SEPARATE OPINION OF VICE-PRESIDENT AL-KHASAWNEH

Concurrence with result — Disagreement with reasoning — FRY lack of access erroneous reasoning — Traceable to 2004 Judgment — Source of confusion — Contradictions with 2007 not substantively resolved — Merely hidden by res judicata *— Majority forced to rely on novel interpretation of* Mavrommatis *— New reasoning leads nowhere — Crucial element in* Mavrommatis *remains missing — Defect is not curable now because of loss of jurisdiction* ratione materiae.

I concur with the majority opinion that the Court possesses jurisdiction to decide the present case on the merits. I regret, however, that there are elements in the Court's reasoning with which I cannot agree. Believing those differences to be important enough to warrant an explanation, I append this separate opinion.

The Judgment is predicated on two premises neither of which I find convincing: first, that the Federal Republic of Yugoslavia (FRY) had no "access" to the Court from its inception on 27 April 1992 until its admission as a new Member of the United Nations on 1 November 2000; and second, that this defect — fundamental in the eyes of some — is nevertheless curable by the invocation of a somewhat unorthodox interpretation of the so-called *Mavrommatis* principle. The first of these elements of the Court's reasoning is not new. Its genesis is located in the 2004 case concerning the *Legality of Use of Force* Judgment(s) where the Court, departing from earlier closely-related jurisprudence (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993; 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); Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections, (Yugoslavia *v.* Bosnia and Herzegovina)*, Judgment, I.C.J. Reports 2003*), drew, from the fact of the 2000 admission of the FRY to the United Nations as a "new Member", the inference that that fact clarified retroactively the hitherto amorphous status of FRY membership in the United Nations, revealing that it had not been

a United Nations Member in the period 1992-2000 and thus lacked the capacity (access) to appear before the Court.

I have already had occasion to discuss these jurisdictional issues in a somewhat lengthy and detailed manner (see dissenting opinion of Judge Al-Khasawneh (especially paras. 11-16) in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 246-249), and no purpose would be served by repeating those arguments. Suffice it to say that in my respectful opinion the erroneous reasoning in the 2004 Judgment has been the source of much confusion and contradictions in the Court's judgments dealing with the aftermath of the disintegration of the former Socialist Republic of Yugoslavia (the SFRY).

In the 2007 Genocide Judgment (*ibid.*, pp. 96-101, paras. 129-138), where the Court upheld its jurisdiction (for the second time, the first being in 1996), the contradictions with the 2004 Judgment were not substantively resolved but merely obscured by the formalism of *res judicata*. In the present judgment, in which the Applicant is different, the ghost of the 2004 Judgment, freed from the shackles of *res judicata*, is back to haunt us, and rather than putting it this time to rest beyond revivication, the Court chose in fact to revive it, making it one of the premises on which the present Judgment is constructed. This is regrettable as the moral and logical implications of the collective disappearing act of the FRY for eight full years, while some of the most horrible crimes occurred, and in which its leaders were implicated, cannot represent a high point in the history of this Court.

Instead — and this leads me to the second premise on which this Judgment is predicated — the majority embarked on a novel interpretation of the so-called *Mavrommatis* principle (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, para. 34) according to which the Court would not insist on a new application if, at the time of institution of proceedings, a procedural defect curable by a subsequent action of the applicant existed. Of course, no other option was open to the majority given the inapplicability of *res judicata* and the choice they made with regard to maintaining the 2004 Judgment. Unfortunately, this new line of reasoning, based on *Mavrommatis*, was to prove exceedingly arduous and ultimately, in my respectful opinion, to lead nowhere.

A brief recollection of pertinent developments is useful: Croatia instituted proceedings on 2 July 1999, i.e., in the period during which the FRY was not, according to the logic of the 2004 Judgment and the present one, a United Nations Member, and hence lacked access to

the Court[1] ; in November 2000 the FRY was admitted as a new Member to the United Nations thereby curing this lack of access and removing the obstacle to jurisdiction *ratione personae*; however a few months later, on 6 March 2001, the FRY undertook treaty action which included the depositing with the Secretary-General of the United Nations of an "instrument of accession" to the Genocide Convention. It has since maintained, in a reversal of its earlier position based on continuity, that it only became a party to that Convention by accession in June 2001. Jurisdiction *ratione materiae* was now lost because the FRY "instrument of accession" contained a reservation to the effect that the FRY "does not consider itself bound by Article IX of the Convention" (Judgment, para. 94). As the Judgment recalls in paragraph 94, Croatia objected on the ground that the FRY "'is already bound by the Convention since its emergence as one of the five equal successor States' of the former SFRY". It goes without saying that if the FRY was not a successor but a continuator of the SFRY the "accession" would be equally invalid. For its part the Court, as recalled in paragraph 102 and as submitted by Croatia, affirmed on six occasions that the FRY was bound by the Genocide Convention in 1993 (twice), 1996, 1999, 2003, and 2007.

Be that as it may, what is of direct interest now is that unless the reservation pertaining *ratione materiae* to the Court's jurisdiction is invalid, it would not be possible by any stretch of the legal imagination to invoke *Mavrommatis*. A crucial element in *Mavrommatis*, and in other cases which follow that old case (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963; Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984; 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)*), is that a procedural defect is curable by subsequent action which is nevertheless deemed unnecessary in view of considerations of judicial economy. The situation in the present case is different. The reservation to Article IX introduced by the FRY in 2001 will act to bar such a subsequent action. Without the invalidation of the reservation to Article IX which the Judgment avoids, I cannot see how the *ratione materiae* element of the Court's jurisdiction can be upheld on the basis of reasoning based on *Mavrommatis*.

[1] Access as a non-Member under Article 35 (2) was also blocked by the interpretation given in 2004 to the phrase "treaties in force" (see pp. 318-324, paragraphs 99-114 of the case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*).

I continue to believe that the FRY was a continuator of the SFRY until 2000 when, of its own volition, it became a successor State. I am also of the opinion that the FRY was bound by the Genocide Convention, including Article IX, by virtue of the ratification by the SFRY of the Convention, without reservation, on 29 August 1950. It is on these bases that I joined the majority in upholding the Court's jurisdiction notwithstanding my respectful, but profound, disagreement with their reasoning.

(Signed) Awn AL-KHASAWNEH.