SEPARATE OPINION OF JUDGE SEPÚLVEDA-AMOR

Fully subscribes to the Court's decision to comply with the request for an advisory opinion — There are no compelling reasons to decline to exercise jurisdiction in respect of the present request — The Court, by virtue of its responsibilities in the maintenance of international peace and security under the United Nations Charter, has a duty to exercise its advisory function in respect of legal questions which, like the present one, relate to Chapter VII situations — A Chapter VII determination requires a positive response from the principal judicial organ of the United Nations as one not only entitled but, first and foremost, required to participate in and contribute to the attainment of peace.

Unable to agree with the reasoning of the Court to the effect that the authors of the declaration of independence (hereinafter DoI) did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework — Arguments advanced by the Court rest upon intentions attributed to the authors of the DoI, inferences drawn from its language and procedural particularities accompanying its adoption — Purpose of the authors of the DoI was to establish an independent and sovereign State — Question is whether the measure was in accordance with legal order in force in Kosovo in 2008 — The Court should have proceeded to assess legality of the DoI by reference to Security Council resolution 1244 (1999) and the Constitutional Framework.

The Court could have taken a broader perspective, providing a more comprehensive response to the request by the General Assembly — Although the Court is not asked to decide on consequences produced by the DoI, but only to determine whether it is in accordance with international law, the larger picture is necessary — Issues such as the scope of self-determination, "remedial secession", the extent of the powers of the Security Council in respect of territorial integrity, the fate of a Chapter VII international administration, complexities in the relationship between UNMIK and the Provisional Institutions of Self-Government, and the effect of recognition and non-recognition in the present case fall within the realm of the Court's advisory functions.

I. The Court's Discretionary Powers

1. I have voted in favour of the Court's decision to comply with the General Assembly's request for an advisory opinion, persuaded as I am that "there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the present request" (Advisory Opinion, para. 48).

2. Not only do I fully subscribe to the reasoning espoused by the

majority of the Members of the Court in upholding the propriety of rendering an advisory opinion in the instant case; I am also of the opinion that the Court, by virtue of its responsibilities in the maintenance of international peace and security under the United Nations Charter, has a duty to exercise its advisory function in respect of legal questions which, like the present one, relate to Chapter VII situations.

3. In other words, the fact that in relation to the Kosovo question, the Security Council, which remains actively seised of the matter, has acted under Chapter VII of the United Nations Charter and determined, in resolution 1244 (1999), that "the situation in the region continues to constitute a threat to international peace and security", is, in and of itself, a "compelling reason" for the Court to comply with the General Assembly's request.

4. Notwithstanding the fundamentally discretionary nature of the Court's advisory function under Article 65, paragraph 1, of its Statute, this Court has never declined to respond to a request for an advisory opinion, provided the conditions of jurisdiction have been met (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). To follow the same path in the present case will enhance legal certainty and ensure predictability and consistency in the Court's jurisprudence.

5. The Court has repeatedly acknowledged that the discharge of its advisory function "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J Reports 2004 (I)*, p. 156, para. 44).

6. According to well-established jurisprudence, "only 'compelling reasons' should lead the Court to refuse its opinion in response to a request falling within its jurisdiction" (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44).

7. As indicated by the Court in paragraph 29 of its Advisory Opinion, "[t]he discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function".

8. In assessing the propriety of rendering an advisory opinion in any given case, consideration must be given to the particular responsibilities accorded to the Court within the architecture of the United Nations Charter. In this regard, the proposition that the Court's judicial functions are inextricably linked to the maintenance of international peace and security is, in my view, indisputable. It could hardly be otherwise, if one

considers that the Court is the principal judicial organ of a world organization whose very *raison d'être* was the preservation of peace amongst its members.

9. The Court acknowledged as much in its Order on provisional measures in the case concerning the *Legality of Use of Force (Yugoslavia* v. *Belgium)*. After expressing profound concern at the use of force in Yugoslavia, the Court declared itself to be "mindful of the purposes and principles of the United Nations Charter and of *its own responsibilities in the maintenance of [international] peace and security under the Charter and the Statute of the Court*" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 132, para. 18; emphasis added).

10. The Court's role in the maintenance of international peace and security through the exercise of its contentious and advisory jurisdiction, finds support in the United Nations Charter, the Court's Statute and the subsequent practice of the main United Nations organs, including the Court's own jurisprudence.

11. Pursuant to Article 36, paragraph 1, of its Statute, the Court's jurisdiction "comprises all . . . matters specially provided for in the Charter of the United Nations . . .". Those matters surely include the purposes and principles of the Organization, foremost amongst which is "[t]o maintain international peace and security, and to that end: . . . to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Article 1, paragraph 1, of the United Nations Charter).

