SEPARATE OPINION OF JUDGE KEITH

1. As my votes indicate, I agree with the conclusions the Court has reached. My purpose in preparing this opinion is to give further reasons in support of those the Court gives in rejecting Croatia's claim and Serbia's counter-claim. The issue I address is the failure of each Party to establish the existence of the specific intent which is an essential element of genocide — the intent to destroy in whole or in part the identified protected group. Accordingly, although I have studied the detail of the record relating to, and reached conclusions on, the claims made by each about the *actus reus*, I do not see the need to put into print my conclusions on those matters. The Court does, of course, rule on them, but in refraining I bear in mind the wise caution given by King Solomon 3,000 years ago — not everything that a man thinks must he say; not everything he says must he write; but most important not everything that he has written must he publish.

Croatia's Claim: The Specific Intent

2. As the Court indicates, Croatia contends that genocidal intent can be inferred from 17 factors (Judgment, para. 408), one of which ((5) in the Court's list) was added at the hearing to the list included in the written pleadings. At the hearing it repeated its original list of 16 factors. Each, says Croatia in its Memorial, filed in 2001, was sufficient to demonstrate genocidal intent; collectively they provide overwhelming evidence of that intent (Memorial of Croatia (hereinafter "MC"), paras. 8.16-8.17).

3. In its Reply, filed in 2010, that is after the Court's *Bosnia* Judgment in 2007 (hereinafter the "2007 Judgment"), Croatia quoted from that Judgment (*I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373) the following passage set out in the present Judgment, paragraph 145:

> "The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."

Croatia raised no questions at all about that test, and submitted that the evidence it presented in the Memorial, as supplemented by the Reply, "can only point to a specific intent to destroy that part of the Croat population of Croatia living in areas claimed as Greater Serbia" (Reply of Croatia (hereinafter "RC"), para. 2.14). In the Reply, it repeated its contention that the listed factors "point to the *inevitable* conclusion that there was a systematic policy of targeting Croats with a view to their elimination from the regions concerned" (*ibid.*, para. 9.23 quoting para. 8.16 of the Memorial; emphasis added in the Reply). It was only in the second round of the hearing that Croatia pressed the argument that, because the test stated in 2007 was excessively restrictive and was not based on any precedent, the Court should reconsider it (CR 2014/20, p. 19).

4. Like the Court (Judgment, para. 148), I think that the element of reasonableness is implicit in what the Court said in 2007. It is to be recalled that the standard for drawing an inference was stated in the context in which the Court had stipulated that claims against a State involving charges of exceptional gravity, such as genocide, must be proved by evidence that is fully conclusive; the Court must be fully convinced (2007 Judgment, para. 209; see also paras. 277 and 422). If I may be allowed the comment, there is a danger in reading the words of one sentence or just one phrase in a judgment in isolation from its wider context, including the factual context.

5. Croatia, in support of its initial 16 points, in addition to citing evidence which is reviewed below, asserts that all but one of the points (the failure to prosecute the crimes which it alleges amount to genocide) have been substantially confirmed by judicial findings by the ICTY in proceedings brought against senior Serb officials. It does not however identify those findings. That assertion, along with the list, now of 17, was repeated at the hearing (CR 2014/12, pp. 19-21, paras. 26-28).

6. While those unspecified findings of the ICTY may help establish the facts falling within the paragraphs of Article II of the Convention, I do not see, given the lack of any indictments for genocide, let alone any convictions, how the findings can, as a general proposition, help establish the specific intent. At the hearing, Counsel for Croatia added this:

> "I am sorry to go through in a list form those factors with the Court, but it is important because the Applicant's submission is straightforward. While individual acts committed in the course of the campaign *might* — if considered in isolation — have been explained as 'common crimes' or as 'excesses' committed in the course of a

> conflict, all of the factors relied on by the Applicant, *taken together*, point to the inevitable, overwhelming conclusion that there was a systematic policy of targeting Croats with a view to the elimination of groups of Croats (or parts of groups) as a community within the regions concerned. This establishes quite clearly the required element of a specific intent to destroy a protected group in whole or in part and/or complicity to commit, or failure to prevent, such destructive acts." (CR 2014/12, p. 21, para. 29, original emphasis.)

