DISSENTING OPINION OF JUDGE ONYEAMA

As I stated in my dissenting opinion in the case between the United Kingdom and Iceland, while I concur in the findings in subparagraphs 1 and 2 of the operative clause of the Court's Judgment, I do not agree with the reasons supporting them and so feel unable to vote in favour of the Judgment.

In my view, the Court in subparagraphs 3 and 4 of the operative clause of the Judgment concerned itself with matters about which there was no dispute between the Parties and in which its jurisdiction is doubtful. In subparagraph 5 it declined to accede to the request of the Federal Republic of Germany contained in its final submission that the Court:

> ". . . adjudge and declare that the Republic of Iceland is, in principle, responsible for the damage inflicted upon German fishing vessels by the illegal acts of the Icelandic coastal patrol boats . . . and under an obligation to pay full compensation for all the damage which the Federal Republic and its nationals have actually suffered thereby".

I think this claim should have been allowed and do not agree with the Judgment on this head also.

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There are, at present, four conventions which in the main contain the positive rules of international law concerning the sea. They are the High Seas Convention, the Convention on the Territorial Sea and Contiguous Zone, the Convention on Fishing and Conservation of the Living Resources of the High Seas, and the Convention on the Continental Shelf. Iceland is not a party to any of these conventions, nor does any of them provide any basis in international law for the unilateral extension of exclusive fishery jurisdiction over the high seas by any State. The Convention on the High Seas, whose provisions are recognized as generally declaratory of established principles of international law, provides in its Article 2 that the high seas are open to all nations, and no State may validly purport to subject any part of them to its sovereignty.

In paragraph 44 of the Judgment the Court pointed out that following upon the Geneva Conference on the Law of the Sea in 1958, the concept

of the fishery zone, an area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea, crystallized as a rule of customary international law. The Court went on to say: "the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted."

Attempts by some States to extend their fishery limits beyond 12 miles from baselines do not appear to have been generally accepted, and the Court does not regard such State practice as having developed into customary international law.

The Exchange of Notes of 1961 between the Federal Republic of Germany and Iceland recognized Iceland's claim to an exclusive fishery limit within a 12-mile zone from the baselines round her coast, in return for an assurance by Iceland that in the event of dispute, the validity of any further extension of her fishery jurisdiction would be referred to this Court for determination. Notwithstanding the agreement constituted by the Exchange of Notes, Iceland issued Regulations No. 189/1972 on 14 July 1972, by which she purported unilaterally to extend her exclusive fishery jurisdiction from 12 to 50 miles. In later statements and diplomatic exchanges, she repudiated the agreement constituted by the Exchange of Notes.

The Exchange of Notes provided that in the event of a dispute in relation to the extension by Iceland of her fishery jurisdiction beyond the limit then agreed, either party could refer the dispute to the Court. It was by virtue of this provision that Germany filed the Application in this case, and from it (read with Art. 36, para. 1, of the Statute of the Court), that the Court derived its jurisdiction.

By repudiating the agreement and refusing to recognize the Court's jurisdiction, Iceland was in breach of the agreement; but since the dispute has properly been referred to the Court by one of the parties to the agreement and as provided in the agreement, it is the Judgment of the Court on the question of the validity of the extension which will, in my view, finally determine the opposability of the extension to the Federal Republic of Germany, and not the breach by Iceland of the agreement constituted by the Exchange of Notes. The effect of Iceland's wrongful repudiation of the agreement would be that pending the judicial determination of the question of the validity of the extension of her fishery jurisdiction, Iceland could not validly oppose the Regulations by which she purported to make the extension to the Federal Republic, since Iceland could not be allowed to profit from her own wrong, but such a breach could not by itself, apart from a judgment of the Court deciding the validity of the extension, settle the question of the opposability of the extension.

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The first submission in the Memorial on the merits filed by the Federal Republic of Germany asks the Court to adjudge and declare:

> "That the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the present baselines, put into effect by the Regulations No. 189/1972 issued by the Icelandic Minister for Fisheries on 14 July 1972, 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 and the fishing vessels registered in the Federal Republic of Germany."

As I understand this submission, it is that the Regulations have no basis in international law and, for that reason, cannot be opposed to the Federal Republic of Germany.

The Court is required, in my view, to decide, as a basic question, whether the Regulations have any basis in international law and, if they have not, to say that they are, therefore, not opposable to the Federal Republic of Germany. The Court, however, while declaring that the Regulations are not opposable to the Federal Republic of Germany, and while, in its reasoning, indicating their conflict with the High Seas Convention, refrained from deciding the controlling question whether they have or have not a basis in international law. The operative part of the Judgment avoids any pronouncement on the question.

The grounds on which the Court decided that the Regulations were not opposable to the Federal Republic of Germany are to be found in paragraph 59 of the Judgment, and appear to make the validity of the Regulations depend on their recognition of and giving effect to the fishing rights of the Federal Republic of Germany in the fishery zone, without any reference to their compatibility with general international law. By refraining from deciding what, in my view, was the real dispute between the Parties, the Court has not correctly exercised its function which is, according to Article 38, paragraph 1, of the Statute of the Court, to decide in accordance with international law such disputes as are submitted to it.

