Dissenting Opinion of Judge Kateka

1. I have voted against the operative provisions because I disagree with the Tribunal on the question of urgency. The Tribunal states that the rights claimed by the Applicant could be irreparably prejudiced and that this prejudice is real and ongoing.[1] I do not share this view. I shall explain. Before giving the reasons for my disagreeing with the majority, I shall deal with some preliminary important issues. I start with consideration of the requirements for the prescription of provisional measures. Then I express the view that the posting of a bond should not have been invoked in this case, which is on provisional measures. I explain below that the posting of a bond is more appropriate in prompt release cases. I also express my doubt about the workability of assurances which are part of the operative provisions.[2]

Requirements for provisional measures

2. Under the Convention, there are two procedures for the prescription of provisional measures. The first aspect of provisional measures is to be found in article 290, paragraph 1. Under that provision, a court or tribunal (including the International Tribunal for the Law of the Sea; hereinafter "the Tribunal") may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the rights of the parties to the dispute. The term "may" implies discretion for the court or tribunal as to whether or not such measures should be prescribed. The court or tribunal has to consider whether it is appropriate under the circumstances to prescribe the measures. The circumstances differ from case to case. Even when the requirements for the prescription of provisional measures are established – namely, *prima facie* jurisdiction, plausibility and urgency – judicial discretion and propriety have to be applied. Thus, in the ten provisional measures cases which have come before it, the Tribunal has prescribed measures in some cases while refraining from doing so in others. In some cases the Tribunal has exercised the provision of its Rules that gives it competence to prescribe measures different in whole or in part from those requested.

1 Para. 129 of the Order.
2 Para. 146, subpara. (1)(b).

3. The second aspect for applying provisional measures is under article 290, paragraph 5, which is the one that has been invoked by the Applicant in the present case. By this provision, the Tribunal may prescribe provisional measures if it considers that *prima facie* the Annex VII arbitral tribunal would have jurisdiction and that the urgency of the situation so requires. While paragraphs 1 and 5 of article 290 have to be read together, the two provisions have some differences. Under paragraph 1, a court or tribunal has competence to determine both *prima facie* jurisdiction for provisional measures and substantive jurisdiction for the merits of the dispute. Under paragraph 5, the Tribunal, as in the present case, can prescribe provisional measures in a dispute that has been submitted to an Annex VII arbitral tribunal. This calls for caution and judicial prudence, so as not to cause prejudice to the rights of either party or to prejudge the merits of the case. In my view, given the above understanding of the two paragraphs, the need for restraint in prescribing provisional measures is greater under paragraph 5 than under paragraph 1.

The posting of a bond

4. Regrettably, the Tribunal has reverted to the invocation of the posting of a bond for the second time in its case law. The first time was in the *"Arctic Sunrise"* case in 2013. This trend could lead to the permanent incorporation of prompt release mechanisms into provisional measures procedures. In my view it is a regrettable trend. This is because there are important differences between the two procedures. In this regard I wish to refer to the Separate Opinion of Judge Jesus in the *"Arctic Sunrise"* case. He expressed reservations as to the procedure, which was being invoked for the first time. He saw the release of a vessel upon the posting of a bond as "a back-door" prompt release remedy. I share this concern. In fact the Respondent State in the present case was prescient when it observed towards the end of its first round of oral argument that: "It may be worth noting in passing that this is not a prompt release case and thus not a case where the State has an obligation under the Convention to release the vessel and allow the crew to depart."[3]

3 ITLOS/PV.19/C27/2, p. 32, ll. 44–46.

5. The posting of a bond is appropriate for prompt release cases under article 292 of the Convention. That article provides for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. It is a mandatory procedure which requires a State to release a detained vessel flying the flag of another State. In accordance with article 73, paragraph 3, of the Convention, imprisonment and corporal punishment are prohibited as penalties for fishing offences. Only monetary terms are envisaged for prompt release cases. Similar conditions apply in situations of marine pollution pursuant to articles 220 and 226 of the Convention. These requirements that only monetary penalties be imposed do not apply in provisional measures cases. In the present case, the Master and three officers accused of violating Nigeria's law may be sentenced to imprisonment. Thus, by ordering the release of the crew upon the posting of a bond, Nigeria's rights are prejudiced if the accused crew members of the *M/T "San Padre Pio"* do not return.