An alternative reasonable explanation of the points, individually or collectively, may also be available: the policy or intent was not to destroy in whole or in part the particular Croatian group but rather was to expel them from the proposed "Greater Serbia". As the Court ruled in 2007 (2007 Judgment, para. 190) and recalls in today's Judgment (para. 162), the intent to engage in the policy of "ethnic cleansing" and the operations carried out to implement it cannot as such demonstrate the necessary intent, a proposition which Croatia did not challenge (e.g., CR 2014/12, pp. 15-18, paras. 10-18). I now turn to consider each of the factors.

7. As the Judgment notes (para. 420), the first factor — "the political doctrine of Serb expansionism" — is essentially based on the SANU (Serbian Academy of Science and Arts) Memorandum of 1986 (Memorial of Croatia, Ann. 14) which Croatia claims contributed to the rebirth of the idea of a "Greater Serbia" encompassing parts of the existing Croatia and Bosnia and Herzegovina in which significant Serbian and ethnic populations lived. Slobodan Milošević, the Memorial asserts, was able to "harness and develop further the nationalist sentiments of which the Memorandum was an expression" (*ibid.*, paras. 2.43-2.50; the quote is from paragraph 2.49). In its Counter-Memorial, Serbia responds that "neither the SANU Memorandum nor the proposal for border change in the SFRY contained anything illegal, and that in any case they did not contain even an indication of the intent to destroy the Croats" (Counter-Memorial of Serbia (hereinafter "CMS"), para. 949). It also points to what it sees as the frailty of the evidence supporting the alleged link between the Memorandum and the war in Croatia (*ibid.*, para. 950).

8. The Memorandum describes itself as "a 1986 paper by a group of members of the Serbian Academy of Science and Arts on topical social issues of Yugoslavia". As the Court says, the Memorandum has no official status. While Croatia appeared to seek to link a statement of a Serbian politician, made during the war, to the Memorandum and its proposals (Reply of Croatia, paras. 3.34-3.40; CR 2014/10, p. 48, para. 38; cf. CR 2014/16, pp. 24-28, paras. 1-12), I do not see comments made years later by a prominent Serbian (Opposition) parliamentarian as giving it any official endorsement. Nothing in its 35 pages proposes illegal

action, let alone genocidal acts, and Croatia does not point to any (see RC, paras. 3.9-3.13). The Memorandum and the related evidence do not support the Croatian contention. It does not, on my reading, have anything like the force and official character that the "Strategic Goals" Decision at issue in the *Bosnia* case had, and even that document, the Court ruled in 2007, did not establish the specific intent. Rather, the objectives of that decision were capable of being achieved by the displacement of population and the acquisition of territory (2007 Judgment, paras. 371-372). As well, the position taken by the expert called by Croatia who gave an account of the "Serbian national programme" contained no indication that the programme required or even envisaged the extermination of the Croats (CrY 2013/8, EW2 (Biserko)).

9. The second factor Croatia refers to is statements of public officials, including those made in State-controlled media. As developed at the hearings, this submission is supported by statements by Serbia in its Counter-Memorial that before 2000 Serbian nationalism was the leading political idea and that hate speech was abundant in the Serbian media at the end of the 1980s and during the 1990s (CR 2014/5, p. 32, para. 5 referring to CMS, paras. 423 and 434; see also para. 420; and more generally for Croatia CR 2014/5, pp. 32-42, paras. 4-37 and CR 2014/6, pp. 57-60, paras. 14-23; see also point 11 below, para. 17). Croatia has established that Serbian authorities engaged in dreadful hate speech. The demonization was extreme. An intention to destroy the relevant Croat groups in whole or in part is not the only reasonable inference to be drawn from such actions; rather they may manifest an intention to cause massive expulsions, as in fact happened.

