DISSENTING OPINION
OF PROF. DR. OF LAW ALEXANDER N. VYLEGZHANIN

1. I agree with the majority that the challenge to Judge James Kateka was properly and timely asserted.

2. To my profound regret, I cannot agree with the decision of the majority to dismiss the challenge to Judge Kateka grounded on his involvement in the Declaration of the Institute of International Law (IDI) of 1 March 2022 and his social media activity. In my opinion, the challenge to Judge Kateka on these grounds should have been upheld.

3. I also provide reasoning for my alignment with the majority regarding the third ground of the challenge, which is somewhat different from the justifications listed in the decision.

I. THE STANDARD OF INDEPENDENCE AND IMPARTIALITY

4. The decision gives only a bare outline of the applicable standard of independence and impartiality. I find it important to restate this standard in more detail, as formulated in the Arbitral Tribunal's prior decision on the challenges to Professor Donald McRae and Judge Rüdiger Wolfrum:

> A challenge need not, however, demonstrate actual bias in order to be sustained. Rather, 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. That is, 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.[1]

5. This is the standard by which an arbitrator's conduct should be measured; and in my opinion, the relevant circumstances demonstrate that the conduct of Judge Kateka failed to meet this standard, creating justifiable doubts as to his impartiality.

II. JUDGE KATEKA'S INVOLVEMENT IN THE IDI DECLARATION

6. I disagree with the other Arbitrators on the legal assessment of Judge Kateka's attitude towards the IDI Declaration. In my view, it was a clear case of self-expressed bias against one Party to the dispute and in favour of the other Party.

---

[1] Decision on Challenges, para. 90.

The nature of the IDI Declaration: in favour of one of the Parties to this dispute

7. It has already been accepted by this Tribunal that the IDI Declaration is relevant to the circumstances of the present case. In particular, the Tribunal noted that "in circumstances where the sovereign weight of the armed and police forces have been aligned against the military vessels of a foreign State with the consequent alleged deprivation of the rights of military personnel of a foreign State", it is not easy to disassociate the IDI Declaration from the issues addressed by the Arbitral Tribunal.[2]

8. At the same time according to the Decision on Challenges of this Arbitral Tribunal of 5 March 2024, "for the avoidance of doubt, this Arbitral Tribunal takes no view on the matters addressed within the IDI Declaration".[3]

9. In this context I will take no view on the matter raised by the Russian Federation (as to the 2014 forceful removal of Ukraine's president Viktor Yanukovich from his office and the legitimacy of his substitution by the "acting president" Turchinov without elections and subsequent fact relating to the Ukrainian President Yanukovich finding shelter in the territory of the Russian Federation).

10. Instead, I limit myself to the observation that the IDI Declaration is obviously characterized by its manifest anti-Respondent and pro-Claimant thrust and certainly takes a clear stance against the Respondent.

11. In these circumstances, from the point of the very concept of the principle of impartiality any member of the IDI who supported or otherwise condoned the Declaration – be it formally or informally, for good reasons or not – refusing to follow the general principle of law – *audiatur et altera pars* – cannot be considered unbiased to resolve any dispute between the two States mentioned in the Declaration – which are Parties to this dispute.

Despite not voting in favour of the IDI Declaration, Judge Kateka in his accompanying statement revealed support for the Declaration

12. While Judge Kateka did not vote in favour of the Declaration, this fact alone cannot attest to his impartiality, for a very important reason: when taking part in the voting, Judge Kateka chose to make a statement explaining his position. According to this statement, his abstention was not due to some fundamental disagreement with the text of the Declaration.

---

2 Decision on Challenges, para. 102.
3 Decision on Challenges, para. 28 (footnote 4).

13. Judge Kateka began his statement with an expression of appreciation for "the circumstances and the environment which prompted the draft" and that he "oppose[d] any illegitimate forcible action by any State". Without any further elucidation on Judge Kateka's part, this might be interpreted as aligning oneself with the main message of the Declaration – namely, that the actions of the Respondent were contrary to international law.

14. This observation is supported by the editorial amendments that Judge Kateka suggested to the text of the IDI Declaration, and also by his silent consent towards the rest of the text of the Declaration.