6. Another difference between prompt release and provisional measures proceedings is that the prompt release proceedings provided for in article 292 are not incidental to the merits as the proceedings for provisional measures set out in article 290 are. Prompt release proceedings are separate and independent. This important difference was spelled out in the first ITLOS case, that of the *M/V "SAIGA"*.[4] When a court or tribunal undertakes a judicial function for provisional measures proceedings, it does so in an incidental manner subject to the merits being dealt with either by itself or by another court or tribunal, as is the case with our Tribunal.

7. The Tribunal states that, under article 290 of the Convention, it may prescribe a bond or other financial security as a provisional measure for the release of the vessel and the persons detained.[5] The Tribunal cites its Order in the *"Arctic Sunrise"* case. While it is doubtful that such broad competence exists

4 *Judgment, ITLOS Reports 1997*, p. 16, at p. 27, para 50.

5 Para. 137.

under the article cited, at least in the *"Arctic Sunrise"* case the Netherlands had inquired from the Russian Federation whether the release of the vessel and its crew would be facilitated by the posting of a bond or other financial security. In the present case, no such request for the posting of a bond was made. The majority in the present case points out that the release of a vessel upon the posting of a bond is an option available under the Nigerian administrative procedure, as stated by counsel for Nigeria during the hearing in response to a question by the Tribunal.[6] It is true that counsel for Nigeria confirmed that a vessel can be released under the administrative procedure upon the posting of a bond. He added, however, that the owner of the *M/T "San Padre Pio"* decided not to pursue this avenue of obtaining the vessel's release upon the posting of a bond.[7]

Assurances

8. The majority is of the view that Nigeria needs to be assured unequivocally, through an undertaking, that the Master and the three officers will be available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio"*, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the events of January 2018 do not constitute a violation of the Convention. The Tribunal prescribes that Switzerland "shall undertake to ensure that the Master and three officers are available and present at the criminal proceedings in Nigeria". Such an undertaking will "constitute an obligation binding upon Switzerland under international law".[8]

9. While I understand the majority to be well-intentioned in prescribing such assurances,[9] I wish to express my misgivings about the reality and practicability of such a step. Let me start by observing that the issue of assurances was invoked in the provisional measures phase in the *"Enrica Lexie"* case between Italy and India. In that case, the Tribunal placed on record assurances

6 *Ibid.*
7 ITLOS/PV.19/C27/4 p. 4, ll 14–24.
8 Para. 141.
9 Para. 146, subpara. 1(b) of the *dispositif.*

and undertakings which were given by both Parties during the hearing.[10] Also, in its Order on the request for the prescription of provisional measures of 29 April 2016, the Annex VII arbitral tribunal in the *"Enrica Lexie"* case ordered assurances similar to those ordered by the Tribunal in the present case. However, the Parties to the arbitration had, before the arbitral tribunal took any action about assurances, given assurances to the arbitral tribunal that bail conditions for the marines would be relaxed. Furthermore, the arraigned marines would remain under the authority of the Supreme Court of India during the period before the relevant award. Italy had also offered and renewed the solemn undertaking for the return of the marines to India. Thus, in that case, there was a watertight arrangement between the Parties before the arbitral tribunal issued its order about assurances and undertakings.

10. Regrettably this is not the situation in the present case. Just as in the case of posting a bond, the Parties did not avail themselves of the opportunity provided by both the written and oral pleadings to reach an understanding on assurances. On the contrary, during the oral hearing, the Applicant downplayed the assurances which were given by the Respondent concerning bail. The Agent of the Applicant on the second day of the oral hearing accused Nigeria of

> not complying with bail conditions in the past … how can we have any confidence in their purported new assurances? This is the more true, given that the diplomatic note in which these purported assurances are to be found only arrived this week … Now the presumption of good faith is important, but it should not run counter to the facts.[11]