10. Croatia, thirdly, refers to the attack on Vukovar. The colossal mismatch in troop numbers and capabilities reveals, it says, the true purpose of the attack on Vukovar (CR 2014/8, p. 34, para. 20). It contends that around 1,100-1,700 Vukovar Croats probably died during the shelling, and that only 7,500 of the original 21,500 Croat population of Vukovar returned. "For the others who survived, their displacement was permanent" (*ibid.*, p. 47, paras. 84-85; CR 2014/12, pp. 11-12; cf. CR 2014/24, p. 43, paras. 23-25). Serbia responds that while the use of force by the attacking forces may have exceeded the needs of a normal military operation and while it caused grave suffering to the civilian population (including Serbs), "there is nothing to suggest that the attack was carried out with the [necessary specific] intent" (CMS, para. 955; see also CR 2014/15, p. 22, paras. 32-33). Again, while there is real force in the Croatian contention about the use of excessive, indeed unlawful, force, as Serbia in part recognizes, and as was stated by the ICTY (*Prosecutor* v. *Mile Mrkšić*, IT-95-13/1-T, Trial Chamber Judgment,

27 September 2007, paras. 470-472), that does not, in itself, establish genocidal intent.

11. Fourth, Croatia relies on a videotape of Arkan on 1 November 1991 as evidence of genocidal intent of those carrying out an attack. I agree with the Court (Judgment, para. 438) that this act does not help establish the specific intent.

12. Fifth, Croatia invokes the link between the JNA and certain Serb paramilitary units. But, I do not see any basis at all for finding in these relationships, if established, support for the only reasonable inference being that the specific intent to destroy in whole or in part the protected group existed. The link could, to the contrary, demonstrate an intent to expel Croats from the areas under attack.

13. Sixth, Croatia depends on the nature and scale of the attacks on Croatian civilians, a matter also emphasized in the discussion of the pattern of behaviour (*ibid.*, para. 413). No doubt, as ICTY decisions demonstrate, widespread and systematic attacks did occur (see e.g., CR 2014/12, p. 27, para. 54). In addition to *Mrkšić*, Counsel referred to *Martić* in which the Trial Chamber found the existence of a joint criminal enterprise with the purpose of establishing an "ethnically Serb territory" through the removal of Croatian and non-Serb population from the territory of the "SAO Krajina"/"RSK" (CR 2014/20, pp. 47, para. 8; *Prosecutor* v. *Milan Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 445-446). But again, the purpose was to remove the group or a large part of it, not an intent to destroy the group in whole or in part.

14. No doubt, as Croatia contends for its seventh point, ethnic Croats were consistently singled out for attack (see the references in CR 2014/6, pp. 60-62, paras. 22-29). But, as the Court said in 2007, it is not enough to establish that members of the group had been deliberately and unlawfully killed (2007 Judgment, para. 187). And, as Serbia submits, in the circumstances of an armed conflict between two ethnic groups most of the victims are going to be from the other group (CMS, para. 960).

15. The "white ribbon" requirement, Croatia's eighth point, is to be seen in the same light. To repeat, the Serbian authorities demonized Croatians and engaged in dreadful hate speech. At the oral stage, Croatia developed the argument by referring to certain statements annexed to its Memorial and Reply (CR 2014/6, pp. 57-58, paras. 15-16). Many are subject to the questions raised in the Judgment about unsigned statements or statements prepared by the police (Judgment, paras. 192-199). Those which are not subject to those questions remain but they too are consistent with the policy of driving the Croatians out of the various regions.

16. The ninth and tenth points are about the numbers of Croats killed, missing or injured, the consequences of Serbian action being seen as evidence of the intention with which the actions were planned and carried out. As Croatia acknowledged in an answer to a question from a judge, no established figure for the number of deaths exists (MC, p. 384; RC, para. 9.7; cf. CMS, paras. 963-969). But, even if its figures of 10,000-12,000 dead and 1,000 missing are accepted, that is a small proportion of the total Croatian population of Krajina and Eastern Slavonia. In respect of the latter, the 1991 census showed that over 400,000 Croats lived there before the conflict, and in one village, Tenja, in Krajina, where Croatia claimed 37 men were killed, the census records 2,813 Croatians as living there (MC, paras. 4.20, 4.28-4.29 and CMS, paras. 967-968). Even on Croatia's figures the total killed appears to be less than one per cent of the total population of the allegedly targeted group (12,000 out of 1.7 to 1.8 million). I emphasize that this is not for me a matter simply of calculation. Many illegal killings occurred in this war and in dreadful ways. But the proportions are significant for establishing genocidal intent (e.g., *Kayishema*, ICTR-95-I-T, Trial Chamber Judgment, 21 May 1999, para. 93). I do not consider these factors assist Croatia's case. They also go to the issue of opportunity which the Court considers when addressing the alternative way in which Croatia presented its argument on specific intent (Judgment, paras. 431-440).

