ORAL ARGUMENTS ON JURISDICTION OF THE COURT

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague,
on 5 January and 2 February 1973,
President Sir Muhammad Zafrulla Khan
presiding

THIRD PUBLIC SITTING (5 I 73, 10 a.m.)

Present: *President* Sir Muhammad Zafrulla KHAN; *Vice-President* AMMOUN; *Judges* Sir Gerald FITZMAURICE, PADILLA NERVO, FORSTER, GROS, BENGZON, PETRÉN, LACHS, ONYEAMA, DILLARD, IGNACIO-PINTO, MOROZOV, JIMÉNEZ DE ARÉCHAGA; *Registrar* AQUARONE.

Also present:

For the Government of the United Kingdom:

Mr. H. Steel, Legal Counsellor, Foreign and Commonwealth Office, *as Agent*;

Rt. Hon. Sir Peter Rawlinson, Q.C., M.P., Attorney-General,

Dr. D. W. Bowett, President of Queens' College, Cambridge, Member of the English Bar,

Professor D. H. N. Johnson, Professor of International and Air Law in the University of London, Member of the English Bar,

Mr. J. L. Simpson, Member of the English Bar,

Mr. G. Slynn, Member of the English Bar,

Mr. P. G. Langdon-Davies, Member of the English Bar, *as Counsel*;

Mr. M. G. de Winton, Assistant Solicitor, Law Officers' Department,

Mr. P. Pooley, Assistant Secretary, Ministry of Agriculture, Fisheries and Food,

Mr. G. W. P. Hart, Second Secretary, Foreign and Commonwealth Office, *as Advisers.*

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court meets today to examine the question of its jurisdiction to deal with a dispute between the United Kingdom of Great Britain and Northern Ireland and the Republic of Iceland, concerning the extension by the Government of Iceland of its fisheries jurisdiction. In these proceedings, instituted by Application [1] filed on 14 April 1972, the United Kingdom founds the jurisdiction of the Court on Article 36, paragraph 1, of the Court's Statute, and on an exchange of Notes between the Government of the United Kingdom and the Government of Iceland dated 11 March 1961. The Applicant asks the Court to declare that Iceland's claim to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland is without foundation in international law.

By an Order [2] dated 18 August 1972, the Court decided that the first pleadings should be addressed to the question of the jurisdiction of the Court to entertain the dispute. By the same Order, the Court fixed 13 October 1972 as the time-limit for the Memorial of the United Kingdom and 8 December 1972 as the time-limit for the Counter-Memorial of the Government of Iceland.

The Memorial [3] of the United Kingdom was duly filed within the time-limit fixed therefor. No Counter-Memorial has been filed by the Government of Iceland; the written proceedings being thus closed, the case is ready for hearing on the issue of jurisdiction. In a telegram [4] received in the Registry on 5 December 1972, the Minister for Foreign Affairs of Iceland reiterated that *no basis existed for the Court to exercise jurisdiction* in the case, and informed the Court that the position of the Government of Iceland was unchanged.

I note the presence in Court of the Agent and Counsel of the Government of the United Kingdom; the Court has not been notified of the appointment of any agent for the Government of Iceland, and I note that no representative of that Government is present in Court.

The Governments of Ecuador, the Federal Republic of Germany and Senegal have asked that the pleadings and annexed documents in this case should be made available to them in accordance with Article 44, paragraph 2, of the Rules of Court. The Parties having indicated that they had no objection, it was decided to accede to these requests.

In accordance with practice, the Court decided, with the consent of the Parties, that the pleadings and annexed documents so far filed in the case should be made accessible to the public also, pursuant to Article 44, paragraph 3, of the 1946 Rules of Court, with effect from the opening of the present oral proceedings. The Court further decided that a number of communications [5] addressed to the Court by the Government of Iceland should also be made accessible to the public at this time. The Parties have indicated that they have no objection to this course.

I declare the oral proceedings on the preliminary question of the Court's jurisdiction open.

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[1] See pp. 3-10, *supra*.
[2] *I.C.J. Reports 1972*, p. 181.
[3] See pp. 123-152, *supra*.
[4] **II**, p. 404.
[5] **II**, pp. 374, 388, 389, 399, 404 and 420.

ARGUMENT OF SIR PETER RAWLINSON

COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM

Mr. STEEL: May it please the Court, with the Court's permission I will ask the Attorney-General, Sir Peter Rawlinson, to present the oral submissions on behalf of the United Kingdom.

Sir Peter RAWLINSON: Mr. President and Judges of the International Court, it was on 1 August 1972 [1] that I had the honour to address the Court and on that occasion I spoke in support of the United Kingdom's request for the indication of interim measures of protection [2].

On 17 August 1972 this Court made an Order indicating the provisional measures which should be taken by the Parties pending the Court's final decision in the proceedings and, on 18 August, the Court made a further Order, directing that the first pleadings should be addressed to the question of the jurisdiction of the Court to entertain the dispute. As the Court will appreciate, it is in response to that Order that Her Majesty's Government, having delivered their Memorial on jurisdiction as ordered by the Court, appear today to support the contention that this Court has ample jurisdiction to hear and determine the dispute which has been brought before it. But, before I turn to the question of jurisdiction, the Court will wish to be informed about the events which have taken place since the indication of provisional measures in August.

Those provisional measures indicated by the Court made three requirements of the United Kingdom. The first requirement, which was under paragraph (1) *(a)*, was that the United Kingdom, like the Republic of Iceland, should ensure that no action of any kind should be taken which might aggravate or extend the dispute submitted to the Court. Her Majesty's Government have fully complied with this requirement. Moreover, they have done so notwithstanding serious difficulties caused by the Government of Iceland. The second requirement, under paragraph (1) *(b)* of the Order of 17 August, was that the United Kingdom, like the Republic of Iceland, should ensure that no action should be taken which might prejudice the rights of the other party in respect of the carrying out of whatever decision on the merits the Court may render. Her Majesty's Government have been careful to take no such action. The third requirement, under paragraph (1) *(e)* of the Order of 17 August, was that the United Kingdom should ensure that vessels registered in the United Kingdom should not take an annual catch of more than 170,000 metric tons of fish from the sea area of Iceland as defined by the International Council for the Exploration of the Sea as Area Va.

In pursuance of that requirement by the Court, Her Majesty's Government took statutory powers on 29 September. They came into effect on 30 October, and the full extent of those powers is described in the letter [3] of 19 December 1972 from the Agent of the United Kingdom to the Registrar of this Court. The powers taken by Her Majesty's Government ensure that the total catch for the year beginning 1 September 1972 will not exceed the 170,000 metric

[1] See p. 94, *supra*.
[2] See pp. 71-78, *supra*.
[3] II, p. 405.

tons indicated by the Court. Those statutory powers will, if necessary, be exercised: that limit will not be exceeded. I have the landing figures of fish from the Iceland area taken between 1 September and 14 December—figures are kept weekly—and they can be supplied to this Court if the Court so desires.

But the Government of Iceland have ignored the provisional measures indicated by the Court and, indeed, they have deliberately disobeyed them.

Paragraph (1) *(c)* of the Order of 17 August indicated that, pending the final decision of the Court, the Republic of Iceland should refrain from taking any measures to enforce their regulations of 14 July 1972 against vessels registered in the United Kingdom and engaged in fishing activity in the waters around Iceland outside the 12-mile fishing zone. I regret to inform the Court that the Government of Iceland have embarked upon a policy of harassing British vessels fishing in those waters. They have claimed that in doing so they are seeking to enforce their regulations of 14 July 1972.

