JOINT SEPARATE OPINION OF JUDGE WOLFRUM AND JUDGE KELLY

1. We have voted in favour of the order to release the vessel *Arctic Sunrise* and all persons on board who were arrested in connection with the detention of the vessel. In our view it is mandatory that the order to release covers all persons regardless of their nationality. Considering the latest developments it may be called for to underline that release as referred to in the Order of the Tribunal means that the vessel as well as all persons shall have the right to leave the territory of the Russian Federation including its maritime zones.

2. The objective of this opinion is, firstly, to emphasize and, possibly, to enrich the reasoning in the Order of the Tribunal concerning the non-appearance of the Russian Federation. It will, secondly, deal with the declaration of the Russian Federation made when ratifying the Convention on the Law of the Sea. Thirdly, the opinion will briefly deal with issues concerning the jurisdiction of the Tribunal under article 290, paragraph 5, of the Convention. In our view the jurisdiction of the Tribunal is broader than the Order suggests. Fourthly, the opinion will discuss the enforcement powers claimed by the Russian Federation in its exclusive economic zone from the point of view that provisional measures must take into account the rights and interests of both Parties to the dispute. This latter aspect has not been touched upon in the Order of the Tribunal due to the restrictive approach taken concerning the jurisdiction of the Tribunal under article 290, paragraph 5, of the Convention. Nor does the Order, for the same reasons, touch upon human rights issues although these were argued extensively by the Netherlands.

3. The Order of the Tribunal deals with the non-appearance of the Russian Federation in paragraphs 46-56. It is rightly stated that the non-appearance of a party does not preclude the Tribunal from prescribing provisional measures (paragraph 48), and that the non-appearing party remains a party to the case and is bound by the decision in accordance with article 33 of the Statute of the Tribunal. The Order refrains from referring to article 28 of the Statute of the Tribunal, which states:

> When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law.

4. The reason for not referring to article 28 of the Statute rests in the fact that, taken literally, the last sentence of this provision does not seem to harmonize with article 290 of the Convention. Under the procedure of article 290, paragraph 1, of the Convention the Tribunal may only establish its jurisdiction *prima facie.* In the case of article 290, paragraph 5, of the Convention the Tribunal has the function of establishing the *prima facie* jurisdiction of a still to be established Annex VII arbitral tribunal. However, in interpreting article 28 of the Statute of the Tribunal one should take into account that this article is to be found in Section 3 of the Statute on procedure, which indicates that article 28 of the Statute is meant to cover all procedures, including provisional measures. Apart from that, the latter are referred to in the same section and thus cannot be excluded. A harmonizing interpretation should read the references to jurisdiction and that the claim is well founded in fact and law as referring to the requirements under the particular procedure in question. This would mean that article 28 of the Statute would apply to provisional measures as well as other procedures defined in this Section if the Tribunal found that it (or in the case of article 290, paragraph 5, of the Convention the arbitral tribunal to be established) had jurisdiction *prima facie*. This approach would have been more convincing than, as the Order of the Tribunal does, tacitly following the practice of the ICJ. The Tribunal missed the opportunity to contribute to the interpretation of article 28 of its Statute.

5. In this context the Order of the Tribunal could have shed some further light on how non-appearance is to be seen under a mandatory dispute settlement system such as the one established under Part XV of the Convention. The non-appearing party not only weakens its own position concerning the legal dispute but also hampers the other party in its pursuit of its rights and interests in the legal discourse of the proceedings in question. But, more importantly, it hinders the work of the international court or tribunal in question. The international court or tribunal may in such a situation have to rely on the facts and the legal arguments presented by

one side without having the benefit of hearing the other side. This cannot be fully compensated by recourse to facts which are in the public domain.

6. However, there is a more fundamental consideration to be mentioned. In the case of States having consented to a dispute settlement system in general – such as the Netherlands and the Russian Federation by ratifying the Convention on the Law of the Sea – non-appearance is contrary to the object and purpose of the dispute settlement system under Part XV of the Convention. Surely, as stated in article 28 of the Statute of the Tribunal, the non-appearing State remains a party to the proceedings and is bound by the decisions taken. However, essential as this may be this does not cover the core of the issue. Judicial proceedings are based on a legal discourse between the parties and the co-operation of both parties with the international court or tribunal in question. Non-appearance cripples this process. As Sir Gerald Fitzmaurice put it in his article on "The Problem of the 'Non-Appearing' Defendant Government" (*BYIL* (1980), vol. 51 (1), p. 89 at 115), non-appearance leaves the "outward shell" of the dispute settlement system intact but washes away the "core". For that reason article 28 of the Statute should not be understood as attributing a right to parties to a dispute not to appear, it rather reflects the reality that some States may, in spite of their commitment to co-operate with the international court or tribunal in question, take this course of action. The Order of the Tribunal does not express these concerns sufficiently and appears to be over-diplomatic.

7. One of the decisive issues in this case is that the Russian Federation in its note verbale of 22 October 2013, relying on its declaration of 12 March 1997, stated that "it does not accept the arbitration procedure under Annex VII of the Convention initiated by the Netherlands in regard to the case concerning the vessel 'Arctic Sunrise.' " The declaration reads:

> The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in

> respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations; . . .