17. The eleventh element is the use of ethnically derogatory language during acts of killing, torture and rape. Croatia supported this element by referring to several of the statements annexed to its pleadings, with anti-Croat sentiment being indicated by those making the statements being labelled as Ustashas (see notes to CR 2014/6, pp. 57-60). Even if those statements are accepted, they do no more than confirm that many Serbs with authority engaged in hate speech of a deplorable kind. I do not see them as evidencing genocidal intent at the standard required.

18. Serbia does not contest the twelfth matter — that a large part of the Croatian population was displaced from RSK (CMS, para. 975). But, to repeat, "ethnic cleansing" in itself does not show genocidal intent. In support of its argument under this head, Croatia invoked the *Martić* decision of the ICTY (RC, paras. 9.2, 9.7, 9.30 and 9.29-9.43) which, it claimed, decided that there was a joint criminal enterprise (JCE) among the Serb political and military leadership, the purpose of which was to "eradicate", by killing and removing, the Croat civilian population from about one-third of the territory of Croatia in order to transform that territory into an ethnically homogenous Serb-dominated State (*ibid.*,

para. 9.2; see also para. 9.34). The Tribunal does not use the word "eradicate" in the critical paragraphs of its Judgment which Croatia cites. Rather, it recalls that certain attacks "followed a generally similar pattern which involved the killing *and removal* of the Croat population" (emphasis added). It then referred to widespread violence, intimidation, and crimes against private and public property perpetrated against the Croat population. All of these actions created an atmosphere of fear in which the further presence of Croats and other non-Serbs in these territories was made impossible. "In this respect the Trial Chamber has concluded that the displacement of its non-Serb population was not a mere side-effect but rather a primary objective of the attacks" (*Prosecutor* v. *Milan Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 443).

The Court (Judgment, para. 424) quotes the concluding paragraph which ends with this sentence:

> "The Trial Chamber therefore finds beyond reasonable doubt that the common purpose of the JCE was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population, as charged in Counts 10 [deportation] and 11 [forcible transfer]." *(Ibid.)*

This finding, as I read it, is fully consistent with an overall Serbian intention to create a "Greater Serbia" not by killings but primarily by expulsions. It does not support Croatia's claim of the existence of genocidal intent.

19. The thirteenth and fourteenth factors are the systematic looting and destruction of Croatian cultural and religious monuments and the suppression of that culture and those practices among the remaining population. These allegations, to the extent that they are established (Serbia does not contest the first, CMS, para. 978, but on the second, see paragraph 979) are for me further evidence of the Serb demonization and denigration of the Croats. They do not by themselves evidence genocidal intent. In this context, the Court recalls that "cultural genocide" was not included in the list of punishable acts in the Convention which limited genocide to physical or biological destruction (2007 Judgment, para. 344).

20. The fifteenth matter is the alleged consequent, permanent and intended demographic changes. I have already dealt with this (para. 18 *supra*).

21. The sixteenth factor is Serbia's alleged failure to prosecute genocidal acts. An answer based on Article VI of the Genocide Convention is that there is such an obligation only if the acts were committed on Serbia's territory which does not appear to be the case here. The contention is also of course a circular one.

22. In addition to the 16 factors which it listed in its written pleadings, Croatia at the hearings also emphasized a report of the Chief of Security

of the Republic Territorial Defence Staff in Belgrade dated 13 October 1991 which stated that Arkan's troops were "committing uncontrolled genocide and various acts of terrorism" in the greater area of Vukovar (RC, para. 9.86; CR 2014/6, pp. 25-26, para. 43; CR 2014/10, p. 15, para. 20; CR 2014/12, p. 34, para. 84 referring to the Reply of Croatia, Ann. 63; for Serbia's view, see CR 2014/23, pp. 68-71, paras. 17-30). The Serbian Assistant Minister of Defence was informed of the Report. The truncating of the quotation by Croatia, in both its written and oral argument, gives a seriously misleading impression since the sentence as a whole and the following two paragraphs read as follows:

