DECLARATION OF JUDGE DONOGHUE

1. I have voted in favour of all operative paragraphs of the Judgment and I agree in most respects with the Court's reasoning. In this declaration, I offer observations about the parts of the Judgment that discuss the *actus reus* of genocide, both with respect to Croatia's claim and with respect to Serbia's counter-claim.

2. I begin by addressing the written witness statements submitted by Croatia and the Court's evaluation of them. As the Judgment indicates, there are many deficiencies in those statements. Even if the Court had set aside every witness statement, however, there would be no change in the Court's conclusions as to the principal claim. The factual findings of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), taken together with Serbia's admissions, amply establish that Croats were the victims of intentional killings and of acts causing serious bodily and mental harm. Serbia has admitted that the evidence establishes the *actus reus* of genocide, both generally (CR 2014/15, p. 13, para. 10 (Schabas)) and, as is detailed in the Judgment, in respect of many particular localities. The geographic breadth of the ICTY findings and of Serbia's admissions also convincingly establishes a pattern of conduct by the Yugoslav National Army (*Jugoslovenska narodna armija* ("JNA")) and Serb forces. Croatia's claim fails not because of deficiencies in the witness statements, but because genocidal intent is not the only inference that can reasonably be drawn from the pattern of conduct. Nonetheless, the statements and the Court's analysis of them merit a brief comment.

3. In past cases, the Court has provided guidance about the criteria that it uses to evaluate witness statements. It considers whether a witness is disinterested, giving greater weight to testimony of someone who has nothing to gain or to lose, as well as to statements against interest (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 42-43, para. 69). The Court distinguishes between facts within the witness's personal knowledge, on the one hand, and speculation or repetition of information learned from others (sometimes called "hearsay") on the other hand (*ibid.*, p. 42, para. 68). The Court gives particular weight to statements that are contemporaneous with the events at issue (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244). These evaluative criteria are reaffirmed today (Judgment, paras. 196-197).

4. The Court can apply these criteria only if a statement includes sufficient information to permit analysis. What, then, are the elements that should be included in a written witness statement? The Statute and Rules of Court provide little guidance about the form or content of such statements. As to a witness who will appear in Court, however, the Rules require certain basic information, including the name, nationality and residence of the witness, and a declaration that the testimony is the truth (Articles 57 and 64 of the Rules of Court). This information is also necessary for the evaluation of the probative value of a written statement. In this regard, I draw attention to Article 4, subparagraph 5, of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration of 29 May 2010 (which addresses written witness statements). That provision calls for basic information similar to that required by Articles 57 and 64 of the Rules of Court (including name, residence, affirmation of truth, signature, and date and place of the signature).

5. Of course, to evaluate the probative value of a particular statement, it is necessary to look beyond these matters of form and to scrutinize the content of each statement. The IBA Rules are again instructive. They call for information about the relationship between the witness and the parties, which can shed light on whether the witness is disinterested, and they require that a statement contain a full and detailed description of the facts and of the source of the witness's information. Such a description permits a court or tribunal to evaluate the reliability of the evidence (for example, whether the witness was in a position to see or hear events clearly) and whether the witness had direct knowledge of events that are the subject of the testimony (as opposed to having heard of events from others).

6. The evaluative criteria described in the preceding paragraphs are not new and are not peculiar to this Court. An enumeration of minimum requirements for the form and content of written witness statements (along the lines of Articles 57 and 64 of the Rules of Court or of Article 4 of the IBA Rules) certainly could provide more precise guidance to parties. Even without such an enumeration, however, it should come as no surprise that a witness statement that lacks the information that the Court needs in order to apply established evaluative criteria will not be effective in proving a party's allegations.

7. This leads me to an observation about the way the Court evaluates the witness statements submitted by Croatia in the course of deciding whether the evidence establishes the *actus reus* of genocide in particular localities. As I see it, the localities analysed by the Court can be grouped into two categories, in light of the kind of evidence available to the Court.

8. The first category comprises those localities as to which the case file includes ICTY factual findings and Serbia's admissions, as well as, in some instances, witness statements. For each of these localities, the Court

finds that the evidence establishes the *actus reus* of genocide. These conclusions stand on solid ground. The evidence meets Croatia's burden of proof and satisfies the high standard of proof that governs this case; it "clearly establishes" the *actus reus* of genocide and is "fully convincing" (Judgment, para. 178), whether or not witness statements are taken into account.

9. The second category comprises those localities as to which the case file does not include ICTY factual findings or Serbia's admissions. For these localities, Croatia relies heavily on witness statements. The Court's central inquiry in respect to these statements is whether they are signed and whether the evidence contained therein is based on a witness's first-hand knowledge (as opposed to hearsay). In a few instances, deficiencies in the relevant witness statements (for example, lack of signature or hearsay) lead to the conclusion that the *actus reus* of genocide is not established. For most localities in this second category, however, the Court concludes that the relevant statements are signed and are based on the witness's first-hand knowledge. Repeatedly, the Court indicates that statements that meet these two conditions are to be accorded "evidential weight" ("valeur probante"). I agree that signed statements that are based on first-hand knowledge can have probative value, and thus can support a party's allegations. I am troubled, however, that the Court's analysis seems to leap from the refrain that a statement deserves "evidential weight" to a finding that the *actus reus* of genocide is established. Only after taking into account evaluative criteria additional to signature and first-hand knowledge (such as the location of the witness in relation to the events in question, whether the witness is disinterested, and the circumstances of an interview) is it possible to conclude that statements are fully convincing and that they clearly establish the *actus reus* of genocide, as required by the governing standard of proof. It is therefore unfortunate that the Judgment is inconsistent in the extent to which it sets out the Court's analysis of the elements of particular witness statements that are the basis for the conclusion that the *actus reus* of genocide is established or not, and that it omits citations to the relevant parts of the case file. The obscurity of the Court's reasoning invites questions about whether the Court is faithful to its stated standard of proof. Moreover, because ICTY factual findings and Serbia's admissions clearly establish both the *actus reus* of genocide and the alleged pattern of conduct by the JNA and Serb forces, the Court could have avoided locality-by-locality pronouncements as to the *actus reus* of genocide in respect to localities in this second category.

10. As regards the counter-claim, I offer one comment on the Court's analysis regarding the *actus reus* of genocide. I address here the Court's conclusion that civilian deaths resulting from the shelling of Knin are not "killing[s]" within the meaning of subparagraph *(a)* of Article II of the Convention (Judgment, paras. 474-475), which the Court has interpreted to extend only to intentional killings (*ibid.*, para. 156; 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)*, p. 121, para. 186).

11. I have no quarrel with the Court's conclusion that it is unable to find that the civilian deaths in Knin were the result of indiscriminate shelling (Judgment, para. 472). However, I disagree with the suggestion (*ibid.*, para. 474) that the term "killing", as used in subparagraph *(a)* of Article II, does not extend to deaths resulting from attacks that are directed exclusively at military targets and that do not deliberately target civilians. It is certainly possible for the deaths resulting from such attacks to be intentional killings, even if the attack did not deliberately target civilians. Depending on the particulars, such killings may or may not be lawful under the law of armed conflict and that distinction could bear on the evaluation of evidence as to genocidal intent. At the stage of examining whether deaths comprise the *actus reus* of genocide, however, I consider it sufficient for the Court to decide whether the killings were intentional.

12. This observation does not affect my agreement with the Court's more general conclusions as to the counter-claim: the evidence proves the *actus reus* of genocide but the counter-claim fails because genocidal intent has not been proven.

(Signed) Joan E. DONOGHUE.