While this harassment has not, in fact, seriously interfered with the fishing, it is contrary to good seamanship; it is dangerous; it is in flagrant disregard of the indication of the Court. Between 5 September and 23 November 1972 eight British vessels had their trawls cut by Icelandic gunboats. There was then a pause in those activities. But, in recent days, they have unfortunately been resumed.

Now, the cutting of trawls is a particularly dangerous form of harassment. The trawl wire, when it is in the water, is under great tension. When it is cut, it may whip back on to the deck of the trawler and cause deaths or serious injuries among the crew. It is only by good fortune that, so far, there has been no loss of life or serious injury on a British trawler.

An attempt to cut a trawl also involves disregard of the rules of navigation and good seamanship. Indeed, a collision did occur on 18 October 1972 between an Icelandic gunboat and a British trawler. There was another collision only last week, on 28 December; and it is again only fortune that prevented loss of life or serious personal injury.

Not only is this behaviour contrary to the express terms of paragraph (1) *(c)* of the Court's Order of 17 August 1972, it also constitutes a breach of paragraph (1) *(a)*, for it would be hard to conceive anything more calculated to aggravate the dispute referred to the Court.

These, Mr. President, are not, today, the appropriate proceedings in which to comment in detail on the disregard by the Government of Iceland of the Court's Order, and I do not propose at this stage to say more than that Her Majesty's Government, while for their part continuing to discharge their own obligations to the Court, must fully reserve their right to take all appropriate measures to protect the safety and the legitimate interests of their nationals.

Although the Government of Iceland have indulged in this campaign of harassment which involves danger to life and property, and although Iceland is not willing to appear before the Court, this has not prevented Her Majesty's Government from making efforts to reach an interim agreement. The interim agreement which Her Majesty's Government have sought to reach is an agreement which, without prejudicing the rights of either Party, would, however, create peaceful conditions in the seas around Iceland, pending the decision of the Court on the merits.

Thus, since the date of the Court's Order there have been further negotiations with the Government of Iceland. From 5 to 7 October talks were held in Reykjavik between officials. On 27 and 28 November the Minister of State

in the Foreign and Commonwealth Office, Lady Tweedsmuir, visited Reykjavik for talks at ministerial level.

The object of these negotiations on the part of Her Majesty's Government was to try to obtain an interim agreement which would be consistent with the Court's Order and which would implement it in practice. The agreement sought would have been interim in the sense that it would have covered the period until there was a substantive settlement or conclusion of the dispute—as, for example, by judgment of this Court. Her Majesty's Government were also prepared to consider any method of catch limitation which might be acceptable to both Parties and which would be compatible with the Order of the Court.

In these negotiations, Her Majesty's Government were prepared to accept that one-third of the waters around Iceland should be closed to British vessels at any one time. Her Majesty's Government were prepared to accept seasonal restrictions on trawling, on a non-discriminatory basis, in two areas where scientific advice showed a special need to avoid the nursery grounds of young fish; and to recognize that there might be a need for special arrangements for areas containing fixed gear.

The British fishing industry were prepared to give an assurance on the future composition, or tonnage, of the fishing fleet. However, the Icelandic Government proposed that half the area should be closed to British fishing at any one time. They wanted further extensive areas to be reserved throughout the year for the smaller Icelandic vessels. They pressed for the exclusion of *all* British freezer trawlers as well as trawlers over 180 feet or 750-800 tons in size. This would have excluded the most modern of the British fishing vessels. These vessels are modern, not only in the sense that they have an improved catching system but also in that they are safer and provide better working conditions for their crews.

These restrictions proposed by the Government of Iceland would have cut the British catch by at least 60 to 70 per cent., and for this reason they were inevitably unacceptable as the basis for an interim settlement.

Nonetheless, in a further attempt to reach a just agreement, Her Majesty's Government suggested a different approach. They proposed a 10 per cent. reduction in the actual fishing effort—that is to say the number of days fishing—by British vessels in the disputed waters. This proposal was intended to meet the twin requirements of the Icelandic Government, namely: first, for conservation; and, secondly, for coastal State preference; while yet preserving the livelihood of those British fishermen who have traditionally fished in the area.

The Icelandic Government have not accepted this proposal. They have offered no alternative.

In early December, the British Foreign and Commonwealth Secretary had further informal discussions with the Icelandic Foreign Minister, and we hope that, as a result, negotiations will be resumed—they have certainly not been broken off.

Meanwhile, however, I must advise the Court that, despite every effort on the part of Her Majesty's Government, our negotiations have not, so far, been successful.

I turn now, Mr. President, after that report, to the question before the Court today, the question of the Court's jurisdiction to entertain the substantive dispute.

As required by Article 32 of the Rules of Court, the Government of the United Kingdom specified, in their Application instituting proceedings of

14 April 1972, the provision on which they founded the jurisdiction of the Court. This provision is Article 36 (1) of the Statute of the Court, read in conjunction with the Exchange of Notes between the Government of the United Kingdom and the Government of Iceland of 11 March 1961. The Exchange of Notes is set out in full in Annex A to the Application instituting proceedings.

Article 36 (1) of the Statute, as, Mr. President, you and the Judges will recollect, provides that:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

The penultimate paragraph of the Exchange of Notes of 1961 between Her Majesty's Government and the Icelandic Government provides as follows:

> "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

I emphasize and repeat those last words: "and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice." Mr. President, that penultimate paragraph of the Exchange of Notes is a clear and unambiguous agreement between the United Kingdom and Icelandic Governments, which binds those Governments to refer the dispute which has arisen between them to the decision of the Court.

Nevertheless, Iceland has consistently made it clear that she is unwilling to accept the jurisdiction of the Court. She has appointed no Agent; taken no formal steps in the proceedings; she has filed no pleadings and she has made no appearance before the Court, although such steps would not necessarily amount to an acceptance of the jurisdiction. In particular, she has filed no Counter-Memorial in which she might place before the Court her reasoned case for challenging its jurisdiction. The only response of the Icelandic Government to the Court's Order of 18 August, which required Iceland to file a Counter-Memorial by 8 December, has been a telegram, sent by the Icelandic Foreign Minister on 4 December. That telegram is before the Court.

But, though the Government of Iceland have not seen fit to appear before this Court, nevertheless, through letter and telegram, they appear to be challenging the jurisdiction of the Court, and they have addressed to the Court a letter of 29 May 1972, a telegram of 28 July 1972, a telegram and letter of 11 August 1972 and the telegram of 4 December 1972 to which I have just referred [1].

All these were communications from the Minister for Foreign Affairs of Iceland to the Registrar of the Court. In so far as these communications, unsupported though they may be by any appearance, advance arguments, Her Majesty's Government will today answer them. For, since the Court must satisfy itself that it *has* jurisdiction, and since Iceland has not consented

[1] **II**, pp. 374, 388, 397, 398 and 404.

to appear before the Court to present these, or any other, arguments, Her Majesty's Government accept a duty to the Court fully to examine the Court's jurisdiction and to present Her Majesty's Government's submissions concerning the right and, indeed, the obligation in law, of this Court to exercise jurisdiction in this case.

I will, therefore, in due course, examine each of the Icelandic arguments in turn, and I will seek to show that each of them is without foundation or substance.