> "In the greater area of Vukovar volunteer troops under the command of Arkan and Kum are committing uncontrolled genocide and various forms of terrorism, completely out of the control of the commands of the units carrying out combat activities in that area.
>
> According to unverified information, these two nationalistic leaders known in public as international criminals, are robbing and looting the property of the Croatian and Serbian citizens, 'awarding' the members of their units and are planning to form 'Special Units for the Defence of Serbia', all under the name of 'organized combat'.
>
> We estimate that this is a very dangerous and well-organized paramilitary group of considerable power. Sooner or later governmental bodies and armed forces will have to fight them. I suggest that this problem be raised at the level of the federal organs and official organs of the Republic of Serbia, and that the appropriate solutions be found and measures taken to prevent any harmful effects."

I agree with the Court (Judgment, para. 438) that the Report provides no evidence of the existence of the necessary specific intent being held by the relevant Serbian authorities. The use of the word "genocide" is an attribution to the actions of Arkan and his group by the Chief of Security, without reasons being given.

23. For the reasons I have given, I do not find that the only reasonable inference to be drawn from the list of 17 factors which Croatia assembles is that the Serbian authorities had the necessary specific intent, that is to destroy the relevant ethnic Croat groups in whole or in part.

24. I agree with the Court that the alternative argument made by Croatia at the hearings aimed at establishing the specific intent, based on context, patterns of behaviour and opportunity also fails (*ibid.*, paras. 411-440). As I indicate at the outset, because Croatia has failed, in my view, to establish this essential element of specific intent, I do not in this opinion address the detail of the evidence and submissions relating to the *actus reus*. I note only that Serbia concedes that in some cases the killings alleged by Croatia took place and that they were methodical, directed at civilians and driven by ethnicity (e.g., Rejoinder of Serbia (hereinafter

"RS"), para. 392; CR 2014/13, pp. 64-66) and that the findings of the ICTY provide convincing evidence of acts falling within Article II *(a)* and *(b)* of the Convention.

SERBIA'S COUNTER-CLAIM: SPECIFIC INTENT

25. As the Court indicates (Judgment, para. 500), Serbia claims that the existence of the specific intent of destroying in whole or in part the Krajina Serbs could be inferred on two different bases — (1) the transcript of the Brioni meeting of the President who was Commander in Chief and his senior military officials, and (2) the totality of the actions of the Croatian authorities before, during and after Operation Storm. I give my attention to the first matter to support and supplement the reasoning given by the Court (*ibid.*, paras. 501-507).

26. On their face, the Brioni Minutes appear to be a nearly complete stenographic record of a meeting which lasted nearly two hours (CMS, Ann. 52). I quote the major passages cited by Serbia in the order in which they appear in the Minutes. For ease of reference I number those passages and refer only to the page numbers of the Minutes. I also include passages quoted by Croatia and some passages quoted by neither. The more extensive treatment, I think, is required if the inferences to be drawn from the Minutes are to be properly considered and determined.

(1) The President began by recalling their determination to undertake further operations and that they had been determined to start lifting the Bihać blockade from the west. He continued as follows:

> "However, the situation as it stands now is that the United Nations representatives, Akashi, Stoltenberg and the Serbs have deprived of us this reason, since they are in the process of withdrawing their forces from the Bihać area." (P. 1; CMS, Annex 52; RS, para. 696.)

(2) The next passage quoted by Serbia records the President saying this:

> "But if in the forthcoming days we are to undertake further operations, then Bihać can only serve as some sort of pretext and something of a secondary nature. We must inflict total defeat upon the enemy in the south and north, just so we understand each other, leaving the east aside for the time being." (P. 1; CMS, para. 1197 and Annex 52.)

(3) The next quotation appears a few lines later:

> "Therefore we should leave the east totally alone, and resolve the question of the south and the north.