The Icelandic Regulations challenged have, in my view, no basis in international law since their provisions relating to the extension of Iceland's exclusive fishery jurisdiction are not authorized by any of the four conventions to which I have referred, particularly the Convention on the High Seas, nor do they accord with the concept of the fishery zone as at present accepted [1]. Having regard to the attitude of Iceland as shown in the documents she submitted to the Court, and the first two submissions of the Federal Republic of Germany in its Memorial on the merits, the Parties appear to me to be entitled to know the Court's answer to the question whether, as a matter of international law, Iceland could unilaterally extend her exclusive fishery jurisdiction beyond the limit agreed in the Exchange of Notes of 1961.

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[1] *Vide* para. 44 of the Judgment.

I explained in my dissenting opinion in the case between the United Kingdom and Iceland why I did not think that the dispute between the Parties was about conservation of fish stock, catch-limitations and preferential rights. The discussions between the United Kingdom and Iceland preceded the exchanges between the Federal Republic of Germany and Iceland, and, to my mind, provide a clear indication of Iceland's attitude to the whole question of fishery rights in the waters around Iceland. The Law concerning the Scientific Conservation of the Continental Shelf Fisheries enacted by the Parliament of Iceland (Althing) on 5 April 1948, authorized the Ministry of Fisheries of the Government of Iceland to issue "regulations establishing *explicitly bounded conservation zones within the limits of the continental shelf of Iceland wherein all fisheries shall be subject to Icelandic rules and control*" (emphasis added). I pause to note that in spite of the title of the Law of 1948, the clear aim of Iceland as can be seen from the passage in the Law which I have emphasized, was unilaterally to control and regulate all fishing in the so-called conservation zones; so that as far back as 1948 Iceland was already intent on getting exclusive control of the fishery on her continental shelf. The negotiations between the Federal Republic of Germany and Iceland were preceded by Iceland handing to the Federal Republic of Germany a copy of the Exchange of Notes of 11 March 1961 between the United Kingdom and Iceland, and ended with an agreement constituted by an Exchange of Notes between the two which took effect on 19 July 1961. The provision of the Exchange of Notes relevant to the question of the dispute between the Parties in the present case is as follows:

> "The Government of the Republic of Iceland shall continue to work for the implementation of the Althing Resolution of 5 May 1959 regarding the extension of the fishery jurisdiction of Iceland. However, it shall give the Government of the Federal Republic of Germany six months' notice of any such extension; in case of a dispute relating to such an extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

The clear words of the Exchange of Notes, the diplomatic exchanges between the Parties, and the discussions between the United Kingdom and Iceland, which are relevant to the German case since they throw some light on the attitude of the Icelandic Government, appear to me to leave no doubt that the dispute anticipated in the portion of the Exchange of Notes quoted, and which either Party could refer to this Court, was a dispute as to whether a measure taken by Iceland unilaterally to extend its area of fishery jurisdiction beyond the limit then agreed was or was not valid under international law. By the very nature of the matter, the Parties could not have intended that the Court was to settle questions of preferential and historic rights, conservation and catch-limitation which are not susceptible of unilateral physical delimitation or extension, but only take effect in a special régime, and which, in my view, formed no

part of the dispute and negotiations leading up to the Exchange of Notes. Discussions and diplomatic exchanges subsequent to the Application of the Federal Republic of Germany which suggest certain conservation measures were clearly aimed at arranging matters between the Parties pending a phasing-out period [1], and in no way altered the nature of the claim before the Court.

It is worth noting that in answer to the aide-mémoire of 31 August 1971 by which Iceland gave notice to the Federal Republic of Germany of its intention to extend the exclusive fisheries zone to include the areas of sea over the continental shelf the new limits of which were to be more precisely defined later, the Federal Republic of Germany, by an aide-mémoire of 27 September 1971, expressed the view "that the unilateral assumption of sovereign power by a coastal State over zones of the high seas is inadmissible under international law".

This seems to me to indicate exactly how the Federal Republic of Germany conceived the dispute for which provision for reference to the Court was made in the Exchange of Notes, and with which the present proceedings are concerned; and since Iceland had not itself requested collaboration by other States in establishing measures of conservation nor had it asserted any preferential rights which had been opposed by the Federal Republic, it seems safe to assert that there was a dispute between the Parties as to the validity of the proposed extension of Iceland's exclusive fisheries jurisdiction and none about Iceland's preferential rights as a coastal State in a special situation.

At the jurisdiction phase of the present proceedings, the Court, after reviewing briefly the negotiations between the Parties "in order fully to ascertain the scope and purpose of the 1961 Exchange of Notes [2]", said:

> "This history of the negotiations reinforces the view that the Court has jurisdiction in this case, and adds emphasis to the point that *the real intention of the parties was to give the Government of the Federal Republic of Germany the same assurance as the United Kingdom, including the right to challenge before the Court the validity of any further extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-mile limit* [3]" (Emphasis added.)