Mr. President, in the Order of 18 August 1972, the Court decided that the Parties should address their first pleadings "to the question of the jurisdiction of the Court to entertain the dispute". In the submission of Her Majesty's Government, that Order, expressed in the terms of that Order, has important implications for the present proceedings. For the decision immediately followed the Court's finding that "it is necessary [and I emphasize the word 'necessary'] to resolve first of all the question of the Court's jurisdiction". Thus, the issues on which the Court has invited submissions at the present stage are confined to those issues which might have been raised in a preliminary objection to the Court's jurisdiction. The Court is not, at present, concerned with objections to the United Kingdom's claim which do not bear on that question of jurisdiction. In particular, the Court is, at present, not concerned with issues which might have been raised by way of an objection to the admissibility of the claim. I say this, Mr. President, because the telegram from the Icelandic Government of 28 July 1972 (which is one of the communications referred to in the Order made by the Court on 18 August) contains a passage which might be taken to be an objection to the admissibility of the claim. For in that telegram the Foreign Minister of Iceland stated that "the Application of 14 April 1972 refers to the legal position of the two States and not to the economic position of certain private enterprises or other interests in one of those States". On 1 August I argued that this was intended to be either an objection to the admissibility of the request for the indication of interim measures or, perhaps, an objection to the admissibility of the claim itself, and I submitted that, on either view, it was misconceived and ill-founded.

If the passage I have quoted from the telegram of the Icelandic Foreign Minister was indeed directed at the request for the indication of interim measures, as I suggest it probably was, then the Court has already disposed of it. If, on the other hand, it was intended to relate to the substance of the claim in this case (although the context does not so suggest), Her Majesty's Government maintain that it is equally ill-founded. Her Majesty's Government are ready, if required, to make full submissions to the Court on that matter at the proper time. But, whatever the passage was intended to convey, it is clearly not an objection which goes to the Court's jurisdiction to entertain the dispute. It is therefore outside the scope of the present proceedings. I have referred to it solely because I consider it my duty to explain to the Court the attitude of Her Majesty's Government to the various matters which are raised in the communications from the Government of Iceland that were mentioned in the Order made by the Court on 18 August, even though I regard those points as strictly irrelevant—and especially irrelevant since the Government of Iceland have not even appeared before the Court to clarify their intentions.

I turn now to the substance of the question of jurisdiction.

It is settled law that "the Court's jurisdiction depends on the will of the parties. The Court is always competent once the latter have accepted its

jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it." This principle, which the Court will recognize, was stated by the Permanent Court of International Justice in the *Minority Schools* case in 1928 (*Series A, No. 15*, p. 22) and was repeated by the same Court in the *Chorzów Factory (Merits)* case in the same year (*Series A, No. 17*, p. 37). The present Court has asserted the same principle, for example, in the *Monetary Gold* case, *Preliminary Objections* (*I.C.J. Reports 1954*, p. 19 at p. 32) where it stated:

> "The Court cannot decide such a dispute without the consent of Albania . . . To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."

But this principle that the Court's jurisdiction depends upon consent must be interpreted in the light of the Court's settled jurisprudence. This Court has consistently held that once consent has been freely given, it cannot as freely be withdrawn. Indeed, in one sense, that must be a truism since, if it were otherwise, any State party who had originally given consent, but who subsequently feared examination of a dispute by this Court, could withdraw consent, and its objection to the jurisdiction would have to be upheld. No Court, I would submit with great respect, let alone this Court, could or would tolerate such conditional acceptance of its authority.

Even in a less literal sense, there have been many decisions of this Court which demonstrate that a State which has clearly and definitively consented to submit to the Court's jurisdiction cannot subsequently retract that consent, merely because it finds it no longer convenient. And it matters not whether that purported retraction takes place shortly after the original consent or many years later. An example of the general principle is the *Corfu Channel* case, *Preliminary Objection* (*I.C.J. Reports 1948*, p. 15). In that case, after the United Kingdom had unilaterally initiated proceedings, the Deputy Foreign Minister of Albania wrote to the Court on 2 July 1947 to say that the Albanian Government were "prepared . . . to appear before the Court". In the light of that letter, the Court refused to uphold a subsequent preliminary objection by the Albanian Government which was filed on 9 December 1947 and which sought to argue that the case could not proceed on the basis of the Court's compulsory jurisdiction.

The Court held that "the letter of 2 July [that is, the letter indicating that the Albanian Government were prepared to appear before the Court] constitutes a voluntary and indisputable acceptance of the Court's jurisdiction" (*I.C.J. Reports 1948*, p. 27) and it refused to allow that acceptance to be withdrawn.

A further authority is the *Nottebohm* case, *Preliminary Objection* (*I.C.J. Reports 1953*, p. 111). There, as the Court will recollect, Guatemala sought to argue that the Court lacked jurisdiction in respect of proceedings instituted by Liechtenstein on 17 December 1951, since the Guatemalan declaration accepting the jurisdiction of the Court, made in 1947, expired on 26 January 1952. The Court rejected this contention and it may seem obvious that it should have done so; but the attitude which this Court assumed with respect to the Guatemalan contention is relevant. Guatemala relied not merely on the formal position that her declaration had expired, but also on the more general argument that her acceptance of the jurisdiction of the Court was:

". . . not in an absolute and general form, since this would have implied an indefinite submission to the detriment of its sovereignty and not in accordance with its interest, if by reason of unforeseen circumstances the international situation changed". (*I.C.J. Reports 1953*, pp. 114-115.)

Guatemala further argued that the jurisdiction had been accepted by the Government of Guatemala:

". . . for a period sufficiently long to enable it, during this period, to elucidate and settle legal disputes which had arisen or which might arise, and sufficiently short to avoid the indefinite prolongation of a judgment or the submission of future questions the genesis and circumstances of which could not be foreseen and would affect future governments and perhaps future generations of Guatemalans". (*I.C.J. Reports 1953*, p. 115.)

Finally, Guatemala argued that it would be contrary to her own domestic law for her to appear before the Court and contest the Liechtenstein claim.

The Guatemalan declaration was made under the second paragraph of Article 36 of the Statute of the Court. In rejecting Guatemala's contention, the Court applied the sixth paragraph of the same Article, which provides that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court". The Court rejected the view that the wide power given to it in paragraph 6 of Article 36 of the Statute is confined to disputes concerning jurisdiction in respect of the application of paragraph 2 of Article 36. It went on to say:

"Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognised, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction". (*I.C.J. Reports 1953*, p. 119.)

What then, Mr. President, must be concluded from the Judgment in that case? It is that it is quite fallacious to assume that a consent to the jurisdiction can be withdrawn at will, on the assertion that a State's vital interests or sovereignty override legal commitments under a compromissory clause.

Both the *Corfu Channel* case and the *Nottebohm* case involved situations where the consent had been given only a relatively short time before it was sought to be withdrawn or repudiated; but there have been other cases where the Court has accepted jurisdiction on the basis of a consent given many years before the institution of the proceedings and where, though the efficacy of that consent was called in question, the mere passage of time was never accepted as a valid objection to its continuing operation. Thus in the *Ambatielos* case (*I.C.J. Reports 1952*, p. 28) the consent on which jurisdiction was founded was given partly in 1926 and partly as far back as 1886. Similarly in the *Barcelona Traction* case, *Preliminary Objections* (*I.C.J. Reports 1964*, p. 6), jurisdiction was found to exist in 1964 on the basis of consent given in a treaty concluded in 1927: and again in the *South West Africa* case (*I.C.J. Reports 1962*, p. 319) jurisdiction was held to exist in 1962 on the basis of a mandate created in 1920.

