

DISSENTING OPINION OF JUDGE GROS

[Translation]

The Order of 12 July 1973 purely and simply confirms the interim measures of protection indicated by the Court in its Order of 17 August 1972, pending the judgment on the merits of the case instituted by the Application of 12 April 1972. Having adopted a different position I feel I should briefly state my reasons for doing so. It is Article 41 of the Statute and Article 61 of the 1946 Rules of Court which determine the jurisdiction of the Court in the present proceedings, and I would have preferred Article 61, paragraphs 7 and 8, of the Rules, providing for the possible modification of existing provisional measures, to have been differently applied.

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One need only observe that the circumstances in which the Court made its decision in August 1972 are no longer exactly the same, whether on the plane of facts or on that of the respective subjects of complaint, to realize the case for the Court's re-appraising those circumstances before deciding to confirm measures which, according to the terms of Article 41 of the Statute, had been indicated because the Court considered that "circumstances" so required. The Government of the United Kingdom, by a letter of 22 June 1973, requested the Court to confirm the measures of August 1972; the Government of Iceland, by a telegram dated 2 July 1973, recalled its protests against the indication of measures in August 1972 and against their continuance in force. There is therefore a categorical opposition of views on that point, and the telegram of the Government of Iceland makes certain points which might well be studied, including the argument that "the Court by endeavouring to freeze the present dangerous situation is completely ignoring the scientific and economic facts of the case".

The position adopted by Iceland ever since the beginning of the case has remained unchanged, and the Court took note of it in paragraph 12 of its Judgment of 2 February 1973 on the question of jurisdiction, when it based itself on Article 53 of the Statute and decided that in the absence of Iceland the Court should examine any possible objections against its jurisdiction. Article 53 having formally been taken into consideration in the phase devoted to the jurisdictional issue, I find it very artificial to go back on that position in the present stage of the proceedings. Iceland is still failing to appear, and the legal effects of that fact ought, according to Article 53, to be the same as at the moment of the Judgment on the

question of jurisdiction. Without its being necessary to enquire into the effect of the telegram of 2 July in which the Icelandic Government protested against the continuance of the interim measures, it is to my mind impossible to maintain that the Court did not have to carry out an examination *proprio motu* of its own role in regard to interim measures. The Court seems to consider that Article 53 of the Statute can be interpreted in such a way as to penalize the absent State; I regard that interpretation as erroneous. But in any case, and quite apart from the question of the absence from the proceedings of the Government of Iceland, a hearing ought to have been held and the necessary questions put to the Applicant; Article 61 of the Rules provides precisely for that possibility of verifying any arguments of which the Court may have cognizance—and the Court had been advised that the Applicant was prepared to attend a hearing, and was ready at any time to submit such observations as the Court might wish to request.

Furthermore, the following statement was made on behalf of the British Government in the House of Commons on 12 June 1973:

“Her Majesty’s Government, in a letter of 28th May, drew the attention of the President and members of the Security Council to the serious situation created by the continued and intensified Icelandic harassment of British trawlers. The International Court of Justice, which is the principal judicial organ of the United Nations, is already seized of the dispute; and for this reason it is not at present appropriate to ask the Security Council to take action.” (Hansard, *House of Commons*, p. 302.)

Here the accent is placed on the responsibility of the Court in taking account of the situation which was described in detail in a White Book entitled *Fisheries Dispute between the United Kingdom and Iceland: 14 July 1971 to 19 May 1973* (Cmd. 5341), and more particularly in paragraphs 12, 13 and 14 and in Annexes E and F, laid before the United Kingdom Parliament in June 1973. There was no dearth of information preventing an examination of the situation at the moment when the Court was called upon to pronounce upon the question of interim measures. The Court is aware that both of the interested States accuse each other of employing force with a view to exercising the respective rights which they claim (on this point, cf. the letter addressed on 28 May 1973 to the President of the Security Council by the United Kingdom Permanent Delegation—S/10936, paras. 1, 3, 4 and 6—and the letter of the Permanent Delegation of Iceland dated 29 May 1973—S/10937, paras. 1, 2, 3 and 8. The various incidents were also listed in Annexes E and F of the White Book).

