the obligation is "general and continuing."<sup>14</sup> Due to the outbreak of armed conflict near the Temple, Cambodia also requested the immediate withdrawal of all Thai troops from the area as a provisional measure.<sup>15</sup> Under Article 41 of the Statute, the Court may issue provisional measures to preserve the disputed rights and prevent incidents likely to aggravate or extend the conflict while the judgment is pending.<sup>16</sup>

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11. *Id.* at 2, 7–8; see also *Thai-Cambodia Clashes 'Damage Preah Vihear Temple'*, BBC NEWS (Feb. 6, 2011), <http://www.bbc.uk/news/world-asia-pacific-12377626>.

12. Statute of the International Court of Justice [hereinafter Statute of the I.C.J.] art. 60, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

13. In the present case, Thailand argued that there was no dispute between the parties under Article 60, and therefore the Court had no basis for jurisdiction. *Cambodia v. Thai*, Provisional Measures Order, ¶ 31. Thailand also objected to the Court's jurisdiction in 1959 on grounds that it had not accepted compulsory jurisdiction of the Court under Article 36. Thailand argued that the Siamese declaration of September 20, 1929, accepting compulsory jurisdiction of the Court, lapsed with the dissolution of the PCIJ and could not be renewed by the 1950 declaration. However, the Court rejected Thailand's arguments on grounds that the 1950 declaration revealed a clear intention to recognize the compulsory jurisdiction of the present court, since there was no other Court to which it could have related. See generally *Temple of Preah Vihear (Cambodia v. Thai)*, Preliminary Objections Judgment, 1961 I.C.J. 17 (May 26) [hereinafter *Cambodia v. Thai*, Preliminary Objections Judgment].

14. *Cambodia v. Thai*, Application Instituting Proceedings, ¶¶ 36–37.

15. Interpretation of Temple of Preah Vihear, (*Cambodia v. Thai*), Request for Provisional Measures, ¶ 9 (Apr. 28, 2011), available at [www.icj-cij.org/docket/files/151/16472.pdf](http://www.icj-cij.org/docket/files/151/16472.pdf) [hereinafter *Cambodia v. Thai*, Request for Provisional Measures].

16. Statute of the I.C.J. art. 41, para.1, *supra* note 12. The Court has held that "[t]he context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions be-

On July 18, 2011, the Court issued an order (“July 18 Order”) granting Cambodia’s request for provisional measures and directing both countries, *inter alia*, to (1) withdraw all military personnel from a judicially devised provisional demilitarized zone (“PDZ”) surrounding the Temple and (2) to refrain from any armed activity directed at the zone.<sup>17</sup> Neither party complied with the order of troop withdrawal following the execution of the July 18 Order and troops remained stationed at the Temple despite the binding judgment.<sup>18</sup> In creating the PDZ—to prevent further harm to persons and property in the area pending its judgment on the merits—the Court broke with its precedent of confining its provisional measures to only those rights directly at issue in the primary dispute, here the right to territorial sovereignty.<sup>19</sup>

By extending protection to civilians in the area of the Temple, the Court reinforced its recent liberalization of the power to issue provisional measures to protect human rights in pending border disputes.<sup>20</sup> Although this is a welcome departure from longstanding jurisprudence, the July 18 Order also strayed from precedent in other, alarming ways. First, the PDZ includes the Temple, which the Court has previously ruled belongs to Cambodia,<sup>21</sup> as well as other undisputed territories not

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cause the respective rights of the parties to a dispute before the Court are not preserved.” LaGrand (Ger. v. U.S.) Judgment, 2001 I.C.J. 466, ¶ 102 (June 27) [hereinafter Ger. v. U.S., Judgment].

17. Cambodia v. Thai., Provisional Measures Order, ¶ 69(B)(1). The Court provided coordinates of the PDZ in paragraph 62 of the Order as well as a sketch-map illustrating the demilitarized zone in relation to the two States. *Id.* at 16-17.

18. *PM Wants Parliament to Debate Troop Move*, BANGKOK POST (Aug. 18, 2012), available at <http://www.bangkokpost.com/news/local/307800/pm-wants-parliament-to-debate-troop-move>.

19. See *Legal Status of the South-Eastern Territory of Greenland* (Nor. v. Den.), 1932 P.C.I.J. (ser. A/B) No. 48, at 285 (Aug. 3) [hereinafter Nor. v. Den.].

20. *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Provisional Measures Order, ¶ 85 (Mar. 8, 2011), available at <http://www.icj-cij.org/docket/files/150/16324.pdf> [hereinafter Costa Rica v. Nicar., Provisional Measures Order]; *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Provisional Measures Order, 1996 I.C.J. 13, ¶ 48 (Mar. 15); *Frontier Dispute* (Burk. Faso/Mali), Provisional Measures Order, 1986 I.C.J. 3, ¶ 11 (Jan. 10).

21. Cambodia v. Thai., Judgment, 1962 I.C.J. 6 (June 15).

brought before the Court in the main proceeding.<sup>22</sup> Second, the measure greatly diverges from prior provisional measures involving territorial disputes without providing legitimate justification for eschewing precedent.<sup>23</sup>

Despite the Court's laudable intentions to protect the Temple and civilian population, its creation of the PDZ exceeds the Court's jurisdictional authority and violates principles of territorial sovereignty that are inherent in international law. This Note will explore the Court's expanding power to issue provisional measures and the question of whether the short-term benefits of preventing the risk of irreparable harm outweigh the long term costs of deterring states' willingness to consent to the Court's jurisdiction.<sup>24</sup> Part I of this Note will discuss the powers of the International Court of Justice generally and its evolving jurisprudence to issue provisional measures for the protection of human rights. Part II will describe the origins of the Temple dispute and the contentious provisional measure issued by the Court in the July 18 Order. Part III will discuss the importance of maintaining judicial constraints and will suggest alternative measures available to protect parties' rights in the future while staying within the bounds of the Court's jurisdiction and respecting notions of territorial sovereignty.

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22. Cambodia v. Thai., Provisional Measures Order, ¶ 69(B)(1); Cambodia v. Thai., Provisional Measures Order, at 1 (July 18, 2011) (dissenting opinion of Judge Xue), *available at* <http://www.icj-cij.org/docket/files/151/16574.pdf>; Cambodia v. Thai., Provisional Measures Order, ¶ 7 (dissenting opinion of President Owada), *available at* <http://www.icj-cij.org/docket/files/151/16566.pdf>; Cambodia v. Thai., Provisional Measures Order, ¶ 2 (dissenting opinion of Judge Donoghue), *available at* <http://www.icj-cij.org/docket/files/151/16576.pdf>.

23. Cambodia v. Thai., Provisional Measures Order, pp. 1–2 (dissenting opinion of Judge Xue); Cambodia v. Thai., Provisional Measures Order, ¶ 9 (dissenting opinion of President Owada); Cambodia v. Thai., Provisional Measures Order, ¶ 4 (dissenting opinion of Judge Donoghue).

24. The jurisdiction of the International Court of Justice is consent-based and therefore, the Court may only adjudicate disputes when both States have recognized its jurisdiction. *Contentious Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, *available at* <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1>.

## I. BACKGROUND

A. *The Role of the International Court of Justice*

Judicial settlement of international disputes evolved from the use of international mediation and arbitration at the beginning of the twentieth century. In 1899 and 1907, two Hague Conferences led to the adoption of the Convention on the Pacific Settlement of International Disputes and the establishment of a Permanent Court of Arbitration.<sup>25</sup> Shortly thereafter, in 1921, the League of Nations established the Permanent Court of International Justice ("PCIJ") to provide a full-time judicial system to resolve international disputes.<sup>26</sup> However, the outbreak of World War II led to the demise of the League of Nations and all of the features of the PCIJ were transferred to the International Court of Justice in 1946, including the governing Statute of the Court, which is annexed to the U.N. Charter and to which all members of the United Nations are parties.<sup>27</sup>

As successor to the PCIJ, the International Court of Justice adopted many of its traditions as well as precedent. The Court currently resides in the Peace Palace in The Hague and serves as the "principal judicial organ for the United Nations."<sup>28</sup> Jurisdiction is limited to civil disputes between states and requires consent *ad litem*.<sup>29</sup> Accordingly, a state may only be compelled to settle an international dispute before the Court after specifically consenting to jurisdiction for that particular dispute.<sup>30</sup> Consent may be achieved in three ways: (1) the state may accept general compulsory jurisdiction of the Court pursuant to Article 36(2) of the Statute;<sup>31</sup> (2) the state may enter into

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25. *History*, INTERNATIONAL COURT OF JUSTICE, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=1>.

26. *Id.*

27. *Id.*

28. *Id.*

29. Article 34(1) of the Statute provides that "[o]nly states may be parties in cases before the Court." Statute of the I.C.J., art. 34(1), *supra* note 12. *Contentious Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, *supra* note 24. *Ad litem* is a Latin term meaning "for the suit." BLACK'S LAW DICTIONARY 49 (9<sup>th</sup> ed. 2009).

30. *Contentious Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, *supra* note 24.