Amendments proposed by Judge Kateka did not change the substance of the Declaration

15. The only concrete disagreement Judge Kateka appeared to have with the wording of the Declaration was the use of the word "aggression" – his preference was to replace it with "use of force". However, this replacement did not change the fundamental presumption that this use of force by the Respondent in this case was unlawful. Overall, such a replacement would in no way change the substance of the Declaration, including its principal claim that the action of the Respondent is contrary to the most fundamental principles of international law.

16. The tacit acceptance by Judge Kateka of a manifestly one-sided approach to evaluating the complex situation between the Respondent and the Claimant in this case from the standpoint of international law is in my opinion a justifiable ground for doubting his impartiality in this case.

Conclusion

17. There is a fundamental difference between merely abstaining from a vote, and abstaining while making a statement that aligns oneself with most of the wording and the entirety of the substance of the document in question.

18. When examining matters of potential bias, formal actions such as voting are certainly important, but so are other relevant actions such as explanatory statements and other public expressions of opinion. The standard of impartiality cannot apply solely to the former while disregarding the latter. In the end, what is important is a potential arbitrator's individual attitude – no matter how expressed – to the disputing Parties in the general context of relevant circumstances of the case.

19. In this case, Judge Kateka's attitude was expressed clearly: despite abstaining from voting on the Declaration, he showed both expressly and tacitly his support for its substance.

20. This factor is to be taken into account in light of the accumulative legal consequences of other relevant factors, including Judge Kateka's social media activity, as described further in section (III) of this dissenting opinion.

21. What is in my opinion a relevant factor of even greater legal significance is the fact that it is for the first time in this case that one of the disputing Parties objected *ab initio* and persistently against Judge Kateka's membership in this Arbitral Tribunal. An initial consent of the disputing Parties as to the composition of a relevant inter-State arbitration body is a common practice. As noted even in 1926, "States which conclude an arbitration treaty have to agree upon the arbitrators".[4] The *1899 Hague Convention for the Pacific Settlement of International Disputes* (Art. 16) and the *1907 Hague Convention for the Pacific Settlement of International Disputes* (Art. 45) provide for the initial consent of the disputing Parties in forming the composition of the Arbitral Tribunal. Such an initial consent of the disputing Parties is also implied by Art. 3 of *Annex VII to the 1982 UN Convention on the Law of the Sea* (UNCLOS).

22. I conclude that, in light of the accumulative legal consequences of all the relevant factors, Judge Kateka's involvement in the drafting and adoption of the IDI Declaration and the persistent objection of one of the disputing Parties as to his membership in this Arbitral Tribunal provided justifiable grounds for doubting his impartiality in this case.

III. JUDGE KATEKA'S SOCIAL MEDIA ACTIVITY

23. The interpretation given by the majority of Arbitrators does not, in my opinion, conform to the "reasonable person" criteria. It is significantly skewed to favour an "innocuous" interpretation given by Judge Kateka himself.

24. The majority considers that Judge Kateka's retweet "has to be understood in the context of Mr. van Eijk's comment", rather than in the context of Mr. Van Linge's comment.

25. To recall, Mr. van Linge posted a link to Ambassador Kimani's speech with the following comment:

> 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.

---

4 International Law. A Treatise. By L. Oppenheim. Vol. II. Disputes, War and Neutrality. Fourth Edition. Ed. By A.D.McNaire. Longmans, Green and Co. LTD. 1926. P. 26.

26. Mr. van Eijk then retweeted Mr. van Ligne's post, with the following comment:

> Why aren't UN speeches eligible for Pulitzers??

27. Judge Kateka then retweeted *both* of these posts (Mr. van Eijk's post including Mr. van Linge's comments) without any commentary of his own.

28. It is common to assume that if a person re-posts a post of a second person, without comments of the first person to the contrary, that fact means a tacit consent of the first person with the text of such post (or, at the very least, not disagreement of the first person with the post).

29. As the Delhi High Court has held,

> The retweeting of the content in the present case which was originally created by some other person who did not have as much public following as the present petitioner, by virtue of the petitioner retweeting that content, represented to the public at large that he believed the content created by another person to be true. It has to be held so since the general public would ordinarily believe that the person retweeting such content on his own Twitter account, must have understood, verified and believed the content to be true.[5]

30. There are also other cases which support this interpretation:

- *United States v. Yassin*, Case No. 16-03024-01-CR-S-MDH (W.D. Mo. Feb. 23, 2017):

> even assuming this was a retweet (as asserted by Defendant), there is a general understanding that "[b]y clicking 'retweet,' the user intends to convey the message that she agrees with the 'tweet,' and viewers will understand it that way." (Bethany C. Stein, A Bland Interpretation: Why a Facebook "Like" Should Be Protected First Amendment Speech, 44 Seton Hall L. Rev. 1255, p. 9. 1277 (2014).