> In which way do we resolve [the question of the north and the south]? This is the subject of our discussion today. We have to inflict such blows that the Serbs will to all practical purposes disappear, that is to say, the areas we do not take at once must capitulate within a few days." (P. 2; on several occasions, the passage quoted ends with the word "disappear"; CMS, para. 1198 without the first sentence; see also the Croatian comment on the forms of quotation; RC, para. 11.43 and note 96.)

That is followed, after a few lines, by a passage quoted by Croatia:

> "Therefore our main task is not Bihać, but instead to inflict such powerful blows in several directions that the Serbian forces will no longer be able to recover, but will capitulate." (P. 2; RC, para. 11.43.)

(4) The President completed his introductory remarks in this way, a short time after:

> "I told Sarinić, [Minister of Foreign Affairs] that in principle we favour negotiations if they accept the conditions I have set out in my reply to Akashi [the UNSG's Special Representative to the former Yugoslavia and Chief of UNPROFOR/UNCRO], but that he will not head the delegation if the meeting is held. So we can do that, he will call today, and we can accept this as a mask, that we are accepting the talks, and even designate our own delegation, but let us discuss whether we will undertake an operation tomorrow or in the next few days to liberate the area from Banija to Kordun to Lika and from Dalmatia to Knin, and how to carry this out in three, four or at the very most eight days. Then only some minor enclaves will remain which would be forced to surrender." (P. 2; CMS, para. 1105; the quote does not however include the passage after "Knin".)

(5) Sometime later the President commented:

> "It's all very well that the Admiral is now supposed to close off their remaining three exits, but you are not providing them with an exit anywhere. There is no way out to go . . . to close it off). To pull about and flee, instead, you are forcing them to fight to the bitter end, which exacts a greater engagement and greater losses on our side. Therefore, let us also please take this into consideration [because it's true, they are absolutely demoralized, and just as they have started moving out of Grahovo and Glamoč, when we put pressure on them, now they are already partly moving out of Knin.] Accordingly, let us take into consideration, on a military level, the possibility of leaving them a way out somewhere, so they can pull out part of their forces . . ." (P. 7; CMS, para. 1200; the passage in square brackets was not included in the Counter-Memorial; see also CR 2014/24, p. 55, para. 89.)

Admiral Domazet, an HV Rear Admiral, in a passage not quoted by Serbia, responded:

> "Mr. President, here is a way and two ways; that is why in planning the operation we left this road in this area. This is the Lika area, here where the Serbs are, it is by the Serbs. We are leaving a route here and they can get out. The second route is leaving them Dvor na Uni, because only at the final stage will we break through to Kostajnica, gradually advance and allow them to leave. We won't close it off. So there are two key routes." (P. 7.)

(6) A little later the President accepted in principle the views expressed and said this:

> "There is something still missing, and that is the fact that in such a situation when we undertake a general offensive in the entire area, even greater panic will break out in Knin than has to date. Accordingly we should provide for certain forces which will be directly engaged in the direction of Knin. And, particularly, gentlemen, please remember how many Croatian villages and towns have been destroyed, but that's still not the situation in Knin today . . . Therefore, we will have to resolve this with UNCRO, this matter as well, and so forth. But their counterattack from Knin and so forth, it would provide very good justification for this action and accordingly, we have the pretext to strike, if we can with artillery, you can . . . for complete demoralization . . . not just this . . . *[sic]*." (P. 10; CMS, para. 1204, Serbia quoted only the third sentence; CR 2014/24, p. 23, para. 43.)

(7) Gotovina spoke next: "It is difficult to keep [400 infantrymen heading towards Knin] on a leash." (P. 10; CR 2014/18, p. 36, para. 147; CR 2014/24, p. 23, para. 43.)

The next section of the Minutes referred to by the Parties follows some pages later:

(8) "PRESIDENT:

> Does anyone here have any new proposals or views as to when we can undertake such an overall operation? And you must plan it out. What DOMAZET has set out, but this has to be articulated in detail, what are the points, which are the axes from which we must take those points in order to completely vanquish the enemy later and force him to capitulate. But I've said, and we have said it here, that they should be given a way out here . . . Because it is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other." (P. 15; CR 2014/24, p. 22, para. 41.)

"Ante GOTOVINA:

A large number of civilians are already evacuating Knin and heading towards Banja Luka and Belgrade. That means that if we continue this pressure, probably for some time to come, there won't be so many civilians just those who have to stay, who have no possibility of leaving." (P. 15.)