31. Article 36(2) of the Statute provides "[t]he States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the

a special agreement with the other disputant to refer the matter to the Court;<sup>32</sup> or (3) the state may be a party to a treaty or international agreement which stipulates that any dispute will be referred to the Court.<sup>33</sup> Cases brought to the Court may be argued before all of the Court's fifteen judges—elected for nine-year terms by the U.N. General Assembly and the Security Council<sup>34</sup>—however, upon mutual agreement, parties may opt for a smaller chamber of three or more judges to adjudicate disputes.<sup>35</sup>

Under Article 60 of the Statute, a judgment by the Court is “final and without appeal.”<sup>36</sup> However, Article 60 further provides that “[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”<sup>37</sup> The power to interpret judgments is an important

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same obligation.” Sixty-six states have recognized the Court's jurisdiction as compulsory through such declarations. However, these declarations may also include certain reservations that will prevent the Court from having jurisdiction under specific circumstances. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, available at <http://www.icj-cij.org/jurisdiction/index>. Currently, neither Cambodia nor Thailand has a declaration in force recognizing the Court's jurisdiction as compulsory. *Id.*

32. Article 36(1) of the Statute provides that, “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.” Statute of the I.C.J., art. 36(1), *supra* note 12.

33. *Id.* In such cases the matter is generally brought before the Court in a written application instituting proceedings. The application is a unilateral document which indicates the subject of the dispute, the parties, and the specific provision which is the basis of jurisdiction. *Basis of the Court's Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, available at <http://www.icj-jic.org/jurisdiction/index.php>.

34. Statute of the I.C.J., art. 2, *supra* note 12; Statute of the I.C.J., art. 13, *supra* note 12; *Members of the Court*, INTERNATIONAL COURT OF JUSTICE, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=2>. Under Article 25 of the Statute, a quorum of nine judges is sufficient to constitute the Court. Statute of the I.C.J., art. 25(3), *supra* note 12.

35. *Chambers and Committees*, INTERNATIONAL COURT OF JUSTICE, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=4>.

36. Statute of the I.C.J., art. 60, *supra* note 12.

37. *Id.* This provision is supplemented by Article 98 of the Rules of the Court, which provide, “In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation.” Rules of the Court, art. 98(1), I.C.J. ACTS & DOCS 153. In the *Interpretation of Land and Maritime Boundary*, Judge Weeramentary noted,



mechanism to ensure international peace and security when countries dispute the application of the Court's judgment, which may otherwise result in a lack of compliance and further aggravation of the resounding conflict.<sup>38</sup> The only requirement for jurisdiction in an interpretation proceeding is that there be a "dispute as to the meaning or scope" of a prior judgment.<sup>39</sup> Consent by both parties is not required because it is "deemed to have already been given by virtue of consent to refer to the main dispute to the Court."<sup>40</sup> This aspect may become problematic if the judges construe their interpretive power broadly because it may deter countries from consenting to the Court's jurisdiction in the first place.<sup>41</sup> Moreover, the Court has formally recognized that there is no time limit governing the Court's ability to interpret a prior judgment, meaning the Court has the power to interpret a judgment even fifty years after its passage.<sup>42</sup>

Due to the unique nature of Article 60 proceedings, the Court has devised three important limitations to help preserve the rights of the parties and respect the concept of finality in judgments. First, "any request for interpretation must relate to the operative part of the judgment and cannot concern the reasons

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A judgment, however well crafted, could well embody phraseology which, in the context of a given set of circumstances, may require some clarification. It is one of those incidents of litigation which the judicial experience of ages has shown may arise from time to time, and it is precisely for this reason that Article 60 ... made such clear provision for the right of interpretation.

Interpretation of Land and Maritime Boundary (Nigeria v. Cameroon), Judgment, 1999 I.C.J. 31, at 47 (Mar. 25) (dissenting opinion of Vice-President Weeramantry).

38. KAIYAN HOMI KAIKOBAD, INTERPRETATION AND REVISION OF INTERNATIONAL BOUNDARY DECISIONS 326 (2007).

39. Cambodia v. Thai., Provisional Measures Order, ¶ 21.

40. KAIKOBAD, *supra* note 38, at 104.

41. Cambodia v. Thai., Provisional Measures Order, ¶ 28 (dissenting opinion of Judge Donoghue).

42. Cambodia v. Thai., Provisional Measures Order ¶ 37. "Whereas it should, at the outset, be made clear that Article 60 of the Statute does not impose any time-limit on requests for interpretation." *Id.* In contrast, there is a time limit for revision of a judgment under Article 61 of the Statute of the Court. The application for revision must be made within six months from the discovery of a new fact and within ten years from the delivery of the judgment. Statute of the I.C.J., art. 61, *supra* note 12.

for the judgment except in so far as these are inseparable from the operative part.”<sup>43</sup> Second, “the authority to interpret a judgment under Article 60 is not a power to enforce a judgment or to oversee its implementation.”<sup>44</sup> Finally, the Court’s “[i]nterpretation can in no way go beyond the limits of the Judgment.”<sup>45</sup> In *Interpretation of the Preliminary Judgment in the Cameroon-Nigeria Land and Maritime Boundary*, dissenting Judge Weeramantry noted, “[Parties] may not, for example, under the guise of an application under Article 60, attempt to seek revision of a judgment or reopen a matter which is already *res judicata*.”<sup>46</sup> Given these powerful and intentional limitations, it is important that the Court take them into account when ordering a provisional measure pursuant to Article 60.<sup>47</sup>

In any case before the Court, the judges have the ability to issue binding provisional measures pending a judgment on the merits.<sup>48</sup> These interim measures have proven to be an effective

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43. *Interpretation of Land and Maritime Boundary between Cameroon and Nigeria (Nigeria v. Cameroon)*, Judgment, 1999 I.C.J. 31, ¶ 10 (Mar. 25) [hereinafter *Nigeria v. Cameroon*, Judgment]. See also *Interpretation of Avena and Other Mexican Nationals (Mex. v. U.S.)*, Provisional Measures, 2008 I.C.J. 311, ¶ 47 (July 16).

44. *Cambodia v. Thai.*, Provisional Measures Order, ¶ 8 (July 18, 2011) (dissenting opinion of Judge Donoghue). The Court has noted that Article 60 “does not allow [the Court] to consider possible violations of the Judgment which it is called upon to interpret.” *Interpretation of Land and Maritime Boundary (Nigeria v. Cameroon)*, Judgment, 1999 I.C.J. 31, at 43 (Mar. 25) (dissenting opinion of Vice-President Weeramantry).

45. *Interpretation Asylum Case (Colombia v. Peru)*, Judgment, I.C.J. Reports 1950, p. 403.

46. *Nigeria v. Cameroon*, Judgment, 1999 I.C.J. 31, at 43 (dissenting opinion of Vice-President Weeramantry). *Res judicata* is a Latin term meaning “a thing adjudicated.” The phrase refers to an issue that has been definitively settled by judicial decision and is therefore barred from subsequent adjudication. BLACK’S LAW DICTIONARY 1425 (9<sup>th</sup> ed. 2009).

47. The Court has only issued provisional measures under Article 60 jurisdiction in one other case. See *Avena & Other Mexican Nat’ls. (Mex. v. U.S.)*, Provisional Measures Order, 2008 I.C.J. 311, ¶ 8 (July 16) [hereinafter *Mex. v. U.S.*, Provisional Measures Order]. In that case, however, five judges dissented to the order of provisional measures for lack of jurisdiction under Article 60. In a joint dissent, Judges Owada, Tomka and Keith argued, “Humanitarian considerations which clearly underlie the decision cannot override the legal requirements of the Statute of the Court.” *Id.* at 341. Judge Buerghenthal further criticized the order for setting a troubling precedent for cases involving Article 60 jurisdiction. *Id.* at 334.

48. Statute of the I.C.J., art. 41, *supra* note 12.

preventative tool to ensure that one party to a case will abstain from actions that could adversely affect the rights of the other while the judicial proceedings are in progress.<sup>49</sup> The Court has broad discretionary power under Article 41 of the Statute, which provides “[t]he Court shall have the power to indicate, if it considers that circumstances so require, *any* provisional measures which ought to be taken to preserve the respective rights of either party.”<sup>50</sup> Furthermore, Article 75 of the Rules of Court states, “[t]he Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.”<sup>51</sup> The language of these provisions demonstrates the Court’s considerable flexibility in deciding both when a provisional measure is necessary and if so, the manner in which it should be ordered.<sup>52</sup>

In issuing provisional measures, the Court requires three conditions-*precedent*: (1) the asserted rights must be plausible; (2) there must be a link between the alleged rights and the provisional measures sought to protect them; and (3) there must be an imminent risk of irreparable prejudice to the disputed rights.<sup>53</sup> These conditions-*precedent* are particularly im-

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49. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Provisional Measures Order, 1993 I.C.J. 3, ¶ 46 (Apr. 8) [hereinafter *Bosn. & Herz. V. Serb. & Montenegro*, Provisional Measures Order]; Armed Activities on the Territory of the Congo (*Dem. Rep. Congo v. Uganda*), Provisional Measures Order, 2000 I.C.J. 111, ¶ 43 (July 1) [hereinafter *Dem. Rep. Congo v. Uganda*, Provisional Measures Order]; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Geor. v. Russ.*), Provisional Measures Order, 2008 I.C.J. 353, ¶ 145 (Oct. 15) [hereinafter *Geor. v. Russ.*, Provisional Measures Order].

50. Statute of the I.C.J., art. 41(1), *supra* note 12 (emphasis added).

51. Rules of the Court, art. 75(2), *supra* note 37. *See also* *Bosn. & Herz. v. Serb. & Montenegro*, Provisional Measures Order, 1993 I.C.J. 3, ¶ 46; *Dem. Rep. Congo v. Uganda*, Provisional Measures Order, 2000 I.C.J. 111, ¶ 43; *Geor. v. Russ.*, Provisional Measures Order, 2008 I.C.J. 353, ¶ 145.