- *R. v. Hamdan*, British Columbia Supreme Court, 2017 BCSC 1770:

> By re-posting the statements of others, Mr. Hamdan was clearly aware of the content and thus adopted those statements as his own.

- District Court of Zurich, Conviction for "Facebook Like" on defamatory posts, judgment of 29 May 2017 (case number GG160246):

> By clicking the "like" button, the accused clearly endorsed the defamatory content and thus made it his own. The statements were further disseminated on Facebook, i.e. made accessible to a large number of people.

---

5 *Arvind Kejriwal vs State & Anr*, Delhi High Court, 5 February 2024, available at: https://indiankanoon.org/doc/59702685/.

31. In this context, it is clear to any reasonable person that Mr. van Linge gave a clearly partisan interpretation of Ambassador Kimani's speech, according to which the conduct of one of the Parties to this dispute was qualified as "acts of aggression". It is similarly clear that Mr. van Eijk reacted to this statement by Mr. van Linge, by reposting it and giving it a positive reaction (by suggesting that the speech in question should be eligible for the Pulitzer prize).

32. It is important to note that Mr. van Eijk was reacting to Mr. van Linge's post rather than Ambassador Kimani's speech only; if the latter were the case, Mr. van Eijk could have easily elected to comment on the original speech, rather than retweeting Mr. van Linge's politically charged commentary.

33. Similarly, it is evident to a reasonable person that by retweeting the posts, Judge Kateka was not purely supporting Ambassador Kimani's sentiments, but was casting them in the light of the conflict between the Claimant and the Respondent – Parties to this dispute.

34. Despite being plainly aware of the controversial nature of Mr van Linge's post and Mr. van Eijk's endorsement, Judge Kateka decided to retweet both of them, without any commentary of his own that might have clarified his stance on the issues involved. A retweet without commentary is commonly – and rightly – considered an expression of support, since it serves to expand the original message's audience. As the main function of social media is to transmit messages to the broadest possible audience, by performing such a retweet Judge Kateka plainly acted in support of propagating Mr. van Linge's view about "aggression" of a State which is one of the Parties to this dispute.

35. In my view, this constituted reasonable evidence of Judge Kateka's bias against one of the Parties to this dispute. I find the "innocuous" interpretation given by the majority too stretched to be considered reasonable. This is unfortunate, because it might serve to downplay the impact and importance of actions taken and opinions expressed in the contemporary digital environment – which grows more and more relevant in global politics with each passing year.

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

36. While I decided to agree with the other Arbitrators on this ground for challenge, it is by a very tenuous margin. The Respondent raised what is, in my view, a substantial issue: how can a person who has already expressed a clear and unequivocal legal opinion about the exact circumstances of this particular case, and voted for a decision clearly in favour of one party's position, be

considered neutral? Had this position been expressed by Mr. Kateka outside of his duties as an ITLOS judge, it would have been undoubtedly considered as sufficient for his recusal.

37. The Respondent did not suggest that Judge Kateka – or any other judge – should be barred from examining on the merits a case he reviewed at the provisional measures stage as part of the "same tribunal". It is self-evident that Judge Kateka did *not* examine the present case as part of the current Arbitral Tribunal, but as part of a *different* body – namely, ITLOS. This difference is crucial, since it marks the watershed between two entirely different legal processes.

38. The *Statute of the ICJ* establishes a clear rule:

> No member [of the Court] may participate in the decision of any case in which he has previously taken part [. . .] as a member of a national or international court [. . .] or in any other capacity.

39. This rule plainly does not apply to a situation when the judge in question examined the case at a previous procedural stage within the same court. Otherwise, it would bar ICJ judges from examining any case on the merits after having examined it at the stage of provisional measures or preliminary objections.

40. However, just as plainly, the rule applies to judges who previously acted in a judicial capacity (or, in fact, "any other capacity") with regard to the *same* case in *another* dispute resolution body – specifically including *international courts*.

