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By Electronic Mail

Mr. Martin Doe
Deputy Secretary-General
The Permanent Court of Arbitration
Peace Palace, Carnegieplein 2
2517 KJ The Hague
The Netherlands

Re: PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*)

Dear Mr. Doe:

With reference to the Tribunal's letter of 29 December 2024 and Procedural Order No. 10, Ukraine hereby respectfully conveys its views on the Russian Federation's challenge to Judge Kateka. As discussed below, Russia failed to assert a timely and proper challenge to Judge Kateka, and for that reason alone the challenge should be dismissed. Should the Tribunal nevertheless consider the challenge on the merits, it should be rejected. Ukraine accordingly reiterates its request that the Tribunal dismiss Russia's challenge.

Russia's Challenge Is Untimely and Improper.

As explained in Ukraine's letter of 20 December 2024, the Russian Federation failed to assert a timely and proper challenge to Judge Kateka.[1] Further, by failing to make any submission pursuant to Procedural Order No. 10 in response to Ukraine's claim of waiver in this respect, the Russian Federation has acquiesced on this point.

In its decision on the Russian Federation's challenge to Professor McRae and Judge Wolfrum of 6 March 2024 ("Decision on Challenges"), the Tribunal accepted that — notwithstanding the silence of the Rules of Procedure — "a timeliness requirement can be derived from and applied on the basis of the general requirement of good faith, and the international law rules of waiver and acquiescence."[2] As the Tribunal noted, the timeliness requirement for arbitrator challenges "bar[s] a State from exercising rights that it failed to assert promptly, *i.e.* that it consciously refrained from exercising within a reasonable period of time," and "[t]here may also be a stage when bringing such a challenge would impinge on the fair administration of justice and the principles of the equality of the Parties."[3] The Tribunal further observed that the 30-day time limit in the PCA Optional Rules is a relevant

[1] Ukraine's letter of 20 December 2024, p. 2.

[2] Decision on Challenges, ¶ 98.

[3] Decision on Challenges, ¶ 98.

benchmark for assessing the timeliness of a challenge, even though what is a prompt and reasonable period of time must be appreciated in the circumstances of each case.[4] In the circumstances of the challenge to Judge Wolfrum and Professor McRae, the Tribunal considered it reasonable that Russia raised its concerns within six weeks of allegedly learning of the relevant circumstances.

Here, Russia's delay has been substantially longer, and inexcusably so. Judge Kateka was appointed on 8 August 2024. Four weeks later, Russia raised its purported concerns about Judge Kateka's impartiality, without submitting any actual notice of challenge.[5] Judge Kateka responded within three days, explaining his view that he had not expressed any opinion raising justifiable doubts as to his independence and impartiality, and that he therefore saw no reason to withdraw.[6] The Russian Federation then did nothing. Russia waited *more than twelve additional weeks* (*i.e.,* nearly three times longer than the 30-day time limit under the PCA Optional Rules) to raise the issue again. Only in its letter of 6 December did the Russian Federation "reiterate its serious concerns with regard to the impartiality of Judge Kateka that warrant his disqualification in these proceedings" and — despite never having asserted an actual challenge — requested that "the Russian Federation's challenge to Judge Kateka be upheld."[7]

The Russian Federation has failed to explain or justify in any way its inaction between the receipt of Judge Kateka's letter of 9 September and its purported challenge of 6 December 2024. Russia's failure to promptly assert its challenge is inexcusable. *For almost three months*, the Russian Federation did not assert a formal challenge, despite its continued active participation in these proceedings.[8] By contrast, when Russia challenged Professor McRae and Judge Wolfrum, it submitted its formal challenge just three weeks after they declined to withdraw following Russia's initial notification of its concerns.[9]

There are no circumstances that would render Russia's three-month delay reasonable in this case. The delay between Judge Kateka's response on 9 September and Russia's challenge on 6 December is unreasonable and has impinged on the fair administration of justice in this case.[10] The time frame when Russia first learned of the

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[4] Decision on Challenges, ¶ 98.

[5] Russia's letter of 6 September 2024, pp. 5-13.

[6] Letter from Judge Kateka of 9 September 2024.

[7] Although Russia's letter of 6 December did not contain a proper notice of challenge, the Tribunal noted it would treat that letter as the effective date of Russia's challenge to Judge Kateka. *See* Tribunal's letter of 24 December 2024 ("In response to the Russian Federation's challenge to Judge Kateka in its letter dated 6 December 2024 . . .").

[8] *See* Ukraine's letter of 31 December 2024.