8. To the extent that the Russian Federation relied on this declaration to justify its non-appearance, it is called for to state that this declaration cannot justify the non-appearance. Even if the declaration would exclude the jurisdiction of the Annex VII arbitral tribunal, the decision on its jurisdiction rests with that tribunal and not with the Russian Federation. International courts and tribunals have a sole right to decide on their jurisdiction (Kompetenz-Kompetenz/la compétence de la compétence).

9. The Order of the Tribunal reflects the declaration of the Russian Federation (paragraph 41), quotes the position of the Netherlands (paragraph 43) and states in paragraph 45 that this declaration only covers those disputes excluded in article 297, paragraphs 2 and 3, of the Convention and therefore the Annex VII arbitral tribunal will have jurisdiction *prima facie*. A convincing reasoning is missing but is called for. A clarification of the scope of the declaration of the Russian Federation is a central issue in this case. Only if the Tribunal is of the view – *prima facie* – that the declaration made by the Russian Federation does not exclude the jurisdiction of the future Annex VII arbitral tribunal may it proceed to discuss whether article 283 of the Convention has been satisfied, namely whether the Netherlands *prima facie* has submitted a plausible claim and whether the urgency of the situation requires the issuing of provisional measures.

10. Dealing with the interpretation of the declaration of the Russian Federation and with the question whether it is applicable in the case concerning the *Arctic Sunrise* does not constitute an encroachment on the competences of the Annex VII arbitral tribunal. It is clear from the wording of article 290, paragraph 5, of the Convention that any such finding is without prejudice to the Annex VII arbitral tribunal as the Order seems to suggest. The arbitral tribunal has the right to modify, revoke or affirm the provisional measures taken (article 290, paragraph 5, last sentence, of the Convention). This is the mechanism to avoid any interference by the Tribunal with the functions of the Annex VII arbitral tribunal and not self-restraint on the part of the Tribunal when taking a decision under article 290, paragraph 5, of the Convention.

11. When it comes to the interpretation of the declaration of the Russian Federation and its application to this dispute, it is appropriate to note that the declaration was explicitly made under article 298 of the Convention and covers paragraph 1 of this provision. The declaration deviates from the wording in article 298, paragraph 1(b), of the Convention since it does not contain, as paragraph 1(b) does at the end, the limiting words "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3." Article 297, paragraphs 2 and 3, of the Convention refer to the jurisdictional power of coastal States concerning scientific research and fisheries. Deleting this reference would enlarge the declaration well beyond the scope anticipated in article 298 of the Convention and would exclude basically all potential disputes concerning the exercise of the coastal State's jurisdiction in its exclusive economic zone from judicial settlement. However, based upon its explicit reference to article 298 of the Convention it is justifiable – at least *prima facie* – to assume that the Russian Federation wanted with its declaration to remain within the realm of article 298 of the Convention. *Prima facie*, this interpretation is endorsed by the second part of the declaration, which states the objections of the Russian Federation to any declaration that is not in keeping with article 310 of the Convention. Apart from that it is worth mentioning that the activities undertaken by the Russian authorities *prima facie* are not to be considered as "military activities" as referred to in the declaration.

12. The Order of the Tribunal does not touch upon the issue that the *Arctic Sunrise* was arrested within the exclusive economic zone of the Russian Federation whereas only several of its inflatable rubber boats entered the safety zone of the platform and only very few persons attempted to scale the installation. This could have been of relevance for the issuing of provisional measures under article 290, paragraph 5, of the Convention. Due to the non-participation of the Russian Federation some factual details are unknown in this respect. It should have been taken into account by the Order that a coastal State has only limited enforcement jurisdiction in its exclusive economic zone. These are amongst others the competences set out in articles 73, 110, 111, 220, 221 and 226 of the Convention. The situation is different in respect of artificial islands and installations where the coastal State according to article 60, paragraph 2, of the Convention enjoys exclusive jurisdiction and in the safety zones around such artificial islands or installations. This includes legislative jurisdiction as well as the corresponding enforcement jurisdiction.

13. As far as enforcement actions in the exclusive zone in general are concerned the enforcement jurisdiction of the coastal State is limited if it is not legitimized by one of the exceptions mentioned above. It is for the flag State to take the enforcement actions not entrusted to the coastal State by the Convention on the Law of the Sea. That this is a feasible and even effective way is demonstrated by a court injunction of a court in the Netherlands which prohibited Greenpeace International to enter into the safety zone of a platform in the EEZ off the coast of Greenland (see Rechtbank Amsterdam, Uitspraak, 09-06-2011, No. 491901/KGZA 11-870 Pec/PV).

14. This division of enforcement functions between the coastal State and the flag State should have been of relevance in formulating the provisional measures since such provisional measures should have taken into account that the Russian Federation enjoys enforcement functions in respect of the protection of the platform within the safety zone whereas it has no such right in its exclusive economic zone *vis-à-vis* the *Arctic Sunrise* as the facts present themselves at the moment. In the exclusive economic zone Greenpeace could invoke, amongst others, the freedom of expression as set out in the International Covenant on Civil and Political Rights whereas in the safety zone, depending on the factual situation, the exercise of such rights may have to yield to the safety interests of the operator of the platform.

(*signed*) R. Wolfrum
(*signed*) E. Kelly