PCA Case No. 2019-28

IN THE MATTER OF AN ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

UKRAINE

- and -

THE RUSSIAN FEDERATION

- in respect of a -

DISPUTE CONCERNING THE DETENTION OF UKRAINIAN NAVAL VESSELS AND SERVICEMEN

DECISION ON CHALLENGE

11 April 2025

ARBITRAL TRIBUNAL:

Judge Gudmundur Eiriksson (President)
Sir Christopher Greenwood
Professor Alexander N. Vylegzhanin

REGISTRY:

Permanent Court of Arbitration

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I. INTRODUCTION

1. This Decision addresses the challenge raised by the Russian Federation against Judge James Kateka for alleged justifiable doubts about his impartiality, as discussed in the Russian Federation's letters dated 6 September and 6 December 2024.

2. In accordance with Article 19, paragraph 1, of the Rules of Procedure of the Arbitral Tribunal and Procedural Order No. 10 dated 2 January 2025, the Arbitral Tribunal, constituted for the purpose of deciding the challenge against Judge Kateka by Judge Gudmundur Eiriksson as President, Sir Christopher Greenwood and Professor Alexander Vylegzhanin, hereby issues this decision on the challenge.

II. PROCEDURAL HISTORY

3. On 24 November 2023, the Russian Federation asserted challenges against Professor Donald M. McRae, President of the Arbitral Tribunal, and Judge Rüdiger Wolfrum, Member of the Arbitral Tribunal, and requested their disqualification as arbitrators in this case for lack of independence and impartiality as a result of their votes in support of the Institute of International Law (*Institut de Droit International*) Declaration of 1 March 2022, entitled "Declaration of the Institute of International Law on Aggression in Ukraine" (the "**IDI Declaration**").

4. On 15 December 2023, the Arbitral Tribunal, constituted for the purpose of the challenges by the three unchallenged members, with Judge Eiriksson as Acting President, issued Procedural Order No. 8, which laid out the challenge procedure.

5. On 6 March 2024, following an exchange of written submissions by the Parties and comments by Professor McRae and Judge Wolfrum, the Arbitral Tribunal issued a Decision on Challenges upholding the Russian Federation's challenges by a majority of two votes to one, with Judge Eiriksson and Professor Vylegzhanin voting in favour and Sir Christopher Greenwood dissenting and appending a Dissenting Opinion. By letters dated 6 March 2024, the Arbitral Tribunal communicated the Decision and Dissenting Opinion to the Parties and to Professor McRae and Judge Wolfrum. On the same date, Professor McRae and Judge Wolfrum resigned from the Arbitral Tribunal, with reference to the Decision of the same date communicated to them.

6. On 8 April 2024, the Russian Federation submitted its Rejoinder on the merits of the case.[1]

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[1] The case was commenced by Ukraine by a Notification and Statement of Claim served on the Russian Federation on 1 April 2019. On 22 May 2020, Ukraine submitted its Memorial. On 14 April 2023, the Russian Federation submitted its Counter-Memorial. Ukraine submitted its Reply on 8 January 2024.

7. On 29 April 2024, following an earlier invitation from the Arbitral Tribunal for the Parties to communicate their views on the timing of further proceedings, Ukraine proposed that the oral hearing on the merits which had been contemplated for the week of 27 May 2024 be postponed until two replacement arbitrators had been appointed pursuant to Article 3 of Annex VII to the United Nations Convention on the Law of the Sea (the "**Convention**"), whereupon the Parties and the full Arbitral Tribunal could proceed to schedule the oral hearing in the fall of 2024.

8. On 30 April 2024, the Russian Federation submitted that the hearing that had been tentatively scheduled for the week of 27 May 2024 could not proceed as planned and that it would only be feasible to assign new hearing dates once the Arbitral Tribunal was fully reconstituted. In the same letter, the Russian Federation proposed that the Arbitral Tribunal develop and adopt an *ad hoc* procedure for the selection of replacement arbitrators following the successful challenges.

9. On 2 May 2024, the Arbitral Tribunal decided to postpone the oral hearing scheduled for the week of 27 May 2024 and invited the Parties to submit any comments they might have on each other's letters dated 29 and 30 April 2024.

10. On 16 May 2024, following a further exchange of submissions between the Parties on the procedure for appointment of replacement arbitrators, the Arbitral Tribunal expressed its view that it would be beneficial for the Parties to engage in further efforts to reach an agreement until at least 30 May 2024, at which time a re-evaluation could take place.

11. By separate letters dated 30 May 2024, the Parties indicated to the Arbitral Tribunal that they had agreed upon a set of criteria applicable to the selection of candidates and undertook to update the Arbitral Tribunal on further developments in their efforts to reach an agreement.

12. On 29 June 2024, following a request by the Arbitral Tribunal for further updates, the Russian Federation (i) indicated that the Parties had been discussing the modalities of the selection procedure but had not reached consensus in this regard; (ii) set out its proposed selection procedure and commented on the selection procedure proposed by Ukraine; and (iii) invited the Arbitral Tribunal to assist the Parties in reaching agreement in this respect.

13. On 1 July 2024, Ukraine (i) confirmed that the Parties continued to discuss the modalities of the selection procedure but were not able to reach a consensus; (ii) set out its proposed selection procedure and commented on the selection procedure proposed by the Russian Federation; and (iii) communicated its intent to proceed with requesting the President of the International Tribunal

for the Law of the Sea ("**ITLOS**"), H.E. Judge Tomas Heidar, to make such appointments if no agreement was reached by 5 July 2024.

14. On 8 July 2024, Ukraine informed the Arbitral Tribunal that it had sent a request for appointment of replacement arbitrators to the President of ITLOS, pursuant to Article 3 of Annex VII to the Convention, and requested that the Arbitral Tribunal await the appointments by the President of ITLOS before making any other procedural or substantive rulings in this case.

15. On 10 July 2024, the Russian Federation, *inter alia*, requested that the Arbitral Tribunal:

    (a) Proceed with a ruling in respect of the proper procedure for appointment of replacement arbitrators;

    (b) Inform the ITLOS President that such a ruling is currently pending and that proceeding with making the appointments as requested by Ukraine would be considered inappropriate; and

    (c) Subsequently, inform the Parties and the ITLOS President of the ruling on the proper procedure for appointing the replacement arbitrators in the present case.

16. On 12 July 2024, the Arbitral Tribunal advised the Parties that, in light of the Russian Federation's request for a ruling in respect of the proper procedure for appointment of replacement arbitrators, it would proceed to deliver such a ruling and would expect to do so within one week, to prevent an undue disruption of the proceedings before the President of ITLOS.

17. On 18 July 2024, following consultations with, *inter alia*, the Agents and counsel for each Party, the Arbitral Tribunal issued Procedural Order No. 9, rejecting, by a majority of two votes to one, with Judge Eiriksson and Sir Christopher Greenwood voting in favour and Professor Vylegzhanin dissenting and appending a Dissenting Opinion, the request of the Russian Federation that the Arbitral Tribunal rule on the procedure for the appointment of replacement arbitrators.

18. On 19 July 2024, Ukraine advised the President of ITLOS of the Arbitral Tribunal's issuance of Procedural Order No. 9 and reaffirmed its request of 8 July 2024 for the appointment of replacement arbitrators pursuant to Article 3(e) of Annex VII to the Convention.

19. On 8 August 2024, the President of ITLOS informed the Parties and Judge Eiriksson, as Acting President of the Arbitral Tribunal, of his decision to appoint Judge Eiriksson as President of the Arbitral Tribunal and Judge James Kateka and Professor Joanna Mossop as members of the Arbitral Tribunal.

20. On 9 August 2024, the Russian Federation reiterated its objections regarding the selection procedure and rejected the appointments made by the President of ITLOS, concluding as follows:

> The Russian Federation firmly submits that the purported appointments are inconsistent with the applicable rules and were made without the Russian Federation's participation in consultations, or consent. Therefore, the Russian Federation cannot consider itself bound by the President's decision, and rejects the appointments. If acted upon this decision, the Arbitral Tribunal will not be properly constituted.
>
> In light of the above, the Russian Federation hereby suspends its participation in this Arbitration until further notice.
>
> The Russian Federation respectfully requests that this information be conveyed to the Agent of Ukraine and the incumbent members of the Arbitral Tribunal.

21. On 13 August 2024, Professor Mossop informed the President of ITLOS of her decision to withdraw from the proceedings. On the same day, the Arbitral Tribunal transmitted Professor Mossop's letter to the Parties and invited the Parties to attend consultations with President Eiriksson on 15 August 2024. The Arbitral Tribunal also declared as follows with respect to the matters raised by the Russian Federation in its letter dated 9 August 2024:

> At this stage, then, the concerns of the Russian Federation set out in its letter dated 9 August 2024 could be characterized as a challenge to the constitution of the Arbitral Tribunal, and accordingly its jurisdiction, on which the Arbitral Tribunal could issue a ruling or decision.