[9] Russia brought the circumstances of the IDI Declaration to the attention of the Tribunal on 17 October 2023. *See* Decision on Challenges, ¶ 27. Professor McRae and Judge Wolfrum responded on 2 November 2023. *See* Decision on Challenges, ¶ 32. On 24 November 2023, Russia asserted its challenge. *See* Decision on Challenges, ¶ 36.

[10] *See* Decision on Challenges, ¶ 99 ("[T]the Arbitral Tribunal finds that taking until 17 October 2023 to first raise these circumstances before the Arbitral Tribunal—i.e. a delay of approximately six weeks—is reasonable under the circumstances[.]").

circumstances that allegedly give rise to doubts as to Judge Kateka's impartiality is known.[11] The Russian Federation knew about Judge Kateka's comments on the IDI Declaration well before his appointment on 8 August, having favorably cited the comments in its 24 November 2023 challenge to Professor McRae and Judge Wolfrum.[12] Russia also was of course aware that Judge Kateka was a member of ITLOS when that tribunal issued its Provisional Measures Order on 25 May 2019.[13]

That leaves only a question as to when Russia became aware of Judge Kateka's 22 February 2022 Twitter post (reposting another user's repost of the Kenyan Ambassador's speech before the UN Security Council). Russia has not explained when it developed knowledge of this social media post (and it has declined the Tribunal's invitation to make a further submission on the matter). But it is indisputable that Russia knew about the post no later than 6 September — *i.e.*, more than twelve weeks before its purported challenge of 6 December.

Russia's failure to timely assert its challenge in these circumstances is a blatant violation of the principle of good faith. By failing to assert its right promptly, *i.e.*, consciously refraining from exercising its right of challenge within a reasonable period of time, Russia waived its right to challenge Judge Kateka. As Russia itself argued in December 2023 during its briefing on the earlier arbitrator challenges, "a party may be deemed to have waived its right to challenge an arbitrator [] if it is proven that it actually knew the circumstances giving rise of the challenge and decided not to proceed with asserting it."[14]

Further, this is precisely the scenario the Tribunal contemplated that impinges on the fair administration of justice and the principles of the equality of the Parties.[15] This proceeding has not progressed on the merits in the more than eight months since the filing of Russia's Rejoinder, and Russia should not be permitted to continue to derail this proceeding through its bad-faith procedural gamesmanship. By consciously refraining from asserting its challenge to Judge Kateka within a reasonable period of time, Russia must now be barred from exercising that right.[16]

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[11] *See* Decision on Challenges, ¶ 99 ("Much remains murky about the manner in which the Russian Federation became acquainted with the circumstances of adoption of the IDI Declaration.").

[12] Russia's letter of 24 November 2023, ¶ 27 ("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.'").

[13] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures Order of 25 May 2019 (identifying Judge Kateka as participating in the decision).

[14] Russia's letter of 22 December 2023, p. 2.

[15] Decision on Challenges, ¶ 98.

[16] Decision on Challenges, ¶ 98 ("Such rules . . . bar a State from exercising rights that it failed to assert promptly, i.e. that it consciously refrained from exercising within a reasonable period of time.").

In fact, the record reflects that the Russian Federation has acquiesced on the issue of the untimeliness of its challenge. As the Tribunal noted in its Decision on Challenges, the "international law rules of waiver and acquiescence" are "manifestly applicable to arbitral proceedings under Annex VII to UNCLOS."[17] Under the rules on waiver, rights can be waived expressly or by implication.[18] According to the rules on acquiescence, consent on an issue can be inferred from a "juridically relevant silence or inaction," in line with the principle of *qui tacit consentire videtur si loqui debuisset ac potuisset* ("he who keeps silent is held to consent if he must and can speak").[19]

In its letter to the Parties of 29 December 2024 and Procedural Order No. 10, the Tribunal invited Russia to submit, by 13 January 2025, a supplementary statement "in response to Ukraine's objection in its letter dated 20 December 2024 that 'Russia's failure to assert a challenge to Judge Kateka in the more than three months since [its letter dated 6 September 2024 and Judge Kateka's letter dated 9 September 2024] indicates that it has waived its right to do so'."[20] Russia has submitted no such supplementary statement. Notably, this comes after Russia complained that the Tribunal's proposed briefing schedule "would prejudice the Russian Federation by prompting it to prepare its supplementary statement in the midst of the holiday season, despite the traditions observed by various parts of its legal team."[21] The Tribunal accommodated Russia's observation by extending Russia's deadline for the supplementary submission from 30 December 2024 to 13 January 2025.