In clarification of a statement made by Switzerland on the first day of the oral hearing that "[I]f need be, certain procedures exist for securing the return of the Ukrainian officers",[12] counsel, in response to the Tribunal's third question, stated, on the second day of the oral hearing, that he had been quite cautious in his statement the previous day. He added that, if the Tribunal were minded to devise ways to ensure that the measures prescribed do not prejudice

10 Para. 130.
11 ITLOS/PV.19/C27/3 p. 2, ll.13–19.
12 ITLOS/PV.19/C/27/1 p. 25, ll. 1–2.

Nigeria's rights, it could explore the matter with the Nigerian authorities and perhaps with the State of nationality of the Master and three officers. Counsel for Switzerland added that bail conditions could be adjusted to allow for the departure of the Master and the three officers from Nigeria.

11. I have cited the above details to show the difficulty Switzerland faced during the oral pleading concerning the issue of assurances. The problem will still face the Applicant in the implementation of the measure prescribed in the *dispositif* concerning assurances about the return of the crew members to face trial should the Annex VII arbitral tribunal so determine. In spite of all the good faith on the part of Switzerland, it will be difficult to guarantee the availability of the four defendants. The main reason is that the four defendants are not Swiss nationals. They are nationals of Ukraine, which is not a party to the present proceedings before the Tribunal. The defendants are not even residents of Switzerland. It is difficult for Switzerland to ensure their return to face criminal charges in Nigeria. An understanding between the Parties prior to the Tribunal pronouncing itself on the provisional measures would have facilitated the smooth implementation of the assurances and undertakings. It is noted that the manner in which the majority has formulated the bond and assurances in the *dispositif* is not helpful. Paragraph 1 of the *dispositif* is a package consisting of the bond and the assurances to be given by Switzerland to Nigeria. Regarding the bond, it is not clear what amount is for the vessel, the cargo and the crew. This ambiguity could create problems. The assurances are a unilateral declaration by Switzerland. The Tribunal considers this undertaking to be an obligation binding upon Switzerland under international law. In this regard, it is hoped that the cooperation called for in the formulation and implementation of the undertaking between the Parties will materialize on the basis of the good relations between Nigeria and Switzerland.

Urgency

12. The majority finds that there is a real and imminent risk of irreparable prejudice to the rights of Switzerland pending the constitution and functioning of the Annex VII arbitral tribunal. They find that the urgency of the situation requires the prescription of provisional measures under

article 290, paragraph 5, of the Convention.[13] This finding is the main reason for my disagreement with the majority. I am of the view that there is no such imminent risk of irreparable prejudice.

13. Urgency is one of the two requirements for provisional measures provided for in article 290, paragraph 5, of the Convention. Urgency is defined as "the need to avert real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered."[14] Urgency is a cardinal requirement before provisional measures can be prescribed. While article 290, paragraph 5, of the Convention specifically spells out urgency, this is not the case under paragraph 1 of the same article. Nevertheless, by their very nature, provisional measures are urgent and thus they are implied under paragraph 1. This interpretation is buttressed by the practice of the International Court of Justice ("ICJ"). Even though the ICJ Statute does not specifically mention urgency, the Court has exercised the power to indicate provisional measures only when there is urgency. Thus if there is no urgency, a court or tribunal cannot prescribe provisional measures.

14. I am of the view that in the present case there is no urgency. Provisional measures under article 290, paragraph 5, of the Convention are prescribed only when there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties to the dispute before the constitution and functioning of the Annex VII arbitral tribunal. In the present case the time frame for the constitution of the Annex VII tribunal commenced on 6 May 2019, when the Applicant submitted its Notification and Statement of Claim.[15] The arbitral tribunal will be established in the next few months. Owing to the short time frame involved there seems to be no urgency.

15. When it is considering the preservation of the rights of the requesting State, the Tribunal has to ensure that the rights of both parties are protected. In this regard I do not agree with the majority when it asserts that the arrest and detention of the *M/T "San Padre Pio"* and the exercise of criminal jurisdiction against the vessel and its crew by Nigeria could

13 Para. 131.

14 *Delimitation of the maritime boundary in the Atlantic* Ocean (*Ghana/Cote d'Ivoire*), *Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at p. 156, para. 42.