Her Majesty's Government do not claim that compromissory clauses

should be interpreted with bias in favour of jurisdiction. *Boni judicis ampliare jurisdictionem* may be, to some, an attractive maxim, but it is not good law. Her Majesty's Government claim no more, but no less, than that, by applying the normal rules of treaty interpretation, the Court should seek to discover whether in the circumstances that have arisen it was the intention of the Parties to confer jurisdiction upon the Court.

In the *Chorzów Factory* case (*P.C.I.J., Series A, No. 9*, p. 32) which Her Majesty's Government have cited in paragraph 3 of their Memorial, the Permanent Court said: "When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it". The Court in that case made it clear that, where the force of the arguments militating in favour of jurisdiction is preponderant, the Court will not allow itself to be deflected from its duty merely because it may be possible to conjure up a doubt affecting jurisdiction. That is very apposite to the case at present before this Court, for it is plain that by virtue of the normal rules relating to the application and interpretation of treaties, the Court is entitled to exercise jurisdiction in the present case; and that the arguments in favour of jurisdiction are preponderant, indeed overwhelming.

May I remind the Court once again of the facts? As was explained in paragraph 4 of the United Kingdom Memorial, whether or not the Court has jurisdiction in this case (and that is all with which the Court is at present concerned) depends on the answers to three questions:

> First: was the exchange of Notes of 11 March 1961 a treaty or convention in force between the Parties on 14 April 1972?
>
> Second: was there on 14 April 1972 a dispute between the two Parties?
>
> Third: did that dispute, if it existed, relate to the extension of fisheries jurisdiction around Iceland?

I repeat again the key words in that penultimate paragraph of the Exchange of Notes of 1961. Those words (and they are, I repeat, the key words):

> "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

Her Majesty's Government do not complain, Mr. President, that the Icelandic Government have continued to work for the implementation of the Althing Resolution of 5 May 1959, nor does Her Majesty's Government complain of the notice given by the Icelandic Government in regard to the proposed extension of their fisheries jurisdiction. In the latter respect, at least, the Icelandic Government pointedly has kept within the terms of the Exchange of Notes.

Her Majesty's Government's complaint is that the Icelandic Government's purported implementation of the Althing Resolution, as indicated in their aide-mémoire of 24 February 1972 (which is, for reference, Annex H to the United Kingdom Application) and as set out in further detail in their Regulations which were issued on 14 July 1972 (Annex A to the United Kingdom's request for the indication of interim measures of protection) violates the principles of international law which the Government of Iceland is under a duty to observe. That is the United Kingdom claim on the merits.

As paragraph 6 of the United Kingdom Memorial recites, it is only in regard to the first of those three questions that there ever has been, or appears now to be, a controversy between the Parties. It is surely, and sadly, not open to question that there is a dispute between the Parties, and that this dispute relates to the extension of fisheries jurisdiction around Iceland. That then deals with the second and third of the questions. So I need, therefore, only concern the Court with the first of the three questions, namely was the Exchange of Notes of 11 March 1961 a treaty or convention in force between the Parties on 14 April 1972?

I propose, and I hope that it will be for the convenience of the Court, first to review the negotiations between the Parties leading to the Exchange of Notes in 1961 and, secondly, to examine the terms actually used by the Parties, in order to demonstrate to the Court that the intention to confer jurisdiction was manifest both in the course of the negotiations and in the terms of the agreement which they reached. Finally, I propose to deal with the contentions put forward by the Government of Iceland in their apparent endeavour to show that the agreement either never was, or is not now, valid and that they are not bound to submit to the jurisdiction of this Court.

So then, Mr. President, I turn to the negotiations between the Parties in 1960 and 1961 which led up to the Exchange of Notes.

When the Second United Nations Conference on the Law of the Sea in 1960 failed to reach agreement on a general rule for fishing limits, negotiations between the United Kingdom and Iceland began in October 1960. The Icelandic policy, revealed at an early stage in the negotiations, was essentially twofold. First, to secure recognition of a 12-mile fishery limit and, secondly, to advance further the Icelandic claim to the fishery resources of the continental shelf. This was the policy reaffirmed by the Althing in its Resolution of 5 May 1959.

It was a policy which inevitably encountered legal difficulties. For Iceland was bound to act in accordance with international law. Yet the two Geneva Conferences of 1958 and 1960 had both failed to adopt a 12-mile fishery limit and, in the Continental Shelf Convention, had expressly rejected the coastal State's claim to fishery resources above the shelf.

Not surprisingly, therefore, it soon became apparent in the negotiations that while Her Majesty's Government were prepared to concede to Iceland a 12-mile fishery limit, subject to a phasing-out arrangement, Her Majesty's Government were not prepared to concede that international law permitted any exclusive claim to fisheries outside the 12-mile limit. It was, therefore, clear that some assurance would be needed that the Icelandic Government would not seek to exclude British vessels from any of the waters outside 12 miles, unless there was to be some radical change in the present general rule of international law.

The leader of the British delegation, Sir Patrick Reilly, made it clear very early in the negotiations that an assurance on this point was essential. So, from the very outset of the negotiations, a satisfactory assurance against a further unilateral extension of limits beyond 12 miles was regarded by Her Majesty's Government as fundamental to the whole agreement. It was a *sine qua non* of Her Majesty's Government's consent to the agreement.

Iceland, for its part, wished to reserve the right to extend its fisheries jurisdiction in the future "in conformity with international law". That was the phrase used in the Icelandic Memorandum of 28 October 1960, as is set out in the United Kingdom's Memorial in this case (para. 23).

Let it be remembered that Iceland itself, in 1960, proposed that any such

extension would be based either on agreement or on an arbitral award in favour of such an extension. Thus, although Iceland was not prepared to bind itself indefinitely to a 12-mile limit—and this much was certainly implicit in the Althing Resolution of 1959—Iceland did concede in 1960 that any extension would have to be in conformity with international law and, if disputed, subject to arbitration. Iceland made no claim to a purely unilateral right of extension.

In the opinion of Her Majesty's Government at that time, the Icelandic formula referring to arbitration was unsatisfactory as an assurance. However, given that Iceland made no claim to a right of unilateral extension, the problem was simply that of finding a better formula which would allow Her Majesty's Government to test the validity of any future Icelandic claim under international law.

So, first, Her Majesty's Government suggested that the validity of any rule permitting an extension beyond 12 miles would have to be recognized in either a bilateral agreement or a general, multilateral agreement. To this Iceland made the objection that allowance should be made for the possibility of applying customary international law, so that Iceland could take advantage of a change in customary international law. So, gradually through 1960, the Parties moved towards agreement that it would be best to have the International Court of Justice determine whether any new rule of law had emerged which would permit Iceland to extend her fisheries jurisdiction beyond 12 miles. And on 4 November 1960 the Parties agreed to this.

Thereupon the Icelandic representative, though still expressing a preference for arbitration, stated that he could accept the formula proposed by Her Majesty's Government. This formula contained the crucial phrase: "Any dispute as to whether such a rule exists may be referred, at the request of either party, to the International Court of Justice" (Memorial, para. 25). This, then, was the safeguard, the assurance, which made it possible for Her Majesty's Government to agree to the inclusion in the agreement of a reference to the Althing Resolution of 5 May 1959. Indeed, with this assurance there was no reason to oppose such a reference, for Iceland could extend its jurisdiction only in accordance with international law and, in the event of a dispute, this Court was to be the judge.