12. For its part, Article 36, paragraph 3, of the Charter provides that, in making recommendations for the peaceful settlement of disputes under Chapter VI, the Security Council "should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court".

13. With regard to the Court's jurisprudence, it is important to note that the Court "has never shied away from a case brought before it merely because it had political implications" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 96) or declined a request for an advisory opinion merely because of its allegedly adverse political consequences.

14. In the *Nuclear Weapons* case, the Court explained that

> "The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in

> international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute'. . . . Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

As the Court stated in 1980, "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 87, para. 33).

15. The Security Council's primary responsibility for the maintenance of international peace and security, pursuant to Article 24 of the United Nations Charter, has not been an obstacle to the Court affirming the General Assembly's as well as its own complementary responsibilities in this field, within their respective spheres of competence.

16. Thus, the Court has consistently underscored that, whilst primary, the Security Council's responsibilities under Article 24 of the Charter are by no means exclusive (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 434, para. 95; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 148-149, paras. 26-27).

17. In *Nicaragua* (Jurisdiction and Admissibility), the Court advanced the view that "the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 433, para. 93).

18. Prior to that, in the *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* case, the Court took the opportunity to emphasize the different demarcation of competences operated by the United Nations Charter between, on the one hand, the Security Council and the General Assembly, and, on the other, the Security Council and the Court itself:

> "Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or

> situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter . . ." (*Judgment, I.C.J. Reports 1980*, p. 22, para. 40.)

In view of the foregoing, the Court concluded in *Nicaragua* (Jurisdiction and Admissibility) that

> "The Charter accordingly does not confer *exclusive* responsibility upon the Security Council for the purpose. While in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 434-435, para. 95.)

19. In my view, although formulated in the context of contentious proceedings, the rationale behind the Court's role in the maintenance of international peace is equally relevant to the Court's advisory function. This is underscored by Article 96 of the Charter, which must be interpreted as implicitly acknowledging the Court's contribution to the work of the United Nations' main political organs through the exercise of its advisory jurisdiction in respect of any "legal questions".

20. In light of the above, one cannot presume that, due to the discretionary nature of the Court's advisory function pursuant to Article 65 of the Statute, the Court is in any way predisposed to decline requests for advisory opinions whenever a legal question may have implications for the maintenance of international peace and security.

21. The question that forms the object of the request submitted by the General Assembly in the instant case is one that certainly has such implications. Not only has the Security Council branded the situation in Kosovo a threat to international peace and security (resolution 1203 (1998), of 24 October 1998, and resolution 1244 (1999), of 10 June 1999), but,

more importantly, it has gone as far as to institute an unprecedented international régime of civil administration under Chapter VII of the United Nations Charter.

22. A Chapter VII situation requires a positive response from the principal judicial organ of the United Nations as one not only entitled but, first and foremost, required to participate in and contribute to the attainment of peace. The Court fulfils its legal duties, when requested to do so, by providing assistance and guidance which may help in preventing an aggravation of a conflict. On the Kosovo question, one important contribution of the Court is to interpret Security Council resolution 1244, including a determination that it remains in force and that only the Security Council has the authority to determine that it is no longer in effect.

II. Resolution 1244 (1999), the Constitutional Framework and the Authors of the Declaration of Independence

23. Whilst fully concurring with the Court's finding that, in relation to the identity of the authors of the DoI, the Court is not bound by the terms of General Assembly resolution 63/3 of 8 October 2008 and, therefore, that it is for the Court to decide whether the DoI was promulgated by Kosovo's Provisional Institutions of Self-Government or by some other entity (Advisory Opinion, para. 54), I fail to agree with the reasoning followed by the Court to the effect that

> "the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (*ibid.*, para. 109).

24. In my view, the arguments advanced by the Court in support of its conclusion are not persuasive, resting as they do upon intentions attributed to the authors of the DoI, inferences drawn from the language of the DoI and the procedural particularities that accompanied its adoption.

25. It may well be that the DoI presented a number of peculiarities that differentiated it from other acts adopted by the Assembly of Kosovo as a Provisional Institution of Self-Government acting within the Constitutional Framework. However, the overriding issue is whether the DoI is in accordance with Security Council resolution 1244 (1999), UNMIK regulations and Kosovo's Constitutional Framework, which together constitute the paramount legal order applicable to the situation in Kosovo at the time of the DoI.

26. The Court notes, in support of its argument, the declaration's failure to expressly state that it was the work of the Assembly of Kosovo, and the fact that the first paragraph of the DoI commences with the phrase "We, the democratically-elected leaders of our people . . .", in contrast to what appeared to be the common practice of the Assembly of Kosovo, which used the third person singular (as opposed to the first person plural) in the text of adopted acts (Advisory Opinion, para. 107).

