## DISSENTING OPINION OF JUDGE GROS

*[Translation]*

1. The two Judgments, as will be evident on reading them, are modelled on each other, and the cases have been dealt with together throughout the written, oral and deliberation stages, and lastly the ground for refusal of a joinder was the desire formally conveyed to the Court by the two States. Since I took the view that the United Kingdom *v.* Iceland case and the Federal Republic of Germany *v.* Iceland case should be joined, I shall here confine myself to the observations called for by the fact that one submission peculiar to the Federal Republic has been maintained before the Court. For an explanation of the reasons for my general disagreement with the Judgment, I refer to my opinion on the Judgment concerning the United Kingdom.

In September 1972, after the Icelandic Regulations had been brought into force, the Government of the Federal Republic proposed trilateral talks with Iceland for the negotiation of an interim agreement, but Iceland refused (cf. Memorial of the Federal Republic of Germany on the merits, Part I, para. 43). The *White Book* published by the United Kingdom shows that there was constant consultation and co-operation with the Federal Republic:

> "ANGLO/GERMAN COOPERATION
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> 21. Throughout the dispute there has been close consultation and cooperation with the Federal German Government. The latter are conducting proceedings before the International Court on similar lines to the proceedings instituted by H.M.G. The Federal Republic proposed on 15 September 1972 that the negotiations with the Government of Iceland should be on a tripartite basis. The United Kingdom accepted this proposal but it was rejected by the Government of Iceland. Consequently, the British and German negotiations with Iceland had to continue on a bilateral basis but they have been closely coordinated. The composition of the two fishing fleets and the areas which they use are however different and this difference will no doubt be reflected in any eventual agreement." (*Fisheries Dispute between the United Kingdom and Iceland*, Cmnd. 5341, June 1973.)

Throughout the proceedings in the two cases, in respect of the written

pleadings, the oral argument and the replies to questions, this co-operation was as evident as was the presence of the Agents and counsel of each State at the public sittings devoted to the proceedings instituted by the other State.

2. The Exchange of Notes of 19 July 1961 between the Federal Republic and Iceland is in identical terms to the Exchange of Notes of 11 March 1961 between the United Kingdom and Iceland, and the Federal Republic stated in its Memorial on jurisdiction that:

> "there can . . . be no doubt that the subject-matter of the dispute as defined in the Submissions contained in the Application . . . that is, whether or not the extension by Iceland of its fisheries jurisdiction to 50 nautical miles is valid under international law, falls within the scope of the jurisdiction of the Court" (Memorial, para. 5).

The position of the Government of the Federal Republic was explained in the same way in paragraph 150 of Part IV of the Memorial on the merits:

> "Accordingly, the Government of the Federal Republic of Germany respectfully requests the Court to adjuge and declare that Iceland's unilateral action which had been undertaken without the faintest regard to the long-established traditional fishery rights of the Federal Republic and other States in these waters, is without foundation in international law and cannot be enforced against the Federal Republic, the fishing vessels registered in the Federal Republic, their crews and other persons connected with their fishing activities in these waters."

The reply of the Court should have been that such extension is not in accordance with existing international law for the reasons which I have explained with reference to the Judgment concerning the United Kingdom, and without extending the Court's jurisdiction to a decision on negotiation of preferential and historic rights between Iceland and the Federal Republic.

I would merely add that the clearest possible indication of the general economic background against which the negotiations between Iceland and the Federal Republic took place, and of the need which in my view results therefrom to extend any examination of the elements of any negotiation for the fisheries régime around Iceland to, as regards the subject-matter, these economic problems, and as regards to the participants, to the States and organizations concerned, is given by the diplomatic documents quoted by the Federal Republic (for example, the aide-mémoire of 20 July 1961 of the Icelandic delegation in Bonn, Memorial on the jurisdiction, para. 20 and Ann. H; and the memorandum of the Federal Republic of 21 July 1961, *ibid.*, Ann. J, where the possibility of association with the EEC is contemplated 11 years before the agreement of 22 July 1972 between Iceland and the EEC, which demonstrates

the interest shown by the member States of the Community, including the Federal Republic and the United Kingdom, in the fisheries régime round Iceland).

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3. The point which is peculiar to the present Judgment concerns the fourth submission of the Federal Republic, which is dealt with in the last subparagraph of the operative clause. The Court has decided that it is unable to accede to this fourth submission of the Federal Republic of Germany —which was a claim for reparation for the consequences of action taken against its fishing vessels—exclusively on the grounds of the way in which the submission has been presented: "The fourth submission . . . as presented to the Court cannot be acceded to" (para. 76 of the Judgment). It may be deduced from this that in another form the claim could be acceded to by the Court; but it might be contended, on the basis of the continuance in force of the 1961 agreement, that further action would be possible, particularly should the negotiations which the Court recommends break down. Since there is between Iceland and the Federal Republic no interim agreement, like the agreement of 13 November 1973 with the United Kingdom, there is therefore nothing to prevent the Federal Republic from immediately re-presenting this part of its claim. Since I am unable to accept the implications of the Judgment on this point, and for other reasons also, I voted against subparagraph 5 of the operative clause, as I did in respect of the Judgment as a whole.