At the meeting on 2 December 1960, the Icelandic Foreign Minister stated that "there did not seem to be any real differences of opinion between the two sides" (Memorial, para. 27). He was referring specifically to what Sir Patrick Reilly had described as "the key problem", and what I have described as the *sine qua non* of Her Majesty's Government's consent to the agreement, namely the assurance over any future extensions beyond 12 miles.

The Icelandic Foreign Minister affirmed on 2 December 1960 that Iceland would base any future action on international law and that Iceland was willing to submit any dispute to the International Court. Apart from further making it clear that reference to the Court could be by unilateral application, the Parties had thus arrived at a consensus on the substance of the assurance.

In the series of meetings which began in Paris on 17 December 1960, the Foreign Minister of Iceland gave a categorical assurance that:

> ". . . the Icelandic Government would be able to give a firm assurance that they would not attempt to extend beyond 12 miles calculated from present baselines otherwise than with the agreement of the International Court" (Memorial, para. 38).

All that remained then was for Her Majesty's Government to insist that this

assurance should be embodied in an agreement, formally registered with the United Nations Secretariat under Article 102 of the Charter, so as to ensure that Her Majesty's Government could invoke the agreement before this Court. And that, too, was done. The terms were embodied in the Exchange of Notes of 11 March 1961 and this was registered with the Secretariat by the Government of Iceland.

That, then, Mr. President, is shortly the history of the negotiations in 1960 which led to the agreement embodied in the Exchange of Notes of 11 March 1961.

May I then analyse that agreement which both Governments had solemnly made and solemnly registered? The meaning of the compromissory clause is abundantly clear. The Parties were in complete agreement on two basic propositions.

First, after the three years' transitional period Iceland might contemplate a further extension of its fisheries jurisdiction, but would only make such an extension in conformity with international law. The statement in the Exchange of Notes, if I may remind the Court again, was:

> "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland . . ." (Application, Annex A).

That was clear notice that Iceland might contemplate a further extension, for the Althing Resolution spoke of seeking recognition of Iceland's right to the entire continental shelf. This could only be a statement of future policy. The possibility of an extension lay only in the future precisely because the two Geneva Conferences of 1958 and 1960 had refused to recognize that any rule existed which would have permitted Iceland to extend her jurisdiction beyond 12 miles at that time. It was also commpn ground that any extension would have to be in conformity with international law. This accords with statements repeatedly made in the negotiations by representatives of both Parties and it must be correct as a matter of principle, for no State can assert a jurisdiction over areas of the high seas except in conformity with international law. Nor do I believe, Mr. President, that the Government of Iceland intended at that time to do otherwise than act in accordance with international law.

The second of the basic and agreed propositions was that the question whether some new rule of law had emerged so as to permit an extension beyond 12 miles would, if disputed by Her Majesty's Government, be settled by the International Court of Justice. The terms used in the agreement between the Parties are definite and clear. They leave no room for ambiguity. It is, therefore, in my submission, extraordinary that Iceland should now seek to maintain that the Court has no jurisdiction.

The Court adjourned from 11 a.m. to 11.25 a.m.

Mr. President, Members of the Court, the Government of Iceland apparently challenge the jurisdiction of the Court, and they seek to justify that challenge by arguments used in their messages to this Court to which I have already referred. May I then remind the Court of what appear to be those arguments that are put forward by the Government of Iceland? They are set out most fully in their letter to this Court dated 29 May 1972. I will go through that letter of 29 May 1972, first culling from it what seems to be the main Icelandic arguments, and then countering those arguments in detail.

On the first page of that letter of 29 May 1972, reference is made to "the changed circumstances resulting from the ever increasing exploitation of the fishery resources in the seas surrounding Iceland". This alleged increasing exploitation is further alleged to entail, for the Icelandic people, a danger which "necessitates further control by the Government of Iceland, the only coastal State concerned".

Later in that letter it is stated that—

> "*The 1961 Exchange of Notes took place under extremely difficult* circumstances, when the British Royal Navy had been using force to oppose the 12-mile fishery limit established by the Icelandic Government in 1958."

From that, it appears that the Icelandic Government may now be asserting that the 1961 Exchange of Notes was void *ab initio* for duress or, to borrow the terminology of Article 52 of the Vienna Convention on the Law of Treaties, for "coercion of a State by the threat or use of force".

I pass on from that without comment at this stage, but I assure the Court that I shall return to this serious allegation.

Now that particular Icelandic argument is, however, merged with another. This appears to be that, although the 1961 Exchange of Notes may have been valid initially and for certain purposes, it was, for one reason or another, intended to be very limited both in its objectives and in its duration. Thus the letter goes on to assert that the Exchange of Notes "constituted the settlement of that dispute but the agreement it recorded was not of a permanent nature". The reference in the letter to "that dispute" is presumably meant to be a reference to the dispute arising from the extension of the Icelandic fishery limits to 12 miles in 1958.

Next, it is claimed that, under the 1961 agreement, Iceland undertook to give the United Kingdom Government six months' notice of any further extension of its limits in furtherance of the Althing Resolution of 5 May 1959, and the implication here is, apparently, that this was in fact the *only* undertaking laid upon Iceland under the Exchange of Notes. Moreover, it is suggested that even this limited obligation bound the Icelandic Government only if it should "further extend the limits immediately or in the near future".

The argument that the 1961 Exchange of Notes was "not of a permanent nature" appears then to be merged into a much more general proposition, namely that "an undertaking for judicial settlement cannot be considered to be of a permanent nature". This is followed by the observation that "there *is nothing . . . in any general rule of contemporary international law to justify* any other view". I would say here, in parenthesis, Mr. President, there can be no doubt that if the suggestion is that all undertakings for judicial settlements are to be regarded as intrinsically short-lived and ephemeral, this would undermine the functions and jurisdiction of this Court as the principal judicial organ of the United Nations. However, the Icelandic Government do not support this view with any authority. So far from there being nothing in contemporary international law "to justify any other view", as it is expressed in the lettter, I know of nothing in contemporary international law which justifies the view there being put forward by the Government of Iceland.

To return then to the letter of 29 May 1972, it later suggests that the 1961 Exchange of Notes was no longer in force because "the object and purpose

of the 1961 Agreement had been fully achieved" and also that, since "the vital interests of the people of Iceland are involved", the Government of Iceland are not willing to confer jurisdiction upon the Court in this case, or indeed in *any* case involving the extent of the fishery limits of Iceland.

Now, attached to that letter of 29 May 1972 [1] were five Annexes, as well as a copy of the Memorandum which was entitled *Fisheries Jurisdiction in Iceland* and which was issued by the Ministry for Foreign Affairs of Iceland in February 1972. The Court will find some of these same arguments put forward in the first and second of the Annexes, that is to say, the Government of Iceland's aide-mémoire of 31 August 1971, and their aide-mémoire of 24 February 1972.

In the fifth Annex, that is, the Resolution adopted by the Althing on 15 February 1972, the Court will there find further reference to the arguments based on "vital interests" and "changed circumstances" as well as the statement that it is "the fundamental policy of the Icelandic people that the continental shelf of Iceland and the superjacent waters are within the jurisdiction of Iceland".