The continuance of interim measures, like their indication in the first place, is justified by the concern to safeguard rights—not economic interests, but the rights which the Court may recognize in its judgment on the merits (Order, para. 8). I have some doubt as to the justification for giving a decision which confirms interim measures without re-apprais-

al when, in the present case, the Court cannot be unaware that the dispute has been aggravated since its first Order (cf. the White Book of June 1973, paras. 12-17, and the Annexes above referred to) and that the most effective method of settling the dispute would be to pass judgment on the merits as soon as possible. As interim measures serve only to protect rights, urgency attaches not only to deciding upon such measures but also to settling the dispute. When, by its Order of 15 February 1973, the Court fixed a time-limit of six months for the Memorial of the United Kingdom and a further time-limit, as distant as 15 January 1974, for a possible Counter-Memorial of Iceland, its decision was underlain by the same preoccupations as paragraph 6 of the present Order, namely by concern to leave open to the interested States the possibility of "reaching an interim arrangement pending final settlement of the dispute". But the outcome of specifying such time-limits is that a case which began in April 1972 cannot be settled for two years, on account of the Court's own decisions as to the calendar of the proceedings.

The fixing of time-limits is a useful element in the conduct of proceedings before the Court and enables, within limits, a certain influence to be exerted for the sake of good administration of justice. Each case gives rise to its own particular problem in that respect. Concerning the present case I believe it may be said that, in fixing such lengthy time-limits, the Court has neglected one possible effect of its being seised with the case, when it had just declared, almost unanimously, that it possessed jurisdiction. An international tribunal has always a preventive role—and, as often as not, has none other. In the present case, if the interested States had been conscious of the fact that their dispute would be settled by judicial decision at a relatively early date, that might have given them some incentive to conclude the dispute by other means, if still possible. This raises the general question of the relationship between two modes of peaceful settlement of international disputes, namely negotiation and judicial settlement, but there is no call for me to go into that here. To assist understanding of the course of the proceedings with regard to interim measures, from the request of 17 July 1972 up to today's decision, I need only say that in my view a tribunal ought not to be over-influenced in the exercise of its functions by the course followed by the other mode, that of negotiation. The Permanent Court of International Justice had realized all that from the beginning. In the Order which he made on 15 February 1927 in the case concerning *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium*, President Max Huber said:

"Considering that measures of protection, indicated by the Court as being for purely legal reasons rendered necessary by circumstances, cannot be dependent, as regards their applicability, upon the position of negotiations that may be in progress between the Parties" (*P.C.I.J., Series A, No. 8, p. 11*).

While I am mindful of the different circumstances of the present case,

it seems to me that this dictum is still valid as a principle calling for application by the Court. The institution of proceedings before the Court is an act stemming from the foreign policy of the State, and that aspect of the matter does not concern the judge at all; conversely, negotiations on the subject of the dispute are not part of the proceedings. The Court does not have to draw any conclusion from them in exercising its judicial function for so long as the negotiations have not resulted in an agreement between the parties on the basis of which a request for discontinuance is submitted in conformity with Articles 68 and 69 of the Rules of Court. If in given circumstances States find the conduct of their negotiations rendered difficult by the Court's procedural decisions, particularly in regard to time-limits, it is up to them to make those difficulties known.

In each case the Court, in directing the proceedings, must seek out the most satisfactory manner of fulfilling its judicial role; taking the circumstances as a whole, it seems to me that in the present case the passage of time is not necessarily a favourable factor and that, in any event, the Court's decision should have been preceded by an examination of all the prevailing circumstances, with the assistance of the Applicant.

Such an examination, which would have brought the Agent for the Government of the United Kingdom before the Court, would likewise have afforded an opportunity of deciding whether a new time-limit ought to be fixed for the proceedings on the merits, in application of Article 37 of the Rules and taking Article 53 of the Statute into account.

(Signed) André GROS.