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Mr Martin Doe,
Deputy Secretary General
Permanent Court of Arbitration
The Hague

I have the honour to refer to the letter of the Agent of the Russian Federation dated 6 September 2024 addressed to you.

In the letter, the Agent of the Russian Federation raises several issues and invites me to consider withdrawing from the case. In this Note I shall comment on the three issues raised by the Russian Federation. These issues concern my position on the Declaration of the Institute of International Law on the Aggression in Ukraine (IDI Declaration), my reposting a tweet (X) on the statement of the Ambassador of Kenya in the Security Council and my participation in the ITLOS Order for provisional measures in the case concerning the detention of three Ukrainian naval vessels. I shall comment on each of these issues in turn.

First, the IDI Declaration which was adopted on 1st March 2022.

The Russian Federation states that I participated in the drafting and voting process of the Declaration. It adds that my comments on the Declaration published in the Institute's Yearbook reveal that I align with the substance of the Declaration.

Let me state at the outset that I abstained during the vote on the Declaration. It was adopted by 110 votes in favour, 0 against and 5 abstentions. As to the participation in the drafting of the Declaration, I wish to state that I made some comments and proposals for amending the draft Declaration. However, the circumstances of the Declaration's drafting and

adoption were impacted by the timeframe. This is admitted by the IDI Secretary General in his introduction to the Declaration. He states, “[g]iven the urgency, an amendment procedure, which would have risked considerably slowing down, or even ruling out, adoption of the text, was not envisaged.”¹ It is in this context that my proposals for amendments must be understood. I made the comments and proposals in good faith. In this regard, the imputation that my comments on the Declaration align with the substance of the Declaration, is not doing justice to my position. My abstention on the Declaration cannot be understood as standing firmly in support of the document. My proposals and comments were not accommodated.

Here I wish to quote the Russian Federation’s letter dated 24 November 2023:

Other members of the Institute who abstained from voting or did not participate in the vote also expressed their concerns regarding the Declaration. Notably, Judge James Kateka indicated that the language of the Declaration adopted excessively harsh pronouncements as compared to the Institute’s Bruges Declaration on the Use of Force dated 2 September 2003 (the ‘Bruges Declaration’) and considerations of good faith warranted the toning down of some of the language. It is notable that he appreciated that the members of the Institute ‘could be accused of double standards if [they] act with strong language.’²

Second, the Russian Federation states that their concerns on the IDI Declaration are further corroborated and exacerbated by my activities in the social media. They cite my reposting on X (then Twitter) of a speech by the Kenyan Ambassador on 22 February 2022 before the Security Council. This was a post by one Cris van Eijk (not personally known to me) reposting a tweet by one Thomas van Linge (also not personally known to me). I reposted this tweet when I heard the Kenyan envoy state that Africa’s borders were drawn in London, Paris and Lisbon. It is a matter concerning my continent that touches me. I normally repost or post tweets which touch on African issues of interest. For example, an African President took to task the Chief Justice and Speaker of Parliament for

¹ *Institute of International Law Yearbook*, Volume 83, 2022-2023, p.17

² Letter of the Agent of the Russian Federation to the PCA Deputy Secretary General dated 24.11.2023, p.6, para 27

wearing wigs (my repost of 28 March 2022); Dr S.A. Salim making Africa proud (repost of 23 January 2022); Climate injustice: Africa suffers more from climate impacts (repost of 15 November 2021); the passing of the last of Africa's liberation stalwarts (post of 18 June 2021); election of an African as President of the ICJ (post of 13 February 2018); and election of an African as ICC President (post of 30 March 2018).

In this regard, it is regrettable that my concern for the wording of the Declaration is interpreted as being motivated by a desire for a modicum of neutrality rather than my own personal conviction. It is said that my ostensible disagreement with the word 'aggression' in the Declaration is exemplified by the repost. I could not have proposed the deletion of the word 'aggression' in the Declaration and in the same breath support it in the social media. It would not make sense. I am puzzled by the imputing of issues of colonialism, which have never crossed my mind, to my position.

Third and finally, the Russian Federation raises the question of my participation in the provisional measures stage of the ITLOS Order of 25 May 2019. The Order issued was by ITLOS under Article 290 of UNCLOS which provides for the prescription of provisional measures to preserve the respective rights of the parties to the dispute. The ITLOS provisional measures in the operative part, called on the Russian Federation to release the three Ukrainian vessels and the 24 detained Ukrainian servicemen. It further called on both parties to refrain from any action that might aggravate or extend the dispute.

The ITLOS Order has been cited in the present proceedings. It is a decision that is in the public domain. It concerns provisional measures only and does not concern the merits of the case which is for this Annex VII Arbitral Tribunal.

In light of my above comments, I wish to conclude by stating that I have not expressed any opinion or view that could raise justifiable grounds for doubting my independence and impartiality. I therefore see no reason for withdrawal as arbitrator.


James Kateka