27. The procedure followed in the adoption of the DoI may also have differed from the regular procedure generally followed by the Provisional Institutions of Self-Government in that it was signed by the President of Kosovo (who was not a member of the Assembly) and was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

28. Whereas the aforementioned particularities are a matter of fact, it is questionable whether, as a matter of law, these circumstances, either taken together or viewed in isolation, logically and ineluctably lead to the conclusion espoused in the present Advisory Opinion, namely, that the authors of the DoI were persons other than the representatives of the people of Kosovo acting in their capacity as members of the Assembly of Kosovo as one of Kosovo's Provisional Institutions of Self-Government.

29. Thus, one wonders how the declaration's failure to expressly refer to the Assembly of Kosovo as the organ of adoption could possibly alter the fact that it was indeed the Assembly which adopted it, or how to explain that the Assembly was made up of the same representatives, yet acting in a different capacity. One also wonders how it is that the DoI "was not intended by those who adopted it to take effect within the legal order created for the interim phase" (*ibid.*, para. 105) and that its authors "were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government" (*ibid.*, para. 121). It is clear that the purpose of the authors of the DoI was to establish Kosovo "as an independent and sovereign State". The question is whether the measure was in accordance with the legal order in force in Kosovo in 2008.

30. Had the Assembly of Kosovo adopted a decision falling squarely within its powers and attributions under the Constitutional Framework, the question of authorship would not have arisen, irrespective of whether or not that decision expressly stated that it had been adopted by the Assembly. Taking all factors into account, it is difficult to conclude that the authors of the DoI were "persons who acted together in their capacity as representatives of the people of Kosovo *outside the framework of the interim administration*" (*ibid.*, para. 109; emphasis added) and, as a consequence, outside resolution 1244 and outside the Constitutional Framework.

31. Similar considerations apply to the inferences drawn in the present

Advisory Opinion from the formulation contained in the first paragraph of the DoI ("We, the democratically-elected leaders of our people . . ."). It is difficult to see how the difference in conjugation (first person plural, as opposed to the third person singular commonly used by the Assembly of Kosovo) may reasonably lead to the conclusion that an organ or entity other than the Assembly of Kosovo adopted the declaration of independence. After all, were not the representatives of the Assembly "democratically-elected leaders" of Kosovo?

32. According to what is, in my view, a more plausible reading of the record, the Court should have concluded that, linguistic and procedural peculiarities aside, the Assembly of Kosovo did indeed adopt the DoI of 17 February 2008 in the name of the people of Kosovo. As a result, the Court should have proceeded to assess the legality of that declaration by reference to Security Council resolution 1244 (1999) and the Constitutional Framework.

III. Concluding Remarks

33. The Court, in its Advisory Opinion, could have taken a broader perspective in order to provide a more comprehensive response to the request by the General Assembly. A number of important legal issues should not have been ignored. As Spain indicated during the oral proceedings,

> "the Court will not be able to respond appropriately to the question put by the General Assembly without taking two elements into consideration: first, the fact that the objective to be achieved through the Unilateral Declaration of Independence is the creation of a new State separate from Serbia; and, second, the fact that the Declaration was adopted to the detriment of an international régime for Kosovo established by the Security Council and governed by the norms and principles of international law, as well as by the Charter of the United Nations" (CR 2009/30, p. 11, para. 17).

34. It is true that the Court, in the present request, is not being asked to decide on the consequences produced by the DoI, but only to determine whether it is in accordance with international law. However, the Court is entitled to address a wider range of issues underlying the General Assembly's request. The Court has faced similar dilemmas in the past and has chosen to adopt a broader approach. In a previous Advisory Opinion, it stated that

> "if [the Court] is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request" (*Interpretation of the Agreement of 25 March 1951 bet-*

ween the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 88, para. 35).

The Court then indicated that

> "a reply to questions of the kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization" (*ibid.*, p. 89, para. 35).

35. Many of the legal issues involved in the present case require the guidance of the Court. The Security Council and the Secretary-General of the United Nations, and not just the General Assembly, would indeed benefit from authoritative statements of law in order to dispel many of the uncertainties that still affect the Kosovo conflict. The scope of the right to self-determination, the question of "remedial secession", the extent of the powers of the Security Council in relation to the principle of territorial integrity, the continuation or derogation of an international civil and military administration established under Chapter VII of the Charter, the relationship between UNMIK and the Provisional Institutions of Self-Government and the progressive diminution of UNMIK's authority and responsibilities and, finally, the effect of the recognition or non-recognition of a State in the present case are all matters which should have been considered by the Court, providing an opinion in the exercise of its advisory functions.

(*Signed*) Bernardo SEPÚLVEDA-AMOR.