

DECLARATION OF VICE-PRESIDENT TOMKA

[*English Original Text*]

I am largely in agreement with the Court's Judgment and, accordingly, I have voted in favour of its overall conclusion that the Court lacks jurisdiction to entertain Georgia's Application. I also agree with the Court's conclusion that neither precondition for the seisin of the Court, contained in Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination, has been met by Georgia. I also support the Court's detailed analysis showing 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" (Judgment, para. 105).

I part company with my distinguished colleagues in the majority on a particular point in the analysis of whether the dispute under CERD had arisen in August 2008, before Georgia filed its Application. They see the evidence that there was a dispute between the Parties about the Russian Federation's compliance with its obligations under CERD in various statements, namely: the statements made by Georgia's President during a press conference with foreign journalists and the interview granted to CNN, both held against the backdrop of serious military confrontation which ensued after "a sustained Georgian artillery attack" (*ibid.*, para. 106); the emotional exchanges between the representatives of the two States during the 10 August 2008 Security Council meeting, convened at Georgia's request because of the on-going military confrontation; and the response of the Russian Federation's Foreign Minister to a question posed at the joint press conference held after his meeting with the Minister for Foreign Affairs of Finland. In view of the circumstances in which these statements were made, I consider the majority's conclusion rather artificial.

In the *Certain Property* case, the Court also had to deal with an objection to the effect that there was no dispute between the Parties. It concluded that

"Germany's position taken *in the course of bilateral consultations* and *in the letter by the Minister for Foreign Affairs* . . . has evidentiary value in support of the proposition that Liechtenstein's claims were positively opposed by Germany and that this was recognized by the latter" (*Certain Property (Liechtenstein v. Germany)*, Preliminary

Objections, Judgment, I.C.J. Reports 2005, p. 19, para. 25; emphasis added).

I agreed.

The late Judge Fleischhauer, sitting as judge *ad hoc*, in his last remarks from the Bench, disagreed and took the view

“that these words would reveal themselves as introducing too low a standard into the determination of the existence of a dispute and therefore have negative effects on the readiness of States to engage in attempts at peaceful settlements of disputes” (*ibid.*, p. 69).

I am afraid that in the present case the majority has further lowered the standard. It satisfied itself with a rather formalistic juxtaposition of the words used by the representatives of the Parties during that short period of open military hostilities between the two countries. In my understanding, the references by them to “ethnic cleansing”, in that context, were nothing more than a part of the recent war-time rhetoric intending to put the blame and shame on the other side. In fact, no claim was presented to the Russian Federation with regard to its obligations under CERD, no negotiations or consultations held. Were they held, or at least attempted, this would have certainly assisted in properly articulating the dispute. I am therefore unable, to my regret, to concur with the majority on this point.

(Signed) Peter TOMKA.
