

DECLARATION OF JUDGE NOLTE

Jurisdiction prima facie under Article IX of the Genocide Convention — Difference between the present case and the Legality of Use of Force cases — Subject-matter of the Application of Ukraine does not pertain to the question whether the military operation by Russia amounts to genocide — Subject-matter of the Application concerns the question whether a military operation undertaken to prevent and punish an alleged genocide is in conformity with the Genocide Convention.

1. I agree with this Order. I write separately to underline one particular point. In the present case the Court has found that it has prima facie jurisdiction under Article IX of the Genocide Convention to order the suspension of military operations by way of a provisional measure. This decision is consistent with earlier decisions in which the Court found that it lacked such prima facie jurisdiction.

2. In 1999, the Federal Republic of Yugoslavia requested that the Court order the cessation of acts of use of force by certain member States of NATO (see e.g. *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, pp. 128-129, para. 7 and p. 131, para. 15). In those cases, however, neither the applicant State nor the respondent States stated before the Court that the use of force by the respondent States had the purpose of preventing an alleged genocide. In the present case, in contrast, the Russian Federation has made allegations that Ukraine is committing genocide and has affirmed that its “special military operation” serves the purpose of preventing genocide.

3. The earlier cases concerned an allegation by the requesting State that the States conducting the military operations were committing genocide by their use of force (*ibid.*, pp. 136-137, para. 35). The Court held that “the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention” (*ibid.*, p. 138, para. 40). Since it appeared, at that stage of the proceedings, that the military operations concerned did not entail genocidal intent, the Court was “not in a position to find . . . that the acts imputed . . . to the Respondent are capable of coming within the provisions of the Genocide Convention” (*ibid.*, p. 138, para. 41). Accordingly, the Court found that Article IX cannot “constitute a basis on which the jurisdiction of the Court could prima facie be founded” (*ibid.*).

4. Thus, in the earlier cases the applicant did not show that its request concerned acts of the respondent States that were “capable of coming within the provisions of the Genocide Convention”, whereas in the present case, the Applicant has demonstrated that the Respondent acted in a way “that is capable of coming within the provisions of the Genocide Convention” by making allegations that genocide is being committed by Ukraine and by undertaking a “special military operation” with the stated purpose of preventing genocide.

5. The subject-matter of the Application by the Federal Republic of Yugoslavia in 1999 was whether the use of force by the intervening States amounted to “genocide”. In contrast, in the present case, the subject-matter of the Application concerns the question whether the allegations of genocide and the military operations undertaken with the stated purpose of preventing and punishing genocide are in conformity with the Genocide Convention.

6. It is true that, in 1999, certain respondent States came close to justifying their use of force by stating that their actions were taken with the intent to prevent genocide (see *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, dissenting opinion of Vice-President Weeramantry, p. 184) and that certain of their officials made allegations of genocide in that context. However, such justifications were not the stated purpose of the military operations by the respondent States, nor was that purpose so perceived by the applicant State. That aspect was therefore not the subject-matter of the earlier cases before the Court.

7. In my view, the differences between the present case and the earlier cases are clear and sufficiently significant to justify that the Court has, in the present case, found prima facie jurisdiction based on Article IX of the Genocide Convention, which it did not in the earlier cases.

(Signed) Georg NOLTE.