Yet the Russian Federation *still* failed to submit any supplementary statement, and its purported suspension of its participation in the arbitration does not excuse its silence. As Ukraine noted in its letter of 31 December 2024, Russia has been actively participating in the arbitration — including by commenting on the Tribunal's proposed procedure to prevent "prejudice the Russian Federation by prompting it to prepare its supplementary statement in the midst of the holiday season" — and its alleged non-participation does not excuse or justify its waiver of rights in this instance.[22] By failing to make any supplementary submission to defend the propriety of its challenge, the Russian Federation has waived its right of response and acquiesced on the issue.

Russia's Challenge to Judge Kateka Is Meritless in Any Event.

In addition to being untimely, Russia's challenge to Judge Kateka is also without

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[17] Decision on Challenges, ¶ 98.

[18] Isabel Feichtner, *Waiver*, *in* Max Planck Encyclopedia of Public International Law (October 2006), ¶ 8. As noted, Russia does not dispute that the conscious failure to assert a challenge indicates a waiver of that right. *See* Russia's letter of 22 December 2023, p. 2 ("[A] party may be deemed to have waived its right to challenge an arbitrator only if it is proven that it actually knew the circumstances giving rise to the challenge and decided not to proceed with asserting it.").

[19] Nuno Sérgio Marques Antunes, *Acquiescence*, *in* Max Planck Encyclopedia of Public International Law (September 2006), ¶ 2.

[20] Tribunal's letter of 29 December 2024; Procedural Order No. 10.

[21] Russia's letter of 26 December 2024.

[22] Ukraine's letter of 31 December 2024.

merit. As the Tribunal explained in its Decision on Challenges, an arbitrator may be challenged if "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[23] "Justifiable doubts" is an objective standard, which means that "the doubts as to the arbitrator's impartiality or independence must be justifiable pursuant to an analysis of all relevant circumstances from the perspective of an objective, reasonable and informed third party."[24] The Tribunal further clarified that "doubts are justifiable if a reasonable person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that an arbitrator may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision."[25]

The Tribunal has identified the Russian Federation's letter of 6 September and the relevant part of its letter of 6 December as forming the principal statement of the grounds for its challenge to Judge Kateka.[26] In those letters, Russia identified three grounds supposedly giving rise to doubts about Judge Kateka's impartiality: (i) Judge Kateka's position on the IDI Declaration; (ii) a social media post on Twitter; and (iii) Judge Kateka's participation as a member of ITLOS in the Provisional Measures Order of 25 May 2019.[27] Judge Kateka addressed each of these issues in his letter of 9 September.[28] His comments confirm that the circumstances identified by Russia do not give rise to justifiable doubts as to his impartiality or independence.

i. *The IDI Declaration*

The Russian Federation based its challenge to Professor McRae and Judge Wolfrum on their votes in favor of the IDI Declaration, which concerned Russia's full-scale invasion of Ukraine beginning in February 2022 and the legal consequences under the UN Charter. At that time, Ukraine submitted that because the IDI Declaration had no relation to the discrete events from 2018-2019 at issue in this proceeding and the legal consequences of Russia's actions under UNCLOS, Professor McRae's and Judge Wolfrum's votes did not give rise to justifiable doubts as to their independence and impartiality in this case.[29] As Professor McRae and Judge Wolfrum both explained, they viewed the IDI Declaration as outside the scope of the issues in this case, and voted on the Declaration with that understanding in

[23] Decision on Challenges, ¶ 90.

[24] Decision on Challenges, ¶ 90.

[25] Decision on Challenges, ¶ 90.

[26] Tribunal's letter of 29 December 2024, p. 2.

[27] Russia's letter of 6 September 2024, pp. 5-13.

[28] Judge Kateka's letter of 9 September 2024.

[29] *See* Ukraine's Letter of 19 January 2024, pp. 5-8; Ukraine's letter of 19 February 2024, pp. 6-9. Ukraine remains of the view that Professor McRae's and Judge Wolfrum's votes in favor of the IDI declaration did not create justifiable doubts as to their impartiality in this case, consistent with Sir Greenwood's conclusions that the votes "involved no prejudgment of the issues which will have to be decided in the next phase of the present case," nor "manifested such a hostility to the Russian Federation that a reasonable informed third person would consider there were justifiable doubts regarding the impartiality." Dissenting Opinion of Sir Christopher Greenwood, ¶¶ 10, 11.

mind.[30] In its Decision on Challenges, a majority of the tribunal disagreed, and determined that their votes in favor of the declaration raised justifiable doubts as to Professor McRae's and Judge Wolfrum's impartiality.[31]

Here, there is no such issue. Whatever was the case as to a vote in favor of the IDI declaration, plainly the same cannot be said as to an abstention. 110 IDI members voted in favor of the declaration, and not a single member voted against it.[32] Judge Kateka was one of five members who abstained from voting.[33] His abstention cannot be understood as reflecting support of the declaration, as Russia suggests.[34] By abstaining from voting, Judge Kateka took no position on the declaration's contents. That is the very definition of an abstention.