22. On 15 August 2024, the consultations proposed in the letter of the Arbitral Tribunal dated 13 August 2024 took place with the participation of the representatives of the Parties, the Registrar and President Eiriksson.

23. On 16 August 2024, the Registrar transmitted to the Parties Judge Kateka's signed Declaration of Acceptance and Statement of Impartiality and Independence and his Disclosure Statement dated 15 August 2024.

24. By letter dated 6 September 2024, the Russian Federation asserted that Judge Kateka's appointment "suffer[s] from the same deficiencies that led to the disqualification of Judge Wolfrum and Professor McRae". The Russian Federation drew the Arbitral Tribunal's attention to various circumstances, including the following:

    (a) "Despite Mr Kateka's abstention from voting, his comments on the [IDI] Declaration published in the Institute [of International Law]'s Yearbook reveal that he aligns with the substance of the Declaration."[2]

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2 Letter from the Russian Federation dated 6 September 2024, p. 5.

(b) "[Judge Kateka's] repost[ing on 22 February 2022] on his X (then Twitter) account an entry praising the Kenyan ambassador's speech before the UN Security Council that 'perfectly explains how people across Africa understand Ukraine, and what the Kremlin's acts of aggression mean in our post-colonial world' [. . .] gives rise to justifiable doubts regarding his impartiality much in the same way as Judge Wolfrum's and President McRae's did."[3]

(c) "Mr Kateka was a member of ITLOS when the latter rendered the Provisional Measures Order on 25 May 2019. [. . .] Given the relevance of the issues considered by ITLOS at the Provisional Measures stage of the present arbitration, the Russian Federation is concerned that Mr Kateka's exposure to the Parties' arguments in the earlier proceedings, as well as his unequivocal support of the Order regarding multiple issues at the heart of the proceedings, might unduly influence his decision-making on the merits of the case."[4]

25. In the penultimate paragraph of its letter dated 6 September 2024, the Russian Federation stated:

> The Russian Federation is therefore compelled, without prejudice to its overarching principled position on the illegality of Mr Kateka's appointment in the first place, to bring these considerations to the attention of the incumbent three members of the Arbitral Tribunal and Mr Kateka, and respectfully invites Mr Kateka to consider withdrawing from the case.

26. In a letter dated 9 September 2024, Judge Kateka submitted his comments on the circumstances outlined in the letter of the Russian Federation dated 6 September 2024. His comments were transmitted to the Parties on 12 September 2024. Judge Kateka's statement reads in full:

> 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 responding 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 Ukranian naval vessels. I shall comment on each of these issues in turn.
>
> *First*, the IDI Declaration which was adopted on 1st March 2022.

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3 Letter from the Russian Federation dated 6 September 2024, pp. 8-11.

4 Letter from the Russian Federation dated 6 September 2024, pp. 11-13.

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." 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.'

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 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.

27. On 12 September 2024, the Arbitral Tribunal informed the Parties that it "ha[d] discussed the considerations to which its attention was drawn in the letter of the Russian Federation of 6 September 2024 [and] ha[d] also taken note of Judge Kateka's letter dated 9 September 2024". The Arbitral Tribunal reiterated that it "wishe[d] to remain careful not to make rulings on what would be a proper interpretation of the provisions of Annex VII to the Convention on the appointment of replacement arbitrators until it has been fully re-constituted and [could] consider these questions in exercise of its mandate under the Convention and Annex VII thereto".

28. On 14 October 2024, Ukraine submitted a request to the President of ITLOS for the appointment of an arbitrator following Professor Mossop's resignation.

29. On 28 October 2024, the President of ITLOS informed President Eiriksson and the Parties of his decision to appoint Judge Kathy-Ann Brown as member of the Arbitral Tribunal. On 30 October 2024, the Registrar transmitted to the Parties Judge Brown's signed Declaration of Acceptance and Statement of Impartiality and Independence.

30. On 5 November 2024, the Arbitral Tribunal indicated to the Parties, with reference to its letter dated 13 August 2024, that upon the appointment of Judge Brown it could now proceed to consider the matters raised by the Russian Federation in its letters dated 9 August and 6 September 2024. The Arbitral Tribunal thus invited the Parties to make further written submissions on the challenge of the Russian Federation to the constitution of the Arbitral Tribunal, reserving its decision on the subsequent procedure.

31. On 14 November 2024, the Registrar transmitted to the Parties a Disclosure Statement from Judge Brown.

32. On 22 November 2024, Ukraine submitted its comments on the challenge of the Russian Federation to the constitution of the Arbitral Tribunal, in response to the Russian Federation's letters dated 9 August and 6 September 2024. Ukraine requested that the Arbitral Tribunal:

> 1. Dismiss Russia's challenge to the constitution of the Tribunal as stated in its letters of 9 August 2024 and 6 September 2024;

> 2. Adjudge and declare that it was properly constituted to hear and decide the claims and Submissions filed by Ukraine in this case; and
>
> 3. Award Ukraine its costs for the phase of these proceedings commencing since the resignations of Professor McRae and Judge Wolfrum.

33. On 6 December 2024, the Russian Federation submitted its supplementary comments on its challenge to the constitution of the Arbitral Tribunal, in response to Ukraine's letter dated 22 November 2024. That letter also included a section entitled "The Russian Federation's serious concerns as to impartiality of Judge Kateka", in which the Russian Federation stated:

> [B]y its letter of 6 September 2024, the Russian Federation separately communicated its observations concerning the existence of justifiable concerns about the impartiality of Judge Kateka. While the Registry's communication of 5 November 2024 does refer to that letter, it does not mention how the matter related to Judge Kateka will be addressed.
>
> The letter from Judge Kateka of 9 September 2024, purporting to address the Russian Federation's concerns, fails to dispel the doubts indicated.

34. The Russian Federation's letter of 6 December 2024 concluded with the specific requests that:

> 1. the Russian Federation's objections to the constitution of the Tribunal and its challenge to Judge Kateka be resolved by those three members of the Tribunal whose standing as arbitrators is unchallenged;
>
> 2. the Russian Federation's challenge to Judge Kateka be upheld;
>
> 3. the Russian Federation's challenge to the constitution of the Tribunal be upheld and the appointments of Judge Kateka and Judge Brown be held invalid *ab initio*;
>
> 4. Ukraine's request to award it the costs of this part of the proceedings be dismissed.

35. On 20 December 2024, Ukraine submitted its supplementary comments on the challenge of the Russian Federation to the constitution of the Arbitral Tribunal, in response to the Russian Federation's letters dated 9 August, 6 September and 6 December 2024. In its letter, Ukraine specifically requested that the Arbitral Tribunal:

> 1. Decide Russia's challenge to the constitution of the Tribunal as the fully constituted, five-member Tribunal;
>
> 2. Dismiss Russia's challenge to the constitution of the Tribunal;
>
> 3. Dismiss Russia's purported challenge to Judge Kateka as untimely and/or not properly asserted;
>
> 4. Adjudge and declare that it is properly constituted to hear and decide the claims and Submissions filed by Ukraine in this case; and
>
> 5. Award Ukraine its costs for the phase of these proceedings commencing since the resignations of Professor McRae and Judge Wolfrum.

36. On 24 December 2024, the Registrar, on behalf of the Arbitral Tribunal, advised the Parties that Judge Kateka had indicated that he did not wish to participate in any deliberations of the Arbitral Tribunal with respect to the Russian Federation's challenge to him or the procedure to be adopted for its resolution. Accordingly, the four other members of the Arbitral Tribunal decided, in accordance with Article 19, paragraph 1, of the Rules of Procedure, that Judge Kateka should not take part in any such deliberations but that he should continue to receive copies of any communications between the Arbitral Tribunal and the Parties. The Registrar also communicated the Arbitral Tribunal's proposed procedure to be followed for a decision on the Russian Federation's challenge to Judge Kateka, including a proposal that the Russian Federation be invited to submit 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] indicate[d] that it ha[d] waived its right to do so". The Parties were invited to comment on the proposed procedure by 27 December 2024.

37. On 26 December 2024, the Russian Federation reasserted its position that the Arbitral Tribunal was not legitimately constituted and that its challenge to Judge Kateka—including any related matters of procedure—must therefore be resolved by the Arbitral Tribunal composed only by the three members whose standing as arbitrators remained unchallenged. The Russian Federation also remarked that the dates proposed in the letter of 26 December 2024 encompassed the winter holiday season, which would prejudice the Russian Federation by requiring it to prepare its supplementary statement in the midst of the holiday season. Finally, the Russian Federation "maintain[ed] the suspension of its participation in the present proceedings".

