SEPARATE OPINION OF JUDGE WALDOCK

1. I am in general agreement with both the operative part and the reasoning of the Judgment of the Court. I have one reservation, however, regarding subparagraph 5 of the operative part and there are some aspects of the case which I consider should have received more prominence in the Judgment, and which I feel it incumbent on me to mention in this separate opinion.

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2. The Judgment refers to the Exchange of Notes of 19 July 1961 and draws certain conclusions from it regarding the Federal Republic of Germany's recognition of Iceland's exceptional dependence on coastal fisheries and regarding Iceland's recognition of the Federal Republic's traditional fisheries in the waters around Iceland. It does not, however, give the 1961 Exchange of Notes the importance which, in my opinion, that agreement necessarily has as a treaty establishing a particular legal régime governing the relations between the Parties with respect to fishing in those waters. The 1961 Exchange of Notes, which was negotiated and concluded soon after the United Nations Conference on the Law of the Sea had failed to solve the problem of fishery limits, had as its express object the settlement of an existing fishery dispute between Iceland and the Federal Republic. This it did upon terms which lay down specific rules to cover the case of a subsequent claim by Iceland to extend her jurisdiction beyond the 12-mile limit assented to by the Federal Republic in that agreement. The result, in my view, is that the starting point for determining the rights and obligations of the Parties in the present case has to be the 1961 Exchange of Notes which, by its Judgment of 2 February 1973, the Court has held to be valid, in force, and applicable to the extension of Iceland's fishery jurisdiction now in question before the Court.

3. A similar Exchange of Notes was concluded in 1961 between Iceland and the United Kingdom, and I have set out at length my observations on the implications of that Exchange of Notes in my separate opinion in the *Fisheries Jurisdiction* case between those two countries. The Exchange of Notes between Iceland and the Federal Republic, it is true, was concluded some four months after the Exchange of Notes between Iceland and the United Kingdom and in separate negotiations; and the

Federal Republic did not have any detailed record of its negotiations as was the case with the United Kingdom. Nevertheless, the Exchange of Notes of 11 March 1961 between Iceland and the United Kingdom was used as the model for that between her and the Federal Republic; and the object and provisions of the two Agreements are, in consequence, virtually identical. Accordingly, I do not think that it would be useful for me to repeat here the views which I have expressed on this matter in paragraphs 2-32 of my opinion in the other case before the Court. It will be enough for me to state that, *mutatis mutandis*, I consider them to apply equally in the present case.

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4. I may, however, recall that the Federal Republic made quite clear its understanding of the scope of the compromissory clause in the course of the proceedings on jurisdiction. At the public sitting held on 8 January 1973 its Agent said:

> "I would like to add some remarks in order to show that the subject-matter of the dispute submitted by the Application of the Federal Republic of Germany keeps strictly within the scope of the jurisdiction of the Court, as defined in paragraph 5 of the Exchange of Notes of 1961. I should recall that according to the terms of that provision the jurisdiction of the Court covers all disputes relating to an extension by Iceland of its fisheries jurisdiction over the adjacent waters above its continental shelf beyond the 12-mile limit. Disputes relating to such an extension of the fisheries jurisdiction are those which arise from any measure by which the Government of Iceland purports to exercise jurisdictional rights or powers over fishing activities in the waters beyond the 12-mile limit. Scope and intensity of this jurisdiction, which may give rise to disputes, are of secondary importance; the jurisdictional claim may vary as to the width of the zone in which Iceland attempts to exercise jurisdiction, as well as to the scope of the rights and powers which Iceland attempts to exercise therein. Iceland's jurisdictional claim may amount to a claim for exclusive fishing rights in the extended zone, or may be confined to a claim for preferential fishing rights only. It may also consist in the enactment and enforcement of discriminatory or non-discriminatory conservation measures. Any such measure constitutes an extension of jurisdiction in the sense of paragraph 5 of the Exchange of Notes and, whenever such extension or the modalities of such extension give rise to a dispute between the Federal Republic of Germany and Iceland, the Court has jurisdiction to deal with this dispute on the application of either Party."

That understanding appears to me fully consonant with the Court's finding in its Judgment on jurisdiction of 2 February 1973 in the case

brought by the United Kingdom, as to the meaning of the compromissory clause the terms of which are identical with those of the clause in the present case. The Court there said:

> ". . . the real intention of the parties was to give the United Kingdom Government an *effective assurance* . . . : namely, the right to challenge before the Court the validity of *any further extension* of Icelandic fisheries jurisdiction in the waters above its continental shelf". (*I.C.J. Reports 1973*, p. 13, para. 23; emphasis added.)

