SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

The Duty to Prevent

Duty to prevent — Erga omnes *obligation based on international solidarity — Enduring duty of vigilance and co-operation applying to all States parties — International responsibility of States for omission — Concerted diplomatic action.*

1. In law, international responsibility for omission is recognized in order to safeguard the fundamental interests of the international community. Stipulating the obligation to prevent is part of an approach to international legal relations based on international or even global solidarity. This approach thus adds a new international legal relations dimension to the interpretation of legal relations. In paragraph 430, the Judgment describes the content of the obligation to prevent as one of means and not one of result as such, inasmuch as there is no guarantee of success. If the State party has the discretionary power to act as it deems most appropriate, the question is whether it is free to act or not to act as regards the duty to prevent laid down by the 1948 Convention, as opposed to the rules of general international law. Exceptionally, the State party is obliged to act and, in this case, passivity or indifference constitutes a breach of the obligation to prevent genocide. The silence of the Convention on the conditions for fulfilling that obligation confers on the State party the power to draw whatever conclusions it sees fit from the facts constituting the dispute. Yet the question is whether the failure to act can be regarded as a legitimate option under the treaty law concerned.

2. The 1948 Convention makes it an obligation on States parties to prevent the crime of genocide (see Judgment, para. 166). At the time, that stipulation in the Convention updated the requirements of positive international law in line with the requirements of universal morality and was justified by the universal nature of the jurisdictional mission: the universal conscience was directly challenged by the problems of breaches of the 1948 Convention at a time when most of the major players in world affairs were present at the scene of the catastrophe. Further, one aspect of that obligation appears to have been overlooked: the enduring nature of this duty, unlike that of the duty to punish; vigilance, exercised with discernment, must be constant, with a greater degree of interest if not of curiosity required during political or humanitarian crises. The Court had to point out, in the present case, that the duty to prevent applies to all the

States parties to the Convention. However, the content of this obligation must in reality be interpreted according to the particular situation of each State concerned. The Court's restriction of its analysis to the legal obligations of the Parties in the current proceedings alone cannot be interpreted as in some way qualifying or rendering extraneous the duty to prevent the crime of genocide contracted by the international community as a whole.

3. The account of the preparatory work for the 1948 Convention (Judgment, para. 164) shows that the attention of those involved was focused more on the obligation to punish the crime of genocide than on that to prevent it. This is explained by the historical and political circumstances obtaining immediately before and after the Second World War. In the general framework of international instruments in the immediate post-war period, the duty to prevent was essentially covered by the declaration of the rights and duties of States (A/RES/177 and A/RES/178 (II)). The present Judgment puts an end to any disputes of an ideological rather than a legal nature: the duty to prevent falls within the rules of positive law (Judgment, para. 165). Having asserted that principle, establishing its content is nonetheless no easy matter. The awkwardness of the description in paragraph 430 of the Judgment shows the difficulty of charting the features of this obligation.

4. The Judgment examines the failures in the duty to prevent the crime of genocide in terms of "due diligence" as regards the conduct and acts attributable to one State in particular; *mutatis mutandis*, the Court has analysed the alleged failures by studying individual conduct. From the standpoint of treaty responsibility in bilateral relations, a method of this kind is easily justified. On reflection, it might be queried whether such an approach is adequate to cover the whole range of duty relations under the 1948 Convention with respect to vigilance in a multilateral setting and, moreover, when dealing with the supreme international crime of genocide. If the international solidarity which underlies the duty to prevent genocide is to be ensured, it is hard to see the conventional obligation of this instrument as a series of bilateral relations between the States parties; the Convention would fail to meet its objective if it gave rise to a group which lacked a common understanding of the rules to be applied. This may explain why the duties established by the Convention have been characterized as *erga omnes* obligations "even without any conventional obligation" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). The binding nature of the obligation does not arise from the individual commitment of the State, but from the value attributed to that duty by the law.

5. The 1948 Convention undoubtedly represents a legal advance in two respects. First, it specifies an undertaking to prevent the crime of genocide, establishing the scope of States' discretionary powers through

the legal definition in Article II of acts that constitute genocide. Secondly, it creates an obligation of result in Article V, where it prescribes the legislation necessary to give effect to the Convention. But the initial undertaking raises difficulties in that the existence of certain acts set out in Article II creates a duty to take action. Likewise, seeking to categorize acts as those referred to in Article II is a delicate task to perform, since it involves a subjective and pejorative appraisal of the conduct of the State to which the acts are attributed, when the issue of genocide is a matter for multilateral co-operation. There is a great temptation to endorse, without discernment, the ethnic presuppositions that form the basis for constituting a State. In law, one consequence is clear: States may no longer neglect to gather data and information to account for their decisions where such acts are in issue. For practical reasons, this conclusion is inescapable. The undertaking of a State party is sanctioned by its treaty responsibility, in the sense that each State has had to anticipate the extent of its commitment and also the legal consequences that it would have to face in the event of default. We must not allow these expectations to be undermined by subjective and artificial categorization by third parties of the acts referred to in Article II, when all the Contracting Parties are subject to the same terms of the Convention.

6. For these reasons, however, one must humbly acknowledge the difficulties encountered by judges in gauging the reality of the threat or risk of genocide when an assessment is required. But the fact remains that such an assessment lies within the competence of each State party. Apart from recalling the obligation under general international law not to interfere in the internal affairs of States, the evaluation of the risks of genocide, in disputes before the International Court of Justice, essentially derives from the assessment produced by increasingly concerted diplomatic action. That is the purpose of the provisions of Article VIII and the diplomatic approach, thus illustrating the content of the duty to prevent. Judicial monitoring of the categorization of the acts entails the risk that judges may be led to substitute their analysis for that of the State authorities responsible for international relations.

(Signed) Raymond RANJEVA.