DECLARATION OF JUDGE KATEKA

1. I have voted in favour of the operative paragraph of the Order. However, I have some reservations on some aspects of the Order. I have doubt as to the necessity of the measure prescribed by the Tribunal. After referring to the conditions for the prescription of provisional measures, I express my hesitation on whether there is urgency for the measure prescribed.

2. The conditions for the prescription of provisional measures include prima facie jurisdiction for the Annex VII arbitral tribunal, the risk of irreparable prejudice and the urgency of the situation. In the present case, the party seeking the prescription of provisional measures has established a prima facie basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded. The Tribunal has correctly endorsed this view and further noted that the Applicant has presented sufficient facts and arguments to demonstrate that the rights it seeks to protect regarding the *Enrica Lexie* incident are plausible (paragraph 85 of the Order).

3. My main hesitation about the Order concerns the issue of urgency. The Tribunal can exercise its power to prescribe provisional measures only if there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute (ICJ, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Request for the Indication of Provisional Measures, Order of 3 March 2014,* para. 32). No such real and immediate risk of irreparable damage has been established by the facts and arguments submitted by the Applicant.

4. In the present case, the Tribunal has not only acted without giving full reasons for urgency but has also prescribed measures different from those requested by the Applicant. While the Tribunal has discretion under its Rules (article 89, paragraph 5) to prescribe measures different from those requested by the Applicant, this discretion should be exercised with great caution. It cannot be a matter of routine, especially when the prescription of provisional measures puts a restraint on the liberty of action of a State (Separate Opinion of Judge Higgins, *Legality of the Use of Force*, *Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999*, para. 29). It is

recalled that in its first provisional measure case – *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, *Order of 11 March 1998, ITLOS Reports 1998* – the Tribunal, even though the vessel and its crew had been released, went ahead and prescribed a measure out of concern that the rights of the Applicant would not be fully preserved, if pending the final decision, the vessel and its crew were to be subjected to any judicial or administrative measure (paragraphs 41 and 52). I fear that the Tribunal, out of good but mistaken intentions, has fallen into the same difficulty in the present case.

5. In the Order, the Tribunal has not advanced any satisfactory reason for its action on urgency. There is no imminent risk of irreparable damage to the Parties' rights. And yet the Parties are asked to suspend all court proceedings and to refrain from initiating new ones. In my view there is no justification for such a measure. Italy asserted its jurisdiction over the Enrica Lexie incident. The Office of the Prosecutor of the Military Tribunal in Rome opened an inquiry into the incident and a full investigation for the crime of murder. The criminal investigation is still open. No action is likely to be taken before the constitution of the Annex VII arbitral tribunal. India in both its written and oral pleadings has informed the Tribunal that all proceedings before the Indian Special Court – which has jurisdiction over the incident – have been stayed. The Additional Solicitor General of India stated before the Tribunal that the Indian Supreme Court has actually stayed its proceedings and "it would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and there will be an adverse decision against them (Italian marines)".

6. The Tribunal has noted these assurances and undertakings given by both Parties. Thus the Tribunal should have no reason to doubt that the Parties will not honour their word. As the ICJ has observed, "once a State has made … a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed" (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Request for the Indication of Provisional Measures, Order of 3 March 2014*, para. 44). As the Tribunal has accepted the good faith of the Parties, it had no reason to prescribe the measure in question.

7. The question of urgency is also to be looked at from the procedural aspect in the context of the time left before the constitution of Annex VII arbitral tribunal. According to Article 3 of Annex VII of UNCLOS, the arbitral tribunal will be constituted within the next three months. Bearing in mind that the dispute between the Parties has existed for over three years, nothing has been advanced to show that the situation has suddenly changed as to aggravate the rights of either party. The Applicant has availed itself of the judicial process of the Respondent during the past three years.

(signed) J. L. Kateka