DISSENTING OPINION OF PRESIDENT OWADA

With regret, I had to vote against the most cardinal section (subparagraph (B) (1)) in the operative part of the Order (para. 69). With a view to clarifying my position as to why I had to vote against this most cardinal part of the Order, I wish to state the reasons for my dissent in this opinion attached to the main Order as follows:

1. A request for the indication of provisional measures is made by one of the parties during the course of the proceedings in the main case as its *incidental proceedings*. As such, the scope of the request and the jurisdiction of the Court to deal with the request is limited by its very nature to being incidental to the main case. The extent of competence of the Court to deal with such a request and to indicate an order if it considers that circumstances so require is to be determined by this fact, both in terms of the scope of the measures that it can indicate and in terms of the jurisdiction it has in indicating such measures.

2. It is my considered view that the present Order, where it indicates that

> "[b]oth Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, *as defined in paragraph 62 of the present Order*, and refrain from any military presence within that zone and from any armed activity directed at that zone" (Order, para. 69 (B) (1); emphasis added),

goes beyond this limit inherent in this essential characteristic of the provisional measures as being incidental to the main dispute.

3. The scope of the provisional measures that may be indicated by the Court in the present proceedings and the jurisdiction to deal with the request for provisional measures have their legal basis in the main case. The main case brought by Cambodia before the Court is "a request for interpretation of [the] Judgment [of the Court] of 15 June 1962 . . . in which [the Court] decided the merits of the *Temple of Preah Vihear* case between Cambodia and the Kingdom of Thailand" (Application, para. 1). The present Order has found that it has jurisdiction to rule on the question of interpretation, to the extent that, under Article 60 of the Statute of the Court, "[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". This is the basis of the jurisdiction of the Court for indicating provisional measures relating to the main case (Order, para. 21), which means that this

defines the limit of the jurisdiction of the Court in indicating provisional measures.

4. It is true that the 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" (Statute of the Court, Art. 41, para. 1; emphasis added). In the past case law of the Court, the Court indeed has often indicated, *proprio motu*, to both of the parties to withdraw their forces from the area in dispute or in conflict, "with a view to preventing the aggravation or extension of the dispute whenever it consider[ed] that circumstances so require" (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 18).

5. Out of a total of some 40 Orders of the Court on the indication of provisional measures, there are three cases in which this issue of withdrawal of forces of the parties in the case in question came about and in which the Court did in fact indicate provisional measures to order both of the parties to the dispute to disengage their respective armed forces from potential or actual armed conflict and to withdraw their respective forces from a certain zone specified in the Order. They are:

(*a*) the case concerning *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 12, para. 32;
(*b*) the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 49; and
(*c*) the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 27-28, para. 86.

6. However, in the past cases, the Court indicated, as a provisional measure pending the final outcome of the decision of the Court on the merits in the main case, that: "[b]oth Governments should continue to *observe the ceasefire* instituted by agreement between [the two parties]" (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 12, para. 32 1 (C); emphasis added);

> "[b]oth 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 (*ibid.*, para. 32 1 (D));

or that

> "[b]oth Parties should 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 3 February 1996 (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 49 (3));

or that

> "[e]ach Party shall refrain from sending to, or maintaining *in the disputed territory*, including the *caño*, any personnel, whether civilian, police or security" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (1); emphasis added).

7. In none of these cases has the Court ever gone so far as to order the parties to withdraw from a "provisional demilitarized zone" which is devised artificially by the Court for the purposes of military disengagement of the parties and which comprises part of the territories that indisputably belong to the sovereignty of one or the other of the parties, as it is the case in the present situation.

8. I have no disagreement with the view of the Court adopted in this Order that the Court has the power to indicate provisional measures, which have the binding force upon the parties (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109), provided that certain conditions under Article 41 of the Statute, including the existence of prima facie jurisdiction to deal with the case, are met. For this reason, I embrace the basic proposition of the Court as developed in this Order, including its approach to indicate that "[b]oth Parties shall immediately withdraw their military personnel currently present [in a certain specified zone],. . . and refrain from any military presence within that zone and from any armed activity directed at that zone" (Order, para. 69 (B) (1)), on the condition that that specified *zone* is defined and delimited in a manner consistent with the principle of sovereignty of the parties involved and with the extent of the jurisdiction of the Court as conferred upon it in the specific context of the present case.

9. What I cannot accept, with great regret, is the way in which the Court has decided in an artificial manner to demarcate this "provisional demilitarized zone" without legitimate justification.

