# SEPARATE OPINION OF JUDGE GAJA

1. The Judgment rendered in 2007 on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*I.C.J. Reports 2007 (I)*, p. 43) concerned events that had occurred in Bosnia. It does not formally bind the Court in the present proceedings. However, it would be unreasonable for the Court to adopt a different approach to the interpretation and application of the Genocide Convention when considering events of a similar character which had taken place in the same years in nearby areas in the former Yugoslavia. Thus, it is quite understandable that the Court uses with regard to events in Croatia the same criteria contained in the 2007 Judgment on issues such as the definition of genocide, the material acts covered by this definition and the required mental element. The slight difference in the formulation of the rule on evidence in the present Judgment, which now specifies the need to make a "reasonable" inference of the intention of genocide, is not intended as a modification of the standard previously used (Judgment, para. 148).

It may be worth noting, however, that both the 2007 Judgment and the present Judgment use the same or a similar legal framework when considering issues relating to the responsibility of States for the commission of acts of genocide and the criminal responsibility of individuals for genocide. Certain aspects that are specific to State responsibility appear to be underrated and will be discussed in the following paragraphs.

2. One aspect concerns the *definition of genocide*. This may at first seem strange since Article II of the Genocide Convention applies to the commission of genocide both by individuals and by States. I agree with the Court's view that for States "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide" (*I.C.J. Reports 2007 (I)*, p. 113, para. 166). A State could hardly infringe an obligation to prevent genocide more directly than by itself committing genocide.

It is well known that, in order to define genocide, the statutes of the international criminal tribunals simply reproduce Article II of the Genocide Convention (Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY); Article 2 of the Statute of the International Criminal Tribunal for Rwanda (ICTR); Article 6 of the Rome Statute of the International Criminal Court (ICC)).

While it would seem logical to give to the definition of genocide the same meaning with regard to State responsibility and the criminal responsibility of individuals, there are reasons for the international criminal tri-

bunals to adopt a restrictive approach to the definition which are not applicable when one considers State responsibility.

According to Article 22 (2) of the ICC Statute, "[t]he definition of a crime shall be strictly construed" and "[i]n case of ambiguity . . . shall be interpreted in favour of the person being investigated, prosecuted or convicted". A similar approach, implying a "strict construction", was taken by a Trial Chamber of the ICTY in *Delalić* (Judgment of 16 November 1998, IT-96-21-T, para. 411). With regard to the definition of genocide, a Trial Chamber of the ICTR found in *Kayishema* that "if a doubt exists, for a matter of statutory interpretation, that doubt must be interpreted in favour of the accused" (Judgment of 21 May 1999, ICTR-95-1-T, para. 103).

A restrictive approach to the definition of genocide may also be found in the "Elements of Crimes", adopted by the Assembly of States Parties in order to "assist" the ICC in the interpretation and application of the relevant provisions of the Rome Statute (Art. 9). According to these Elements, for genocide to be committed it is necessary that "[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction". Since the adoption of the Elements of Crimes does not embody a "subsequent agreement between the parties regarding the interpretation" of the Genocide Convention according to Article 31, paragraph 3 *(a)*, of the Vienna Convention on the Law of Treaties, it does not affect the extent of State responsibility for genocide.

Moreover, unlike the Court's jurisdiction under Article IX of the Genocide Convention, the jurisdiction of international criminal tribunals extends to crimes against humanity and serious breaches of international humanitarian law. These crimes in part overlap with genocide and are generally easier to prove. This has caused the Prosecutor sometimes to refrain from charging genocide and also the tribunals to take a restrictive approach to finding that genocide had occurred.

It is noteworthy that in *Krstić*, one of the few instances where the ICTY found that genocide had been committed, the Appeals Chamber observed:

> "The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly." (Judgment of 19 April 2004, IT-98-33-A, para. 37.)

3. Determining the existence of the *mental element of genocide* may lead to different conclusions with regard to individuals and the State for which they may be acting.

The United Nations Commission of Inquiry on Darfur found that, while the Sudanese governmental authorities did not possess an intent to destroy an ethnic group in whole or in part, single individuals belonging to the Sudanese army or paramilitaries could have had that intent (Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, paras. 520-521). The reverse hypothesis may also occur. While it would be difficult to infer from the act of an individual his or her intent to target a substantial part of a group, a number of State organs or other individuals acting for a State may produce a pattern of conduct from which a governmental policy concerning the destruction of a group could be inferred. In relation to the events in Srebrenica, the Appeals Chamber of the ICTY stated in *Krstić* that:

> "The Trial Chamber found, and the Appeals Chamber endorses this finding, that the killing was engineered and supervised by some members of the Main Staff of the VRS. The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims." (Judgment of 19 April 2004, IT-98-33-A, para. 35; footnote omitted.)