The Court went on to say [4]:

[1] See Annex E to the Memorial on the merits of the Federal Republic of Germany.
[2] *I.C.J. Reports 1973*, p. 56.
[3] *Ibid.*, p. 58.
[4] *Ibid.*, p. 64.

> "Account must also be taken of the fact that the Applicant, in its contentions before the Court, expressed the opinion that if Iceland, as a coastal State specially dependent on coastal fisheries for its livelihood or economic development, asserts a need to procure the establishment of a special fisheries conservation régime (including such a régime under which it enjoys preferential rights) in the waters adjacent to its coast but beyond the exclusive fisheries zone provided for by the 1961 Exchange of Notes, it can legitimately pursue that objective by collaboration and agreement with the other countries concerned, but not by unilateral assumption of exclusive rights within those waters. *The exceptional dependence of Iceland on its fisheries and the principle of conservation of fish stocks having been recognized, the question remains as to whether Iceland is or is not competent unilaterally to assert an exclusive fisheries jurisdiction extending beyond the 12-mile limit.* The issue before the Court in the present phase of the proceedings concerns solely its jurisdiction to determine the latter point." (Emphasis added.)

I understand this to mean that the special situation of Iceland and the principle of conservation, both of which engage Iceland's preferential rights, having been recognized by the Federal Republic of Germany, are not in dispute in these proceedings, and the question which remains for the Court is "whether Iceland is or is not competent unilaterally to assert an exclusive fisheries jurisdiction extending beyond the 12-mile limit". The Court decided it had jurisdiction to determine that question, and, in my view, the Court cannot now enlarge its jurisdiction by such an interpretation of the dispute as would widen its scope. The Court's jurisdiction derives from the consent of the Parties as expressed in the Exchange of Notes which, in its turn, sets out the dispute the Parties agreed was to be referred to the Court; the Court's jurisdiction ought always to be strictly construed and where it is not clear that the Parties have consented to it ought to be declined.

In the present case there does not appear to be any dispute between the Parties on the matters on which the Court pronounced in subparagraphs 3 and 4 of the operative clause of the Judgment, nor are these matters covered in the compromissory clause of the Exchange of Notes from which the Court derives its jurisdiction. The Federal Republic of Germany, in the third submission in its Memorial on the merits, makes a submission based on the hypothesis that Iceland, as a coastal State specially dependent on fisheries, establishes a need for conservation measures in respect of fish stocks in the waters adjacent to its coast beyond the limits of Icelandic jurisdiction agreed to by the Exchange of Notes of 19 July 1961; but Iceland has not asked the Court to adjudicate on conservation measures, and a request to the Court by one party to a dispute that a different dispute be settled by the Court cannot take the place of the consent of all Parties which is a prerequisite of the Court's jurisdiction. For the foregoing reasons, I have come to the conclusion that the Court

exceeded its jurisdiction in passing judgment on the matters pronounced upon in subparagraphs 3 and 4 of the operative part of the Judgment; it ought to have confined itself to deciding the validity under international law of Iceland's extension of her zone of fishery jurisdiction beyond the 12-mile limit agreed between the Parties in the Exchange of Notes of 1961 which was the only dispute before it and over which it had jurisdiction.

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Regarding the fourth submission of the Federal Republic of Germany that the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany or with their fishing operations by the threat or use of force are unlawful under international law, and that Iceland is under an obligation to make compensation therefor to the Federal Republic of Germany, I am of the opinion that the Court is competent to entertain the claim grounded on the submission, since the acts of interference complained of arose directly out of Iceland's attempt to enforce its extension of its fisheries jurisdiction before the validity of such extension had been decided by the Court as agreed in the Exchange of Notes of 1961. In my view, claims for compensation for acts done in breach of the agreement constituted by the Exchange of Notes must be deemed to be in the contemplation of the Parties when they conferred jurisdiction on the Court, and the particular acts in this case appear to me to form part of what the Exchange of Notes referred to as "a dispute in relation to such extension".

If, as I believe, the Court has jurisdiction to entertain the claim for compensation, I consider its reasons for rejecting the claim wholly inadequate. In the first place, the Federal Republic of Germany was not asking for quantified compensation but for a declaration of principle as follows:

(a) that the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany were illegal;
(b) that Iceland is responsible for the damage inflicted;
(c) that Iceland is under an obligation to pay full compensation for all the damage which the Federal Republic and its nationals have actually suffered as a result of the acts of interference.

In the second place, even if a claim for a specific sum was made, the Court is not without means of calling for further information on any issue in the claim if it considers that course necessary in the interest of justice [1].

[1] See, for example, Art. 57, paras. 1 and 2 of the Rules of Court.

The decision that the Regulations whereby Iceland sought to extend its fisheries jurisdiction beyond the limit agreed in the Exchange of Notes are not opposable to the Federal Republic of Germany, appears to me to carry the necessary implication that acts done in enforcement of the Regulations against German fishing vessels are contrary to law. Consistently with its Judgment, the Court should have made a general declaration of principle along the lines set out in the submission in the Memorial on the merits of the Federal Republic of Germany.

(Signed) Charles D. ONYEAMA.