DISSENTING OPINION OF JUDGE SKOTNIKOV

1. The Court, in my view, should have used its discretion to refrain from exercising its advisory jurisdiction in the rather peculiar circumstances of the present case. Never before has the Court been confronted with a question posed by one organ of the United Nations, to which an answer is entirely dependent on the interpretation of a decision taken by another United Nations organ. What makes this case even more anomalous is the fact that the latter is the Security Council, acting under Chapter VII of the United Nations Charter. Indeed, in order to give an answer to the General Assembly, the Court has to make a determination as to whether or not the Unilateral Declaration of Independence (UDI) is in breach of the régime established for Kosovo by the Security Council in its resolution 1244 (1999).

2. In the past, the Court has deemed it important to emphasize that it was giving its legal advice in respect of decisions adopted by the requesting organ, in order that the latter could benefit from this advice. In the *Namibia* Advisory Opinion the Court pointed out that:

> "*The request is put forward by a United Nations organ* [the Security Council] *with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions.* This objective is stressed by the preamble to the resolution requesting the opinion, in which the Security Council has stated 'that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking'." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 32; emphasis added.)

Clearly, the present case is starkly different.

3. In its Advisory Opinion on *Legal Consequences of the Construction of a Wall*, the Court reaffirmed that "advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 162, para. 60). In the present case, the General Assembly is not an organ which can usefully benefit from "the elements of law" to be furnished by the Court. The Assembly, when it receives the present Advisory Opinion, will be precluded, by virtue of Article 12 of the United Nations Charter, from making any recommendation with regard to the subject-matter of the present request, unless the Security Council so requests.

4. The Security Council itself has refrained from making a determination as to whether the UDI is in accordance with its resolution 1244, although it could have done so by adopting a new resolution or by authorizing a statement from the President of the Council. Nor has the Council sought advice from the Court as to whether the issuance of the UDI was compatible with the terms of its resolution 1244. That is the position currently taken by the Council on the issue, which is the subject-matter of the General Assembly's request for an Advisory Opinion from the Court.

5. The Members of the United Nations have conferred distinct responsibilities upon the General Assembly, the Security Council and the International Court of Justice and have put limits on the competence of each of these principal organs. The Court — both as a principal organ of the United Nations and as a judicial body — must exercise great care in order not to disturb the balance

between these three principal organs, as has been established by the Charter and the Statute. By not adequately addressing the issue of the propriety of giving an answer to the present request, the Court has failed in this duty.

6. The majority, in an attempt to justify its position, refers to "an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security" (Advisory Opinion, paragraph 41), a tendency which was noted by the Court in its Advisory Opinion on *Legal Consequences of the Construction of a Wall*. However, the present case simply does not form part of this tendency. It is true that the General Assembly has also adopted resolutions relating to the situation in Kosovo (Advisory Opinion, paragraph 38). However, as is evident from the Advisory Opinion, none of these resolutions is relevant either to the régime established by resolution 1244 or to an answer to the question posed by the General Assembly. The truth is that everything hinges on the interpretation of Security Council resolution 1244.

The majority also cites the *Namibia* Advisory Opinion, as well as the Advisory Opinion on *Certain Expenses of the United Nations* and *Conditions of Admission of a State to Membership in the United Nations* (see paragraphs 46 and 47 of the Advisory Opinion). None of these cases, however, is remotely similar to the present one. In the *Namibia* case, the requesting organ was the Security Council (see para. 2 above). In the *Certain Expenses* Opinion, the Court merely quotes from a number of Security Council resolutions, in order to note the clear existence of "a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 176). In the *Conditions of Admission* Opinion, the Court does not deal with any Security Council resolutions. In both the *Certain Expenses* and *Conditions of Admission* cases, the Court's task was to interpret the United Nations Charter and in both cases the General Assembly, the requesting organ, could have made use of "the elements of law" furnished by the Court. The majority, in addition, refers to the contentious cases of *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*. However, in these cases, the Court does not interpret any Security Council resolutions. It only states that Libya, the United States and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the United Nations Charter (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 126, para. 42; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, para. 39).

The majority's inability to find jurisprudence of any relevance is quite understandable since the present case, as explained in paragraph 1, is unprecedented.

7. The Court's failure to exercise its discretion to refrain from giving an answer to the question posed by the General Assembly unfortunately entails serious negative implications for the integrity of the Court's judicial function and its role as a principal organ of the United Nations.

