

## DISSENTING OPINION OF JUDGE XUE

I am in agreement with the Court's decision to indicate provisional measures in the present case, but with serious reservation to its defining of a provisional demilitarized zone (the PDZ) as stated in the operative paragraph 69 (B) (1) of its Order. I will explain my position on the reservation.

In paragraph 61, the Court states that "the Court considers it necessary, in order to protect the rights which are at issue in these proceedings, to define a zone which shall be kept provisionally free of all military personnel". For that purpose, in paragraph 62, it defines a zone to be delimited by straight lines connecting four points with specific co-ordinates. On the sketch-map (p. 553), it shows that the zone, as thus drawn up, disregards the boundary lines as claimed respectively by the Parties, but exceeds well beyond the territories where the claims of the Parties overlap in the present proceedings. In other words, the PDZ covers undisputed territories of the Parties.

Based on the existing jurisprudence of the Court, this measure is unprecedented in the sense that the Court has never before indicated provisional measures ordering the Parties to withdraw troops or personnel from their undisputed territories. This measure, in my view, is excessive in light of the current situation between the Parties and 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.

Article 41 (1) of the Statute of the Court provides that "[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".

Further, Article 75 (2) of the Rules of Court provides, that "the 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".

By virtue of these provisions, the Court possesses the power to indicate provisional measures that it deems appropriate and necessary under the relevant circumstances and independently of the requests submitted by the parties to the extent as required by the relevant circumstances (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Provisional Measures, Order of 15 October 2008*, *I.C.J. Reports 2008*, p. 397, para. 145; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Provisional Measures, Order of 1 July 2000*,

*I.C.J. Reports 2000*, p. 128, para. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 22, para. 46; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Provisional Measures, Order of 10 January 1986*, *I.C.J. Reports 1986*, p. 9, para. 18).

The purpose of exercising such discretion is to prevent the aggravation or extension of the dispute between the Parties and preserve the rights that the Parties seek for protection in the main proceedings. So far, 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 (*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)*, p. 27, para. 86; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Provisional Measures, Order of 15 March 1996*, *I.C.J. Reports 1996 (I)*, pp. 24-25, para. 49; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Provisional Measures, Order of 10 January 1986*, *I.C.J. Reports 1986*, pp. 11-12, para. 32). In the case of peaceful settlement procedure by the third party, unless otherwise requested by the parties or the relevant circumstances so require, it is questionable that the Court should exercise the discretionary power in such a liberal way that provisional measures would extend to undisputed territories.

Theoretically, under Article 41 (1) of the Statute of the Court, the Court has the power to indicate “any” measure that it deems necessary, but the term “any” does not mean such power is unlimited. It should be restricted by the factual evidence that the circumstances on the ground require that such measure ought to be taken, otherwise, irreparable prejudice would be caused to the rights of either of the parties which would be adjudicated subsequently in the main proceedings.

With the evidence presented by both Parties, the Court is in a position to ascertain that the circumstances on the ground are grave enough for the indication of provisional measures as evidence shows that serious armed incidents in the area of the Temple of Preah Vihear between the Parties have resulted in the damage to the Temple, loss of life and bodily injury, and the evacuation of local inhabitants. As such armed clashes may recur in the area of the Temple, there indeed exists a risk of aggravation of the dispute and irreparable prejudice to the rights of either Party.

In consideration of the possible provisional measures, the Court has to decide on, in light of the factual circumstances, the measures that ought to be taken.

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. When factual circumstances constitute the only ground for the Court to consider the form and the extent of provisional measures independently of the requests of the Parties, the necessity of delimiting a provisional demilitarized zone should be sufficiently explained on the part of the Court, especially why factual circumstances require so excessive a measure that it even includes undisputed territories of the Parties.

Cambodia, at the end of its Application, requests the Court to adjudge and declare:

“The obligation incumbent upon Thailand to ‘withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory’ (second paragraph of the operative clause) is a particular consequence of the general and continuing obligation to respect the integrity of the territory of Cambodia, that territory having been delimited in the area of the Temple and its vicinity by the line on the Annex I map, on which the Judgment of the Court is based.” (Application instituting proceedings, p. 37, para. 45.)

Obviously, Cambodia’s request for the interpretation of the 1962 Judgment bears territorial implications. As an incidental proceeding, the Court at this stage should not pronounce on the merits of the case (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *Provisional Measures, Order of 10 January 1986*, *I.C.J. Reports 1986*, p. 11, para. 30; *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Interim Protection, Order of 11 September 1976*, *I.C.J. Reports 1976*, p. 13, para. 44; *Legal Status of the South-Eastern Territory of Greenland, Orders of 2 and 3 August 1932*, *P.C.I.J., Series A/B, No. 48*, p. 285). As the Court points out in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*,

“the Court, in the context of the proceedings concerning the indication of provisional measures, cannot make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments, if appropriate, in respect of the merits, must remain unaffected by the Court’s decision” (*Provisional Measures, Order of 15 March 1996*, *I.C.J. Reports 1996 (I)*, p. 23, para. 43).

In the previous paragraphs of the present Order, the term “the area of the Temple” is consistently and repeatedly referred to by the Parties in their pleadings as well as by the Court in its own reasoning. When the relationship between the two terms “the area of the Temple” and “the PDZ” is not clarified, the specificity of the zone with its co-ordinates in place does not necessarily render the latter more easily for the implementation of the Order. Because the Court draws the PDZ without adequate

knowledge of the ground situation in the territories of the Parties respectively, the defining of a PDZ, albeit provisional, on a flat map may cause unpredictable difficulties in reality to the detriment of the legitimate interests of the Parties.

This precaution not to intuitively draw any territorial line between the parties to a dispute in the indication of provisional measures was exercised by the Court in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case between Burkina Faso and Mali, where the Chamber ordered the parties to work out a separation line first between themselves. It ordered:

“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.” (*Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 12, para. 32 (1) (D).)

In the present case, first of all, I am of the view that it would be sufficient for the Court to just order the Parties to refrain from any military activities in the area of the Temple. Since this is a case concerning interpretation of the Court’s judgment, at this stage there is no real need for the Court to identify an area for demilitarization. So far as the protection of the Temple is concerned, securing no military actions from both sides in the area of the Temple would suffice to preserve the rights of the Parties in the main proceedings.

Otherwise, the Court could still have, in my opinion, indicated a similar provisional measure, as in the *Burkina Faso/Republic of Mali* case, by asking the Parties in the present case, with the co-operation of the Association of Southeast Asian Nations (ASEAN), to determine first by themselves the positions to which their armed forces should be withdrawn. Failing such agreement, the Court could then, if necessary, draw such lines by means of an order.

The Court has so far followed the jurisprudence that, in indicating provisional measures, there must be a link between the rights which form the subject of the main proceedings on the merits and the measures requested, and the Court must be concerned to preserve by such provisional measures the right which may subsequently be adjudicated by the Court to belong to either party (see, for example, *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)*, p. 18, para. 54; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 118; *Request for Interpretation of the Judgment of*

31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (*Mexico v. United States of America*), *Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 327, para. 58; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34). Likewise, the provisional measures as thus indicated should logically relate to the rights concerned. The PDZ as indicated in the operative paragraph 69 (B) (1) fails to maintain this necessary link within reasonable bounds.

(Signed) XUE Hanqin.