Croatia quoted the following statement by the President made about half way through the meeting:

"When you say you're going to block Gračac off, bear in mind that there can be a state of panic in Gračac, you have to enter as quickly as possible and report that you have entered, as well as all of you who will be involved, because that will have a psychological effect in such situations. The psychological effect of the fall of a town is greater than if you shell it for two days." (P. 18; RC, para. 11.47.)

(9) "Vladimir ZAGOREC:

Mr. President, we must open up a pocket for them. When they start to flee they will have to flee somewhere, they won't go towards Knin or Kostajnica, we must open up a pocket where they will flee — Dvor na Uni." (P. 20; CR 2014/18, p. 25, para. 89.)

(10) "If we had enough [ammunition], then I too would be in favour of destroying everything by shelling prior to advancing." (P. 22; CMS, para. 1204.)

(11) "PRESIDENT:

A leaflet of this sort — general chaos, the victory of the Croatian Army supported by the international community, and so forth. Serbs, you are already withdrawing, and so forth, and we are appealing to you not to withdraw, we guarantee . . . This means giving them a way out, while pretending to guarantee civil rights, etc." (P. 29; CMS, para. 1203; CR 2014/18, p. 26, para. 92.)

(12) "PRESIDENT:

Hold on, I'm going to Geneva to hide this, not to talk. I won't send a Minister, but the Assistant Foreign Minister. That's on Thursday.

So, I want to hide what we are preparing for the day after. And we can rebut any argument in the world about we didn't want to talk, but we only wanted what . . ." (P. 32; CMS, para. 1196.)

27. In its Counter-Memorial, Serbia quotes the passages set out at (2) and (3) above, emphasizing the last sentence of (3), and continues in this way:

> "[i]t clearly follows that the goal of the forthcoming military action was not only to achieve military control over Krajina and its reintegration to Croatia, but 'to inflict such blows that the Serbs will to all practical purposes disappear'. It can be seen from the transcripts that none of the participants opposed such a plan but, after President Tudjman spoke, they discussed methods of how to implement it." (CMS, para. 1198.)

I think that is a serious misreading of that part of the Minutes. It gives no weight at all to the reference to leaving to the east alone — which provided a possible exit for the Serbian populations. And it takes no account of the closely following passage in which the emphasis is on the capitulation of the Serb *forces*. The Trial Chamber in *Gotovina* rejected the claim of the Prosecutor that the reference to making "Serbs disappear" was to the Serb civilians rather than to the Serb military forces (para. 1990); the statement focused mainly on the Serb military forces, rather than the Serb civilian population; as the Court notes, the Appeals Chamber did not even go that far (Judgment, para. 506). The frequent, truncated quotations of the passage under (3), ending at "disappear", also mislead. The "within a few days" element in that passage is also reflected in the last two lines of the passage (4), again words not quoted by Serbia. The Counter-Memorial does then recognize that Croatia would allow exits (para. 1200 quoting passage (5), but not fully). Serbia does not in this pleading or elsewhere give weight to the brief extent of Operation Storm, both in its planning, so far as it appears from the Brioni Minutes, and in fact. In the course of those few days, 200,000 Serbs were able to flee. President Tudjman had insisted on a number of occasions that they be left with ways out.

28. The remaining passages quoted above, with the exception of (9), are all about trying to recover the territory and to expel the Serbs, military as well as civilian, as quickly as possible. Other passages, not quoted above, emphasize that need for speed — e.g.:

> "President: How long would that first stage [seizing Ljinboro, placing Udbina under control] last?
> Davor Domazet: Two to three days." (CMS, Ann. 52, pp. 7-8.)

29. Also significant are the other references to causing greater panic; complete demoralization; the psychological effect of the fall of a town being greater than shelling it for two days; "we must be daring, in a situation of general demoralization" (*ibid.*, p. 14); and later a presidential reference to the operations being over in four days (*ibid.*, p. 24). Against that continuing emphasis on rapid action and expulsion rather than on an

intention to engage in mass killing, I do not see the passage about ammunition (10), however shocking, as significant in establishing the necessary intent.