15 Article 1 of Annex VII to the Convention.

> irreparably prejudice the rights claimed by Switzerland relating to the freedom of navigation and the exercise of exclusive flag State jurisdiction over the vessel … there is a risk that the prejudice to the rights asserted by Switzerland, with respect to the vessel, cargo and crew – which constitute a unit – may not be repaired by monetary compensation alone.[16]

This is a serious assertion which goes to the merits of the case. It also overlooks the fact that, by deciding to release the four defendants, the majority has caused irreparable prejudice to Nigeria's rights. This prejudice is not compensable in monetary terms either. The sovereign right of Nigeria to exercise its criminal jurisdiction cannot be quantified in monetary terms.

16. On the contrary, the alleged harm to the vessel and the cargo is economic and can be wiped out by monetary compensation by an award of the Annex VII arbitral tribunal.[17] Here I wish to underscore my view that the release of the Master and the three officers constitutes an irreparable prejudice to Nigeria. There is no imminent risk to them because they are on board the vessel out of their own volition. The Nigerian Federal High Court released them on bail. They are free to stay anywhere in Nigeria. There is no detention of the Master and the three officers as the Applicant argues.[18] The surrender of their passports to Nigerian judicial authorities is a standard requirement that applies in many countries in the world. The Applicant also questions Nigeria's security situation and cites incidents of pirate attacks as reason for the request of release of the four defendants. This concern about the safety of the vessel and the crew has been taken care of by Nigeria's deploying armed guards on board the vessel since its arrest.[19] Hence there is no urgency.

17. In this regard I wish to stress my disagreement with the reasoning of the majority concerning the arrest and detention of the four defendants. The majority considers that the restrictions on the liberty and freedom of the Master

16 Para. 128.
17 Para. 123.
18 Para. 116.
19 Para. 127.

and three officers for a lengthy period raise humanitarian concerns.[20] By this observation the majority seems to question the Nigerian legal system, which is functioning well. As stated by Nigeria during the written and oral pleadings, the four defendants are getting a fair trial. They are currently free on bail. The Nigerian judiciary has ensured due process for the defendants. The Applicant has complained about the 16 months since the accused were first arraigned in the Federal High Court. It is worth pointing out that this time frame is normal in such cases. This period could be compared with that in the M/V *"Norstar"* case, where it took many years before the trial ended.

18. The questioning of the Nigerian legal system has also been linked with the security and safety situation in the Gulf of Guinea. The "piratical'" attack on the *M/T "San Padre Pio"* is cited as a danger to the crew.[21] The presence of the Nigerian navy officers on board the vessel, which ensured the failure of the attack, is not acknowledged. Instead, the Tribunal cites statistics from the International Chamber of Commerce's International Maritime Bureau describing incidents of piracy and armed attack against ships.[22] The majority uses these statistics in order to justify its contention that the vessel, the crew and others on board "appear to remain vulnerable". This is not justified by the situation on the ground. It is an unfortunate inference to conflate the existence of piracy and armed robbery in the Gulf of Guinea with the security situation in Nigeria. There are many complex problems in the real world. But they do not influence the determination of security and peace in different countries. It would be unfortunate if the existence of the twin problems of piracy and illegal, unreported and unregulated fishing – which is fuelled by the third emerging problem of illegal bunkering – in the Gulf of Guinea were to be used to judge the security and safety of the West African States. The comment about humanitarian concerns is misplaced and should be used with great care. It should apply in serious situations, such as those in the *M/V "Louisa"* case.

20 Para. 130.
21 Para. 129.
22 *Ibid.*

19. In conclusion, I wish to state that the majority has failed to follow its jurisprudence in prescribing provisional measures in the present case. The circumstances are such that the Tribunal should not have prescribed the measures requested by Switzerland. As I argued in this opinion, besides the lack of urgency, the measures prescribed will prejudice the merits. The Tribunal should not have prescribed the provisional measures in order not to touch upon issues related to the merits of the case.[23] By its action, the Tribunal has prejudiced the rights of Nigeria.

(*signed*) J.L. Kateka

23 *"Enrica Lexie"*, para 132.