4. The 1961 agreement, which has been subjected by the Court to an extensive interpretation which has already been adverted to in my observations on the United Kingdom case, is in fact now presented by the Court as having provided for acceptance by Iceland of judicial jurisdiction extending also to reparation for any damage related to a further extension of Icelandic fisheries jurisdiction beyond 12 miles. But the Records of the 1960 negotiations provided by the United Kingdom (the only such records available to the Court) show that reference to the Court was only contemplated on a single point, and was only discussed and accepted on that point, namely the assurance asked for by the United Kingdom, and of which the Federal Republic subsequently had the benefit, that any further extension would have to be submitted to the judgment of the Court in accordance with international law. When two States negotiate for and conclude an assurance which is confined to a single point, it is not possible to draw the same conclusion from it as would have been possible if what they had agreed was: "The Court shall have jurisdiction in respect of any dispute concerning the application and interpretation of the present agreement"; I would recall that the 1961 agreement was submitted for approval to the Althing, which was in no position to understand that it was being asked to accept reference of any dispute whatsoever to the Court, to which it had always refused to agree,

since the negotiations reported to it terminated only in an assurance against any "further extension". The commitment which has been relied upon against Iceland should be understood as it was understood by the two Parties at the time of its conclusion (cf. paras. 16 and 28 of my opinion on the United Kingdom Judgment). An agreement can never define anything other than what was subject to negotiation at the appropriate time between the parties who concluded it; as the Court has said, "no party can impose its terms on the other party" (*I.C.J. Reports 1950*, p. 139). Nor can a court impose its interpretation of an agreement on the States which concluded it, so as to make it say something more than, or something different from, what it says. Here again the Court has already spoken:

> ". . . though it is certain that the Parties, being free to dispose of their rights, might . . . embody in their agreement any provisions they might devise . . ., it in no way follows that the Court enjoys the same freedom; as this freedom, being contrary to the proper functions of the Court, could in any case only be enjoyed by it if such freedom resulted from a clear and explicit provision . . ." (*Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 11).

5. The Court is bound to satisfy itself that the Applicant's claim is well founded in fact and law; I consider that the two identical agreements of 1961 do not provide for any proceedings to establish responsibility *(contentieux de responsabilité)*, but only proceedings to establish lawfulness *(contentieux de légalité)*, directed to obtaining a declaratory judgment on a limited point of law, and nothing more. It is therefore because the fourth submission of the Federal Republic fell outside the subject-matter of the compromissory clause, and therefore of the Court's jurisdiction, that it should have been rejected in the Judgment, and not by means of an argument based on the way in which the submission was presented. As to certain arguments concerning the law of responsibility in general, since the Court has not given its decision on this aspect of the matter, but may be seised of it again, I do not consider it possible to discuss the point.

6. One final observation seems to me to be necessary. The way in which the Court has applied Article 53 of the Statute leads me to observe that the difficulties which are inherent in any investigation of the position taken up by a State which fails to appear, on the law and on the facts, have not been sufficiently overcome, and thus there remains a feeling that a State which has put itself in such a position can be subjected to sanctions. This interpretation of failure to appear has, in both Judgments, led to action *ultra vires*, as a result of an incorrect interpretation of the commitments entered into by the absent State, for lack of more thorough enquiry into what that State said and, in that context, into what it could have said, which is exactly what is required by Article 53. I therefore disagree on this point with paragraph 18 of the Judgment, particularly as regards the decision on the fourth submission of the Federal Republic.

7. The 1961 agreement was conceived by the parties as a guarantee against a further extension, which was already under contemplation by Iceland, of its fishery limits, which would consist in the matter being referred to the Court on the question whether a fresh extension would be, at the relevant time, in accordance with existing international law. As a result of the Court's construction of the 1961 agreement, not only is its Judgment *ultra vires*, but by refusing to pronounce on the question of the lawfulness of the extension which was validly and clearly laid before it, it has finally left unanswered the only claim which defined the divergence between the Parties in 1961, and constituted the dispute between them: the fresh extension of limits effected by the Icelandic Regulations of 1972 is not in accordance with existing international law, but the Court has not said so. This is however the basis necessary for the establishment of any fisheries régime round Iceland, and that is doubtless the reason why, when negotiating the 1961 agreement, the United Kingdom insisted so strongly that it should be the Court which should decide, when the time came, what the state of the applicable law was.

8. The real task of the Court is still to "decide in accordance with international law such disputes as are submitted to it" (Art. 38 of the Statute). To introduce into international relations an idea that the decisions of the Court may be given according to what on each occasion the majority thought to be both just and convenient, would be to effect a profound transformation. It will be sufficient to quote the Court itself:

> "Having thus defined . . . the legal relations between the Parties . . . the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function. But it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical . . . solution . . ." (*I.C.J. Reports 1951*, p. 83.)

That this new concept must be rejected as in contradiction with the role of an international tribunal appears to me to be clear simply from the observation that an international court is not a federal tribunal; the States—of which there are now not many—which come before the Court do not do so to receive advice, but to obtain judicial confirmation of the treaty commitments which they have entered into according to established international law, in relation to a situation with which they are well acquainted. The Court saw all this in the Judgment in the *Fisheries* case, in which the special nature of the situation was the dominant feature in the decision *(I.C.J. Reports 1951, Judgment of 18 December 1951)*; by seeking to effect, under cover of a case limited to Icelandic fisheries, a pronouncement of universal effect the Court contradicts its whole previous attitude. As long ago as 1963, Charles De Visscher wrote in his commentary on judicial interpretation:

> "The function of interpretation is not to perfect a legal instrument with a view to adapting it more or less precisely to what one may

be tempted to envisage as the full realisation of an objective which was logically postulated, but to shed light on what was in fact the will of the Parties."

There could be no better riposte to the philosophy which inspires the Judgment and the postulates it contains (particularly paras. 36-40).

*(Signed)* André GROS.

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