SEPARATE OPINION OF JUDGE KREĆA

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I. Composition of the Court in This Particular Case

1. In the context of the conceptual difference between the international magistrature and the internal judicial system within a State, the institution of judge *ad hoc* has two basic functions:

> "*(a)* to equalize the situation when the Bench already includes a Member of the Court having the nationality of one of the parties; and *(b)* to create a nominal equality between two litigating States when there is no Member of the Court having the nationality of either party" (S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, pp. 1124-1125).

In this particular case room is open for posing the question as to whether either of these two basic functions of the institution of judge *ad hoc* has been fulfilled at all.

It is possible to draw the line between two things.

The first is associated with equalization of the Parties in the part concerning the relations between the Applicant and the respondent States which have a national judge on the Bench. *In concreto*, of special interest is the specific position of the respondent States. They appear in a dual capacity in these proceedings:

primo, they appear individually in the proceedings considering that each one of them is in dispute with the Federal Republic of Yugoslavia: and,

secondo, they are at the same time member States of NATO under whose institutional umbrella they have undertaken the armed attack on the Federal Republic of Yugoslavia. Within the framework of NATO, these respondent States are acting *in corpore*, as integral parts of an organizational whole. The *corpus* of wills of NATO member States, when the undertaking of military operations is in question, is constituted into a collective will which is, formally, the will of NATO.

2. The question may be raised whether the respondent States can qualify as parties in the same interest.

In its Order of 20 July 1931 in the case concerning the *Customs Régime between Germany and Austria*, the Permanent Court of International Justice established that:

> "all governments which, in the proceedings before the Court, come to the same conclusion, must be held to be in the same interest for the purposes of the present case" (*P.C.I.J., Series A/B, No. 41*, p. 88).

The question of qualification of the "same interest", in the practice of the Court, has almost uniformly been based on a formal criterion, the criterion of "the same conclusion" to which the parties have come in the proceedings before the Court.

In the present case, the question of "the same conclusion" as the relevant criterion for the existence of "the same interest" of the respondent

States is, in my opinion, unquestionable. The same conclusion was, in a way, inevitable in the present case in view of the identical Application which the Federal Republic of Yugoslavia has submitted against ten NATO member States, and was formally consecrated by the outcome of the proceedings before the Court held on 10, 11 and 12 May 1999, in which all the respondent States came to the identical conclusion resting on the foundation of practically identical argumentation which differed only in the fashion and style of presentation.

Hence, the inevitable conclusion follows, it appears to me, that all the respondent States are *in concreto* parties in the same interest.

3. What are the implications of this fact for the composition of the Court in the present case? Article 31, paragraph 2, of the Statute says: "If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge."

The Statute, accordingly, refers to the right of "any other party", namely, a party other than the party which has a judge of its nationality, in the singular. But, it would be erroneous to draw the conclusion from the above that "any other party", other than the party which has a judge of its nationality, cannot, under certain circumstances, choose several judges *ad hoc*. Such an interpretation would clearly be in sharp contradiction with *ratio legis* of the institution of judge *ad hoc*, which, in this particular case, consists of the function "to equalize the situation when the Bench already includes a Member of the Court having the nationality of one of the parties" (S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, pp. 1124-1125). The singular used in Article 31, paragraph 2, of the Statute with reference to the institution of judges *ad hoc* is, consequently, but individualization of the general, inherent right to equalization in the composition of the Bench in the relations between litigating parties, one of which has a judge of its nationality on the Bench, while the other has not. *The practical meaning of this principle applied* in casum *would imply the right of the Applicant to choose as many judges* ad hoc *to sit on the Bench as is necessary to equalize the position of the Applicant and that of those respondent States which have judges of their nationality on the Bench and which share the same interest.* In concreto, *the inherent right to equalization in the composition of the Bench, as an expression of fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges* ad hoc, *since even five out of ten respondent States (the United States of America, the United Kingdom, France, Germany and the Netherlands) have their national judges sitting on the Bench.*

Regarding the notion of equalization which concerns the relation between the party entitled to choose its judge *ad hoc* and the parties which have their national judges on the Bench, the fact is that the Federal Republic of Yugoslavia, as can be seen from the Order, did not raise any objections to the circumstance that as many as five respondent States have judges of their nationality on the Bench. However, this circumstance surely cannot be looked upon as something making the question

irrelevant, or, even as the tacit consent of the Federal Republic of Yugoslavia to such an outright departure from the letter and spirit of Article 31, paragraph 2, of the Statute.

The Court has, namely, the obligation to take account *ex officio* of the question of such a fundamental importance, which directly derives from, and vice versa, may directly and substantially affect, the equality of the parties. The Court is the guardian of legality for the parties to the case, for which *presumptio juris et de jure* alone is valid — to know the law *(jura novit curia)*. As pointed out by Judges Bedjaoui, Guillaume and Ranjeva in their joint declaration in the *Lockerbie* case: "that is for the Court — not the parties — to take the necessary decision" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), I.C.J. Reports 1998*, p. 36, para. 11).