Finally, in the Icelandic Memorandum entitled *Fisheries Jurisdiction in Iceland*, which Her Majesty's Government had already put before the Court as Enclosure 2 to Annex H of our Application, there appears, on pages 26, 27, 52 and 55 suggestions that the fisheries off the coast of a State come under its exclusive sovereign jurisdiction in such a way as to *override* any express obligation of that State to submit disputes concerning them to international jurisdiction.

Well, these then, Mr. President, appear to be the contentions of the Icelandic Government. In the absence of their representative, and in the exercise of what I believe to be my duty, I have recited them to the Court. I shall now seek to demonstrate that none of them has any validity.

First, there is the argument, contained in the letter addressed to the Registrar of the Court by the Foreign Minister of Iceland on 29 May 1972, to the effect that the compromissory clause providing for reference to the Court was intended to apply only where Iceland attempted to extend its jurisdiction without giving the required six months' notice. But this is wholly inconsistent with the plain words used. It was not the intention of the parties. That requirement of six months' notice was inserted to allow Her Majesty's Government to file an application to the Court before any claim was actually implemented by Iceland. That clause was inserted in default of a firm commitment by Iceland not to implement any extension before Her Majesty's Government could refer a dispute to the Court. It was designed as an alternative to such a commitment. It was in no sense conceived as an alternative to reference to the Court. This argument by Iceland has no conceivable merit.

Second, there is the argument that the Exchange of Notes has fulfilled its purpose. This is stated as the Icelandic view in the two aide-mémoire of 31 August 1971, and 21 February 1972, and repeated in the letter of 29 May 1972. But this is only true of the transitional arrangements permitting British vessels to fish in areas within 12 miles for a period of three years. It is certainly not true of the agreement as a whole.

The Court will recall that the origin of such transitional arrangements lay in the formula canvassed at the Geneva Conference of 1960. Under that

[1] II, p. 374-377.

formula, a coastal State would have been entitled to claim a territorial sea of six miles and, beyond that, fisheries jurisdiction in a further six-mile zone, subject to a phasing-out period during which foreign fishing would have continued in that outer six-mile zone. The idea was to give time for adjustment to the foreign fishery interests.

But all this was only one part of the agreement between the Parties. For the Exchange of Notes of 1961 between Her Majesty's Government and the Government of Iceland embodied agreement on four main points. I propose to refer to them in the order which the Icelandic Government took when the Exchange of Notes was submitted to the Althing for their approval on 28 February 1961. Their memorandum, for this purpose, is set out in Annex I to the United Kingdom Memorial. The four main points were: first, agreement on the 12-mile fishery limit; second, agreement on new baselines; third, agreement on transitional arrangements for a period of three years; and fourth, agreement on the assurance formula so as to provide for adjudication by the Court on any future contested extension beyond 12 miles.

Now, whilst the third of these four points (that is, the transitional arrangements) has certainly been fulfilled—because it was transitional arrangements for a period of three years—the other three points remain a matter of agreement, binding on Iceland and of continuing benefit to both Parties. So, the argument, or any argument, by Iceland that the whole agreement has fulfilled its purpose, is devoid of substance.

Third, there is the suggestion, also contained in the letter of 29 May, that the agreement was not of a permanent nature and, by implication, that therefore Iceland can unilaterally terminate the agreement.

I must emphasize, Mr. President, that Her Majesty's Government does not regard this agreement as one in perpetuity; but that does not concede that the agreement may be terminated unilaterally—and for the very obvious reason that the Parties specifically agreed upon a means whereby the agreement could be brought to an end. The Parties clearly envisaged, first, the possibility that Iceland might in the future claim a fisheries jurisdiction beyond 12 miles and, second, in that event, that the legality of the claim could be either conceded by Her Majesty's Government or, if not, referred to the Court whose decision Her Majesty's Government would be bound to accept. That was to be the method of termination.

The compromissory clause was, in effect, an express clause providing for termination. How then can it be said with any validity that there is an implied right of unilateral termination? In my submission, an express termination clause must exclude any implied right of unilateral termination. It would indeed be remarkable if, in a treaty which provided for termination through the operation of a compromissory clause, a party were able to avoid the obligations under that compromissory clause by implying a right of unilateral termination.

The whole presumption of international law is against any implied right of unilateral termination, and this is amply illustrated by Article 56 of the Vienna Convention on the Law of Treaties, which states in clear terms:

> "1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal . . ."

To that clear proposition, which in my submission is declaratory of existing customary law, the Vienna Convention provided only two exceptions. They are:

". . . unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty."

This very stringent limitation of any implied right of termination was necessary to preserve that most fundamental of norms, *pacta sunt servanda*.

A study of the successive reports of the Rapporteurs of the International Law Commission, leading up to the Commentary of the Commission itself in submitting its final report to the General Assembly, reveals with what care the general presumption against an implied right of termination was maintained. The Commission's Commentary stated:

> ". . . a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal." (Draft articles of the International Law Commission, *United Nations Conference on the Law of Treaties*, First and Second Sessions, Vienna, *Official Records*, p. 71; para. 5 of commentary to Article 53.)

The record shows, Mr. President, conclusively that the Parties never implied nor intended any unilateral right of termination. If they had implied or intended such a right, the insistence of Her Majesty's Government on the assurance formula would have been otiose and wholly without point, for the assurance would have been completely nullified.

Nor does the Icelandic argument gain in cogency by severing the compromissory clause from the remainder of the agreement and suggesting that a right to terminate unilaterally be implied as to the compromissory clause. For that clause—the compromissory clause—was envisaged as fundamental to the whole agreement; without it there would have been no agreement. Such a fundamental clause is incapable of severance. Moreover, since the compromissory clause was the agreed mode of termination, it is impossible to make that clause subject to an implied right of unilateral termination, for this would make the compromissory clause worthless.

Thus, the Parties cannot have intended to allow unilateral termination; nor can a right of unilateral termination be implied from the nature of the treaty. The history of the negotiations and the existence and purpose of the compromissory clause combine to show that the Parties intended exactly the opposite.

To insist that there can be no implied right to terminate a treaty where that treaty provides some other, agreed, mode of termination is, in the submission of Her Majesty's Government, consistent, first, not only with established international law, but also, secondly, with the jurisprudence of this Court.

In the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council*, Pakistan pleaded the rule, which had been approved by the Court in the *North Sea Continental Shelf* cases,

> ". . . according to which, when an agreement or other instrument itself provides for the way in which a given thing is to be done, it must be done in that way or not at all" (*I.C.J. Reports 1972*, p. 68).

I repeat: ". . . it must be done in that way or not at all." That principle is particularly apposite to the case now before the Court.

The Exchange of Notes provided a specific method by which any extension of fisheries jurisdiction by Iceland, and any dispute arising therefrom, should be tested. It was to be tested by reference to this Court; it was to be decided by judgment of this Court. Iceland is not free to choose another method. Iceland is not free to choose unilateral termination. Iceland must defer to the judgment and the jurisdiction of this Court. Especially where a jurisdictional clause—or compromissory clause—is in question, to imply a right of unilateral termination must by wholly unacceptable.