Moreover, identifying the individuals who committed specific acts may be problematic and therefore impede prosecution. However, when the acting persons are at least identified as State organs or as acting for the State, a finding of State responsibility for genocide may be warranted.

In any case, establishing that an individual or organ committed certain acts with genocidal intent is not a precondition for finding that a State committed genocide. The following passage in the 2007 Judgment may contain some ambiguity, but does not suggest the existence of such a precondition. The Court only said that "if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred" (*I.C.J. Reports 2007 (I)*, p. 119, para. 179). The further developments contained in the present Judgment (paras. 128-129) on this issue do not fully remove the ambiguity, but also do not point to a precondition.

4. The main difference between international criminal responsibility and State responsibility for genocide concerns the *standard of proof*. In international criminal proceedings, as in criminal proceedings in general, the evidence against the accused is often required to be "beyond all reasonable doubt". This standard was set with regard to genocide by the Trial Chamber of the ICTR in *Akayesu* (Judgment of 2 September 1998, ICTR-96-4-T, para. 530) and in *Rutaganda* (Judgment of 6 December 1999, ICTR-96-3-T, para. 398) and by the Trial Chamber of the ICTY in *Jelisić* (Judgment of 14 December 1999, IT-95-10-T, para. 108). In the latter Judgment the Chamber also stated that "the benefit of the doubt must always go to the accused" *(ibid.)*.

With regard to the evidence relating to the intent to commit genocide, the 2007 Judgment of the Court used a similar approach. The Court found that:

> "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." (*I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373; see also Judgment, paras. 145 and 148.)

The Court went on to say that the "broad" proposition advanced by the applicant State (Bosnia and Herzegovina) concerning intent was "not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor" (*I.C.J. Reports 2007 (I)*, p. 197, para. 374).

In the 2007 Judgment a variety of expressions were used to describe the required standard of proof. The Court said that it had to be "fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established"; this also "applies to the proof of attribution for such acts" (*ibid.*, p. 129, para. 209; see also Judgment, paras. 178-179). With regard to a breach of the obligations "to prevent genocide and to punish and extradite persons charged with genocide", the Court observed that there was the need of "proof at a high level of certainty" (*I.C.J. Reports 2007 (I)*, p. 130, para. 210). The Court also found that one condition for the responsibility for complicity in genocide was not fulfilled

> "because it [was] not established *beyond any doubt* in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way" (*ibid.*, p. 218, para. 422; italics added).

In substance, although different wording was used, the Court applied the same standard of "beyond all reasonable doubt" that the ICTY and the ICTR apply with regard to individual crimes. This was confirmed by a remark made by President Higgins in her presentation in November 2007 of the Court's jurisprudence to the Sixth Committee of the General Assembly. After quoting paragraph 209 of the Judgment, she noted that:

> "There have been some curious comments by observers as to this being a 'higher' or 'lower' standard than 'beyond reasonable doubt'. It is simply a *comparable* standard, but employing terminology more appropriate to a civil, international law case." (Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 2 November 2007.)

One of the reasons for requiring such a standard of proof for issues of State responsibility was found by the Court in the "exceptional gravity" of the charges involving the commission of genocide (*I.C.J. Reports 2007 (I)*, p. 129, para. 209). The Court referred *(ibid.)* to the passage in the *Corfu Channel* Judgment where, in view of "allegations short of conclusive evidence" of a minefield having been laid by two Yugoslav vessels, the Court said: "A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here." (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 17.) Also with regard to the alleged breach of obligations to prevent genocide and to punish and extradite persons charged with genocide, the Court linked the standard of proof with the "seriousness of the allegation" (*I.C.J. Reports 2007 (I)*, p. 130, para. 210). The present Judgment adopts "the same standard of proof" (para. 179).

However, it would be difficult to explain why the seriousness of the alleged wrongful act and its connection with international crimes should make the establishment of international responsibility more difficult. As was pointed out by the Eritrea-Ethiopia Claims Commission in two of its decisions dated 1 July 2003:

> "The Commission does not accept any suggestion that, because some claims may involve allegations of potentially criminal individual conduct, it should apply an even higher standard of proof corresponding to that in individual criminal proceedings. The Commission is not a criminal tribunal assessing individual criminal responsibility. It must instead decide whether there have been breaches of international law based on normal principles of state responsibility. The possibility that particular findings may involve very serious matters does not

change the international law rules to be applied or fundamentally transform the quantum of evidence required." (*RIAA*, Vol. XXVI, p. 41, para. 47, and p. 88, para. 38.)

5. The difference in approach that should be taken with regard to State responsibility, on the one hand, and individual criminal responsibility, on the other, may not be very substantial. However, it is not insignificant. It may provide a greater opportunity for a State to assert before the Court a claim that another State committed genocide.

*(Signed)* Giorgio GAJA.