A contrario, the Court would risk, in a matter which is *ratio legis* proper of the Court's existence, bringing itself into the position of a passive observer, who only takes cognizance of the arguments of the parties and, then, proceeds to the passing of a decision.

4. The other function is associated with equalization in the part which is concerned with the relations between the Applicant and those respondent States which have no national judges on the Bench.

The respondent States having no judge of their nationality on the Bench have chosen, in the usual procedure, their judges *ad hoc* (Belgium, Canada, Italy and Spain). Only Portugal has not designated its judge *ad hoc*. The Applicant successively raised objections to the appointment of the respondent States' judges *ad hoc* invoking Article 31, paragraph 5, of the Statute of the Court. The responses of the Court with respect to this question invariably contained the standard phrase "that the Court . . . found that the choice of a judge *ad hoc* by the Respondent is justified in the present phase of the case".

Needless to say, the above formulation is laconic and does not offer sufficient ground for the analysis of the Court's legal reasoning. The only element which is subject to the possibility of teleological interpretation is the qualification that the choice of a judge *ad hoc* is "justified in the present phase of the case". *A contrario*, it is, consequently, possible that such an appointment of a judge *ad hoc* would "not be justified" in some other phases of the case. The qualification referred to above could be interpreted as the Court's reserve with respect to the choice of judges *ad hoc* by the respondent States, a reserve which could be justifiable on account of the impossibility for the Court to perceive the nature of their interest — whether it is the "same" or "separate" — before the parties set out their positions on the case.

The meanings of equalization as a *ratio legis* institution of judges *ad hoc*, in the case concerning the Applicant and respondent States which

are parties in the same interest, and which do not have a judge *ad hoc* of their nationality on the Bench, have been dealt with in the practice of the Court, in a clear and unambiguous manner.

In the *South West Africa* case (1961) it was established that, if neither of the parties in the same interest has a judge of its nationality among the Members of the Court, those parties, acting in concert, will be entitled to appoint a single judge *ad hoc* (*South West Africa, I.C.J. Reports 1961*, p. 3).

If, on the other hand, among the Members of the Court there is a judge having the nationality of even one of those parties, then no judge *ad hoc* will be appointed (*Territorial Jurisdiction of the International Commission of the River Oder, P.C.I.J., Series C, No. 17-II*, p. 8; *Customs Régime between Germany and Austria, 1931, P.C.I.J., Series A/B, No. 41*, p. 88).

This perfectly coherent jurisprudence of the Court applied to this particular case, means that none of the respondent States were entitled to appoint a judge ad hoc.

Consequently, it may be said that in the present case neither of the two basic functions of the institution of judge *ad hoc* has been applied in the composition of the Court in a satisfactory way. In my opinion, it is a question of the utmost specific weight in view of the fact that, obviously, its meaning is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

II. Appraisal of the Spanish Reservation to Article IX of the Genocide Convention

5. In the particular case of Spain, relevant conditions for the jurisdiction of the International Court of Justice have not concurred.

However, it should be pointed out that a reservation such as the one made by Spain with respect to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide surely does not contribute to the implementation of the concept of an organized, *de jure*, international community.

As the Court set out in its Opinion of 28 May 1951, "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23) and

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention." (*Ibid.*)

States do not express verbally their belief in international law by

making declaratory vows but by taking effective measures aimed at the implementation of human rights and fundamental freedoms.

In an eminently political commonwealth, such as the international community, judicial protection of those rights and liberties is almost the only way of realization of Grotius' dream of the international community as a true *genus humanum*.

III. Other Relevant Issues

6. In paragraph 15 of the Order the Court states:

> "Whereas the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia."

The phrasing of the statement seems to me unacceptable for a number of reasons. First, the formulation introduces dual humanitarian concern. The Court is, it is stated, "deeply concerned", while at the same time the Court states "the loss of life". So, it turns out that in the case of "all parts of Yugoslavia" the Court technically states "the loss of life" as a fact which does not cause "deep concern". Furthermore, the wording of the formulation may also be construed as meaning that Kosovo is not a part of Yugoslavia. Namely, after emphasizing the situation in Kosovo and Metohija, the Court uses the phrase "in all parts of Yugoslavia". Having in mind the factual and legal state of affairs, the appropriate wording would be "in all other parts of Yugoslavia". Also, particular reference to "Kosovo" and "all parts of Yugoslavia", in the present circumstances, has not only no legal, but has no factual basis either. Yugoslavia, as a whole, is the object of attack. Human suffering and loss of life are, unfortunately, a fact, generally applicable to the country as a whole; so, the Court, even if it had at its disposal the accurate data on the number of victims and the scale of suffering of the people of Yugoslavia, it would still have no moral right to discriminate between them. Further, the qualification that "human tragedy and the enormous suffering in Kosovo . . . form the background of the present dispute" not only is political, by its nature, but has, or may have, an overtone of justification of the armed attack on Yugoslavia. Suffice it to recall the fact that the respondent State refers to its armed action as humanitarian intervention.