What is demarcated in paragraph 62 of the Order for the purpose of setting up a "provisional demilitarized zone" is in my view devoid of legal justification, intruding as it does into part of the territories which indisputably belong to the sovereignty of one or the other of the Parties. In this sense, what this Order prescribes by way of establishing this "provisional demilitarized zone" is qualitatively different as a legal régime from all the other examples that I have referred to above, inasmuch as in all the other precedents that I have cited, what the Court prescribed was to ask the parties to withdraw from the areas the sovereignty of which was being

contested — the areas that constituted the very subject of the dispute in issue. In such a situation where, pending the outcome of the final determination of the Court, the issue of to whom this piece of disputed territory in question belongs is unclear, it is not just reasonable but also clearly within the power and jurisdiction of the Court to indicate to the parties such provisional measures as to disengage their forces only in relation to this disputed piece of territory. By contrast, the present situation is different in nature. The Court is ordering, with binding force, that each of the Parties be compelled to withdraw its forces from a certain portion of its own territory, even if on a provisional basis, over which no one disputes that it has an unfettered sovereignty to exercise.

10. In my view, this clearly goes beyond the power of the Court in relation to the indication of provisional measures under the Statute and the jurisdiction conferred upon the Court with regard to the indication of provisional measures of protection.

11. The legal situation would be quite different, if such provisional measures were taken by the Security Council under Chapter VII of the United Nations Charter "[i]n order to prevent an aggravation of the situation" (Charter, Art. 40). The Security Council is expressly empowered to take such "provisional measures" under the Charter, for the specific purpose referred to in its Article 40. The International Court of Justice is not the Security Council; the Court is not empowered by its Statute, nor authorized by the United Nations, to take measures, even on a provisional basis, which would encroach upon the sovereignty of a State without its consent, either explicit or implicit, even with the best of intentions.

12. I have no doubt whatsoever that the Court has acted in the present case with the best of intentions, emanating from its serious concern that the situation on the ground involved in the case, if unattended, would bring about *a real risk of irreparable prejudice which is present and imminent*.

Indeed, the Order specifically refers to this concern that there is a real risk

> "[that] the area of the Temple of Preah Vihear has been the scene of armed clashes between the Parties . . .; [that] the Court has already found that such clashes may reoccur; [and that] it is for the Court to ensure, in the context of these proceedings, that no irreparable damage is caused to persons or property in that area pending the delivery of its Judgment on the request for interpretation" (para. 61).

13. I share all these concerns of the Court. That is why I am in agreement with the Order, to the extent that it indicates the establishment of *some* "provisional demilitarized zone" compatible with its competence and jurisdiction, as a mechanism for preventing this real risk from becoming a reality. However, this has to be done within the legitimate competence of the Court as the court of law.

14. One view that may be advanced in favour of the establishment of this quadrangular zone artificially drawn on the map rather than the more classical exclusion zone based on the disputed territory is that given the unique geomorphological characteristic of the terrain involved, the demilitarization of the territory in dispute between the Parties may be extremely difficult, if not impossible, to enforce, whereas this artificially created demilitarization zone takes into account the specific topographical features of the area and is therefore more amenable to effective enforcement.

15. While I accept that rationale, I find it difficult to believe that the approach of the proposed zone will be easier to *implement* — not to *enforce* — than the approach based on the "territory in dispute" (see paragraph 9 of this opinion). What appears to be reasonable on the map may not necessarily be reasonable from the viewpoint of implementation on the ground. To my mind, what is at issue in this situation is not the question of *enforcement* of the demilitarized zone by a third party authority, but the feasibility of *implementation* of the demilitarized zone by the Parties. My own view is that as long as the Parties are willing to implement the Order of the Court — and there is no reason to think otherwise — the respective boundaries as claimed by each of the Parties as its own are well known to each of the Parties and easy to implement and observe the injunction prescribed by the Court on demilitarization, whereas the artificial line of demarcation to designate the provisional demilitarization zone may be clear on the map but it may turn out to be difficult for the Parties to implement.

16. In the final analysis, what in my view ensures the adherence of the Parties to the provisional measures prescribed by the Court is not the enforceability of the decision, but rather the legitimacy and persuasiveness based on the reasonableness of the proposition given by the Court. From this point of view, it is regrettable that this quadrangular zone includes more of the territory of one Party under its undisputed sovereignty than that of the other Party, although this imbalance may be wholly explicable and understandable when account is taken of the geomorphological characteristics of the terrain. It is earnestly hoped that this solution indicated by the Court will not lead to a misunderstanding of the intention of the Court in creating a provisional demilitarization zone.

(*Signed*) Hisashi OWADA.