DECLARATION OF JUDGE KEITH

Explanation of vote on complicity — Knowledge of principal's genocidal intent necessary as a matter of law, but not shared intent — Evidence of aid and assistance established — Evidence of knowledge of the facts underlying the genocidal intent established — Finding of complicity in the genocide committed at Srebrenica.

1. This declaration explains my vote on the alleged complicity of the Respondent, in breach of Article III *(e)* of the Genocide Convention, in the genocide committed at Srebrenica in July 1995. In summary, my position on the law is that the Respondent, as an alleged accomplice, must be proved to have knowledge of the genocidal intent of the principal perpetrator (but need not share that intent) and, with that knowledge, to have provided aid and assistance to the perpetrator. My position on the facts is that those two elements are proved to the necessary standard.

2. The reasons for my conclusion on the law that it is sufficient in terms of Article III *(e)* to establish that the accomplice knew that the principal perpetrator had genocidal intent, relate to the definition and the nature of complicity in unlawful acts, the purpose of the prohibition on complicity in genocide, and the case law.

3. Dictionary definitions of "complicity" and "(ac)complice" provide both narrower and broader meanings. To put the matter in legal terms, the narrower meaning appears to equate complicity with aiding and abetting (or assisting) while the broader meaning also includes a co-author or co-perpetrator of the offence. Thus the *Oxford English Dictionary* (OED Online, 2nd ed., 1989) defines "complice" as "[o]ne associated in any affair with another, the latter being regarded as the principal", and also as a "confederate" or "comrade", words apt to include a co-perpetrator. And *Le Petit Robert* (version électronique, version 2, 2001) defines "complicité" as participation by intentional assistance in the breach committed by another and in terms of agreement or entente. Legal dictionaries also include narrower and broader approaches. Gerard Cornu, *Vocabulaire Juridique* (7th ed., 2005, p. 188), drawing on Articles 121-6 and 121-7 of the French Penal Code, defines "complicité" as a contribution to the realization of a breach by aid or assistance to the author of the offence, or by instigation; a "complice" in his definition is contrasted with a principal author or co-author; see similarly Jean Salmon, *Dictionnaire de Droit International Public* (2001, pp. 218-219). *Halsbury's Laws of England* (4th ed., Vol. 11, para. 43), says that persons are accomplices if they are participants in the offence charged, whether as principals, procurers, aiders or abettors. *Mellinkoff's Dictionary of American Legal Usage* (1992, p. 463), defines "accomplice" as "a general term for a person who participates with others in the commission of a crime, whether as principal or accessory", with the last word being equated with "someone who aids and abets". My final reference is to a publication of the United Nations Office at Geneva, *Law Terminology in English, French and Spanish* (1990, p. 196). It helpfully distinguishes between the broader and narrower sense of "complice"; in the broader sense, the accomplice is the person who participates in the crime or wrong of another, including as a co-author; and in the narrower, by contrast to a co-author, the person who participates as an accessory.

4. As those definitions show, complicity is often equated in whole or in part with aiding and abetting. The present aspect of the case is concerned with complicity only in the sense of aiding and abetting. I agree with the Court that the Applicant has not established that the Respondent is in breach of its obligation, as a principal, not to commit genocide. I now turn to the mental element required if complicity in this more restricted sense is to be established.

5. In many national legal systems aiders and abettors need only be aware that they are aiding the principal perpetrator in the commission of its offence by their contribution (see e.g. the law of France, Germany, Switzerland, England, Canada, Australia and some of the states of the United States referred to in *Prosecutor* v. *Krstić*, IT 98-33-A, Judgment of 19 April 2004, para. 141). More significantly, the Appeals Chamber of the ICTY in *Krstić*, following earlier decisions, has ruled consistently with that body of national law that "an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime" (*Krstić*, para. 140). Having recalled that consistent jurisprudence and principle, the Chamber applied it to the prohibition of genocide stated in its Statute, the wording of which is taken directly from Article II of the Genocide Convention.

6. That understanding of the mental element required by complicity when it is limited to aiding and abetting serves the purpose of sanctioning the actions of those who knowingly assist the unlawful act of the primary perpetrator, knowing in particular of the primary perpetrator's genocidal intent. The necessary intent of the aider and abettor is the intent to provide the means by which the perpetrator may realize his own intent to commit genocide. As Judge Shahabudeen said in paragraph 67 of his opinion in *Krstić*, those preparing the text of the Genocide Convention could not have failed to criminalize the actions of the commercial suppliers of poisonous gas who knew of the intent of the purchasers to use the gas for the purpose of destroying a national, ethnical, racial or religious group, even if the suppliers themselves did not share that intent.