38. On 27 December 2024, Ukraine stated that it did not object to the proposed procedure for deciding the Russian Federation's challenge to Judge Kateka.

39. On 29 December 2024, the Registrar, on behalf of the Arbitral Tribunal, advised the Parties that Judge Brown had informed the President and the other two members of the Arbitral Tribunal that she considered that she should not take part in the proceedings on the challenge to Judge Kateka. Accordingly, the three other members of the Arbitral Tribunal decided, in accordance with Article 19, paragraph 1, of the Rules of Procedure, that Judge Brown should not take part in the deliberations and decisions of the Arbitral Tribunal on the present challenge. Responding to the comments of the Russian Federation, the Arbitral Tribunal also revised its proposals as regards the timelines for the challenge procedure such that the Russian Federation would not be required to submit its supplementary statement within the holiday season.

40. On 31 December 2024, Ukraine commented that it had no objection to the revised proposal and additionally noted that the Russian Federation's assertion of non-participation was "inaccurate, self-serving, and [did] not excuse or justify any rights it ha[d] waived in this proceeding". No comments on the proposed revised procedure were received from the Russian Federation.

41. On 2 January 2025, the Arbitral Tribunal, constituted for the purposes of the challenge to Judge Kateka by President Eiriksson, Sir Christopher Greenwood and Professor Vylegzhanin, issued Procedural Order No. 10, setting out the procedure for a decision on the challenge to Judge Kateka as follows:

> 1. The Russian Federation's letter dated 6 September 2024 and the relevant part of its letter dated 6 December 2024 shall be taken as the principal statement of the grounds for its challenge to Judge Kateka.
>
> 2. The Russian Federation is invited to submit by **Monday, 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 December 2024 and Judge Kateka's letter dated 9 September 2024] indicates that it has waived its right to do so".
>
> 3. Ukraine shall submit by **Monday, 20 January 2025** a response to the challenge to Judge Kateka.
>
> 4. Judge Kateka is invited to submit by **Friday, 24 January 2025** any comments he might have on the challenge.
>
> 5. The Russian Federation shall submit by **Friday, 31 January 2025** a reply on the challenge.
>
> 6. Ukraine shall submit by **Friday, 7 February 2025** a rejoinder on the challenge.
>
> 7. The Arbitral Tribunal shall thereafter issue a decision on the challenge to Judge Kateka, made by a majority vote of the Arbitral Tribunal, constituted for the purposes of the challenge by President Gudmundur Eiriksson, Sir Christopher Greenwood and Professor Alexander Vylegzhanin.

42. No supplementary statement was received from the Russian Federation in accordance with the above procedure.

43. On 20 January 2025, Ukraine submitted its comments on the challenge to Judge Kateka in accordance with the above procedure.

44. On 24 January 2025, Judge Kateka wrote to the Registrar, stating that he had "nothing further to add to the comments in [his] letter to the Tribunal dated 9 September 2024".

45. No reply on the challenge was received from the Russian Federation in accordance with the above procedure.

46. On 6 February 2025, Ukraine noted that, the Russian Federation having elected not to submit a reply on the merits of its challenge, Ukraine elected not to submit a rejoinder.

III. REQUESTED RELIEF

A. THE REQUEST OF THE RUSSIAN FEDERATION

47. In its letter dated 6 December 2024, the Russian Federation requests, in relevant part, that:

(a) the Russian Federation's challenge to Judge Kateka be resolved by those three members of the Tribunal whose standing as arbitrators is unchallenged; and

(b) the Russian Federation's challenge to Judge Kateka be upheld.

B. THE REQUEST OF UKRAINE

48. In its letters dated 20 December 2024 and 20 January and 6 February 2025, Ukraine requests, in relevant part, that the Arbitral Tribunal reject the Russian Federation's challenge to Judge Kateka.

IV. POSITIONS OF THE PARTIES

A. WHETHER THE RUSSIAN FEDERATION'S CHALLENGE TO JUDGE KATEKA WAS PROPERLY AND TIMELY ASSERTED

1. Position of Ukraine

49. Ukraine raised its objection to the timeliness of the Russian Federation's challenge to Judge Kateka for the first time in correspondence dated 20 December 2024.

50. Ukraine submits that the Russian Federation failed to assert a timely challenge to Judge Kateka and therefore waived its right to do so.[5] Citing the Decision on Challenges of 6 March 2024, Ukraine asserts that the Arbitral Tribunal accepted that "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".[6] Ukraine further argues that, in its Decision on Challenges of 6 March 2024, the Arbitral Tribunal accepted the 30-day time limit in the PCA Optional Rules as

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5 Letter from Ukraine dated 20 December 2024, p. 2; Letter from Ukraine dated 20 January 2025, p. 1.

6 Letter from Ukraine dated 20 January 2025, *citing* Decision on Challenges dated 6 March 2024, para. 98.

a "relevant benchmark" for assessing timeliness, while recognising that timeliness must be considered in light of the circumstances of each case.[7]

51. Ukraine contends that, compared to the relevant benchmarks, the Russian Federation's delay in asserting its challenge against Judge Kateka is substantial and inexcusable.[8] According to Ukraine, the Russian Federation was already aware of the relevant facts, at the latest, on 6 September 2024.[9] The Russian Federation was aware of Judge Kateka's comments on the IDI Declaration before his appointment on 8 August 2024, as Russia even favourably cited his comments in its 24 November 2023 challenge to Professor McRae and Judge Wolfrum.[10] In addition, Ukraine notes that the Russian Federation was aware that Judge Kateka was a member of ITLOS at the time of the Provisional Measures Order on 25 May 2019.[11] While there is a question about when the Russian Federation became aware of Judge Kateka's Twitter repost of 22 February 2022, Ukraine notes that, at the very least, the Russian Federation was aware of it on 6 September 2024—"more than twelve weeks before its purported challenge of 6 December".[12]

52. Ukraine also notes that the Russian Federation waited four weeks after Judge Kateka's appointment on 8 August 2024 before raising its concerns on 6 September 2024, without however, even then, submitting any actual notice of challenge.[13] After Judge Kateka responded on 9 September 2024 and declined to withdraw, the Russian Federation waited another three months before formally asserting a challenge, despite being then aware of the facts on which its challenge relies.[14] This, according to Ukraine, further delayed the proceedings and prevented the fair administration of justice.[15]

53. Ukraine further argues that, by failing to make any submission on Ukraine's claim of waiver pursuant to Procedural Order No. 10, the Russian Federation must be deemed to have acquiesced

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7 Letter from Ukraine dated 20 December 2024, p. 2, *citing* Decision on Challenges dated 6 March 2024, para. 98; Letter from Ukraine dated 20 January 2025, p. 2.

8 Letter from Ukraine dated 20 January 2025, p. 2.

9 Letter from Ukraine dated 20 January 2025, p. 3.

10 Letter from Ukraine dated 20 December 2024, p. 2; Letter from Ukraine dated 20 January 2025, p. 3, *citing* Letter from Russian Federation dated 24 November 2023, para. 27.

11 Letter from Ukraine dated 20 January 2025, p. 3.

12 Letter from Ukraine dated 20 January 2025, p. 3.

13 Letter from Ukraine dated 20 January 2025, p. 2.

14 Letter from Ukraine dated 20 December 2024, p. 2; Letter from Ukraine dated 20 January 2025, pp. 2-3.

15 Letter from Ukraine dated 20 January 2025, p. 3.

on the issue of untimeliness.[16] According to Ukraine, acquiescence can be inferred from a "juridically relevant silence or inaction".[17] Here, Ukraine contends that the Russian Federation's failure to submit a supplementary statement—despite the Arbitral Tribunal accommodating the Russian Federation following its comment on being required to prepare such statement over the holiday season—should be considered a waiver of its right of response and acquiescence to Ukraine's claim of untimeliness.[18]

54. Finally, Ukraine submits that the Russian Federation's alleged suspension on 9 August 2024 of its participation in the proceedings does not "excuse or justify [the Russian Federation's] failure to timely assert a challenge to Judge Kateka".[19] Ukraine notes that the Russian Federation continued to engage in correspondence with the Arbitral Tribunal and the President of ITLOS, notwithstanding its alleged non-participation.[20] Accordingly, the Russian Federation is not entitled to claim that its non-participation excused its waiver of rights in this instance.[21]

2. Position of the Russian Federation

55. In its Procedural Order No. 10 dated 2 January 2025, the Arbitral Tribunal invited the Russian Federation to submit a supplementary statement by 13 January 2025 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".