52. *See* Statute of the I.C.J., art. 41(1), *supra* note 12; Rules of the Court, art. 75(2), *supra* note 37.

53. *Cambodia v. Thai.*, Provisional Measures Order, pp. 9-12. *See also* *Costa Rica v. Nicar.*, Provisional Measures Order, ¶¶ 53, 64; *Avena & Other Mexican Nat’ls. (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, ¶ 58 (Mar. 31) [hereinafter *Mex. v. U.S., Judgment*]. The Court must satisfy these three conditions any time it issues an order of provisional measures, even if it is

portant due to the nature of Article 41 proceedings. The short time frame renders the Court unable to consider the detailed evidence or arguments, which are otherwise required for a judgment on the merits, and the Court is only vested with *prima facie* jurisdiction.<sup>54</sup> Accordingly, the conditions-precedent must be fully considered and clearly met in order to ensure that the Court does not overstep its authority to issue binding orders.

*B. The Use of Provisional Measures to Protect Human Rights*

The power to issue interim measures to protect persons from imminent danger is arguably one of the most powerful mechanisms by which an international tribunal can address human rights abuses.<sup>55</sup> That power is expanding even more as courts are construing it more liberally in pending border disputes.<sup>56</sup> This growing trend is a departure from the PCIJ's narrow interpretation of Article 41, which denied provisional measures for the protection of human rights where those rights were ancillary to the subject matter of the dispute.<sup>57</sup> For example, in 1932, the Norwegian government instituted proceedings in the PCIJ against the Danish government to establish the legal va-

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done *proprio motu* (by the Court's own initiative) pursuant to Article 75 of the Rules of the Court.

54. Rules of the Court, art. 74(1), *supra* note 37; *Costa Rica v. Nicar.*, Provisional Measures Order, ¶ 2 (Declaration of Judge Greenwood).

55. SHABTAI ROSENNE, *PROVISIONAL MEASURES IN INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 225 (2005). Rosenne notes,

The Court's work in the sphere of provisional measures of protection, as it has developed from its cautious beginnings at the start of the existence of the Permanent Court in 1927 is probably the most significant of the Court's activities for the settlement of international disputes and the maintenance of international peace and security, the prime objective of the United Nations of which the Court is a principal organ.

*Id.*

56. *Costa Rica v. Nicar.*, Provisional Measures Order, ¶ 85; *Cameroon v. Nigeria*, Provisional Measures Order, 1996 I.C.J. 13, ¶ 48; *Frontier Dispute (Burk. Faso/Mali)*, Provisional Measures Order, 1986, I.C.J. 3, ¶ 11 (Jan. 10).

57. *See Nor. v. Den.*, 1932 P.C.I.J. (ser. A/B) No. 48, at 285; *Factory at Chorzow (F.R.G. v. Pol.)* 1927 P.C.I.J. (ser. A) No. 12 (Nov. 21); *Polish Agrarian Reform & German Minority (F.R.G. v. Pol.)*, 1933 P.C.I.J. (ser. A/B) No. 58 (July 29).

lidity of a 1932 Norwegian Royal Decree claiming sovereignty over the Southeastern territory of Greenland.<sup>58</sup> The Norwegian government requested an order of provisional measures requiring the Danish government "to abstain in the said territory from any coercive measure directed against Norwegian nationals."<sup>59</sup> However, the PCIJ dismissed Norway's request on grounds that the provisional measure requested would not "affect the existence or value of the sovereign rights claimed by Norway over the territory in question," which, the Court held, were the only rights the Court could take into account in issuing a provisional measure.<sup>60</sup>

The International Court of Justice has since departed from this strict interpretation and has demonstrated a more functional approach in the issuance of provisional measures.<sup>61</sup> Former ICJ President Rosalyn Higgins has noted:

The requirements for the indication of provisional measures have evolved over the years. Although these are now well established, their scope and application in particular circumstances continue to evolve. At the same time, the evolving jurisprudence on provisional measures shows a growing tendency to recognize the human realities behind disputes of states.<sup>62</sup>

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58. *Id.* at 278.

59. *Id.*

60. *Id.* at 285.

61. Prior to 1986, the International Court of Justice followed the PCIJ's jurisprudence in denying provisional measures when requested to protect rights not directly at issue in the main proceeding. *See Interhandel (Switz. v. U.S.) Provisional Measures Order*, 1957 I.C.J. 105 (Oct. 24); *Aegean Sea Continental Shelf (Greece v. Turk.) Provisional Measures Order*, 1976 I.C.J. 3 (Sept. 11). However, as Rosenne notes, "During the last twenty or so years, requests for provisional measures have gone beyond measures required to protect the rights which the requesting party is claiming." Rosenne, *supra* note 55. *See Costa Rica v. Nicar.*, Provisional Measures Order, ¶ 85; *Cameroon v. Nigeria*, Provisional Measures Order, 1996 I.C.J. 13, ¶ 48; *Frontier Dispute (Burk. Faso/Mali)*, Provisional Measures Order, 1986, I.C.J. 3, ¶ 11 (Jan. 10) [hereinafter *Burk. Faso/Mali*, Provisional Measures Order].

62. Rosalyn Higgins, *Interim Measures for the Protection of Human Rights*, 36 *Colum. J. Transnat'l L.* 91, 108 (1997). Higgins further noted,

The Burkina Faso/Mali Order and the Cameroon/Nigeria Order, taken together, go beyond the series of cases in which provisional measures that protect human life were indicated because the dispute in question was exactly about such rights . . . Taken together, they

The jurisprudential trend toward more far reaching orders in cases involving armed conflict is consistent with principles in the U.N. Charter and human rights law.<sup>63</sup> However, this liberal trend does not grant the Court unfettered discretion to disregard concepts of state sovereignty and territorial integrity, thereby compromising the legitimacy of the Court.<sup>64</sup> The Court must respect the procedural mechanisms in place and abide by accepted principles of international law in order to maintain an effective presence in international affairs.

### *C. Legal Precedent*

There have been three prior cases in which the Court has ordered two parties to disengage their respective military forces as a means to avoid violent border conflicts pending a judgment on the merits.<sup>65</sup> However, in none of the three did the Court go so far as to order the withdrawal of military troops from territories that “indisputably belong to the sovereignty of one or the other of the parties.”<sup>66</sup> The Court has previously ordered the parties to withdraw only from the areas of sovereignty that were being contested and which were the subject of the legal dispute.<sup>67</sup> Furthermore, in prior provisional measures, the Court has generally refrained from defining the specific terms

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would seem effectively to overrule the determination by the Permanent Court of International Justice in the Eastern Greenland case that no measures will be indicated to afford protection to persons if that goes beyond the subject matter of the dispute.

*Id.*

63. *Id.*; see also U.N. Charter, preamble.

64. Cambodia v. Thai., Provisional Measures Order, ¶ 45; Cambodia v. Thai., Provisional Measures Order, at 4 (dissenting opinion of Judge Xue); Cambodia v. Thai., Provisional Measures Order, ¶ 10 (dissenting opinion of President Owada); Cambodia v. Thai., Provisional Measures Order, ¶ 2 (dissenting opinion of Judge Donoghue); Cambodia v. Thai., Provisional Measures Order, (dissenting opinion of Judge Al-Khasawneh); Cambodia v. Thai., Provisional Measures Order (dissenting opinion of Judge ad hoc Cot).

65. Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶ 27; Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 49; Costa Rica v. Nicar., Provisional Measures Order, ¶ 86.

66. Cambodia v. Thai., Provisional Measures Order, ¶ 7 (dissenting opinion of President Owada).

67. Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶ 22; Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 49; Costa Rica v. Nicar., Provisional Measures Order, ¶ 86(1).

of the troop withdrawal itself and instead left it to the disputing states to decide troop movements or ordered the parties to withdraw to positions occupied before the armed conflict.<sup>68</sup>

### 1. Frontier Dispute

In 1983, the governments of Upper Volta (now Burkina Faso) and the Republic of Mali signed a Special Agreement submitting to the Court a dispute involving the delimitation<sup>69</sup> of their common frontier line.<sup>70</sup> Prior to the Court's boundary delimitation, armed forces of the Republic of Mali attacked Burkina Faso for violating its territorial sovereignty when it occupied Malian border villages and conducted a population census in Malian territory.<sup>71</sup> Due to the onset of violent armed conflicts along the border, both parties requested an immediate order of provisional measures to prevent further conflict.<sup>72</sup> The Court recognized that the rights at issue in the primary proceeding were "the sovereign rights of the Parties over their respective territories on either side of the frontier,"<sup>73</sup> however, the Court determined that troop withdrawal was necessary to prevent harm to persons or property in the disputed area.<sup>74</sup> This was the first

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68. Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶ 27; Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 49.

69. "Delimitation means the selection of a boundary site and definition." Whereas "[d]emarkation refers to the construction of boundary markers in the landscape." VICTOR PRESCOTT & GILLIAN D. TRIGGS, INTERNATIONAL FRONTIERS AND BOUNDARIES 12 (2008).

70. Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶ 4.

