

Declaration of Judge Kelly

1. I have voted in favour of the Order of the Tribunal in the case of the “*Enrica Lexie*” Incident in full agreement with the considerations and the provisional measures prescribed therein.

2. However, in prescribing that

... pending a decision by the Annex VII arbitral tribunal... Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render,

the Tribunal falls short of what I believe should have been its logical legal consequence, i.e., the prescription of an additional provisional measure to the effect of lifting all restrictions ordered by the Indian courts on the liberty and freedom of movement of the two Marines detained in India and the establishment by Italy of a similar form of control over them until a decision by the Annex VII arbitral tribunal is adopted, in accordance with assurances given by the Agent of Italy, Mr Azzarello, during the oral hearing held on 11 August 2015.

3. The cases of these two members of the Italian armed forces, a status that I believe should not be overlooked, are similar inasmuch as they are restrained in their freedom and subject to the bail constraints decided by the Indian courts even if at present the situation of Chief Master Sergeant Massimiliano Latorre – who is in Italy due to medical reasons – is somewhat different from the one of Sergeant Salvatore Girone, who remains in India.

4. The fact that the two Marines were never charged notwithstanding the murder allegations made by India is in my opinion a very important element that should have been taken into consideration. The provisional measure ordered by the Tribunal which I have quoted will have the effect of freezing the present situation of the two Marines inasmuch as the bail conditions determined by the Indian courts will not be changed. The present situation of Sergeant Girone,

in detention since 19 February 2012, will likely be maintained until the Annex VII arbitral tribunal decides which of the two States has jurisdiction over the incident.

5. I believe that the continuation of the bail restrictions imposed by India on the two Italian Marines is not acceptable bearing in mind that – for whatever reasons invoked by India – they have not been charged with murder and that the criminal law principle of presumption of innocence should apply in this case.

6. The assumption by India that the lifting of the bail restrictions on the two Marines granting them the freedom to return to Italy would imply that the killing of its two nationals will remain unpunished and that, therefore, this would cause an irreparable prejudice to the rights of India is, in my opinion, unfounded. As has been stated by Judge Jesus in his separate opinion in this case, an irreparable prejudice to the rights of India would have been caused if, and only if, Sergeant Latorre and Sergeant Girone were not to return to India if the Annex VII arbitral tribunal decides that India has jurisdiction in this case.

7. I also believe that the assurances given by the Agent of Italy, Mr Azzarello, as registered by the Tribunal in paragraph 118 of the Order, should have been taken into account not only as a basis for the first provisional measure prescribed but also as a basis for the prescription of an additional provisional measure as I have previously stated.

(*signed*) E. Kelly