56. No such supplementary statement was received from the Russian Federation.

57. In its Procedural Order No. 10 dated 2 January 2025, the Arbitral Tribunal invited the Russian Federation to submit by 31 January 2025 a reply on the challenge.

58. No such reply was received from the Russian Federation.

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16 Letter from Ukraine dated 20 January 2025, p. 1.

17 Letter from Ukraine dated 20 January 2025, p. 4, *citing* Nuno Sérgio Marques Antunes, *Acquiescence*, in Max Planck Encyclopedia of Public International Law (September 2006), para. 2.

18 Letter from Ukraine dated 20 December 2024, p. 4.

19 Letter from Ukraine dated 20 December 2024, p. 2.

20 Letter from Ukraine dated 20 December 2024, p. 2; Letter from Ukraine dated 20 January 2025, p. 2.

21 Letter from Ukraine dated 20 December 2024, p. 3.

B. WHETHER THERE ARE JUSTIFIABLE DOUBTS AS TO THE IMPARTIALITY OF JUDGE KATEKA

1. Position of the Russian Federation

59. The Russian Federation submits that Judge Kateka's actions raise justifiable doubts as to his impartiality[22] and that his appointment "suffer[s] from the same deficiencies that led to the disqualification of Judge Wolfrum and Professor McRae".[23] In its letters dated 6 September and 6 December 2024, the Russian Federation discusses three principal grounds in support of these justifiable doubts, namely: (i) Judge Kateka's participation in the drafting and voting process of the IDI Declaration; (ii) Judge Kateka's reposting of a tweet on social media that is allegedly critical of the Russian Federation; and (iii) Judge Kateka's participation as a judge of ITLOS when the latter rendered its Provisional Measures Order in respect of this case, and his alleged failure to indicate this in his Disclosure Statement. These grounds will be summarized *seriatim*.

Involvement in the IDI Declaration

60. The Russian Federation recalls that the challenges to Professor McRae and Judge Wolfrum arose from the two arbitrators' votes in favour of the IDI Declaration[24] which, according to the Russian Federation, contained language critical of its conduct in its military confrontation with Ukraine.[25] Citing the Decision on Challenges dated 6 March 2024, the Russian Federation observes that an arbitrator's endorsement of such a declaration "creates an inherent risk that the present case will not be considered with an open mind".[26]

61. The Russian Federation argues that, similarly, Judge Kateka's impartiality is put into question by his involvement in the drafting and voting process of the IDI Declaration.[27] While Judge Kateka abstained from voting, the Russian Federation contends that he nonetheless "stood firmly in support" of the substance of the Declaration.[28] This support is allegedly evidenced by, *first*, Judge Kateka stating in his published comments to the IDI Declaration that he "appreciate[s] the

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22 Letter from the Russian Federation dated 6 December 2024, p. 3.

23 Letter from the Russian Federation dated 6 September 2024, p. 3; Letter from the Russian Federation dated 6 December 2024, p. 3.

24 Letter from the Russian Federation dated 6 September 2024, p. 3.

25 Letter from the Russian Federation dated 6 September 2024, p. 3.

26 Letter from the Russian Federation dated 6 September 2024, p. 4, *citing* Decision on Challenges dated 6 March 2024, para. 102.

27 Letter from the Russian Federation dated 6 September 2024, p. 5.

28 Letter from the Russian Federation dated 6 September 2024, p. 8; Letter from the Russian Federation dated 6 December 2024, p. 3.

circumstances and the environment which have prompted the draft" and "oppose[s] any illegitimate forcible action by any State".[29] According to the Russian Federation, such statements reflect "agreement with the Declaration's assertion that the actions of the Russian Federation were unlawful".[30] The Russian Federation contrasts Judge Kateka's abstention with those of other arbitrators who abstained from voting and did not express their overall endorsement of the IDI Declaration.[31]

62. *Second*, the Russian Federation highlights that Judge Kateka's proposed amendments were minor and "substantially confined to replacing the word 'aggression' with the phrase 'use of force'".[32] The Russian Federation notes that Judge Kateka did not object to other statements that are purportedly "against the Russian Federation and in support of Ukraine", such as those denying the legal justification of the Russian Federation's actions and invoking its responsibility under international law.[33]

63. *Third*, the Russian Federation characterizes Judge Kateka's "limited editorial suggestions" to the IDI Declaration as falling short of the "mild language" of the 2003 Bruges Declaration, which also dealt with the use of force.[34] In his comments on the IDI Declaration, Judge Kateka had stated:

> I am making the above suggestions in good faith to tone down the language. In the 2003 Bruges Declaration such mild language was used. I am afraid we could be accused of double standards if we act with strong language.

The Russian Federation states that Judge Kateka's proposed edits reveal his "overall alignment" with the IDI Declaration, as the edits do not succeed in achieving the moderation of the Bruges Declaration.[35] In the Russian Federation's view, the Bruges Declaration did not refer to the alleged wrongdoing of any particular State, nor to the responsibility of any State under international law, instead making a more general appeal to the principles of international law.[36] By contrast, the

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29 Letter from the Russian Federation dated 6 September 2024, p. 8, *citing* Institute of International Law, Declaration on the Aggression in Ukraine, *Yearbook of the Institute of International Law*, 2022-2023, Vol. 83, p. 22.

30 Letter from the Russian Federation dated 6 September 2024, p. 6.

31 Letter from the Russian Federation dated 6 December 2024, p. 4.

32 Letter from the Russian Federation dated 6 September 2024, p. 6; Letter from the Russian Federation dated 6 December 2024, p. 4.

33 Letter from the Russian Federation dated 6 September 2024, p. 6.

34 Letter from the Russian Federation dated 6 September 2024, p. 7.

35 Letter from the Russian Federation dated 6 September 2024, pp. 7-8.

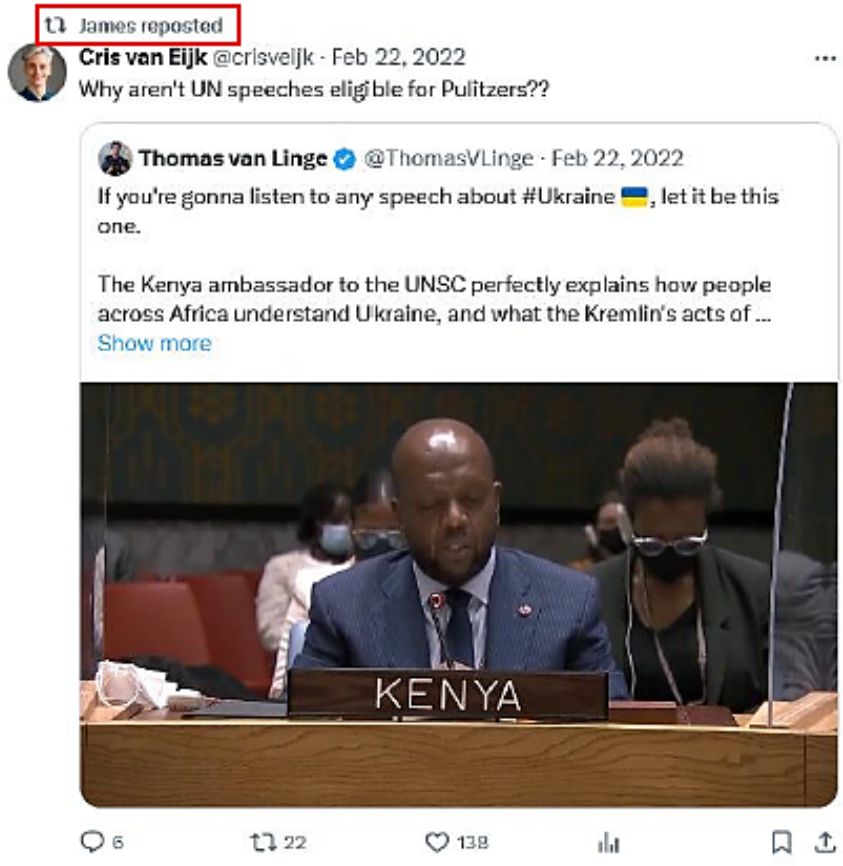
36 Letter from the Russian Federation dated 6 September 2024, p. 7.