71. On December 25, 1985 Burkinabe troops occupied the villages of Dioulouna, Kounia, Selba, and Douna, and raised the flag of Burkina Faso. *Id.*

72. *Id.* at ¶¶ 6(4), 6(8), 8(3)-(4). Burkina Faso requested, *inter alia*, that each Party "shall withdraw its forces from the area claimed by Mali... [and] refrain from any act of territorial administration beyond the line adopted in 1975 by the Legal Sub-Commission of the OAU Mediation Commission." Whereas Mali requested a provisional measure ordering "each of the Parties to refrain from any act or action which might prejudice the rights of the other Party... [and] refrain from any act of whatsoever kind which might aggravate the dispute." Mali objected to Burkina Faso's request on grounds that a troop withdrawal would constitute a judgment on the merits and was incompatible with the ceasefire agreements. *Id.*

73. *Id.* at ¶ 15.

74. *Id.* at ¶ 19. The Court noted,

Whereas, in particular, when two States jointly decide to have recourse to a chamber of the Court, the principal judicial organ of the United Nations, with a view to the peaceful settlement of a dispute,

case in which the Court extended the “the nature of the rights claimed... to cover the eligibility of actual or potential injury to human beings for protection through the indication of provisional measures.”<sup>75</sup> This landmark decision was the first to advocate the use of provisional measures as a tool to protect human rights even when those rights are not directly at issue in the proceeding.<sup>76</sup>

After determining that provisional measures were necessary to protect the civilian population, the Court unanimously ordered both parties to withdraw their troops to mutually agreed-upon positions.<sup>77</sup> The parties were given twenty days to reach an agreement on the troop withdrawal<sup>78</sup> and, if unable to do so, were ordered to allow the Court to step in and determine the positions through an order.<sup>79</sup> The Court refrained from indicat-

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in accordance with Article 2, paragraph 3, and Article 33 of the Charter of the United Nations, and incidents subsequently occur which not merely are likely to extend or aggravate the dispute but comprise a resort of force which is irreconcilable with the principle of the peaceful settlement of international disputes, there can be no doubt of the Chamber’s power and duty to indicate, if need be, such provisional measures as may conduce to the due administration of justice.

*Id.*

75. ROSENNE, *supra* note 55, at 193. The Court justified the order on grounds that the withdrawal of troops was necessary to “eliminat[e] the risk of any future action likely to aggravate or extend the dispute.” Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3 ¶ 27. The non-aggravation principle is a judicially devised doctrine that initially developed in the *Anglo-Iranian Oil Co.* case in 1951. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Provisional Measures Order, 1951 I.C.J. 89, 83 (July 5). See also BERNHARD KEMPEN & ZAN HE, *THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE ON PROVISIONAL MEASURES: THE RECENT DEVELOPMENT*, available at [www.zaoerv.de/69\\_2009/69\\_2009\\_4\\_a\\_919\\_930.pdf](http://www.zaoerv.de/69_2009/69_2009_4_a_919_930.pdf).

76. Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶¶ 15–16.

77. *Id.* at ¶ 27.

78. *Id.* at ¶ 32(1)(D).

79. *Id.* at ¶ 32. The court issued the following provisional measures:

- A. The Government of Burkina Faso and the Government of the Republic of Mali should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Chamber or prejudice the right of the other Party to compliance with whatever judgment the Chamber may render in the case;



ing the terms of withdrawal itself, explaining that doing so “would require a knowledge of the geographical and strategic context of the conflict which the Chamber does not possess, and which in all probability it could not obtain without undertaking an expert survey.”<sup>80</sup> The parties came to an agreement with the help of the Ministers for Foreign Affairs of the *Accord de non-agression et d'assistance en matière de défense* (ANAD)<sup>81</sup> and there were no further conflicts before the Court entered its final judgment on the merits.<sup>82</sup>

## 2. Land and Maritime Boundary between Cameroon and Nigeria

A decade later, the Court built upon the precedent established in *Frontier Dispute* and confirmed the Court's authority to protect human rights in international territory disputes through provisional measures.<sup>83</sup> The case revolved around a

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- B. Both Governments should continue to observe the ceasefire instituted by agreement between the two Heads of State on 31 December 1985;
  - C. Both Governments should 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, it being understood that the terms of the troop withdrawal will be laid down by the agreement in question and that, failing such agreement, the Chamber will itself indicate them by means of an Order;
  - D. In regard to the administration of the disputed areas, the situation which prevailed before the armed actions that gave rise to the requests for provisional measures should not be modified.

*Id.*

80. *Id.* at ¶ 27.

81. The Agreement of Non-aggression and Defense Assistance Agreement (ANAD) came into force on November 21, 1983 between members of the West African economic community (CEAP) and Togo to promote co-operation and peace “in accordance with the principles of the Charter of the United Nations and the Charter of OAU [Organization of African Unity].” Agreement on Non-Aggression and Assistance in the Field of Defense, Sept. 6, 1977, 1354 U.N.T.S. 215.

82. *Frontier Dispute* (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, ¶ 10 (Dec. 22) [hereinafter Burk. Faso/Mali, Judgment].

83. In the Judge Mbaye's Declaration he responded to this progression by stating that, “[t]he Court has consolidated its jurisprudence.” Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, 34 (separate opinion of

maritime boundary dispute between Cameroon and Nigeria and the issue of territorial sovereignty over the Bakassi Peninsula.<sup>84</sup> Cameroon brought the dispute before the Court in 1994 and requested the bench to “specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea.”<sup>85</sup> However, on February 3, 1996, while the judicial proceedings were in progress, Nigerian troops occupied the Bakassi Peninsula and violence broke out along the Cameroon-Nigeria border.<sup>86</sup> Cameroon immediately requested an order of provisional measures.<sup>87</sup> Due to the gravity of the situation, while the Court deliberated, the President of the Security Council intervened and called upon both parties to respect the ceasefire agreement and to return their troops to the positions occupied before the dispute was referred to the Court.<sup>88</sup>

In determining whether to grant Cameroon’s request for provisional measures, the Court recognized two important limitations: (1) that it cannot “make definitive findings of fact or of imputability,” and (2) the rights of the Parties “must remain unaffected by the Court’s decision.”<sup>89</sup> After careful consideration, the Court issued a provisional measure on March 15,

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Judge Mbaye). Furthermore, Judge Ranjeva wrote, “The present Order confirms – if any confirmation was needed – the jurisprudence of the Chamber in the case concerning the *Frontier Dispute*.” *Id.* at 29 (separate opinion of Judge Ranjeva).

84. Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 1.

85. *Id.* ¶ 9.

86. *Id.* ¶ 18. On February 3, 1996, Nigerian troops attacked Cameroonian troops resulting in one death, one person missing and several wounded, as well as significant property damage. *Id.*

87. *Id.* ¶ 18 (Mar. 15). Cameroon requested that the Court indicate the following provisional measures:

- (1) [T]he armed forces of the Parties shall withdraw to the position they were occupying before the Nigerian attack of 3 February 1996;
- (2) the Parties shall abstain from all military activity along the entire boundary until the judgment of the Court takes place;
- (3) the Parties shall abstain from any act or action which might hamper the gathering of evidence in the present case.

*Id.* ¶ 20.

88. *Id.* ¶ 45.

89. *Id.* ¶ 43. See also *Bosn. & Herz. v. Serb. & Montenegro*, Provisional Measures Order, 1993 I.C.J. 3, ¶ 44; *Dem. Rep. Congo v. Uganda*, Provisional Measures Order, 2000 I.C.J. Reports 111, ¶ 41.

1996, ordering both Parties, *inter alia*, to “ensure that the presence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to [February 3, 1996].”<sup>90</sup> The measure was consistent with the Security Council’s order that both Parties “take necessary steps to return their forces to the positions they occupied before the dispute was referred to the International Court [of Justice].”<sup>91</sup> By doing so, the Court remained within the confines of the dual limitations it had articulated, listed above, and adhered to principles of territorial sovereignty.<sup>92</sup>

### 3. Certain Activities Carried Out by Nicaragua in the Border Area

The Court took a third approach in ordering provisional troop withdrawal from contested territory in *Certain Activities Carried Out by Nicaragua in the Border Area*.<sup>93</sup> The dispute arose in 2011 after Nicaragua sent armed forces to Costa Rica, without the latter’s consent, for the purpose of protecting Nicaraguan workers engaged in the construction of a canal across Costa Rican territory.<sup>94</sup> Costa Rica claimed that the presence of Nicaraguan troops violated principles of territorial sovereignty and constituted a threat of force in violation of the U.N. Charter.<sup>95</sup> Additionally, Costa Rica alleged that Nicaragua’s dredging operation led to the deforestation of internationally protected rainforests.<sup>96</sup> Costa Rica brought the case before the Court in order to protect its right to territorial sovereignty and to obtain reparation for the environmental damage. Pending the outcome of the case, Costa Rica also requested provisional measures requiring Nicaragua to withdraw its troops from the disputed area immediately and to discontinue its dredging operations.<sup>97</sup>

The Court granted Costa Rica’s request for provisional measures in part. The Court refused to order provisional measures requiring Nicaragua to suspend its dredging operations because it did not find a risk of irreparable harm to Costa

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90. Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 49.

91. *Id.* ¶ 46.

92. *Id.* ¶ 43.

93. Costa Rica v. Nicar., Provisional Measures Order, ¶ 86.

94. *Id.* ¶¶ 3, 31.

95. *Id.* ¶ 2.

96. *Id.* ¶ 31.

97. *Id.* ¶ 13.