7. It is true that the Appeals Chamber in *Krstić* did go on to suggest that, for complicity to be established in some circumstances, the accomplice had to share the principal's intent (*ibid.*, para. 142). But, because that suggestion is expressly limited to conduct broader than aiding and abetting, as well as being unnecessary for the decision in that case (as the Chamber acknowledges at footnote 247), it is irrelevant to the present case. Further, the two reasons the Chamber gives for its suggestion are unpersuasive. The first reason — the natural reading of Article III *(e)* — is merely asserted. Moreover, that reading would necessarily have to apply to aiding and abetting as well as to the broader matters encompassed within Article III *(e)*, an application which would contradict the Chamber's main ruling that knowledge is sufficient for aiding and abetting. That problem also arises with the second argument based on an examination of the drafting history in the Sixth Committee of the General Assembly in 1948. In any event, that history is better read as requiring that the alleged accomplice know that the principal perpetrator has the necessary intent, not that the alleged accomplice share it (United Nations, *Official Records of the General Assembly, Third Session, Sixth Committee*, Summary Records of the 87th meeting, pp. 254-259). The discussion on the proposed amendment (which was to add the word "deliberate" before "complicity" but which was withdrawn on the basis that complicity in genocide must be "deliberate") indicates that the actions had to be "deliberate" in the sense of knowing of the perpetrator's intent; the intent did not have to be shared.

8. I now turn to the facts and to the question whether the Applicant has shown that the Respondent, knowing of the perpetrator's genocidal intent, continued to supply the perpetrators with the means to facilitate the realization of that intent. There can be no possible dispute about that supply and its continuation. It is seen in the very extensive involvement of the Respondent in the actions of Republika Srpska and the VRS in Bosnia and Herzegovina, notably in the provision from late 1991, and especially from 19 May 1992, of 1,800 officers to the VRS and their continued support (including "rehatting", housing, promotion and discipline), of material, both initially and subsequently, of joint operations and the involvement of the Ministry of the Interior, and of funding, including the huge budget support and the integrating of the central banks. Extensive documentation of that was presented to the Court. One revealing acknowledgment is provided by President Karadžić speaking at a session of the Assembly of Republika Srpska in May 1994 — "[w]ithout Serbia nothing would have happened, we don't have the resources and would not have

been able to make war". Or, as the Court concludes, had the Respondent chosen to withdraw its military and financial support from the Republika Srpska, this would greatly have constrained the options available to the authorities of Republika Srpska (Judgment, paragraph 241).

9. But did the Respondent have the necessary knowledge in the very short time the Srebrenica massacre was undertaken, essentially from 13 to 16 July 1995? My primary specific source in answering that question is the 1999 Report of the United Nations Secretary-General, *The Fall of Srebrenica* (A/54/549, Ch. VIII); see paragraphs 228-230 of the Judgment of the Court.

10. That specific information is to be understood in the context of the more general information about the very close relationships between the leaderships in Belgrade and in Pale and especially between President Milošević and President Karadžić and General Mladić, and particularly between President Milošević and General Mladić. The Court had extensive evidence of those relationships, for instance from two of the UNPROFOR Commanders, General Dannatt and General Rose. As the Court says, the leadership of the Federal Republic of Yugoslavia, and President Milošević above all, were fully aware of the climate of deep seated hatred which reigned between the Bosnian Serbs and Muslims of the Srebrenica region (Judgment, paragraph 438). More specifically they were aware of the dire and deteriorating situation in Srebrenica in the first part of 1995.

11. Coming closer to the time of the atrocities, not just the leadership in Belgrade but also the wider international community was alerted to the deterioration of the security situation in Srebrenica by Security Council resolution 1004 (1995) adopted on 12 July 1995 under Chapter VII of the Charter. The Council expressed grave concern at the plight of the civilian population "in and around the safe area of Srebrenica". It demanded, with binding force, the withdrawal of the Bosnian Serb forces from the area and the allowing of unimpeded access for international humanitarian agencies to the area to alleviate the plight of the civilian population.