Russian Federation submits that the IDI Declaration—even with Judge Kateka's proposed edits—is biased against the Russian Federation, as it condemns the acts of the latter without taking into account Ukraine's alleged wrongdoings.[37]

Social media activity

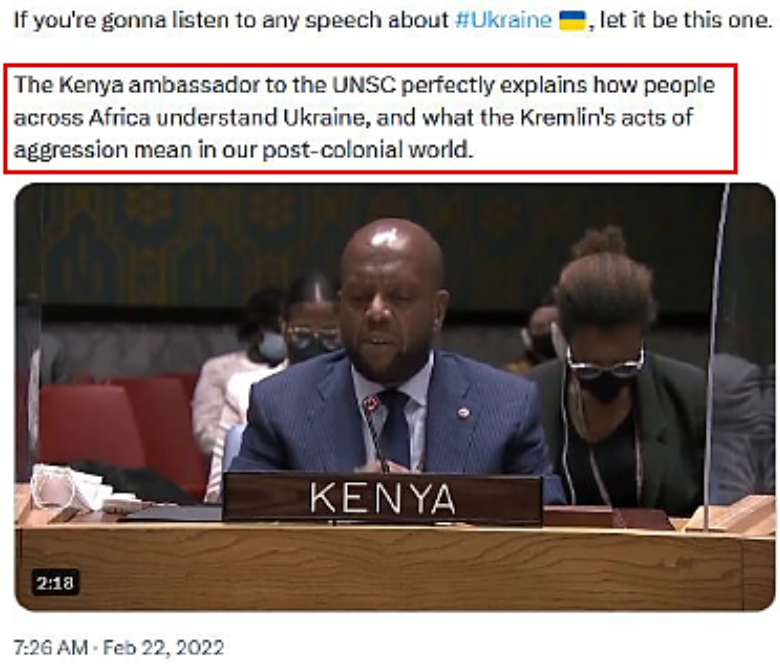
64. The Russian Federation also points to Judge Kateka's social media activity as further supporting the doubts concerning his impartiality. In its letter dated 6 September 2024, the Russian Federation states:[38]

> [T]hese concerns are further corroborated and exacerbated by Mr Kateka's activities on social media. For instance, on 22 February 2022, he reposted on his X (then Twitter) account an entry praising the Kenyan ambassador's speech before the UN Security Council that 'perfectly explains how people across Africa understand Ukraine, and what the Kremlin's acts of aggression mean in our post-colonial world'[21] [emphasis added]:



37 Letter from the Russian Federation dated 6 September 2024, p. 8.

38 Letter from the Russian Federation dated 6 September 2024, pp. 8-9.



This further exemplifies that despite Mr Kateka's ostensible disagreement with the use of the word 'aggression' to describe the Russian Federation's conduct in the Declaration, he did in fact personally agree with this characterization in both form and substance. His concern for the wording of the Declaration was apparently motivated by a desire for the Institute to maintain a modicum of neutrality rather than his own personal convictions, which were fully aligned with the Declaration.

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[21] See X, James Kateka's Account, Entry dated 22 February 2024, available at: https://x.com/jlkateka.

65. According to the Russian Federation, the post that Judge Kateka reposted characterized the Russian Federation's conduct as "aggression", and drew a connection to "colonialism", thereby suggesting that the Russian Federation is a "coloniser" in relation to Ukraine.[39] In the Russian Federation's view, a reasonable person would conclude that a repost without additional commentary signifies endorsement.[40]

66. The Russian Federation's position is that "arbitrators must strive to refrain from making any statements in social media that could attest to their predisposition towards one of the parties and put into question their impartiality".[41] The Russian Federation cites a recent UNCITRAL proceeding in which the appointing authority upheld the Russian Federation's challenge against

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39 Letter from the Russian Federation dated 6 September 2024, p. 9.

40 Letter from the Russian Federation dated 6 December 2024, p. 4, *citing* Arvind Kejriwal v State & Another, 2024 SCC OnLine Del 719, CRL.M.C. 6347/2019, Delhi High Court, 5 February 2024.

41 Letter from the Russian Federation dated 6 September 2024, p. 10.

an arbitrator based on a social media post that sought to support Ukrainian lawyers who joined the Ukrainian Armed Forces, characterizing the lawyers as "Ukrainian defenders" under attack.[42]

Involvement in the Provisional Measures Stage

67. Finally, the Russian Federation faults Judge Kateka for alleged failure to indicate in his Disclosure Statement his involvement in the Provisional Measures stage of this case before ITLOS,[43] noting that Judge Kateka was a member of ITLOS at the time that ITLOS rendered its Provisional Measures Order on 25 May 2019.[44] Citing Article 17(2) of the Statute of the International Court of Justice (the "**ICJ**")[45] and the Burgh House Principles on the Independence of the International Judiciary, the Russian Federation expresses concerns that Judge Kateka's previous involvement—albeit in a different phase of the same proceedings—may have an impact on his impartiality.[46] In the words of the Russian Federation:

> While the Russian Federation is aware that such happenstance has apparently become common in Annex VII arbitrations, the repeated appearance of the same individuals as neutrals in more than one adjudicating body under Article 287 of UNCLOS in the same case (even if in different phases of the same proceedings) may still have an impact on their perception and attitude towards the case.[47]

68. According to the Russian Federation, Judge Kateka's prior involvement in this case, as well as his acquiescence in (and therefore implicit support of) the ITLOS Order, gave him an opportunity already to form a view on the merits of the case,[48] including on such pertinent issues as the Arbitral Tribunal's jurisdiction over the dispute, the plausibility of Ukraine's rights under the Convention and the possibility that the Russian Federation's actions could prejudice such rights if the Arbitral Tribunal found them to belong to Ukraine.[49]

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42 Letter from the Russian Federation dated 6 September 2024, pp. 10-11, *citing* Global Arbitration Review, US arbitrator disqualified from Russia case over LinkedIn post (21 August 2024), available at: https://globalarbitrationreview.com/article/us-arbitrator-disqualified-russia-case-over-linkedin-post.

43 Letter from the Russian Federation dated 6 September 2024, p. 11.

44 Letter from the Russian Federation dated 6 September 2024, p. 11.

45 Article 17(2) of the ICJ Statute provides:

> No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

46 Letter from the Russian Federation dated 6 September 2024, p. 11.

47 Letter from the Russian Federation dated 6 September 2024, p. 11.

48 Letter from the Russian Federation dated 6 September 2024, pp. 12-13.

49 Letter from the Russian Federation dated 6 September 2024, p. 12; Letter from the Russian Federation dated 6 December 2024, p. 5.

2. Position of Ukraine

69. Ukraine asserts that there is no merit to the Russian Federation's challenge to Judge Kateka's impartiality.

70. Ukraine refers to the Arbitral Tribunal's Decision on Challenges of 6 March 2024, in which the Arbitral Tribunal stated that an arbitrator may be challenged if "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence".[50] According to Ukraine, "justifiable doubts" is an objective standard, and arise when a reasonable person would conclude 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".[51] Ukraine's position is that the circumstances identified by the Russian Federation do not give rise to justifiable doubts as to the impartiality or independence of Judge Kateka.

71. *First*, Ukraine submits that Judge Kateka's abstention from the IDI Declaration cannot give rise to justifiable doubts as to his impartiality or independence. Ukraine reiterates its position that even a vote in favour of the IDI Declaration does not necessarily give rise to justifiable doubts, as the IDI Declaration refers to events outside the scope of the present arbitration.[52] In any case, Ukraine submits that an abstention creates even less room for justifiable doubts, as the "very definition" of an abstention is to take no position on the IDI Declaration's contents.[53] According to Ukraine, Judge Kateka's comments cannot be understood as being in alignment with the substance of the Declaration, as the Russian Federation itself had previously cited Judge Kateka's comments favourably as an example of an IDI member who "expressed [his] concerns regarding the Declaration".[54]

72. *Second*, concerning Judge Kateka's Twitter repost of 22 February 2022, Ukraine points to Judge Kateka's explanation that he reposted the tweet because of his interest in issues concerning colonialism and Africa.[55] Ukraine notes that, in contrast to the cases which the Russian Federation

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50 Letter from Ukraine dated 20 January 2025, p. 5, *citing* Decision on Challenges dated 6 March 2024, para. 90.

51 Letter from Ukraine dated 20 January 2025, p. 5, *citing* Decision on Challenges dated 6 March 2024, para. 90.

52 Letter from Ukraine dated 20 January 2025, p. 5.

53 Letter from Ukraine dated 20 January 2025, p. 6.

54 Letter from Ukraine dated 20 January 2025, p. 6, *citing* Letter from the Russian Federation dated 24 November 2023, p. 7.