8. In particular, any interpretation of Security Council resolution 1244 which the Court might have given, would have been less than authoritative under the circumstances of the present case.

Indeed, one may recall a dictum by the Permanent Court of International Justice to the effect that "it is an established principle that the right to giving an authoritative interpretation of a legal

rule belongs solely to the person or body who has power to modify or suppress it" (*Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8*, p. 37). This, of course, leads to the conclusion that:

> "Only the Security Council, or some body authorized to do so by the Council, may give an authentic interpretation [of a Security Council resolution] in the true sense." (Michael C. Wood, "The interpretation of Security Council Resolutions", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 82.)

It is equally obvious that:

> "The I.C.J. and other international tribunals (including those on Yugoslavia and Rwanda) may have to interpret SCRs [Security Council resolutions] for the purpose of giving effect to what the Council has decided." *(Ibid.*, p. 85.)

In the present case, however, the Court is not interpreting resolution 1244 for the purpose of giving effect to what the Council has decided. The Council has not decided anything on the subject of the UDI. The Council has not even acknowledged the issuance of the UDI. The terms of resolution 1244 have remained unaltered since the UDI was adopted (see paragraphs 91 and 92 of the Advisory Opinion).

9. It must be borne in mind that Security Council resolutions are political decisions. Therefore, determining the accordance of a certain development, such as the issuance of the UDI in the present case, with a Security Council resolution is largely political. This means that even if a determination made by the Court were correct in the purely legal sense (which it is not in the present case), it may still not be the right determination from the political perspective of the Security Council. When the Court makes a determination as to the compatibility of the UDI with resolution 1244 — a determination central to the régime established for Kosovo by the Security Council — without a request from the Council, it substitutes itself for the Security Council.

10. In some ways, the situation faced by the Court in the present case is similar to that which confronted it in respect of the Federal Republic of Yugoslavia's (FRY) membership in the United Nations, prior to its admission in 2000. The Court, when considering, in 1993 and 1996, the *Bosnia and Herzegovina* v. *Yugoslavia* case in incidental proceedings, refrained from interpreting the relevant resolutions of the General Assembly and the Security Council in order to make a determination as to whether or not the FRY was a Member of the United Nations and *ipso facto* party to the Statute of the Court. It confined itself to the observation that the solution adopted in the United Nations on the question of the continuation of the membership of the Socialist Federal Republic of Yugoslavia (SFRY) was "not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18). The Court did not address this question in its 1996 Judgment on the preliminary objections (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*). The Court was clearly not authorized to make a determination on the issue of the membership of the FRY in the United Nations and it did not do so, although this was a question of *jus standi*. Only after the Security Council and the General Assembly brought clarity to the situation by admitting the FRY to the United Nations as a new Member did the Court, in the *Legality of Use of Force* cases in 2004, come to the conclusion that the FRY was not a Member of the United Nations or party to the Statute prior to its admission to the United Nations in 2000. The Court observed that

> "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 310-311, para. 79.)

11. Had the Court made this determination in 1993, 1996 or 1999, when it considered the request for the indication of provisional measures in the *Legality of Use of Force* cases, it would have both jeopardized the integrity of its judicial function and compromised its role as a principal organ of the United Nations.

This is precisely what is at stake in the present case. Therefore, the Court's decision to answer the question is as erroneous as it is regrettable.

12. Now, however reluctantly, I will have to address the majority's attempt to interpret Security Council resolution 1244 with respect to the UDI. Unfortunately, in the process of doing so, the majority has drawn some conclusions, which simply cannot be right.

13. One of these is finding that resolution 1244, which had the overarching goal of bringing about "a political solution to the Kosovo crisis" (resolution 1244, operative paragraph 1), did not establish binding obligations for the Kosovo Albanian leadership (see Advisory Opinion, paragraphs 117 and 118). The Security Council cannot be accused of such an omission, which would have rendered the entire process initiated by resolution 1244 unworkable. The Permanent Representative of the United Kingdom stated the obvious at the time of the adoption of resolution 1244:

> "This resolution applies also *in full* to the Kosovo Albanians, requiring them to play their full part in the restoration of normal life to Kosovo and in the creation of democratic, self-governing institutions. *The Kosovo Albanian people and its leadership must rise to the challenge of peace by accepting the obligations of the resolution*, in particular to demilitarize the Kosovo Liberation Army (KLA) and other armed groups." (Statement by the Permanent Representative of the United Kingdom; United Nations doc. S/PV.4011, 10 June 1999, p. 18; emphasis added.)