Rica's environment or to the flow of the Colorado River.<sup>98</sup> However, the Court did order both parties to withdraw troops from the "disputed territory" as a means necessary to protect the civilian population from the threat of force.<sup>99</sup>

Costa Rica had a stronger claim to the territorial title over the disputed land; however, the Court issued an even-handed measure that effectively ordered both parties out of the disputed area.<sup>100</sup> Furthermore, each Party retained responsibilities for policing the area over which it unquestionably had sovereignty.<sup>101</sup> In so doing, the Court complied with the fundamental limitation on its power to issue interim measures – that it may not prejudice a temporary order on the merits of the overall case.<sup>102</sup>

#### 4. Significance of Prior Orders

The prior orders discussed above are not binding on the Court; however, they are highly influential and have shaped the Court's jurisprudence on provisional measures in the context of territorial disputes.<sup>103</sup> The progression of the Orders' reach into human rights considerations demonstrates a broadening of the Court's authority to issue provisional measures.<sup>104</sup> In the *Frontier Case*, the Court ordered troop withdrawal to protect human rights, which were incidental to those being disputed in the main proceeding, effectively overruling the

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98. *Costa Rica v. Nicar.*, Provisional Measures Order, ¶ 82.

99. *Id.* ¶ 86.

100. *Id.*

101. *Id.*

102. *Id.* ¶ 85.

103. Under Article 59 of the Statute of the Court, "The decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the I.C.J., art. 59, *supra* note 12; *see also* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 JOURNAL INT'L DISP. SETTLEMENT 5, 12 (2011).

104. For example, in *Cameroon v. Nigeria*, the Court observed:

Where the rights at issue in these proceedings are sovereign rights which the Parties claim over territory, and whereas these rights also concern persons; and whereas armed actions have regrettably occurred on territory which is the subject of proceedings before the Court . . . . The Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute.

*Cameroon v. Nigeria*, Provisional Measures Order, 1996 I.C.J. 13, ¶¶ 39, 41.

PCIJ's narrow interpretation of Article 41.<sup>105</sup> However, this initial extension of rights was consistent with the principles set forth in the U.N. Charter and other humanitarian concerns, suggesting that it was an appropriate step in a popular direction.<sup>106</sup> Yet, in a show of important restraint, the Court left it to the conflicting parties to determine the terms of the withdrawal.<sup>107</sup> Whereas in the *Land and Maritime Boundary* case, the Court indicated the general positions for troop withdrawal itself, albeit in a manner consistent with the Security Council's recommendation and limited to the territory in dispute.<sup>108</sup>

The prior cases broadened the Court's power to issue provisional measures without overstepping the Court's jurisdictional bounds or infringing upon the territorial sovereignty of the Parties.<sup>109</sup> These cases demonstrate three different appropriate approaches the Court may use to determine troop withdrawal positions: (1) mandating that the parties reach a mutual agreement,<sup>110</sup> (2) ordering parties' armed forces to return to those positions occupied prior to the conflict,<sup>111</sup> and (3) ordering a mutual withdrawal from the "disputed territory."<sup>112</sup> Although these were viable options available to the Court in the *Interpretation of Temple of Preah Vihear*, the Court opted for a fourth approach that was unprecedented and unwarranted.<sup>113</sup>

## II. ORIGINS OF THE PREAH VIHEAR DISPUTE

### A. 1904 Franco-Siamese Treaty

The legal dispute over the Temple has its origins in an ambiguous border delimitation of the Thai-Cambodian border.<sup>114</sup> On February 13, 1904, France (under which Cambodia was a protectorate) and Siam (as Thailand was then known) entered

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105. Higgins, *supra* note 62, at 108.

106. ROSENNE, *supra* note 55, at 4; *See generally* U.N. Charter.

107. Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶ 32(1)(D).

108. *Id.*

109. Costa Rica v. Nicar., Provisional Measures Order, ¶ 85; Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 48; Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶ 11.

110. Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶ 27.

111. Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 49.

112. Costa Rica v. Nicar., Provisional Measures Order, ¶ 86.

113. Cambodia v. Thai., Provisional Measures Order, ¶ 69.

114. Cambodia v. Thai., Judgment, 1962 I.C.J. 6, 16–17.

into a boundary settlement treaty.<sup>115</sup> Article 1 of that treaty stipulated that the border between Thailand and Cambodia was to follow along a watershed in the eastern Dangrek Mountains<sup>116</sup> and Article 3 delegated authority to a Franco-Siamese Mixed Commission to carry out the exact delimitation of the boundary.<sup>117</sup> French officers created a definitive boundary in 1906 and published a map of the frontier (“Annex I Map”), which illustrated the entire Preah Vihear promontory, including the Temple, to be located in Cambodian territory.<sup>118</sup> The frontier line in the Annex I Map diverged from the treaty’s original watershed provision, which had placed the Temple in Thailand’s territory.<sup>119</sup> Following the execution of the treaty,

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115. *Id.* at 16.

116. Article 1 of the 1904 Franco-Siamese Treaty provides:

The frontier between Siam and Cambodia starts, on the left shore of the Great Lake, from the mouth of the river Stung Roluos, it follows the parallel from that point in an easterly direction until it meets the river Prek Kompong Tiam, then, turning northwards, it merges with the meridian from that meeting-point as far as the Pnom Dang Rek mountain chain. From there it follows the watershed between the basins of the Nam Sen and the Mekong on the one hand, and the Nam Moun, on the other hand, and joins the Pnom Padang chain the crest of which it follows eastwards as far as the Mekong. Upstream from that point, the Mekong remains the frontier of the Kingdom of Siam, in accordance with Article I of the Treaty of 3 October 1893.

*Id.*

117. Article 3 of the 1904 Franco-Siamese Treaty provides:

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

*Id.*

118. The maps were drawn up by French officers at the request of the Siamese Government, due to the limited means of the Siamese Government. The French officers completed eleven maps covering a large portion of land between the countries. *Id.* at 18, 21. The Commission agreed that the frontier line “should ascend the Dangrek from the Cambodian plain by the Pass of Kel, which lies westwards of Preah Vihear.” *Id.* at 17.

119. *Id.* at 15.

both countries asserted forms of control over the Temple and the issue was not revisited for another fifty years.<sup>120</sup>

### B. 1962 Judgment

In 1953, Cambodia attained its independence from France and sent guards to the Temple as a symbol of their territorial integrity.<sup>121</sup> However, Cambodian troops arrived to find that Thai forces had reclaimed sovereignty over the Temple.<sup>122</sup> Thailand and Cambodia attempted to settle the dispute peacefully and carried out territorial negotiations in Bangkok.<sup>123</sup> Cambodia claimed sovereignty on the basis that Thailand had accepted the Annex I map and was therefore precluded from denying its validity.<sup>124</sup> Thailand responded with claims that the Annex I map was not legally binding on the parties and that “at all material times, Thailand has exercised full sovereignty in the area of the Temple to the exclusion of Cambodia.”<sup>125</sup> The parties failed to come to an agreement and Cambodia brought the issue before the Court in 1959 to determine which country had rightful ownership to the Temple.<sup>126</sup>

In order to make a judgment on the competing claims to the Temple, the Court needed to resolve the threshold issue of which treaty provision governed the boundary—the watershed provision or the Annex I map.<sup>127</sup> Basing its decision on the lan-

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120. Cambodia v. Thai., Judgment, 1962 I.C.J. 6, 27. Since the 1904 Treaty, Cambodia “performed only a very few routine acts of administration.” Thailand showed more evidence of conduct in the area of the Temple, however, “the acts concerned were exclusively the acts of local, provincial, authorities” in the vicinity of the Temple. *Id.* at 30. Furthermore, although Thailand came into possession of Preah Vihear and certain other parts of Cambodia after WWII, Thailand and France entered into a Settlement Agreement whereby the States agreed to revert back to the *status quo*. In order to settle the terms of the agreement, France set up a Franco-Siamese Conciliation Commission consisting of two representatives for each State and three neutral commissioners. During the negotiations Thailand objected to part of the frontier line but did not object to the frontier line concerning Preah Vihear and even “filed with the Commission a map showing Preah Vihear as lying in Cambodia” in 1947. *Id.* at 28.

121. *Id.* at 31.

122. *Id.* at 31.

123. *Id.* at 27.

124. *Id.*

125. Cambodia v. Thai., Judgment, 1962 I.C.J. 6, 11–12.

126. *Id.* at 8.

127. *Id.* at 17.

guage of the treaty, the Court determined that the watershed provision was merely a guideline on the general character of the boundary, whereas the map delineated the boundary's exact course.<sup>128</sup> Accordingly, the frontier would be "the line resulting from the work of delimitation, unless the delimitation were shown to be invalid."<sup>129</sup> The Court found that the map held official standing and that Thailand had accepted the map through its conduct and acquiescence, "conferring on it a binding character."<sup>130</sup> Therefore, the Court declared the Temple to be in the sovereign territory of Cambodia.<sup>131</sup> The issue was then laid to rest for fifty years.<sup>132</sup>

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128. In its decision, the Court stated that,

[i]n general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question . . . There are boundary treaties which do no more than refer to a watershed line . . . The Parties in the present case must have had a reason for taking this further step. This could only have been because they regarded a watershed indication as insufficient by itself to achieve certainty and finality.

*Id.* at 34.

129. *Id.* at 34–36.

130. The Court held that Thailand could not reasonably assert that it had never accepted the map because Thailand "for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier." *Cambodia v. Thai.*, Judgment, 1962 I.C.J. 6, 22. Moreover, the Court found significance in a visit to the Temple by Prince Damrong, President of the Royal Institute of Siam, in 1930. When the Prince arrived at the Temple, the French Resident for the Cambodian province greeted him with the French flag flying. The Court held that this constituted a "tacit recognition by Siam of the sovereignty of Cambodia (under the French protectorate) over Preah Vihear." *Id.* at 30–31.