55 Letter from Ukraine dated 20 January 2025, p. 6, *citing* Letter from Judge Kateka dated 9 September 2024, p. 2.

cites as examples of successful challenges to arbitrators, Judge Kateka did not author the speech, or the Twitter post.[56]

73. *Third*, Ukraine submits that Judge Kateka's participation in the ITLOS Provisional Measures Order of 25 May 2019 would not lead an objective observer to conclude that there is a likelihood that Judge Kateka may be influenced by factors other than the merits of the case.[57] According to Ukraine, "[the Russian Federation] conceded in its letter of 6 September 2024 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 proceedings".[58] In any case, the Provisional Measures Order was unrelated to the merits of the case, and the Order expressly noted that it "in no way prejudges" the issues to be considered during the merits phase.[59] Ukraine submits that "[a]s 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 would appear to prevent judges who decided provisional measures from examining the merits of a case, even as the *same tribunal* — an absurd result."[60]

V. ANALYSIS OF THE ARBITRAL TRIBUNAL

A. TIMELINESS

74. In its Decision on Challenges dated 6 March 2024, the Arbitral Tribunal held as follows:

> [T]he rules governing this arbitration are silent as to the procedure to be followed in respect of the assertion of a challenge against a Member of the Arbitral Tribunal, including the question of any applicable time limit to bring a challenge. Relying on the *Chagos* Challenge Decision's identification of the PCA Optional Rules as reflecting the established practice of inter-State arbitral tribunals, Ukraine argues that the 30-day deadline set forth in those Rules should apply to the Challenges. The Russian Federation disputes that this provision can be considered established to the same degree as the justifiable doubts standard.

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56 Letter from Ukraine dated 20 January 2025, p. 6.

57 Letter from Ukraine dated 20 January 2025, p. 7.

58 Letter from Ukraine dated 20 January 2025, p. 7, *citing* Letter from the Russian Federation dated 6 September 2024, p. 11:

> While the Russian Federation is aware that such happenstance has apparently become common in Annex VII arbitrations, the repeated appearance of the same individuals as neutrals in more than one adjudicating body under Article 287 of UNCLOS in the same case (even if in different phases of the same proceedings) may still have an impact on their perception and attitude towards the case.

59 Letter from Ukraine dated 20 January 2025, p. 7.

60 Letter from Ukraine dated 20 January 2025, p. 7.

> Nevertheless, both Parties accept that 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, both manifestly applicable to arbitral proceedings under Annex VII to UNCLOS. There 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 as mentioned above. Such rules do not, however, prescribe a fixed time limit regardless of the circumstances. Rather, they 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. What is a prompt and reasonable period of time will vary and must be appreciated in the circumstances of each case. In this connection, the 30-day time limit in the PCA Optional Rules is a relevant benchmark to be considered, but not to be applied in a strict manner.

75. That Decision concerned the time limit to raise a challenge for justifiable doubts as to independence and impartiality. This is what the Russian Federation did in its letter dated 6 September 2024, submitting that Judge Kateka's "[candidacy as arbitrator] in the present proceedings, in essence, suffer[s] from the same deficiencies that led to the disqualification of Judge Wolfrum and Professor McRae".[61] It invited Judge Kateka to consider withdrawing. The letter of 6 September 2024 was sent less than 30 days after Judge Kateka's appointment by the President of ITLOS on 9 August 2024. Even if certain of the circumstances invoked by the Russian Federation were already known to it as of the moment of Judge Kateka's appointment—namely his comments on the IDI Declaration and his participation in the ITLOS Provisional Measures Order—the Arbitral Tribunal does not find the delay sufficient to render the challenge untimely.

76. Ukraine proposes an additional time limit in this case, which would establish a deadline for the Russian Federation to pursue its challenge and seek a decision of the Arbitral Tribunal. In the absence of any rules governing an applicable time limit, the timeliness requirement can again be derived from and applied on the basis of the general requirement of good faith, the international law rules of waiver and acquiescence and the principles of the fair and equal administration of justice. However, there is no similar 30-day benchmark that the Arbitral Tribunal can rely upon in this context. This time limit to pursue and seek a decision on a challenge constitutes a gap in inter-State arbitration practice, as reflected in the PCA Optional Rules. Although certain more recent sets of arbitration rules, including the PCA's own newer arbitration rules, include a 30-day time limit in this regard, this practice has not yet consolidated in a manner that can be relied upon. In any event, the Arbitral Tribunal recalls that such benchmarks cannot be applied in a strict manner. What is a prompt and reasonable period of time for seeking a decision on a challenge will vary and must be appreciated in the circumstances of each case.

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61 Letter from the Russian Federation dated 6 September 2024, p. 3.

77. In this connection, Ukraine argues that the Russian Federation allowed nearly three months to pass between the Arbitral Tribunal's letter dated 12 September 2024 acknowledging Judge Kateka's 9 September 2024 response to the challenge and the Russian Federation's 6 December 2024 submission in which it requested a decision on the challenge.

78. However, in the circumstances, it does not appear to the Arbitral Tribunal that this is the relevant period for examination. The Arbitral Tribunal's letter dated 12 September 2024 fell in the period where the Parties were once again engaged in the reconstitution of the Arbitral Tribunal following Professor Mossop's resignation. It was only upon the Registrar's letter on behalf of the Arbitral Tribunal dated 5 November 2024 that it should have been clear to the Russian Federation that the proceedings would resume. That letter read as follows:

> I write on behalf of the Arbitral Tribunal in the above-referenced matter, and refer to my letter on behalf of the Arbitral Tribunal dated 12 September 2024 in which it was stated:
>
> > [T]he Arbitral Tribunal has discussed the matters raised by the Russian Federation in its letter dated 9 August 2024, also addressed at the outset (pp. 1-2) of its letter dated 6 September 2024. In keeping with the considerations set forth in my letter on behalf of the Arbitral Tribunal of 13 August 2024 and discussed during the consultations held between the Parties and Judge Eiriksson on 15 August 2024, the Arbitral Tribunal wishes to remain careful not to make rulings on what would be a proper interpretation of the provisions of Annex VII to the Convention on the appointment of replacement arbitrators until it has been fully re-constituted and can consider these questions in exercise of its mandate under the Convention and Annex VII thereto.
>
> It will be recalled that, in its letter to the Parties dated 13 August 2024, the Arbitral Tribunal, after referring to the letters of H.E. Judge Tomas Heidar, President of the International Tribunal for the Law of the Sea dated 8 August 2024 to the President of the Arbitral Tribunal and the Parties, informing them about his appointment of Judge Eiriksson as President of the Arbitral Tribunal and of Judge James Kateka and Professor Joanna Mossop as members of the Arbitral Tribunal, declared as follows with respect to the matters raised by the Russian Federation in its letter dated 9 August 2024:
>
> > At this stage, then, the concerns of the Russian Federation set out in its letter dated 9 August 2024 could be characterized as a challenge to the constitution of the Arbitral Tribunal, and accordingly its jurisdiction, on which the Arbitral Tribunal could issue a ruling or decision.
>
> Upon the appointment by H.E. Judge Tomas Heidar, President of the International Tribunal for the Law of the Sea, of Judge Kathy-Ann Brown in replacement of Professor Mossop following her resignation as member of the Arbitral Tribunal, the Arbitral Tribunal is now in a position to consider the matters raised by the Russian Federation in its letter dated 9 August 2024 as also addressed at the outset (pp. 1-2) of its letter dated 6 September 2024.

79. In this context, one may have wished the Russian Federation to speak up immediately, instead of waiting to address this issue together with its submission on its objection to the constitution of the Arbitral Tribunal on 6 December 2024. However, seeing as the Russian Federation's letter of that date falls just beyond another 30 days from the Arbitral Tribunal's letter dated 5 November

2024—31 days to be exact—the delay in pursuing the challenge does not appear unreasonable in the circumstances.

80. On this basis, the Arbitral Tribunal, unanimously, dismisses the timeliness objection by Ukraine.

B. THE STANDARD OF INDEPENDENCE AND IMPARTIALITY

81. Having resolved the objection to the timeliness of the challenge, the Arbitral Tribunal turns to the standard applicable to the merits of the challenge.

82. In its Decision on Challenges dated 6 March 2024, the Arbitral Tribunal concurred with the applicable standard for upholding a challenge for lack of independence and impartiality in inter-State arbitration proceedings set out by the *Chagos* tribunal in its Challenge Decision, as follows:

> [A] party challenging an arbitrator must demonstrate and prove that, applying the standards applicable to inter-State cases, there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case.[62]

83. In the view of the Arbitral Tribunal, this remains the applicable standard for assessing the challenge to Judge Kateka.

84. The Arbitral Tribunal will therefore proceed to apply this standard to the following grounds asserted by the Russian Federation in its challenge:

(a) Judge Kateka's involvement in the IDI Declaration;

(b) Judge Kateka's social media activity; and

(c) Judge Kateka's involvement in the Provisional Measures stage before ITLOS.