41. Article 7 of the *Statute of the International Tribunal for the Law of the Sea* provides a similar rule:

> No member of the Tribunal may participate in the decision of any case in which he has previously taken part as [. . .] a member of a national or international court or tribunal, or in any other capacity.

42. The International Tribunal for the Law of the Sea is an international court which has examined the *same case* as is currently being examined by this Arbitral Tribunal. That examination was a wholly separate legal process, conducted under different rules, than the rules of the present arbitration. Within that process, the ITLOS examined the same facts, and reached certain specific conclusions which have a direct bearing on matters to be examined by the Arbitral Tribunal.

43. Judge Kateka was part of that process as an ITLOS judge, and voted unequivocally in favour of legal positions contained in the ITLOS Judgment on provisional measures. If the ICJ rule and the ITLOS rule noted above were to be stringently applied, the mere fact of his participation in that

process would be sufficient for barring him from being appointed Arbitrator in this case. Even if the rules were to apply circumstantially, this participation (combined with Judge Kateka's unequivocal vote in favour of all parts of the ITLOS judgment – which heavily favoured the Claimant's interpretation of the events) would be sufficient to consider him as having already formed and expressed a firm opinion on the circumstances of the case.

44. As for the opinion that there is an "express link" between the competence of ITLOS to examine requests for provisional measures and the Annex VII arbitration, which "effectively" renders these two separate proceedings as "separate phases of the same case before a single court or tribunal", I note that there is indeed a certain link. But it is not sufficient, in my view, to conflate ITLOS proceedings with a subsequent Annex VII arbitration. These are, for all intents and purposes, separate and distinct legal proceedings, grounded on fundamentally different procedural rules and – most importantly – conducted by different bodies.

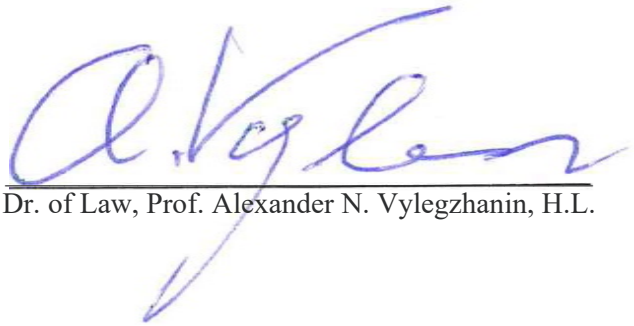
45. It would be generally inappropriate for the same judge to sit at two different national or international courts, or at a national and international court, while examining the same case, without special reasons to the contrary. In this case, in the context of other relevant factors noted earlier, it should be inappropriate for ITLOS Judge Kateka (who already examined a case at the provisional measures stage, who formed a clear opinion on it and expressed this opinion by voting on the verdict, who was involved in the IDI Declaration clearly supporting one of the Parties to this dispute) to be then appointed as Arbitrator in an Annex VII arbitration for the same case.

46. However, the argument that ultimately prevailed in my mind was that, for good or ill, instances when ITLOS judges participated in issuing ITLOS Provisional Measures and then were Annex VII arbitrators have already occurred on multiple occasions. So, taking a decision now that such practice was inherently biased would cast a shadow of doubt over the impartiality of those esteemed arbitrators in other cases – something that, in good conscience, I am not prepared to do. For this reason, I decided to align my vote with the other Arbitrators.

47. In this regard, I draw attention to the part of the present decision which reads "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". This wording aims to emphasize that the Tribunal's decision is not to be considered setting or confirming any standard or precedent, but should only be construed as applicable to the unique circumstances of the present case.

48. By expressing this position, I hope to attract the arbitration community's attention to the issue, and advocate in favour of minimizing and ultimately reversing this unfortunate practice, which in my view creates confusion and additional risks of introducing bias to arbitration proceedings. Surely, ITLOS judges could abstain from participating as arbitrators at least in those same cases they have previously examined in their ITLOS capacity, and the President of ITLOS could bear this concern in mind when selecting arbitrators to appoint within the Annex VII process (without prejudice to the challenges to such appointment within the present Arbitration).

Date: 11 April 2025



Dr. of Law, Prof. Alexander N. Vylegzhanin, H.L.