30. It is the case, as Serbia says, that Croatia's various actions — notably during and following Operation Storm — have led to a huge drop in the Serbian population in Croatia. Both Parties relied extensively on the 1991 census. It was also relied on in the proceedings leading to the 2007 Judgment in *Bosnia* v. *Serbia* (*I.C.J. Reports 2007 (I)*, p. 138, para. 232). The sets of figures do not appear to be in dispute. They give some sense of the massive displacement in both directions. But, as already noted (see para. 6 *supra*), the Court has earlier ruled and today confirms that "ethnic cleansing" in itself does not amount to genocide. The result actually achieved by Croatia is to be seen as confirming that the intention was to expel the greater part of the Serbian population from the area and not to destroy it in whole or in part.

31. To summarize, I read the Brioni Minutes as demonstrating:

(a) that the action was aimed at getting the Serb *forces* to capitulate;
(b) that departure routes into Serb controlled areas would be left to the east;
(c) an intention that a large proportion of the Serbian population would be displaced; and
(d) that the whole operation would be over in 3, 4, or at the very most 8 days.

32. To return to paragraph 1198 of the Counter-Memorial quoted in paragraph 27 above, I read the Minutes as indicating the goal of achieving military control over Krajina, Croatian territory after all, and its reintegration, and at the same time achieving a substantial removal of the local Serb communities. The goal was not to destroy in whole or in part that group. Accordingly, in my view, an essential element in the counter-claim, as originally presented, is not established.

33. I have nothing to add to the Court's discussion and rejection of Serbia's alternative contention (Judgment, paras. 508-514). It follows that I conclude that the counter-claim fails. For the reasons given earlier, I do not address in this opinion the evidence and submissions relating to the *actus reus*.

* * *

34. The record in this case, like that in the *Bosnia* case and in the many cases decided by the ICTY and by national courts, demonstrates that

dreadful crimes and atrocities were committed in the region of former Yugoslavia in the early 1990s. The rejection by the Court in this case of both the claim and the counter-claim should not be allowed to obscure those facts. The rejections are to be explained by the limited jurisdiction of the Court under the Genocide Convention (e.g., Judgment, para. 85) in this case. The failure of each Party, in terms of the Convention, to establish that the other had the necessary specific intent does not affect in any way the clear findings, based on concessions by each Party, rulings of the ICTY and persuasive evidence that each side did commit serious crimes.

35. The Agent of Serbia made this acknowledgment in the course of the hearing before the Court:

> "Mr. President, the fundamental disagreement of the respondent State with the Applicant's approach to the unsigned statements and police reports does not mean that the Serbian Government denies that serious crimes were committed during the armed conflict in Croatia. Yes, the serious crimes were perpetrated against the members of the Croatian national and ethnic group. They were committed by groups and individuals of Serb ethnicity. It goes without saying that Serbia condemns such crimes, regrets that they were committed, and sympathizes profoundly with the victims and their families for the suffering that they have experienced.
>
> . . . . . .
>
> [I]t is not in dispute that murders of Croatian civilians and prisoners of war took place during the conflict." (CR 2014/13, pp. 64-65, paras. 38 and 40.)

He recognized that:

> "In that notorious crime [Ovčara], the ICTY recorded 194 prisoners of war who were killed. This was the gravest mass murder in which Croats were the victims during the entire conflict." *(Ibid.)*

36. The Agent of Croatia also acknowledged that crimes were committed against Serbs:

> "Croatia wishes to express to this Court its sincere desire to achieve full reconciliation with Serbia. Our Presidents, Mr. Mesić and Mr. Josipović, have expressed their sincere regret on behalf of the Croatian people for all crimes committed against Serbs — including in Operation Storm. They have done so on official visits to Belgrade. However, reconciliation must be based on historical facts.
>
> . . . . . .

It is a fact that individual crimes were committed in the course of Operation Storm. Croatia deeply regrets the crimes committed and the pain caused to victims during the course of Croatia's liberation in Operation Storm. It has put in place structures to compensate the victims, and to provide redress through criminal and civil proceedings." (CR 2014/19, p. 17, paras. 20-21.)

(Signed) Kenneth KEITH.