14. No less striking is the Court's finding to the effect that "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" envisaged in resolution 1244 (resolution 1244, operative paragraph 11 *(e)*), can be terminated by a unilateral action by the Kosovo Albanian leadership (see Advisory Opinion, paragraphs 117 and 118). In other words, the Security Council, in the view of the majority, has created a giant loophole in the régime it established under resolution 1244 by allowing for a unilateral "political settlement" of the final status issue. Such an approach, had it indeed been taken by the Council, would have rendered

any negotiation on the final status meaningless. Obviously, that was not what the Security Council intended when adopting and implementing resolution 1244. It is useful to recall that operative paragraph 11 *(e)* of resolution 1244 refers to the Rambouillet accords which provide that:

> "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's [Belgrade and Prishtina] efforts regarding the implementation of this Agreement, and the Helsinki Final Act . . ." (United Nations doc. S/1999/648, 7 June 1999, p. 85.)

By no stretch of imagination can a "unilateral settlement" be read into this clear policy statement endorsed by the Security Council in its resolution 1244.

The subsequent practice of the Security Council in respect of resolution 1244 is equally clear. When the process for determining Kosovo's final status was initiated in 2005, the Members of the Security Council attached to the letter from its President to the Secretary-General, "for [his] reference", the Guiding principles for a Settlement of the Status of Kosovo agreed by the Contact Group (composed of France, Germany, Italy, Russia, the United Kingdom and the United States). The Guiding Principles stated in no ambiguous terms that "*[a]ny solution that is unilateral* or results from the use of force *would be unacceptable"* and that "[t]he final decision of the status of Kosovo should be endorsed by the Security Council" (Guiding Principles, annexed to the letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709; emphasis added).

15. Finally, the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework:

> "the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order [established for the interim phase] but, rather, set out to adopt a measure [the UDI] the significance and effects of which would lie outside that order" (Advisory Opinion, paragraph 105).

The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it.

16. The majority's version of resolution 1244 is untenable. Moreover, the Court's treatment of a Security Council decision adopted under Chapter VII of the United Nations Charter shows that it has failed "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).

17. There is also a problem with the Court's interpretation of general international law. According to the Advisory Opinion, "general international law contains no applicable prohibition of declarations of independence" (paragraph 84). This is a misleading statement which, unfortunately, may have an inflammatory effect. General international law simply does not address the issuance of declarations of independence, because

> "declarations of independence do not 'create' or constitute States under international law. It is not the issuance of such declarations that satisfies the factual requirements,

> under international law, for statehood or recognition. Under international law, such declarations do not constitute the legal basis for statehood or recognition." (CR 2009/31, p. 46 (Fife, Norway).)

Declarations of independence may become relevant in terms of general international law only when considered together with the underlying claim for statehood and independence. However, the question posed by the General Assembly "is narrow and specific" (Advisory Opinion, paragraph 51). "In particular, it does not ask whether or not Kosovo has achieved statehood." *(Ibid.)* Therefore, the question as to the legality of the UDI simply cannot be answered from the point of view of general international law. The only law applicable for the purpose of answering the question posed by the General Assembly is the *lex specialis* created by Security Council resolution 1244.

18. In conclusion, it should be said that the purport and scope of the Advisory Opinion is as narrow and specific as the question it answers. The Opinion does not deal with the legal consequences of the UDI. It does not pronounce on the final status of Kosovo. The Court makes it clear that it

> "does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly" (Advisory Opinion, paragraph 51).

The Court also notes that

> "[d]ebates regarding the extent of the right of self-determination and the existence of any right of 'remedial secession' . . . concern the right to separate from a State . . . and that issue is beyond the scope of the question posed by the General Assembly" (Advisory Opinion, paragraph 83).

In no way does the Advisory Opinion question the fact that resolution 1244 remains in force in its entirety (see paragraphs 91 and 92 of the Advisory Opinion). This means that "a political process designed to determine Kosovo's future status" envisaged in this resolution (para. 11 *(e)*) has not run its course and that a final status settlement is yet to be endorsed by the Security Council.

(Signed) Leonid SKOTNIKOV.