DECLARATION OF JUDGE SKOTNIKOV

I have voted in favour of the Court's overall conclusion that it has no jurisdiction to entertain the Application filed by Georgia on 12 August 2008. I fully concur with the Court's decision to uphold the second preliminary objection raised by the Russian Federation. However, for the reasons given below, I am unable to support the Court's decision to reject the first preliminary objection raised by Russia.

1. I agree with the Court's conclusion that "Georgia has not . . . cited any document or statement made before it became party to CERD in July 1999 which provides support for its contention that 'the dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention'" (Judgment, para. 64). I equally support the Court's determination that "no legal dispute arose between Georgia and the Russian Federation during [the] period [between 1999 and July 2008] with respect to the Russian Federation's compliance with its obligations under CERD" (*ibid.*, para. 105).

2. The Court has arrived at the above conclusions after painstakingly considering all the relevant facts within their proper context.

3. Regrettably, the Court has not applied the same yardstick of rigorous contextual examination in forming the conclusion that a dispute with respect to the interpretation and application of CERD emerged on 9 August 2008 in the course of the armed conflict which started on the night of 7 to 8 August 2008 and that, consequently, there was a legal dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD at the date on which Georgia filed its Application, 12 August 2008 (*ibid.*, para. 113).

4. As the Court has stated on many occasions "[o]ne situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures" (*ibid.*, para. 32). The Court observes throughout the Judgment that in the situation which preceded the outbreak of hostilities on 7/8 August 2008 there were disputes involving a range of different matters, but not the question of the interpretation or application of CERD.

5. The Court is under a duty to determine whether or not the August 2008 dispute was about compliance with CERD, rather than with the provisions of the United Nations Charter relating to the non-use of force or with the rules of international humanitarian law. This task is admittedly not an easy one. Indeed, some acts prohibited by international

humanitarian law may also be capable of contravening rights provided by CERD. In order to determine the existence of a dispute under CERD, the Court must nevertheless satisfy itself that an alleged dispute relates to establishing a "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" (Art. 1, CERD).

6. Given this difficulty, it may not always be possible for the Court to make a determination as to the existence of a CERD dispute in a situation of armed conflict at the preliminary stage of the proceedings. However, the Court always has the option of declaring that the objection as to the existence of a dispute does not possess, in the circumstances of the case, an exclusively preliminary character (Art. 79, para. 9, of the Rules of Court). Had the Court resorted to that option in the present case, it would have found itself on much safer ground.

7. It is striking that the Court's decision to reject the first preliminary objection in so far as the period starting on 9 August 2008 is concerned is based solely on various pronouncements by the Parties.

A contextual analysis would have shown that those pronouncements do not constitute sufficient evidence of the existence of a dispute with respect to the interpretation or application of CERD.

8. The Court begins its consideration of that period of August 2008 by quoting the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, established by the Council of the European Union, to the effect that on the night of 7 to 8 August:

> "a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another." (Report, Vol. I, para. 2; Preliminary Objections of the Russian Federation, Vol. II, Ann. 75; see Judgment, para. 106.)

I think it would have been useful to consider at least two more observations contained in the Mission's Report:

> "There is the question of whether the use of force by Georgia in South Ossetia, beginning with the shelling of Tskhinvali during the

night of 7/8 August 2008, was justifiable under international law. It was not." (Report, Vol. I, para. 19.)

"At least as far as the initial phase of the conflict is concerned, an additional legal question is whether the Georgian use of force against Russian peacekeeping forces on Georgian territory, i.e. in South Ossetia, might have been justified. Again the answer is in the negative . . . There is . . . no evidence to support any claims that Russian peacekeeping units in South Ossetia were in flagrant breach of their obligations under relevant international agreements such as the Sochi Agreement and thus may have forfeited their international legal status. Consequently, the use of force by Georgia against Russian peacekeeping forces in Tskhinvali in the night of 7/8 August 2008 was contrary to international law." (*Ibid.*, para. 20.)

9. The factual context emerging from the Report is quite clear: it appears highly unlikely, to say the least, that the Russian response to Georgia's attack was in contravention of CERD. The majority which voted to reject the first preliminary objection unfortunately lost sight of this rather obvious proposition.

10. The Court, in addressing the exchange of accusations by the Parties, should have assessed them within the context of the armed conflict in progress when those accusations were made. Whenever the Court deals with a situation of armed conflict and the issue of compliance with CERD, it has to distinguish between wartime propaganda, on the one hand, and statements which may indeed point to the emergence and crystallization of a dispute under CERD, on the other. This may not be easy, but the Court is perceptive enough to handle this task. For example, one could have concluded without any difficulty that Georgia's claim that Russia's intention was "to erase Georgian statehood and to exterminate the Georgian people" (Judgment, para. 109) belongs in the category of war rhetoric and thus is of no probative value as to the existence of a dispute under CERD. The same is true of Georgia's claims that "there is an ethnic cleansing of whole ethnic Georgian population of Abkhazia taking place by Russian troops" (*ibid.*, para. 111) or that "Russian troops . . . expelled the whole ethnically Georgian population of South Ossetia" (*ibid.*, para. 109). Incidentally, it is quite clear from the Report of the Fact-Finding Mission that all the above accusations were manifestly unfounded.

11. The Court puts much emphasis on what it terms "the response on 12 August by the Russian Foreign Minister" to "the claims made by the Georgian President on 9 and 11 August" (*ibid.*, para. 113). However, the remark of the Russian Minister for Foreign Affairs quoted in paragraph 112 of the Judgment is not at all a response to the claims made by Mr. Saakashvili. Mr. Lavrov said at a press conference:

> "A couple of days after [US Secretary of State] Rice had urgently asked me not to use such expressions, Mr. Saakashvili . . . claimed hysterically that the Russian side wanted to annex the whole of Georgia and, in general, he did not feel shy of using the term ethnic cleansings, although, true, it was Russia that he accused of carrying out those ethnic cleansings." (Judgment, para. 112.)

Then he adds (this sentence is omitted from the above quotation): "I assume that Rice, having spoken to me, didn't have time to address the same request to Mr. Saakashvili." (Written Statement of Georgia on Preliminary Objections, Vol. IV, Ann. 187.) It is clear that Mr. Lavrov is addressing Secretary Rice, rather than the Georgian President, expressing his view that she should perhaps have asked *both* sides to tone down their language.

12. Georgia made no credible claim which could have been positively opposed by the Russian Federation in the sense of the Court's established jurisprudence (see most recently *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). The exchange of accusations by the Parties, given the context of the armed conflict, simply cannot be sufficient in determining the existence of a legal dispute with respect to the interpretation or application of CERD.

(Signed) Leonid SKOTNIKOV.