It is up to the Court to establish, at a later stage of the proceedings, the real legal state of affairs, namely, the relevant facts. At the present stage, the question of the underlying reasons for the armed attack on the Fed-

eral Republic of Yugoslavia is the object of political allegations. While the Respondent argues that what is involved is a humanitarian intervention provoked by the "human tragedy and the enormous suffering", the Applicant finds that *sedes materiae* the underlying reasons are to be sought elsewhere — in the support to the terrorist organization in Kosovo and in the political aim of secession of Kosovo and Metohija from Yugoslavia.

Consequently, we are dealing here with opposed political qualifications in which the Court should not, and, in my view, must not, enter except in the regular court proceedings.

7. The formulation of paragraph 39 of the Order leaves the impression that the Court is elegantly attempting to drop the ball in the Security Council's court. Essentially, it is superfluous because, as it stands now, it only paraphrases a basic fact that "the Security Council has special responsibilities under Chapter VII of the Charter". It can be interpreted, it is true, also as an appeal to the United Nations organ, specifically entrusted with the duty and designed to take measures in case of threat to the peace, breach of the peace or act of aggression; but, in that case the Court would need to stress also another basic fact — that a legal dispute should be referred to the International Court of Justice on the basis of Article 36, paragraph 3, of the United Nations Charter.

8. The Court, by using the term "Kosovo" instead of the official name of "Kosovo and Metohija", continued to follow the practice of the political organs of the United Nations, which, by the way, was also strictly followed by the respondent States.

It is hard to find a justifiable reason for such a practice. Except of course if we assume political opportuneness and involved practical, political interests to be a justified reason for this practice. This is eloquently shown also by the practice of the designation of the Federal Republic of Yugoslavia. After the succession of the former Yugoslav federal units, the organs of the United Nations, and the respondent States themselves, have used the term Yugoslavia (Serbia and Montenegro). However, since 22 November 1995, the Security Council uses in its resolutions 1021 and 1022 the term "Federal Republic of Yugoslavia" instead of the former "Federal Republic of Yugoslavia (Serbia and Montenegro)" without any express decision and in a legally unchanged situation in relation to the one in which it, like other organs of the United Nations, employed the term "Federal Republic of Yugoslavia (Serbia and Montenegro)". The fact that this change in the practice of the Security Council appeared on the day following the initialling of the Peace Agreement in Dayton gives a strong basis for the conclusion that the concrete practice is not based on objective, legal criteria but rather on political criteria.

By using the word "Kosovo"instead of the name "Kosovo and Metohija", the Court, in fact, is doing two things:

(a) it gives in to the colloquial use of the names of territorial units of an independent State; and

(b) it ignores the official name of Serbia's southern province, a name embodied both in the constitutional and legal acts of Serbia and of the Federal Republic of Yugoslavia. Furthermore, it runs contrary to the established practice in appropriate international organizations. *Exempli causa*, the official designation of the southern Serbian province "Kosovo and Metohija" has been used in the Agreement concluded by the Federal Republic of Yugoslavia and the Organisation for Security and Co-operation in Europe (*International Legal Materials*, 1999, Vol. 38, p. 24).

Even if such a practice — which, in my opinion, is completely inappropriate not only in terms of the law but also in terms of proper usage — could be understood when resorted to by entities placing interest and expediency above the law, it is inexplicable in the case of a judicial organ.

9. A certain confusion is also created by the term "humanitarian law" referred to in paragraphs 18 and 37 of the Order. The reasons for the confusion are dual: on the one hand, the Court has not shown great consistency in using this term. In the *Genocide* case the Court qualified the Genocide Convention as a part of humanitarian law, although it is obvious that, by its nature, the Genocide Convention falls within the field of international criminal law (see dissenting opinion of Judge Kreća in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996 (II)*, para. 108, p. 774-775).

On the other hand, it seems that in this Order the term "humanitarian law" has been used with a different meaning, more appropriate to the generally accepted terminology. The relevant passage in the Order should be mentioned precisely because of the wording of its paragraphs 18 and 37. The singling out of humanitarian law from the rules of international law which the Parties are bound to respect may imply low-key and timid overtones of vindication or at least of diminishment of the legal implications of the armed attack on the Federal Republic of Yugoslavia.

Humanitarian law, in its legal, original meaning implies the rules of *jus in bello*. If, by stressing the need to respect the rules of humanitarian law, which I do not doubt, the Court was guided by humanitarian considerations, then it should have stressed *expressis verbis* also the fundamental importance of the rule contained in Article 2, paragraph 4, of the Charter, which constitutes a dividing line between non-legal, primitive international society and an organized, *de jure*, international community.

(Signed) Milenko KREĆA.