131. *Id.* at 34–36.

132. *Cambodia v. Thai.*, Provisional Measures Order, at 48. Following the decision, Thailand "accepted the decision of the Court, turned over the Temple to Cambodia, withdrew its troops stationed at the temple, and withdrew the Thai tricolor national flag from the disputed area." The Thai government also formally informed the U.N. Acting Secretary-General on July 6, 1962 that:

His Majesty's Government desires to make an express reservation regarding whatever rights Thailand has, or may have in the future, to recover the Temple of Phra Viharn by having recourse to any existing or subsequently applicable legal process, and to register a protest against the decision of the International Court of Justice award-



*C. 2008-Present*

On July 7, 2008, UNESCO listed the Temple as a World Heritage Site due to its “outstanding universal value.”<sup>133</sup> One week later, Thai forces occupied land adjacent to the Temple – included in the UNESCO nomination – claiming territorial rights on the basis of the original watershed line in the 1962 Judgment.<sup>134</sup> The presence of Thai troops and combat vehicles outside the Temple resulted in intermittent armed clashes between Thai and Cambodian forces.<sup>135</sup> On February 4, 2011, after nearly three years of sporadic armed conflicts, the Security Council called for a permanent ceasefire<sup>136</sup> and encouraged the

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ing the Temple of Phra Viharn [the name given to the Temple by Thailand] to Cambodia.

*See Cambodia v. Thai.*, Application Instituting Proceedings, ¶ 12. However, no official claims were made by Thailand in the area of the Temple until 2008. *Id.*

133. *Temple of Preah Vihear*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION: WORLD HERITAGE CONVENTION, *available at* <http://whc.unesco.org/en/list/1224>; Interpretation of Temple of Preah Vihear (Cambodia v. Thai.), Provisional Measures Order, at 48. Cambodia’s bid included “a disputed map drawn up by French colonial rulers in 1907.” Mydans, *supra* note 4. Thailand stipulated that the inclusion of the Temple shall in no way prejudice Thailand’s rights to the dispute and submitted an objection “on the basis of incomplete integrity.” Statement by His Excellency Mr. Noppadon Pattama, Minister for Foreign Affairs of Thailand and head of the Thai delegation to the forty-second session of the World Heritage Committee, (July 7, 2008) S/2008/474.

134. *Cambodia v. Thai.*, 1962 I.C.J. 6. The Democrat Party in Thailand, under the leadership of Abhisit Vejjajiva, strongly objected to Cambodia’s nomination of the Temple as a World Heritage Site in 2008 out of concern that it would negatively affect Thailand’s sovereignty in the area surrounding the Temple. This led to the occupation of Thai troops at the Temple and the resultant border conflict lasting from 2008–2011. However, the recent election of Yingluck Shinawatra for Prime Minister of Thailand is expected to mitigate the border conflict and help bring peace to the neighboring countries. Yingluck Shinawatra was formally elected on July 3, 2011. Supalek Ganjanakhundee, *Restoration of Relations with Cambodia ‘a priority’*, NATION (July 5, 2011), <http://nationmultimedia.com/2011/07/05/national/Restoration-of-relations-with-Cambodia-a-priority-30159463.html>. *Cambodia v. Thai.*, Application Instituting Proceedings, ¶ 14.

135. *Cambodia v. Thai.*, Provisional Measures Order, ¶ 48; Mydans, *supra* note 4.

136. In a press statement, Ambassador Maria Luiza Ribeiro Viotti of Brazil stated, “The members of the Security Council called on the two sides to display maximum restraint and avoid any action that may aggravate the situa-

parties to work with the Association of Southeast Asian Nations (“ASEAN”)<sup>137</sup> to reach a diplomatic resolution.<sup>138</sup> However, the powerful political divide between the nations has complicated the process and led to failed negotiations.<sup>139</sup>

On April 28, 2011, Cambodia brought the matter before the Court and requested an interpretation of the Judgment rendered on June 15, 1962.<sup>140</sup> Specifically, Cambodia requested clarification on three specific issues: (1) whether the line shown on the Annex I map represents a binding boundary between the Parties; (2) the meaning and the scope of the phrase “vicinity o[f] Cambodian territory;” and (3) whether Thailand’s obligation to withdraw armed forces was of a continuing or instantaneous character.<sup>141</sup> Cambodia additionally requested the immediate withdrawal of all Thai troops as a provisional measure pending the Court’s decision on the merits, as discussed in this Note’s Introduction.

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tion.” *Security Council Urges Permanent Ceasefire After Recent Thai-Cambodia Clashes*, U.N. NEWS CENTRE, (Feb. 14, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37528&Cr=cambodia&Cr1=thai&Kw1=Thailand&Kw2=&Kw3=>; Cambodia v. Thai., Provisional Measures Order, ¶ 48. The ambassador went on to add that the Security Council had also “[u]rged the parties to establish a permanent ceasefire and to implement it fully and resolve the situation peacefully and through effective dialogue.” *Id.*

137. ASEAN was established in 1967 pursuant to the ASEAN Declaration. The aims and purposes of the Declaration include stimulating economic growth and advancing cultural achievements in the region as well as the promoting compliance with the U.N. Charter to ensure regional comity and stability. *Overview*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, [http://www.asean.org/about\\_ASEAN.html](http://www.asean.org/about_ASEAN.html). Thailand and Cambodia are both Member States of ASEAN. *Member Countries*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, [www.aseansec.org/74.htm](http://www.aseansec.org/74.htm). As ASEAN members, Thailand and Cambodia are signatories to the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC), which obliges them to resort to peaceful settlement of inter-state disputes. *Treaty of Amity and Cooperation in Southeast Asia*, Feb. 24, 1976, 1025 U.N.T.S. 316.

138. Cambodia v. Thai., Provisional Measures Order, ¶ 48.

139. *Restoration of Relations with Cambodia ‘a priority’*, *supra* note 134; Mydans, *supra* note 4. See generally Paul Battersby, *Border Politics and the Broader Politics of Thailand’s International Relations in the 1990s: From Communism to Capitalism*, 71 PAC. AFF. 473 (Winter 1998–1999), for a broader overview of the history of the Thai-Cambodia political conflict.

140. Cambodia v. Thai., Provisional Measures Order, ¶¶ 1 – 4.

141. *Id.* ¶ 31.

*D. July 18 Order*

On July 18, 2011, the Court granted Cambodia's request for provisional measures after finding that the Court had prima facie jurisdiction under Article 60<sup>142</sup> and that Cambodia had fulfilled the conditions-precedent.<sup>143</sup> First, the Court found plausible Cambodia's asserted rights of sovereignty and territorial integrity under the Court's 1962 Judgment.<sup>144</sup> Second, it found that a link existed between the provisional measures Cambodia had requested and the country's asserted rights of sovereignty and territorial integrity.<sup>145</sup> Lastly, the Court found merit in Cambodia's claim that recent armed conflicts surrounding the Temple had created an urgent need for judicial intervention, notwithstanding the existence of a ceasefire.<sup>146</sup> Based on these findings, the Court granted Cambodia's request and issued the following four provisional measures:

[1.] Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at the zone... [2.] Thailand shall not obstruct Cambodia's free access to the Temple of Preah Vihear or Cambodia's provision of fresh supplies to its non-military personnel in the Temple... [3.] Both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by

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142. Jurisdiction under Article 60 requires that there be a dispute between the meaning or scope of a prior judgment. The Court found that the parties demonstrated a difference in opinion regarding: (1) the meaning and scope of the phrase "vicinity on Cambodian territory;" (2) the nature of the obligation imposed on Thailand to withdraw military forces; and (3) the issue of whether the 1962 Judgment recognized the Annex I map as binding with respect to the entire frontier. *Cambodia v. Thai.*, Provisional Measures Order, ¶ 31.

143. *Cambodia v. Thai.*, Provisional Measures Order, at 9–12.

144. *Id.* ¶ 39. Thailand asserted that Cambodia's rights were not plausible because "the rights invoked in the request for interpretation must be based on the facts examined in the 1962 Judgment and not on facts subsequent to that Judgment." *Id.* ¶ 36.

145. *Id.* ¶ 45. Thailand argued that the link has not been established because Cambodia's request refers to the status of the Annex I map, which cannot be the subject of interpretation. *Id.* ¶ 43. Judge Xue also argued that the necessary link had not been established in the issuance of the provisional demilitarized zone. *Cambodia v. Thai.*, Provisional Measures, at 4 (dissenting opinion of Judge Xue).

146. *Cambodia v. Thai.*, Provisional Measures, ¶ 56.

that organization to have access to the provisional demilitarized zone... [4.] Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.<sup>147</sup>

The second, third, and fourth elements of the Court's order of provisional measures—directing both Parties to cooperate with ASEAN and refrain from any action that may aggravate or extend the dispute—are consistent with the Court's jurisprudence and represent a practical interim solution under the circumstances.<sup>148</sup> It is the order directing both parties to withdraw from a provisional demilitarized zone, which includes the Temple and additional, undisputed territory that is an unprecedented measure exceeding the Court's jurisdiction.<sup>149</sup>

### III. A BREAK FROM PRECEDENT

#### *A. Necessary Expansion to Protect Human Rights*

The importance of provisional measures lies in their ability to prevent imminent harm, rather than simply compensate the aggrieved parties. International proceedings often take months or even years to be resolved and therefore provide an inadequate remedy in urgent situations, particularly in the context of human rights cases.<sup>150</sup> Therefore, provisional measures play the crucial role of protecting persons from imminent danger or death while at the same time preserving important procedural safeguards to ensure justice is achieved through a deliberative judgment on the merits.<sup>151</sup>

Provisional measures have been granted more frequently in recent years to ease international tensions and preserve rights to pending disputes.<sup>152</sup> Previously, this judicial tool was used

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147. *Id.* ¶ 19–20.