Further, Russia is wrong to submit now that Judge Kateka's public comments and proposed amendments on the IDI declaration align with the final substance of the document.[35] On 24 November 2023, Russia itself characterized Judge Kateka's comments on the Declaration as an example of an IDI member who "expressed their concerns regarding the Declaration."[36] The Russian Federation should not be permitted to change its view of Judge Kateka's comments on the Declaration simply because its own stated prior view is now inconvenient.

ii. *The Twitter Post*

With respect to Judge Kateka's 22 February 2022 Twitter repost featuring a speech by the Kenyan Ambassador at the UN Security Council, Judge Kateka explained that he was motivated to repost another user's tweet because the Ambassador addressed issues of colonialism in that speech, and Judge Kateka frequently posts about issues concerning Africa.[37] He also noted that, contrary to Russia's suggestion, the tweet was unrelated to his position on the IDI Declaration.[38] Russia's comparisons to an arbitrator's LinkedIn post soliciting humanitarian assistance for Ukraine or a social media post forcefully criticizing Chinese practices are inapt because Judge Kateka did not author the speech, nor the Twitter

[30] *See* Statement of Professor Donald McRae, 24 October 2023; Statement of Judge Rüdiger Wolfrum, 24 October 2023.

[31] Decision on Challenges, ¶ 101.

[32] Institute of International Law, Declaration on the Aggression in Ukraine, *Yearbook of the Institute of International Law*, 2022-2023, Vol. 83, p. 21.

[33] Judge Kateka's letter of 9 September 2024, p. 1; *see also* Institute of International Law, Declaration on the Aggression in Ukraine, *Yearbook of the Institute of International Law*, 2022-2023, Vol. 83, p. 21.

[34] *See* Judge Kateka's letter of 9 September 2024, p. 2.

[35] Russia's letter of 6 September 2024, p. 5.

[36] Russia's letter of 24 November 2023, p. 7. The Russian Federation referred favorably to Judge Kateka's comments on the tone of the Declaration in its letter challenging Professor McRae and Judge Wolfrum.

[37] Judge Kateka's letter of 9 September 2024, pp. 2-3.

[38] Judge Kateka's letter of 9 September 2024, pp. 2-3.

post, at issue.[39] The act of reposting another user's repost for the purpose of drawing attention to discussion of issues of colonialism is not a statement of prejudice against the Russian Federation.

iii. The ITLOS Provisional Measures Order

Finally, as to Judge Kateka's participation in the ITLOS Provisional Measures Order of 25 May 2019, Russia conceded in its letter of 6 September that it is common in Annex VII arbitrations for the same individuals to appear in more than one adjudicating body in different phases of the same proceeding.[40] Moreover, as Judge Kateka explains, the order was issued under Article 290 of UNCLOS, and was unrelated to the merits of the case.[41] As ITLOS stated, the order concerned Ukraine's request for provisional measures only, and "in no way prejudges" the issues that will be considered by this Annex VII Tribunal during the merits phase.[42] As a general principle, Russia's suggestion that Judge Kateka's participation in the provisional measure stage risks "impacting his appreciation of the legal arguments and factual circumstances" to be considered during the merits phase[43] would appear to prevent judges who decided provisional measures from examining the merits of a case, even as the *same tribunal* — an absurd result.[44] There is thus no support for Russia's position that Judge Kateka's participation as a member of ITLOS during the separate provisional measures stage would lead an objective observer to "the conclusion that there is a likelihood that [Judge Kateka] may be influenced by factors other than the merits"[45] as the case proceeds.

For the reasons described above and in Ukraine's prior correspondence, Ukraine requests that the Tribunal promptly reject Russia's untimely and meritless challenge to Judge Kateka.

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[39] Russia's letter of 6 September 2024, pp. 10-11.

[40] Russia's letter of 6 September 2024, p. 11.

[41] Judge Kateka's letter of 9 September 2024, p. 3.

[42] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures Order of 25 May 2019, ¶ 122.

[43] Russia's letter of 6 September 2024, p. 12.

[44] As Russia appears to recognize, it is commonplace for international courts and tribunals to decide the merits of a case after having ruled on provisional measures in the same matter. *See, e.g.*, *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Case No. 2, Provisional Measures Order of 11 March 1998; *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Case No. 2, Judgment of 1 July 1999; *see also Jadhav Case (India v. Pakistan)*, ICJ Provisional Measures Order of 18 May 2017; *Jadhav Case (India v. Pakistan)*, ICJ Judgment of 17 July 2019.

[45] Decision on Challenges, ¶ 90.

Respectfully submitted,

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