85. The Arbitral Tribunal notes that the present decision on the Challenge is without prejudice to the Russian Federation's objections to the constitution of the Arbitral Tribunal and the appointments of Judge Kateka and Judge Brown by the President of ITLOS, as raised by the Russian Federation in its letter dated 9 August 2024, at the outset (pp. 1-2) of its letter dated 6 September 2024 and in paragraph (iii) of the request for relief in its letter dated 6 December 2024.[63] The Arbitral Tribunal has received the Parties' submissions on this issue and reserved its decision on the subsequent procedure in its letter dated 5 November 2024. Accordingly, the Russian Federation's

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62 Decision on Challenges, para. 88, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge of 30 November 2011, para. 166.

63 *See above*, paras 20, 21, 25, 27, 30, 32-35, 37, and 40.

objections to the constitution of the Arbitral Tribunal and the appointments of Judge Kateka and Judge Brown by the President of ITLOS will be the subject of a separate decision.

C. JUDGE KATEKA'S INVOLVEMENT IN THE IDI DECLARATION[64]

86. Judge Kateka's comments on, and proposed amendments to, the text of the IDI Declaration are reproduced below:

> I appreciate the circumstances and the environment which have prompted the draft. Let me state at the outset that I oppose any illegitimate forcible action by any State. The Institute [of International Law] has previously dealt with the specific use of force only on two occasions. In 1877 at the Zurich Session and in 2003 at the Bruges Session. This is thus the third time. At the Bruges Session, in spite of not spelling out the States that used force, there was opposition by some Members who argued that the Institute is a learned society that should not get involved in political matters that would prejudice its standing. I wish to observe here that the Institute is the highest body—analogy of a Supreme Court—in promoting the progress of international law. The Institute is composed of international lawyers from different parts of the world. Its pronouncements must be balanced and objective. Hence my appeal for the toning down of some of the language. The title should be: "Declaration of the Institute of International Law on the Use of Force in Ukraine". In the second paragraph of the text, line 4 of the English text, we should replace "firmly denounce the aggression" with "deplores the use of force". Consequential changes of "use of force" should be made wherever "aggression" is used. In the 5th line, delete "massive". The paragraphs after para 3 should be numbered 4, 5, 6, and 7. I am making the above suggestions in good faith to tone down the language. In the 2003 Bruges Declaration such mild language was used. I am afraid we could be accused of double standards if we act with strong language.[65]

87. In his letter dated 9 September 2025, Judge Kateka explains his comments as follows:

> 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." 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.

88. Unlike Judge Wolfrum and Professor McRae, Judge Kateka did not vote in favour of the IDI Declaration. Instead, he abstained, consciously choosing not to cast a vote either in support of or against the Declaration. By doing so, he distanced himself from the text of the Declaration and, as a result, cannot be held to have subscribed to the views expressed therein. The Arbitral Tribunal

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64 The Arbitral Tribunal reiterates its statement in footnote 4, paragraph 29, of its Decision on Challenges dated 6 March 2024, that, for the avoidance of doubt, it takes no view of any kind on the matters addressed within the IDI Declaration.

65 Institut de Droit International, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (Vol. 83), pp. 22-23.

takes note in particular of his statement that "[m]y abstention on the Declaration cannot be understood as standing firmly in support of the document".

89. Notwithstanding his abstention, Judge Kateka made several proposals to amend the text of the Declaration, which, as he explained at the time, were aimed at "toning down the language" and aligning it more closely with the "mild language" of the 2003 Bruges Declaration, to avoid a situation where the Institute of International Law "could be accused of double standards". Specifically, his suggestions to replace the phrase "firmly denounces the aggression" with "deplores the use of force" and to substitute references to "aggression" with "use of force" more generally must be seen in this light.

90. However, as noted by the Secretary General of the *Institut de Droit International* in his introduction to the Declaration, "[g]iven the urgency, an amendment procedure, which would have risked considerably slowing down or even jeopardizing the adoption of the text, was not considered". Considering the rushed nature of the adoption process, the fact that Judge Kateka did not make further objections or propose further amendments to other parts of the Declaration cannot be interpreted *per se* as an endorsement of those parts on which he expressed no opinion.

91. Therefore, having carefully reviewed Judge Kateka's involvement in the drafting and voting process of the IDI Declaration, the Arbitral Tribunal concludes that the comments accompanying his abstention and proposed amendments to the text of the Declaration do not give rise to justifiable doubts as to his impartiality and independence. Accordingly, the Arbitral Tribunal, by a majority of two votes to one, with Judge Eiriksson and Sir Christopher Greenwood voting in favour and Professor Vylegzhanin dissenting, dismisses these grounds for the Challenge.

D. JUDGE KATEKA'S SOCIAL MEDIA ACTIVITY

92. In addition to his comments on the IDI Declaration, the Russian Federation takes Judge Kateka's repost on Twitter (now X) of a post that uses the phrase "Kremlin's acts of aggression" as evidence that Judge Kateka "did in fact personally agree" with such characterization of the Russian Federation's actions.[66] Judge Kateka's repost had no comments of his own. The question then is how Judge Kateka's repost is to be understood, in particular, whether it can be characterized as an endorsement of the original post, such that the act of reposting creates in the mind of a reasonable person justifiable grounds for doubting the independence and impartiality of Judge Kateka in this particular case.

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66 Letter of the Russian Federation dated 6 September 2011, p. 9.

93. The Arbitral Tribunal notes that the question of whether a repost of another person's speech amounts to an endorsement is still an unsettled question in law, and in any event a matter for appreciation. Applying the standard for challenges set out above, the Arbitral Tribunal thus considers that the impact of such conduct for the assessment of the independence and impartiality of an arbitrator in the context of a challenge is a matter that must be judged on a case-by-case basis following an examination of all relevant circumstances.

94. In this vein, the Arbitral Tribunal notes the importance of the particular chronology of events:

(a) on 21 February 2022 at 21:00 Eastern Time (3:00 AM Coordinated Universal Time (UTC)), Ambassador Martin Kimani, Permanent Representative of Kenya to the United Nations, made a speech in an emergency meeting of the United Nations Security Council on the situation in Ukraine;[67]

(b) on 22 February 2022 at 4:26 AM UTC, Mr. Thomas van Linge posted a video of Ambassador Kimani's speech, with the accompanying text: "If you're gonna listen to any speech about #Ukraine 🇺🇦, let it be this one. The Kenya ambassador to the UNSC perfectly explains how people across Africa understand Ukraine, and what the Kremlin's acts of aggression mean in our post-colonial world.";

(c) on 22 February 2022 at 2:09 PM UTC, Mr. Cris van Eijk reposted Mr. van Linge's original post, with a comment: "Why aren't UN speeches eligible for Pulitzers??";

(d) later on 22 February 2022 (exact time uncertain), Judge Kateka reposted Mr. van Eijk's post, without any comment of his own;

(e) on 24 February 2022, the present military confrontation between the Russian Federation and Ukraine commenced;

(f) on 26 February 2022, the draft of the IDI Declaration was circulated to the members of the Institute;[68]

(g) on 1 March 2022, the IDI Declaration was adopted and circulated.[69]

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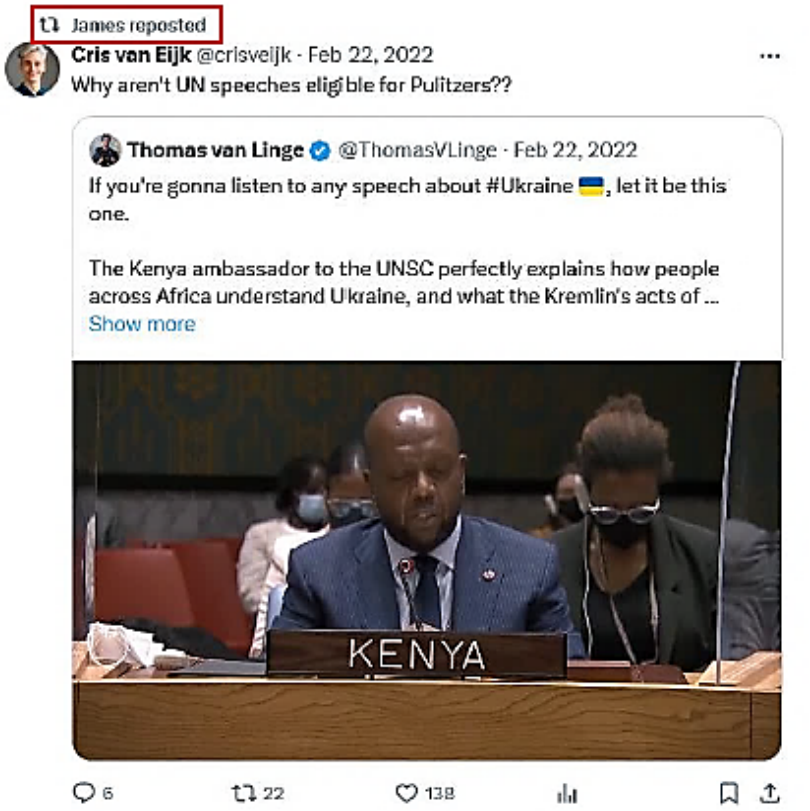
67 Statement by Amb. Martin Kimani during the Security Council Urgent Meeting on the Situation in Ukraine, 21 February 2022, available at https://www.un.int/kenya/statements_speeches/statement-amb-martin-kimani-during-security-council-urgent-meeting-situation.