148. *Id.* ¶ 69(B)(2)–(4).

149. *Id.* ¶ 69(B)(1). Eleven judges were in favor of the provisional demilitarized zone and five judges dissented.

150. ROSENNE, *supra* note 55, at 4.

151. *Bosn. & Herz. v. Serb. & Montenegro*, Provisional Measures Order, 1993 I.C.J. 3, ¶ 46; *Dem. Rep. Congo v. Uganda*, Provisional Measures Order, 2000 I.C.J. 111, ¶ 43; *Geor. v. Russ.*, Provisional Measures Order, 2008 I.C.J. Reports 353, ¶ 145.

152. ROSENNE, *supra* note 55, at 222. *See also* *Bosn. & Herz. v. Serb. & Montenegro*, Provisional Measures Order, 1993 I.C.J. 3, ¶ 52; *Burk. Faso/Mali*, Provisional Measures Order, 1986 I.C.J. 3, ¶ 27; *Nicar. v. U.S.*, Provisional

with caution and exercised only under the most dire circumstances, resulting from the PCIJ's narrow interpretation of the language "as circumstances so require."<sup>153</sup> However, the Court has gradually provided a more liberal interpretation of the urgency and gravity required to warrant an order of interim measures, particularly in the realm of border disputes.<sup>154</sup> This trend is not isolated to the International Court of Justice, but has been demonstrated by other international bodies as well such as the Inter-American Court of Human Rights, the European Court of Human Rights, the U.N. Human Rights Committee, the U.N. Committee against Torture, and the Inter-American Commission on Human Rights.<sup>155</sup>

Provisional measures provide an effective way in which international tribunals may prevent human rights atrocities rather than merely compensate victims after the fact. Accordingly, the Court was within its jurisdictional and institutional capacity to depart from the PCIJ's jurisprudence and follow a more functional approach that is consistent with its role as the principal judicial organ of the United Nations.

### *B. PDZ Constitutes Judicial Overreach*

Article 41 of the Statute grants the Court explicit power to indicate *any* measure deemed necessary to protect rights before the Court; however, there are innate limitations in that power.<sup>156</sup> These limitations stem from the Court's jurisdiction and jurisprudence discussed in Part I of this Note, as well as from widely accepted principles of sovereignty and territorial integ-

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Measures Order, 1984 I.C.J. 209, ¶ 41; *Ger. v. U.S.*, Judgment, 2001 I.C.J. 466, ¶ 102.

153. See *Factory at Chorzow (F.R.G. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 12 (Nov. 21); *Nor. v. Den.*, 1932 P.C.I.J. (ser A/B) No. 48 at 287; *Polish Agrarian Reform & German Minority (F.R.G. v. Pol.)*, 1933 P.C.I.J. (ser A/B) No. 58 (July 29).

154. "The need for the preservation of rights is the legal basis that entitles the Court to indicate provisional measures under Article 41 of the Statute.... In the past this provision was interpreted strictly." *Cameroon v. Nigeria*, 1996 I.C.J. 13, 50 (Separate Opinion of Judge Ajibola). Judge Ajibola observed in 1996 that "[r]ecent decisions of the Court and its Chambers have given a more liberal interpretation to this issue of the preservation of rights." *Id.*

155. Jo M. Pasqualucci, *Interim Measures in International Human Rights: Evolution and Harmonization*, 38 VAND. J. TRANSNAT'L L. 1, 4 (2005).

156. Statute of the I.C.J., art. 41, *supra* note 12.

rity.<sup>157</sup> It was because of these internal and external limitations, despite the absence of express statutory limitations on the Court's authority to issue provisional measures, that five judges dissented to the PDZ as exceeding the Court's jurisdictional bounds.<sup>158</sup> Among the dissenting judges was Judge Xue, who argued that the measure "puts into question the proper exercise of the judicial discretion of the Court in indicating provisional measures, both under the law and by the jurisprudence of the Court."<sup>159</sup>

Although troop withdrawal may have been necessary to avoid irreparable harm and to protect the rights of local civilians, the inclusion of the Temple in the Court's order raises substantial questions concerning the Court's competence to devise provisional measures and may lead to adverse effects on party compliance.<sup>160</sup> The PDZ forces both parties to withdraw troops from their own undisputed sovereign territory<sup>161</sup> and the measure greatly diverges from prior judgments involving territorial disputes without providing legitimate justification for eschewing precedent.<sup>162</sup>

### 1. Undisputed Territory

Judgments by international tribunals involving territorial disputes are sensitive and require consideration of many important factors such as "history, culture, perceptions of 'right-

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157. *Id.*, art. 41(1), *supra* note 12; CUKWURAH, *supra* note 9, at 29.

158. Cambodia v. Thai., Provisional Measures Order, ¶ 45; Cambodia v. Thai., Provisional Measures Order, at 4 (dissenting opinion of Judge Xue); Cambodia v. Thai., Provisional Measures Order, ¶ 10 (dissenting opinion of President Owada); Cambodia v. Thai., Provisional Measures Order, ¶ 2 (dissenting opinion of Judge Donoghue); Cambodia v. Thai., Provisional Measures Order (dissenting opinion of Judge Al-Khasawneh); Cambodia v. Thai., Provisional Measures Order (dissenting opinion of Judge ad hoc Cot).

159. Cambodia v. Thai., Provisional Measures Order, at 1 (dissenting opinion of Judge Xue).

160. *PM Wants Parliament to Debate Troop Move*, BANGKOK POST (Aug. 18, 2012), <http://www.bangkokpost.com/news/local/307800/pm-wants-parliament-to-debate-troop-move>; see also Karin Oellers-Frahm, *Expanding the Competence to Issue Provisional Measures—Strengthening the International Judicial Function*, 12 GERMAN LAW J. 1279 (2011).

161. Cambodia v. Thai., Provisional Measures Order, ¶ 69(1).

162. Cambodia v. Thai., Provisional Measures Order, at 1–2 (dissenting opinion of Judge Xue); Cambodia v. Thai., Provisional Measures Order, ¶ 9 (dissenting opinion of President Owada); Cambodia v. Thai., Provisional Measures Order, ¶ 4 (dissenting opinion of Judge Donoghue).

fulness,' prior administrative lines, presence in the area of tribal and language groups, access to natural resources and respective political power."<sup>163</sup> Consequently, territorial boundary disputes are generally resolved through diplomatic negotiations and then legally reflected in treaties, rather than through the courts.<sup>164</sup> According to one study, courts adjudicated only thirty out of 348 territorial disputes between 1919 and 1995.<sup>165</sup> Yet Courts may be gaining more of a role in boundary conflicts, evidenced by the large, and growing, portion of cases before the International Court of Justice concerning border conflicts.<sup>166</sup> Still, the Court has never before ordered countries to withdraw armed forces from their own undisputed territories.<sup>167</sup>

Territorial sovereignty is a particularly sensitive issue in Southeast Asia where decolonization and shifting empires have exacerbated political relations and heightened nationalism concerns.<sup>168</sup> These issues and the longstanding conflict along the Thai-Cambodian border further support dissenting Judge Owada's view that the Court does not have the power to issue provisional measures that "encroach upon the sovereignty of a State without its consent, either explicit or implicit, even with the best of intentions."<sup>169</sup>

Furthermore, in the July 18 Order, the Court devised a demilitarized zone using four coordinated points on a flat map without sufficient knowledge of the "ground situation in the territories."<sup>170</sup> In the *Frontier Dispute*, the Court refused to define territorial boundaries without the assistance of expert car-

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163. PRESCOTT & TRIGGS, *supra* note 69, at 138.

164. *Id.*

165. *Id.*

166. "Approximately one third of the contentious cases before the ICJ have dealt with boundary disputes of one kind or another." *Id.*

167. Judge Xue observed that, "in all the cases that either directly involve territorial disputes or bear territorial implications, the Court, in indicating provisional measures, has invariably confined such measures to the disputed territories and never gone beyond such areas." *Cambodia v. Thai., Provisional Measures*, at 1 (dissenting opinion of Judge Xue).

168. "Cambodia, which has been annexed throughout history by its neighbors on both its eastern and its western borders, is particularly sensitive, and its temples are a source of national pride." Mydans, *supra* note 4.

169. *Cambodia v. Thai., Provisional Measures*, ¶ 11 (dissenting opinion of President Owada).

170. *Cambodia v. Thai., Provisional Measures Order*, at 3 (dissenting opinion of Judge Xue).

tographers.<sup>171</sup> Rather, the Court ordered the parties in that case to withdraw their troops to such positions determined by an agreement between the parties. This allowed the Court to avoid making any arbitrary and impractical determinations on troop placement.<sup>172</sup> The *Frontier Dispute* Court demonstrated judicial restraint and pragmatism in its refusal to issue a judgment that it may be criticized as institutionally incompetent to make. The PDZ devised by the Court in the present case, however, does not guarantee cohesion with the land or demonstrate judicial restraint.