12. On the following day, 13 July, United Nations military observers reported that General Mladić had told them that there were several hundred bodies of dead Bosnian soldiers in one part of the enclave. There were other reports of murders and other atrocities that day. On that day the Chargé d'Affaires of Bosnia and Herzegovina in New York officially expressed his government's concern about the fate of detainees and fears of their execution in a letter to the Secretary-General. The 1999 Report provides this summary:

> "Thus, on 13 July, strong alarm was expressed at various levels that abuses might have been or were being committed against the men of Srebrenica, but none had been confirmed as having taken place at that time. Efforts were nevertheless focused at the highest levels to try to address the situation." (A/54/549, para. 359.)

Also on that day the Secretary-General's Special Envoy, Thorvald Stoltenberg, was given instructions on how he was to proceed with high level negotiations with the Bosnian Serbs and, if appropriate, with the authorities in Belgrade. Among other things he was to obtain commitments for humane treatment of the refugees and displaced persons. He was urged to co-ordinate with the Special Representative of the Secretary-General and the European Union negotiator, Carl Bildt, who was hopeful of being able to offer assistance through contacts with the authorities of the Federal Republic of Yugoslavia (*ibid.*, para. 360).

13. The mass executions began the next day, 14 July, and continued until 16 or 17 July. On 14 July Mr. Bildt met President Milošević in Belgrade:

> "According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war." (A/54/549, para. 372; the "public account" is in Carl Bildt, *Peace Journey: The Struggle for Peace in Bosnia* (1998), p. 61.)

(The meeting is referred to as a second meeting because Mr. Bildt had met President Milošević and General Mladić at the same place the previous week (*ibid.*, pp. 52-54).) Mr. Bildt also made a number of other demands as the 1999 Report records:

> "President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.
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> A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević's intervention, it appeared that an agreement in principle had been reached. It was decided that another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladić." (A/54/549, paras. 372-373.)

On the same day, 14 July, the Security Council had again convened and adopted a presidential statement expressing deep concern about the ongoing forced relocation of tens of thousands of civilians which it characterized as a clear violation of the rights of the civilian population.

> "The Council was 'especially concerned about reports that up to 4,000 men and boys had been forcibly removed by the Bosnian Serb party from the Srebrenica safe area'. It demanded that 'in conformity with internationally recognized standards of conduct and international law the Bosnian Serb party release them immediately, respect fully the rights of the civilian population of the Srebrenica safe area and other persons protected under international humanitarian law and permit access by the International Committee of the Red Cross'." (*Ibid.*, para. 374.)

14. On 15 July Mr. Bildt briefed senior international officials on the result of his meeting the previous day with President Milošević and General Mladić, who also joined the officials for a largely ceremonial meeting over lunch. The UNPROFOR Commander and General Mladić then met to finalize the details. At that point, while the international officials were aware of reports that grave human rights abuses might have been committed against the men and boys of Srebrenica, they were unaware that systematic executions had begun (*ibid.*, para. 375). The points of agreement on Srebrenica were as follows:

> "Full access to the area for UNHCR and ICRC;
>
> ICRC to have immediate access to 'prisoners of war' to assess their welfare, register them, and review procedures at Bosnian Serb reception centres in accordance with the Geneva Conventions;

> UNPROFOR requests for resupply of Srebrenica, via Belgrade, Ljubovija and Bratunac, to be submitted on 17 July;
>
> Dutchbat troops in Srebrenica to be free to leave with their equipment on 21 July or shortly thereafter via Bratunac (both the UNPROFOR Commander and Mladić to observe the move);
>
> UNPROFOR to organize immediate evacuation of injured persons from Potočari and Bratunac, including provision of ambulances; UNPROFOR presence, 'in one form or another' [was] agreed for 'key areas'." (A/54/549, para. 377.)

General Mladić plainly did not honour those agreements over the following days (*ibid.*, paras. 383-390).

15. Those agreements were of course between UNPROFOR and General Mladić on behalf of the Pale authorities. Their significance for me, however, is that they followed directly from the discussions and negotiations between President Milošević and General Mladić on the one hand and Mr. Bildt on the other. Given President Milošević's overall role in the Balkan wars and his knowledge, his specific relationship with General Mladić, and his involvement in the detail of the negotiations of 14 and 15 July, by that time he must have known of the change in plans made by the VRS command on 12 or 13 July and consequently he must have known that they had formed the intent to destroy in part the protected group. I am convinced that that knowledge of the Respondent is proved to the necessary standard stated by the Court in its Judgment (paragraph 209).

16. Accordingly, I conclude that the Respondent was complicit in the genocide committed at Srebrenica in July 1995 in breach of Article III *(e)* of the Genocide Convention.

(Signed) Kenneth KEITH.

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