68 Institut de Droit International, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (Vol. 83), p. 17.

69 Institut de Droit International, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (Vol. 83), p. 17.

95. In the Arbitral Tribunal's view, this sequence of events may support Judge Kateka's explanation of his repost in his letter of 9 September 2024. First, Judge Kateka's repost has to be understood in the context of Mr. van Eijk's comment, which concerns itself with praising the speech of Ambassador Kimani. This may be consistent with Judge Kateka's description of his own practice to draw attention to matters of importance in the African continent.

96. Second, the reposting predated the Russian Federation's confrontation with Ukraine on 24 February 2022, which is the event that later led to the adoption of the IDI Declaration and its use of the term "aggression". In this context, a reasonable person cannot imply from the repost—even if understood to include the original post of Mr. van Linge—any opinion on Judge Kateka's part on any action of the Russian Federation subsequent to 22 February 2024. Indeed, in Judge Kateka's repost of Mr. van Eijk's repost, the word "aggression" does not appear. It is cut out from the rest of the text, such that a casual reader on Twitter would not even see the word unless an extra step of clicking the link is taken, as one can see in the final repost as it would be seen by the public, reproduced here below:



97. Accordingly, the Arbitral Tribunal, by a majority of two votes to one, with Judge Eiriksson and Sir Christopher Greenwood voting in favour and Professor Vylegzhanin dissenting, dismisses these grounds for the Challenge.

E. JUDGE KATEKA'S INVOLVEMENT IN THE PROVISIONAL MEASURES STAGE BEFORE ITLOS

98. The Arbitral Tribunal begins by observing that it is accepted in inter-State dispute settlement that a given court or tribunal may ordinarily rule on provisional measures in the same composition as it then proceeds to address any preliminary objections and the eventual merits of a case. This much the Russian Federation does not appear to contest.

99. In general, international courts and tribunals address the concern about prejudgment referred to by the Russian Federation by hewing strictly to the legal standards for provisional measures, including as regards the plausibility of the rights asserted,[70] as distinct from those applicable to their final decisions rendered on the case. These decisions are also commonly prefaced by overt statements that such determinations in relation to provisional measures are without prejudice to eventual decisions on jurisdiction, admissibility and merits to follow.

100. This was the case for the ITLOS Provisional Measures Order in relation to this case, where it was stated:

> At this stage of the proceedings, the Tribunal is not called upon to determine definitively whether the rights claimed by Ukraine exist, but need only decide whether such rights are plausible (see *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84).
>
> [. . .]
>
> The present Order in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the admissibility of Ukraine's claims or relating to the merits themselves, and leaves unaffected the rights of Ukraine and the Russian Federation to submit arguments in respect of those questions.[71]

101. A more recent example may be found in the Provisional Measures Order in the *San Padre Pío* case, where ITLOS held:

> At this stage of the proceedings, the Tribunal is not called upon to determine definitively whether the rights claimed by Switzerland exist, but need only decide whether such rights are plausible (*Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation),*

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70 *"Enrica Lexie" (Italy v. India),* Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Heidar, ITLOS Reports 2015, p. 292, paras. 18-20.

71 *Case Concerning the Detention of Three Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, ITLOS Reports 2019, pp. 306, 311, paras. 95, 122.

> *Provisional Measures, Order of 25 May 2019*, para. 95; see *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84).
>
> [. . .]
>
> The present Order in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the admissibility of Switzerland's claims or relating to the merits themselves, and leaves unaffected the rights of Switzerland and Nigeria to submit arguments in respect of those questions.[72]

102. In this respect, Article 290(5) of the Convention adopts a unique scheme in inter-State dispute settlement. Pending the constitution of an Annex VII arbitral tribunal to which a dispute is being submitted, ITLOS (or any other court or tribunal agreed upon by the parties to the dispute) is called upon to rule on provisional measures applications.[73]

103. In the Arbitral Tribunal's view, the express link formed between provisional measures applications before ITLOS and Annex VII arbitration therefore effectively makes these separate phases of the same set of dispute settlement proceedings under the Convention and justifies treating them as if they were separate phases of the same case before a single court or tribunal.

104. In this sense, the Arbitral Tribunal notes a number of occasions in which ITLOS appears to have assessed whether concurrent service on an Annex VII arbitral tribunal and as a judge or judge *ad hoc* of ITLOS would run afoul of Article 8(1) of the ITLOS Statute[74]—which is nearly

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72 *M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019, pp. 399, 408, paras. 105, 145.

73 Article 290(5) reads:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

74 Article 8(1) of the ITLOS Statute reads:

> 1. No member of the Tribunal may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court or tribunal, or in any other capacity.

identical to Article 17(2) of the ICJ Statute invoked by the Russian Federation.[75] In each instance, ITLOS observed that "no objection [. . .] was raised [to such concurrent service], and none appeared to the Tribunal itself".[76]

105. Accordingly, without suggesting that there could not, in other circumstances, arise an incompatibility between serving on ITLOS and subsequently on an Annex VII arbitral tribunal in respect of the same case, the Arbitral Tribunal does not consider that Judge Kateka's involvement in the ITLOS Provisional Measures Order raises justifiable doubts as to his independence or impartiality.

106. Therefore, the Arbitral Tribunal, unanimously, dismisses these grounds for the Challenge.

F. COSTS

107. In its letters dated 22 November and 20 December 2024, Ukraine requested that the Arbitral Tribunal, *inter alia*, "[a]ward Ukraine its costs for the phase of these proceedings commencing since the resignations of Professor McRae and Judge Wolfrum".[77]

108. In its letter dated 6 December 2024, the Russian Federation requested, *inter alia*, that "Ukraine's request to award it the costs of this part of the proceedings be dismissed".[78]

109. As it decided in its Award on the Preliminary Objections of the Russian Federation dated 27 June 2022, the Arbitral Tribunal decides, unanimously, that it will rule on the question of costs in conjunction with the merits.

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75 The Arbitral Tribunal has also taken note of article 9.1 of the Burgh House Principles, invoked by the Russian Federation.

76 *See, e.g., "Enrica Lexie" (Italy v. India),* Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182, para. 16; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 12, para. 8; *The "ARA Libertad" Case (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 334, para. 12. (emphasis added)

77 Letter from Ukraine dated 22 November 2024, p. 14; Letter from Ukraine dated 20 December 2024, p. 9.

78 Letter from the Russian Federation dated 6 December 2024, p. 26.

VI. DECISION

110. For the reasons set out above, the Arbitral Tribunal, constituted for the purposes of this challenge by President Gudmundur Eiriksson, Sir Christopher Greenwood and Professor Alexander Vylegzhanin:

(a) *decides*, unanimously, that the challenge to Judge Kateka was properly and timely asserted;

(b) *rejects* the challenge to Judge James Kateka, having decided with respect to the individual grounds, as follows:

(i) *dismisses*, by two votes to one, the challenge grounded on Judge Kateka's involvement in the Declaration of the Institute of International Law of 1 March 2022:

IN FAVOUR: Judge Gudmundur Eiriksson, Sir Christopher Greenwood

AGAINST: Professor Alexander Vylegzhanin

(ii) *dismisses*, by two votes to one, the challenge grounded on Judge Kateka's social media activity:

IN FAVOUR: Judge Gudmundur Eiriksson, Sir Christopher Greenwood

AGAINST: Professor Alexander Vylegzhanin

(iii) *dismisses*, unanimously, the challenge grounded on Judge Kateka's participation in the Provisional Measures stage of this dispute before the International Tribunal for the Law of the Sea;

(c) *decides*, unanimously, that the question of costs shall be ruled upon in conjunction with the merits.

Done at the Peace Palace, The Hague, the Netherlands, this 11th day of April 2025,

For the Arbitral Tribunal:

Professor Alexander Vylegzhanin

Subject to the attached dissenting opinion

Sir Christopher Greenwood KC

Judge Gudmundur Eiriksson
President

For the Registry:

Mr. Martin Doe
Registrar