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5. In its first submission the Federal Republic asks the Court to declare that Iceland's *unilateral* extension of her zone of exclusive fisheries jurisdiction to 50 miles "has, *as against the Federal Republic of Germany*, no basis in international law *and can therefore not be opposed to the Federal Republic of Germany* . . .". Whether this submission is intended to be limited to the question of the "opposability" of Iceland's extension vis-à-vis the Federal Republic or claims that the extension is invalid *erga omnes* and, therefore, not opposable to the Federal Republic may not perhaps be entirely clear. In any event, however, for the reasons which I have given in paragraphs 33-36 of my separate opinion in the case between the United Kingdom and Iceland, the true legal issue appears to me to be whether the extension of Iceland's fishery jurisdiction beyond the 12-mile limit agreed to in 1961 is opposable to a State which, like the Federal Republic, has not accepted or acquiesced in that extension; and not whether under general international law the extension is objectively invalid *erga omnes*. On this point too, it therefore seems enough for me to state that, *mutatis mutandis*, the views which I have expressed in my separate opinion in the United Kingdom *v.* Iceland case apply also in the present case.

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6. The Federal Republic, unlike the United Kingdom in the other case before the Court, has maintained its claim, set out in its fourth submission, to compensation for alleged acts of harassment of its vessels by Icelandic coastal patrol vessels. I concur in the Court's view, stated in paragraph 72 of the Judgment, that this submission falls within its competence in the present proceedings. Although the Court does not develop its grounds for so holding and I myself entertain no doubt upon the point, I wish to indicate briefly the reasons which lead me to share the Court's view.

7. The claim to compensation raises two points as to the Court's competence to entertain it, the first of which is whether the claim falls within the terms of the compromissory clause: "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." It seems to me too narrow an interpretation of those words to regard them as confining the competence conferred on the Court to the question of the extension of jurisdiction as such. In my view, incidents arising out of Iceland's extension of her fishery limit and claims in respect of such incidents clearly form part of "a dispute *in relation to* such extension"—words of a quite general character. Indeed, every act enforcing Iceland's jurisdiction outside the 12-mile limit is in a very real sense an extension of her jurisdiction beyond the agreed limit. Furthermore, as the Court itself emphasized in paragraphs 21-22 of its Judgment of 2 February 1973 on its jurisdiction in the case of the United Kingdom *v.* Iceland, the very object of the compromissory clause was to provide an assurance that "if there was a dispute, *no measure to apply an extension* on fishery limits would be taken pending reference to the International Court" (*I.C.J. Reports 1973*, at p. 13; emphasis added). It therefore seems entirely justifiable to consider that the Federal Republic's claim to compensation must, in principle, fall within the general competence conferred on the Court in the case of a dispute in relation to an extension of fishery jurisdiction.

8. Moreover, as Judge Jiménez de Aréchaga pointed out in the *ICAO Council* case (*I.C.J. Reports 1972*, p. 147) both this Court and the Permanent Court of International Justice have held that, if a jurisdictional clause provides for the reference to an international tribunal of disagreements relating to the interpretation or application of a treaty, the competence given to the tribunal embraces questions arising out of the performance or non-performance of the treaty. Thus, in the Advisory Opinion on *Interpretation of Peace Treaties* the Court considered that disputes relating to the question of the performance or non-performance of the obligations provided for in treaties "are clearly disputes concerning the interpretation or execution" of the treaties in question (*I.C.J. Reports 1950*, p. 75). Even more specific, for present purposes, is the dictum of the Permanent Court in the *Factory at Chorzów* case (*P.C.I.J., Series A, No. 9*, p. 21):

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. *Differences relating to reparations, which may be due by reason of failure to apply a convention, are*

consequently differences relating to its application." (Emphasis added.)

In my view, as I have indicated above, the present dispute in relation to an extension of Iceland's fishery jurisdiction is at the same time a dispute in relation to the application of the 1961 Exchange of Notes. But in any event, by parity of reasoning, it seems to me clear that a jurisdictional clause conferring competence on the Court to determine the validity of an extension of fishery jurisdiction embraces differences relating to reparations which may be due by reason of the invalidity of an extension.

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9. The second point concerns the question whether the claim comes within the scope of the case referred to the Court by the Federal Republic's Application of 5 June 1972. The Application contained only two submissions: one concerning the alleged unlawfulness of the unilateral extension of the fishery limit, and the other concerning the need for agreement in regard to conservation measures. The Application did not deal with acts of harassment or compensation in respect of them for the very good reason that it was filed before the new Icelandic Regulations came into force on 1 September 1972 and before any acts of harassment had occurred. Indeed, soon after filing the Application, the Federal Republic sought to obviate any risk of harassment by requesting and obtaining an Order for provisional measures. True, the Federal Republic's Memorial on jurisdiction, which was filed on 5 October 1972 after some acts of harassment had occurred, also made no mention of them. But the Court had ordered that the Federal Republic's first Memorial should be directed specifically to the question of its jurisdiction to entertain the Application, and the question of harassment was not germane to that issue. Consequently, it was in the Memorial on the merits that acts of harassment were first made a cause of action and a claim to compensation was first included among the submissions.