## 2. Lack of Justification for Eschewing Precedent

Legal justifications and sound reason are important aspects of the Court's role in adjudicating disputes in a fair manner.<sup>173</sup> According to Thomas Franck, even without an overarching mechanism to enforce international law, states will nevertheless comply if they perceive the law to be fair.<sup>174</sup> Fairness, in this sense, entails both procedural fairness and perceived substantive fairness. In the July 18 Order, the Court failed to provide sufficient reasons for the adoption of the provisional demilitarized zone under the factual circumstances, especially considering the other viable options available.<sup>175</sup> This lack of justification could be detrimental to the perceived legitimacy of the judgment as the parties may fail to comply based on resentment, disagreement, or a sense of illegitimacy.<sup>176</sup>

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171. Burk. Faso/Mali, Provisional Measures Order, 1986 I.C.J. 3, ¶ 27.

172. *Id.* ¶ 32(1)(D).

173. Cambodia v. Thai., Provisional Measures, ¶ 9 (dissenting opinion of President Owada).

174. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 3 (1990). "In the international system, rules usually are not enforced yet they are mostly obeyed. Lacking support from a coercive power comparable to that which provides backing for the laws of a nation, the rules of the international community nevertheless elicit much compliance on the part of sovereign states." *Id.*

175. Judge Xue wrote, "I regret that the Court did not give sufficient reasons for the adoption of the PDZ as one of the provisional measures, particularly upon what considerations such extraordinary measure is warranted." Cambodia v. Thai., Provisional Measures Order, at 2 (dissenting opinion of Judge Xue). Judge Owada also criticized the Majority's Order as "devoid of legal justification." Cambodia v. Thai., Provisional Measures Order, ¶ 9 (dissenting opinion of President Owada).

176. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS*, *supra* note 174.



Non-compliance with the Court's provisional measures constitutes a violation of international law under the U.N. Charter.<sup>177</sup> However, in practice a State's unwillingness to comply with provisional measures does not have significant ramifications.<sup>178</sup> Most likely, a non-complying state will suffer only reputational harm, for example, "being designated as a rogue state or as a State that considers itself above international law."<sup>179</sup> Accordingly, the benefits of non-compliance often outweigh potential reputational effects, which has resulted in a lack of uniformity in states' compliance with orders of provisional measures.<sup>180</sup>

Consequently, the July 18 Order raises concerns that the Court's expanding power to issue provisional measures will negatively impact States' willingness to consent to the Court's jurisdiction. As the Court's Judge Donoghue observed,

[T]oday's 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, e.g., in a special agreement, through a compromissory clause or through a declaration that contains some limitations. If States cannot be confident that the

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177. Article 94(1) of the United Nations Charter provides that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94, para. 1. Moreover in *Germany v. U.S.*, the Court confirmed the binding nature of provisional measures issued under Article 41 by stating that the provisional measure "was consequently binding in character and created a legal obligation for the United States." *Ger. v. U.S.*, Judgment, 2001 I.C.J. 466, ¶ 110.

178. See generally Joseph Sindi Warioba, *Monitoring Compliance with and Enforcement of Binding Decisions of International Courts*, in 5 MAX PLANCK YEARBOOK OF U.N. LAW (J.A. Frowein and R. Wolfrum eds., 2001) (discussing the need for the development of a world mechanism to enforce binding decisions of international courts).

179. Pasqualucci, *supra* note 155, at 46.

180. *Id.* at 4. *Nicar. v. U.S.*, Provisional Measures Order, 1984 I.C.J. 209, ¶ 41; *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Request for Provisional Measures, 1979 I.C.J. 7 (Dec. 15); see also *Nuclear Tests (N.Z. v. Fr.)*, Provisional Measures Order, 1973 I.C.J. 135 (June 22) [hereinafter *N.Z. v. Fr.*, Provisional Measures Order] (France refused to comply with the Court's provisional measure and subsequently withdrew from the Court's jurisdiction.)

Court will respect the limits of its jurisdiction, they may be unwilling to expose themselves to that jurisdiction.<sup>181</sup>

Therefore, the July 18 Order may negatively impact the Court's ability to issue authoritative judgments in the future.<sup>182</sup>

The Court had alternative courses of action available to it when ruling on the provisional measure, provided in prior decisions as well as in the Rules of the Court. Arguably, the Court could have achieved its goals of reducing the risk to human lives by simply ordering both Parties to abstain from any military activities in the disputed territory.<sup>183</sup> Furthermore, the Court could have also indicated a provisional measure similar to that rendered in the *Burkina Faso/Mali* case, asking the Parties, with the co-operation of the Association of Southeast Asian Nations (ASEAN), to determine themselves the positions to which their armed forces should be withdrawn. Failing such agreement, the Court could then, if necessary, draw its own lines by means of an Order.<sup>184</sup> These alternatives would have preserved the Court's legitimacy and created a similar result to that which came from the Court's unfortunate and overreaching mandate without encroaching on the parties' territorial sovereignty. This in turn, may have resulted in compliance by the parties and a full troop withdrawal as ordered.

#### CONCLUSION

The Court should strive to apply international norms and procedures consistently to achieve harmonization and legitimacy. This is especially important due to the jurisdictional posture of the Court and the need for consent by both parties in each particular dispute. Provisional measures have been increasingly prominent in recent years due to their impact in protecting civilian populations and preventing any escalation of armed conflict during the pendency of border disputes.<sup>185</sup> Inter-

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181. Cambodia v. Thai., Provisional Measures Order, ¶ 28 (dissenting opinion of Judge Donoghue).

182. See THOMAS M. FRANCK, JUDGING THE WORLD COURT 47 (1986) (discussing state's general unwillingness to submit matters of national importance to the compulsory jurisdiction of the Court.)

183. Cambodia v. Thai., Provisional Measures, at 3 (dissenting opinion of Judge Xue).

184. *Id.*

185. See Nuclear Tests (Austl. v. Fr.), Interim Protection Order, 1973 I.C.J. 99, at 106 (June 22); Nuclear Tests (N.Z. v. Fr.), Interim Protection Order,

im measures are a necessary tool for international tribunals because they offer preventative protection to potential victims rather than mere compensatory relief to actual victims.<sup>186</sup> The value of provisional measures can be further demonstrated by the fact that international proceedings can take years to be resolved and the rights at stake may be affected before the final judgment is determined.

The beneficial value of these provisional measures, however, is contingent upon compliance by the disputants.<sup>187</sup> In order to ensure party compliance, the Court must adhere to the procedural mechanisms set forth by the Statute of the Court and Rules of the Court, as well as established doctrines of international law. The July 18 Order constituted an unnecessary overreach that undermined the Court's legitimacy and may adversely impact future consent by U.N. member states.<sup>188</sup> Furthermore, underscoring the misguided nature of the Court's decision, the PDZ has proven to be ineffective as neither party complied with the terms of the order following the judgment.<sup>189</sup> As of this writing, armed forces continue to occupy the area

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1973 I.C.J. 135, at 142 (June 22); Burk. Faso/Mali, Provisional Measures Order, 1986, I.C.J. 3, ¶ 18; Bosn. & Herz. v. Serb. & Montenegro, Provisional Measures Order, 1993 I.C.J. 3, ¶ 48; Bosn. & Herz. v. Serb. & Montenegro, Provisional Measures Order, ¶ 57; Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 41; Ger. v. U.S., Judgment, 1999 I.C.J. 9, ¶ 29.

186. See Pasqualucci, *supra* note 155, at 3. The "protective function [of provisional measures] is more important than the compensatory function of a final judgment." *Id.*

187. For example, the United States refused to comply with the Court's order of provisional measures in the case concerning the Vienna Convention on Consular Relations. The right at issue in the main proceeding, Walter LaGrand's right to life, was irreparably harmed by his execution. Ger. v. U.S., Provisional Measures Order, 1999 I.C.J. 9, ¶ 24; Ger. v. U.S., Judgment, 2001 I.C.J. 466, ¶ 34.

188. Judge Koroma observed, "In the absence of such power, the Court's efficacy could be diminished in many cases, since it would run the risk of facing a *fait accompli* [a thing accomplished and presumably irreversible] or seeing an issue become moot by the time it issues a judgment." Costa Rica v. Nicar., Provisional Measures (Separate Opinion of Judge Koroma).

189. "So far, both sides' troops have not been withdrawn from the PDZ." *Cambodia's Preah Vihear Heritage Site Attracts 49,740 Tourists in 11 Months*, XINHUAENET.COM (Dec. 5, 2011, 7:24 PM), [http://news.xinhuanet.com/english2010/culture/2011-12/05/c\\_131289347.htm](http://news.xinhuanet.com/english2010/culture/2011-12/05/c_131289347.htm).

surrounding the Temple, with virtually no remaining hope for the Court to be a part of a resolution to the dispute.<sup>190</sup>

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190. Thailand and Cambodia began to withdraw troops on July 18, 2012, exactly one year after the July 18 Order. However, both sides have replaced their troops in the area with police and civilian security guards. Therefore, it is unclear whether this action can “be deemed as troop withdrawal in accordance with the court order.” *Thailand Must Show Maturity in Handling Preah Vihear*, THE NATION (Aug. 12, 2012, 7:01 AM) <http://www.nationmultimedia.com/politics/Thailand-must-show-maturity-in-handling-Preah-Vihe-30188340.html>.

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