I refer again to the Judgment in the case I have just cited, the *Appeal Relating to the Jurisdiction of the ICAO Council*. The Court there referred to the ". . . contention . . . that questions that prima facie may involve a given treaty, and if so would be within the scope of its jurisdictional clause, could be removed therefrom at a stroke by a unilateral declaration that the treaty was no longer operative" (*ibid.*, p. 64). But this is precisely analagous to Iceland's contention. The Court rejected such a contention in a passage memorable—if I may say so, with respect—for its decisiveness:

> "The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension,—whereas of course it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon. Such a result, destructive of the whole object of adjudicability, would be unacceptable." (*Ibid.*, pp. 64-65.)

The submission of Her Majesty's Government is therefore that the Exchange of Notes of 1961 embodied an agreement which is certain and definite. That agreement was that, first, if, in the future, Iceland should seek to extend its fisheries jurisdiction beyond 12 miles, and if Her Majesty's Government contested the legality of that claim under international law as it stood at the moment of that claim, then, secondly, either Party could apply to the Court to have the legality of the claim tested. This is precisely the situation which has arisen. The Parties are presented with exactly the situation in which both envisaged that this Court was to have jurisdiction. Her Majesty's Government submit that this is the only interpretation which can be validly given to this agreement.

I turn now to arguments of a different kind, by which Iceland appears to be seeking either: first, to deny the validity of the agreement on the ground that it was void *ab initio*; or, secondly, to terminate the agreement by reference to grounds of nullity or termination recognized in general international law.

In Her Majesty's Government's Memorial, the Court will recognize that these arguments are classified as follows: first, that the Exchange of Notes of 1961 was void for duress; second, that the Exchange of Notes of 1961 had lapsed owing to a fundamental change of circumstances; and third, that the Exchange of Notes of 1961 had lapsed or had been validly terminated by reason of the development of a new peremptory rule permitting coastal States to assert exclusive fishing rights over the waters above their continental shelves, the so-called *jus cogens*. I shall follow, in my submissions, that classification.

Since these contentions have been examined fully in the Memorial, I can be brief.

The first and second of these Icelandic contentions—that is, "void for duress" or "lapsed owing to fundamental change of circumstances"—both involve questions of fact, and even questions of opinion. As to these, while it may be in order for a respondent to address to the Court communications such as the Government of Iceland have done in the present case, without appointing an Agent, without taking part in the proceedings, the Court should surely be cautious of giving them the same value as it would to written and oral pleadings made before the Court.

I give an example, Mr. President. The Government of Iceland have alleged that during the period of the negotiations leading up to the Exchange of Notes of 1961 "the British Royal Navy had been using force to oppose the 12-mile fishery limit established by the Icelandic Government in 1958". Now that is a serious charge. No Agent, no Law Officer, no counsel comes before you to make it. No evidence is proffered in support of it.

I submit that this Court should place some limit upon the admissibility of assertions made, from afar, by a Government which is not prepared openly to substantiate its allegations before the Court.

But it is not upon procedural grounds that Her Majesty's Government refute those Icelandic charges. The evidence recited in Her Majesty's Government's Memorial shows conclusively that force was neither used nor threatened to procure the Exchange of Notes of 1961, and that, so far as the presently controversial compromissory clause is concerned, it actually derived from a proposal of the Icelandic Government itself. I emphasize: it derived from a proposal of the Icelandic Government itself. So much for duress.

Next, there is the assertion that there has been, since 1961, a fundamental change of circumstances from those existing at the time when the Exchange of Notes was concluded. In the United Kingdom's Memorial, Her Majesty's Government claim that such a reliance on fundamental change of circumstances must satisfy five conditions if it is to justify the termination of a treaty. Her Majesty's Government referred to the longstanding authority in international law, including decisions of the Permanent Court, in support of these five conditions. I need not cite those authorities again. The principles underlying the five conditions are clear.

The five conditions are as follows: first, the change must be of circumstances existing at the time of the conclusion of the treaty; second, the change must be a fundamental one; third, the change must be one not foreseen by the parties; fourth, the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and above all, fifth, the effect of the change must be radically to transform the scope of the obligations still to be performed under the treaty.

In the Memorial, Her Majesty's Government demonstrated that none of these five conditions is satisfied in the present case. Again, I will not repeat all that is said on this point in the Memorial. Both the evidence which the Icelandic Government have produced, and the manner in which they have produced it, are insufficient to prove that there has been, since 1961, a fundamental change of circumstances with regard to those existing at the time of the conclusion of the Exchange of Notes.

It would have been open to the Icelandic Government to bring before the Court expert witnesses on this point, who could have been questioned either by the Court or by counsel for the United Kingdom, or by both. But they have not done so.

If a party in a litigation makes assertions with regard to facts, it must prove those assertions. This has not been done in the Memorandum en-

titled *Fisheries Jurisdiction in Iceland* a document which was issued by the Icelandic Ministry for Foreign Affairs in February 1972, and which is Enclosure 2 to Annex H of the Application instituting proceedings. The same document was sent to the Court by the Government of Iceland as an accompaniment to their letter of 29 May 1972. That document contains the statement that "it is well-known" that the fishing activities of the United Kingdom and Germany "are increasingly being directed towards the waters around Iceland". There is no evidence to support this assertion. Indeed, all the statistics before the Court show a remarkable and continuing long-term stability in the total catch of the main species and the national shares of them, with fluctuations confined to quite narrow limits. Even the graph produced in the document cited shows this to be the case for cod, with the short-term fluctuations working at that time in the direction of foreign catches falling and Icelandic catches increasing. But apparently it is suggested that increased fishing power, with increased mobility, already exists, and can be turned towards Iceland. For, at one point, the Icelandic document says: "The danger of intensified foreign fishing in Icelandic waters is now imminent. The catch capacity of the distant water fleet of nations fishing in Icelandic waters has reached ominous proportions." There is no evidence to support this assertion. Instead, in Her Majesty's Government's Memorial, at paragraph 58, there is evidence to the contrary.

But in any event, this argument has been overtaken by events. The Icelandic statement was made in February 1972. On 13 and 14 January, when a British negotiating team was in Reykjavik, the United Kingdom offered to limit the British catch in the Icelandic area to 185,000 tons, a reduction of 22,000 tons from the estimated 1971 level. The German Government later made a similar offer. Those offers were specifically designed to meet the Icelandic apprehension about an imminent intensification of fishing by the distant water countries, without—I emphasize—any restriction being sought from Iceland. Since then, the annual catch of United Kingdom vessels has been limited by the Court to 170,000 tons. The apprehensions of intensified foreign fishing are groundless.

In short, the first charge is that a fundamental change has taken place, in terms of intensified foreign fishing. But the statistics refute that charge—it has just not happened. The second charge is that such a change is, or was, about to take place. Her Majesty's Government were prepared to ensure that it did not happen. The Court has now ruled that it shall not happen. It has not happened.

Assume, however, Mr. President, that the Government of Iceland did have serious reason to believe that a fundamental change of circumstances had occurred. Of what relevance is that to the jurisdiction of the Court? There can be no connection. The issue in the present case, when we come to the substantive merits of the dispute, is not whether the Exchange of Notes of 1961 prevents Iceland from extending her exclusive fishery limits to the full extent permitted by current international law. The issue is rather whether current international law does indeed permit such an extension as Iceland now seeks to make.

The question in issue on the substantive merits is, therefore, what is the current international law to be applied? At the present stage of the proceedings, the issue is even more limited. It is whether, as against the United Kingdom, Iceland is bound by the Exchange of Notes of 1961 to accept the decision of the Court on this question of international law. *That* was the obligation which Iceland accepted in 1961. How then can the change of circumstances which Iceland now alleges have any relevance to such an obligation?