10. The question then is whether the Federal Republic's claim to compensation, formulated in the Memorial on the merits and again in the final submissions, is a permissible modification of the submissions formulated in the Application. In other words, is the addition of the claim to compensation such a modification of the submissions in the Application as is permissible under Article 40 of the Statute and Article 32 (2) of the Rules? Under the practice of the Permanent Court of International Justice the parties to proceedings begun by a unilateral Application were allowed a certain freedom to amend their submissions so long as the amendments did not have the effect of altering the subject of the dispute. Thus, the Permanent Court said in the *Société commerciale de Belgique* case:

"It is to be observed that the liberty accorded to the parties to

> amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute. The Court has not hitherto had occasion to determine the limits of this liberty, but it is clear that the Court cannot, in principle, allow a dispute brought before it by application *to be transformed by amendments in the submissions into another dispute which is different in character.*" (*P.C.I.J., Series A/B, No. 78*, at p. 173.) (Emphasis added.)

As to this Court, Judge Read referred in the *Certain Norwegian Loans* case to the established practice "to permit the Parties to modify their Submissions up to the end of the Oral Proceedings", but observed that "when there is an appreciable change, the other Party must have a fair opportunity to comment on the amended Submissions". He added: "The second condition is that the amendment must be an amendment. It must not consist of an attempt by the Applicant Government to bring a new and different dispute before the Court" (*I.C.J. Reports 1957*, pp. 80-81). It is therefore significant that in the *Temple of Preah Vihear* case the Court accepted and upheld a claim to the restoration of objects removed from the Temple by the Thailand authorities since 1954, which had been made by Cambodia for the first time in its final submissions at the oral hearings (*I.C.J. Reports 1962*, p. 6).

11. In the present case, Iceland had the opportunity, by filing a Counter-Memorial, to reply to the Federal Republic's claim to compensation and, if she considered it to be outside the scope of the Application, to object to its admissibility. But she decided not to appear in the proceedings. As to the claim itself, this seems to me related to the subject of the Application more directly than was the restoration of the Temple objects in the *Temple of Preah Vihear* case: the relief for which it asks is consequential upon and implied in the Federal Republic's first submission. True, the facts on which it is based occurred subsequently to the Application and the claim therefore introduces a new element into the case. But it does not seem to me to "transform the dispute" brought before the Court in the Application into "another dispute which is different in character". On the contrary, it arose directly out of the matter which is the subject of the first submission in the Application and was the direct result of Iceland's own actions with respect to that matter when it was already before the Court. The very fact that the new claim concerns matters explicitly dealt with in the Court's Order for provisional measures seems to me to make it difficult to treat that claim as an impermissible modification of the submissions in the Application. Consequently, in my view, the claim to compensation ought not to be ruled out on the ground that it had no place in the Application.

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12. My reservation regarding subparagraph 5 of the operative clause arises from a doubt as to whether the Court should simply state that it is unable to accede to the Federal Republic's fourth submission and thus, in effect, to dismiss outright the claim to compensation. In so far as this submission may be considered as asking the Court for a final decision pronouncing upon Iceland's obligation to make compensation for particular specified acts of interference, I agree with the Court that, as the case now stands, it is not in a position to give such a decision because the evidence is scarcely sufficient. The Federal Republic appears, moreover, to be asking for final judgment in the case without requesting further proceedings to deal with its claim to compensation or requesting the Court to reserve for the Federal Republic the liberty to apply to the Court on the question of compensation in the event that no agreement is arrived at between the Parties on this question. In consequence, it may be doubtful whether it would be appropriate for the Court, *proprio motu*, to reserve the question of compensation to be dealt with in further proceedings.

13. In so far, however, as the fourth submission may be understood as merely claiming a declaration of principle that Iceland is under an obligation to make reparation for any acts of interference established as unlawful under subparagraphs 1 and 2 of the operative clause of the Court's Judgment, I do not myself see the same difficulty in the Court's acceding to the claim. The Court has held that Iceland's unilateral extension of her exclusive fishing rights to 50 miles is not opposable to the Federal Republic and that Iceland is not entitled unilaterally to exclude the Federal Republic's fishing vessels from the waters to seaward of the fishery limits agreed to in the 1961 Exchange of Notes. It then really follows automatically that acts enforcing that extension against fishing vessels of the Federal Republic are unlawful and engage Iceland's international responsibility to the Federal Republic with respect to such acts. Since it is a well-established principle of international law that every violation of an international obligation entails a duty to make reparation, the right to reparation also follows without even being stated. Accordingly, it may be said, as was indeed said in the *Corfu Channel* case (*I.C.J. Reports 1949*, pp. 23-24), that to make the claim to reparation is superfluous; if the claim to a declaration of the unlawful character of acts is upheld, the consequence is that as a matter of law, reparation is due. Nevertheless, an Applicant may think it important to obtain from the Court, as a form of satisfaction, an express declaration in the operative part of the Judgment that reparation is due, and I see no obstacle to the Court's acceding to such a submission.

(Signed) H. WALDOCK.