SEPARATE OPINION OF JUDGE CHANDRASEKHARA RAO

1. I have voted in favour of the Order. Nevertheless, the Order remains conspicuously silent on certain aspects of the case which deserve to be noted in this Separate Opinion.

2. The central issue in this case concerns the detention of the Argentine warship *ARA Libertad* by Ghana at its port of Tema. Though its entry into this port was authorized by Ghana, Ghana argues that the ship was detained pursuant to an order of the Ghanaian High Court sitting in Accra, notwithstanding the clear submission made before the Court by the Director of the Legal and Consular Bureau of the Ministry of Foreign Affairs of Ghana to the effect that the warship enjoyed immunity and that it was the duty of the Judge to release the vessel forthwith. His statement deserves to be quoted in full:

> First of all there are two levels in this matter one has to do with the jurisdiction of the court for the Republic of Argentina subject to the jurisdiction of the courts of Ghana. The second has to do with the status of the warship and on both count as the department responsible for the conduct of our relations we want to ride on the established principles that we need the express waiver of a foreign government to subject that government to your foreign jurisdiction, not even the American courts will entertain an exercise of jurisdiction over the Republic of Argentina in breach of the principle of the sovereign immunity of a foreign state in a foreign court. The second part is the vessel, the warship. As has been deposed by counsel for Argentina, the foreign ministry advised the Attorney Generals Department that the vessel is a warship and on that point I want to refer to a ruling by a U.S. Court in the case of Ex-parte Republic of Peru in which Chief Justice Stone in ruling upon Peru's claim of sovereign immunities stated that the department of state has allowed the claim of immunity and caused it actions to be certified to the District Court through the appropriate channels. The certification and the request that the vessel the warship be declared immuned must be accepted by a court as a conclusive determination by the political arm of government that the continued retention of the vessel interferes with the

> proper conduct of our foreign relations. Upon the submission of this certification to the court (in this case our letter which is attached to the affidavit filed by counsel). Upon certification to the court (in this case this honourable court), it became the court's duty in conformity to established principles to release the vessel and to proceed no further in the case. I recognize that this is of persuasive authority.

3. In spite of this clear and unambiguous certification by the executive wing of the Government, the Court took measures of constraint against the warship.

4. During the course of the oral proceedings, Ghana did not take the legal position that it expressed before its own court. Ghana explained its inability to help in the matter of release of the warship. Ghana stated:

> However, by reason of my Government's strong and unwavering commitment to the rule of law and the separation of powers – encompassing a completely independent judiciary – the situation is not one which can be resolved instantaneously by an act of the executive branch of the Ghanaian Republic. In Ghana the independence of the Ghanaian Judiciary is fully respected. (ITLOS/PV.12/C20/2, p. 3)

> The executive arm of government is therefore unable to interfere with the work of the Ghanaian courts; it is not within the powers of the Government to compel the Ghanaian courts to do anything. It is not for the executive branch to meddle with the judicial function of the Ghanaian High Court, just as no political body and no organ of the United Nations can in any way interfere with the judicial functions of this illustrious Tribunal. (ITLOS/PV.12/C20/2, p. 3)

5. In response to the Ghanaian argument, Argentina points out that a State is required to abide by its obligations under international law, that a State is responsible for the acts of all its organs, whether they exercise judicial or other functions, and that Ghana has not taken any kind of measure aimed at putting an end to the unlawful act generated by the decision of its judiciary.

6. It is well established that a State cannot take shelter behind a decision of any of its organs as an excuse for not implementing its international legal obligations. The Permanent Court of International Justice stated:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.
(*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19. See the Judgment of this Tribunal in the *M/V "SAIGA" (No 2)* Case, *Judgment, ITLOS Reports 1999*, p. 10 at p. 52, citing with approval the above quoted Judgment)

7. The International Court of Justice held:

According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

> The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State. (*Yearbook of the International Law Commission*, 1973, Vol. II, p. 193)

. . .

As indicated above, the conduct of an organ of a State – even an organ independent of the executive power – must be regarded as an act of that State.

(*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I. C. J. Reports 1999*, p. 62 at pp. 87-88, paras. 62-63)

8. More recently, the International Court of Justice stated:

> The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity.
> . . .
>
> The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law. (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at p. 29)

9. The question whether the doctrine of estoppel could also be invoked as a ground for opposing the judicial proceedings has not been mentioned in the Judgment. It has been discussed in the Separate Opinion of Judges Wolfrum and Cot. There is no doubt that, as noted in the Judgment, the visit of the warship *ARA Libertad* to the port of Tema was the subject of an exchange of diplomatic notes between Argentina and Ghana, whereby the visit of the warship had been authorized by Ghana by a note verbale of 4 June 2012. What is the legal significance of this authorization? The position that obtains under general international law is well established.

10. As early as 1812, the United States Supreme Court, in the *Schooner Exchange* case, held:

> If the preceding reasoning be correct, the *Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. (*The Schooner Exchange v. McFaddon*, 11 U.S. 116, para. 20 (1812))

11. To the same effect are the following observations by C. John Colombos:

> When the entry of foreign warships has been either expressly or impliedly allowed by the territorial State, its jurisdiction is waived, and no form of public or private process lies against the foreign warships. They cannot be seized or interfered with in any manner by judicial proceeding [...]. (C. John Colombos, *The International Law of the Sea (*6th revised edition 1967), pages 264-265)

12. Since in this case the entry of the warship into the internal waters had been expressly authorized by Ghana, the warship should be considered as exempted from Ghana's jurisdiction by its consent. The coastal State with whose permission a warship enters its internal waters can be said to have waived its jurisdiction over the warship. It does not appear that such waiver in and by itself affords a basis on which prima facie jurisdiction of the Annex VII arbitral tribunal might be founded.

13. Even if the doctrine of estoppel can be relied upon on the facts of this case, it may not have a bearing on the prima facie jurisdiction of the Annex VII arbitral tribunal. Judges Wolfrum and Cot disagree with the holding of the Tribunal that the Annex VII arbitral tribunal would prima facie have jurisdiction over the dispute. Nevertheless, they are of the opinion that the Tribunal can prescribe appropriate provisional measures, since Ghana is estopped from presenting any objection for such prescription in the particular circumstances of this case. The Convention does not appear to support this view. How can the Tribunal prescribe provisional measures if it has no jurisdiction?

14. The argument based on waiver or, as the case may be, estoppel may become relevant at the merits stage of this case.

15. Paragraph 97 of the Judgment deals with the consequences of a warship being prevented by force from discharging its mission.

16. I would have preferred to see in this paragraph a clear statement to the effect that even an attempt to threaten or use of force against a warship would be a matter impinging on the maintenance of international peace and security. In a comprehensive article on warships, Bernard Oxman stated:

> An attempt to exercise law enforcement jurisdiction against a foreign warship is in fact an attempt to threaten or use force against a sovereign instrumentality of a foreign State. That is primarily the subject matter of the law

regarding the maintenance of international peace and security, not the law of the sea as such – with a notable qualification in the case of innocent passage in the territorial sea . . . (Bernard H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea", *24 Va. J. Int'l L.,* pp. 809 at 815 (1983-1984))

(signed) P. Chandrasekhara Rao