There is yet another ground on which Iceland's reliance on fundamental change of circumstances must fail. It is well accepted in international law, and some of the authorities are cited in the Memorial, that the doctrine of *rebus sic stantibus* does not operate to terminate a treaty automatically, or to give one party to it a right to denounce it unilaterally. It operates only to confer a right to request termination of the treaty and, if that request is refused, to bring the question whether the treaty should be terminated on that ground before an appropriate judicial body. Reliance on the *rebus sic stantibus* doctrine cannot relieve Iceland of her undertaking to submit this dispute to the Court, if Iceland at the same time refuses to appear before the Court to attempt to uphold that very contention.

The third doubt which Iceland seeks to raise concerning the Court is of a different character. It involves the argument, not that the circumstances have changed, but that the law itself has changed. It alleges that the sovereign right of a coastal nation with respect to the natural resources, not merely of the seabed and subsoil of the continental shelf, but even of the superjacent waters, rests not merely on a rule of general international law but on a rule of so peremptory a character that it overrides existing treaty obligations.

Her Majesty's Government's Memorial (para. 74) shows that the first leg of this proposition goes to the merits, and I shall not discuss it now.

The second leg of the proposition, the *jus cogens* character of the alleged rule, is one which, so far as Her Majesty's Government are aware, has never been advanced before by any government. Indeed, the alleged new rule, far from being the *jus cogens*, is itself contrary to customary international law as embodied in Article 2 of the Geneva Convention on the High Seas. Moreover, the recent Vienna Convention, while providing for the *jus cogens* principle in certain circumstances, carefully restricts the application of the principle. In fact, any State seeking to invoke principle will, under the Convention, be bound in the last resort to submit a dispute concerning its interpretation or application to the International Court of Justice for a decision.

Her Majesty's Government, I must confess, Mr. President, find it remarkable therefore that an argument of this character should be put before the Court from a distance by a Party which not only denies the jurisdiction of the Court, but even declines to appear before the Court to support that denial.

There is an even more fundamental flaw in the objection based on *jus cogens*. It is that it can have no relevance to the particular obligations which arise under the Exchange of Notes of 1961. Even if there could be a new peremptory rule of international law authorizing coastal States to extend their exclusive fisheries jurisdiction to the edge of the continental shelf adjacent to them, there could be no conflict between such a rule and the treaty obligations with which we are here concerned. May I remind the Court, these obligations are twofold. First, that the coastal State, Iceland, shall not extend its exclusive fisheries limits at any given time beyond what is permitted by international law in force at that time. Secondly, that a dispute concerning the legality of any particular extension should be referred to and determined by the International Court of Justice; it is this which is in issue at this stage of these proceedings.

These, Mr. President, then are the matters which arise at this hearing at this stage of the case. On 1 August, I said, in my submissions, that the issue in this case is whether Iceland should be entitled by unilateral decision to take all the fish for herself, notwithstanding the disastrous effect that this would have on those who, up to now, have shared the fishery with her. I also said that at the proper time I would argue that Iceland has no right in inter-

national law to do any such thing. That will be the case of the United Kingdom on the merits of the dispute. Her Majesty's Government stand ready to file a Memorial on the merits at such time as the Court will direct.

So I have presented the detailed oral submissions of Her Majesty's Government on the issues which arise at this stage. The Agent for the Government of the United Kingdom will transmit to the Registrar a written statement of the formal contentions and submissions of the Government of the United Kingdom. Their contentions are:

(a) that the Exchange of Notes of 11 March, 1961, always has been and remains now a valid agreement;

(b) that, for the purposes of Article 36 (1) of the Statute of the Court, the Exchange of Notes of 11 March, 1961, constitutes a treaty or convention in force, and a submission by both parties to the jurisdiction of the Court in case of a dispute in relation to a claim by Iceland to extend its fisheries jurisdiction beyond the limits agreed in that Exchange of Notes;

(c) that, given the refusal by the United Kingdom to accept the validity of unilateral action by Iceland purporting to extend its fisheries limits (as manifested in the Aides-Mémoires of the Government of Iceland of 31 August, 1971, and 24 February, 1972, the Resolution of the Althing of 15 February, 1972, and the Regulations of 14 July, 1972, issued pursuant to that Resolution), a dispute exists between Iceland and the United Kingdom which constitutes a dispute within the terms of the compromissory clause of the Exchange of Notes of 11 March 1961;

(d) that the purported termination by Iceland of the Exchange of Notes of 11 March, 1961, so as to oust the jurisdiction of the Court is without legal effect; and

(e) that, by virtue of the Application Instituting Proceedings that was filed with the Court on 14 April, 1972, the Court is now seised of jurisdiction in relation to the said dispute.

Accordingly, the Government of the United Kingdom submit to the Court that they are entitled to a declaration and judgment that the Court has full jurisdiction to proceed to entertain the Application by the United Kingdom on the merits of the dispute.

Mr. President, these proceedings involve a dispute of grave importance for Her Majesty's Government for whom I appear before you in this Court. It is a dispute between old friends and allies, and it is the sadder for that. Her Majesty's Government regret that it should ever have arisen. But it is a dispute which concerns a question of international law which, I repeat, is of grave importance. The forum, the proper forum, to decide this dispute and to judge these issues of law is this Court, the principal judicial organ of the United Nations; and it is to this Court that Her Majesty's Government in the United Kingdom have come.

The PRESIDENT: I thank the Agent and counsel for the Government of the United Kingdom for the assistance they have given the Court, and I request the Agent to remain at the disposal of the Court for any further information it may require. With that reservation, I declare the oral proceedings on the question of the jurisdiction of the Court to entertain the dispute in this case closed. The Parties will be informed in due course of the date on which the Court's Judgment will be delivered.

The Court rose at 12.10 p.m.

FOURTH PUBLIC SITTING (2 II 73, 10 a.m.)

Present: [See sitting of 5 I 73.]

READING OF THE JUDGMENT

The PRESIDENT: The Court meets today to deliver its Judgment on the question of its jurisdiction in the *Fisheries Jurisdiction* case instituted by the United Kingdom of Great Britain and Northern Ireland against the Republic of Iceland by Application filed on 14 April 1972.

The Parties were duly notified of the present sitting, in accordance with Article 58 of the Statute; I note the presence in Court of the Deputy-Agent and counsel for the United Kingdom.

I shall now read the English text of the Judgment of the Court on the question of its jurisdiction.

[The President reads from paragraph 11 to the end of the Judgment [1].]

I shall now ask the Registrar to read the operative clause of the Judgment in French.

[The Registrar reads the operative clause in French [2].]

I myself append a declaration to the Judgment. Judge Sir Gerald Fitzmaurice appends a separate opinion to the Judgment. Judge Padilla Nervo appends a dissenting opinion to the Judgment.

In order to avoid the delay involved in printing the Judgment, particularly in view of the fact that the composition of the Court will be altered in a few days' time, it has been decided to read the Judgment today from a stencil-duplicated text. The normal printed edition will be available in about a week's time.

(Signed) ZAFRULLA KHAN,
President.

(Signed) S. AQUARONE,
Registrar.

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[1] *I.C.J. Reports 1973*, pp. 7-22.
[2] *Ibid.*, p. 22.