

DISSENTING OPINION OF JUDGE AL-KHASAWNEH

I wish, in appending this dissenting opinion, to explain briefly the reasons that led me, not without regret, to vote against operative paragraph 69 (B) (1) of the Order.

Such explanation is all the more called for since I take no issue, in principle, with the premise upon which the Order is predicated, namely that all the conditions necessary for the indication of provisional measures have been met in the present instance. I thus agree that the Court's jurisdiction and the prima facie existence of a dispute within the meaning of Article 60 of the Statute of the Court have both been established and that, likewise, the rights alleged in the principal request are plausible and at risk of irreparable prejudice.

What I question, however, is the link between those plausible rights that ought to be conserved and protected pending a final judgment and one of the measures indicated by the Court, namely the establishment of a "provisional demilitarized zone" around the Temple of Preah Vihear.

What are the rights that need to be urgently protected? According to paragraph 55 of the Order, these are:

"the rights which Cambodia claims to hold under the terms of the 1962 Judgment in the area of the Temple [that] might suffer irreparable prejudice resulting from the military activities in that area and, in particular, from the loss of life, bodily injuries and damage caused to the Temple and the property associated with it".

It seems plain to me (and I leave aside the finer points as to the Temple itself being incontestably Cambodian and hence outside the purview of the principal request) that those rights can be adequately and effectively protected by indicating a provisional measure directing both Parties to refrain from any military activities in the area around the Temple without necessarily defining that area and much less by establishing a "provisional demilitarized zone" as is presently contained in the Order.

The provisional demilitarized zone, as defined in the Order, contains parts of territory indisputably Cambodian or indisputably Thai as well as parts where sovereignty is at issue. I see no justification for asking each of the two Parties to withdraw its respective troops from the areas that appertain to it. Therefore, the measure is excessive since the protection to be given to the rights at issue can be achieved adequately and effectively by directing the Parties that they must strictly refrain from any military activities.

Besides, the concept of a demilitarized zone has been condemned to obsolescence by modern developments in the fields of artillery, missiles and other forms of projectiles.

The Court's power to indicate measures is wide, and rightly so, but because of this it should be exercised with caution. The imposition of a demilitarized zone, the spatial definition of which is not defined on the basis of a discernible criterion, is therefore both unnecessary for the protection of the rights at issue and infinitely open to accusations of arbitrariness. A more sensible approach would have been to restrict the provisional measures to a strict observation of a ceasefire in the area of the Temple, coupled with a measure directing Thailand not to obstruct access to the precincts of the Temple and a measure directing the two Parties to allow the observers, appointed by ASEAN, to access the Temple area.

(Signed) Awn Shawkat AL-KHASAWNEH.
