

## SEPARATE OPINION OF JUDGE DE CASTRO

[*Translation*]

I voted with the majority, and I have explained the reasons for my vote in my separate opinion in the case of *Fisheries Jurisdiction (United Kingdom v. Iceland)*, and these reasons apply *mutatis mutandis* to the present case. I would like however to add the following observations.

During the oral proceedings, the Government of the Federal Republic requested the Court, in its last submission, to adjudge and declare that Iceland is under an obligation to make compensation for the acts of interference by Icelandic coastal patrol boats with the German fishing vessels by the threat or use of force (hearing of 28 March 1974, p. 92). In the German Memorial its request is clearer, namely that the Court should 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 described in the preceding paragraphs, and under an obligation to pay full compensation for all damage which the Federal Republic of Germany and its nationals have actually suffered thereby.” (Part V, para. 18.)

This claim by the Federal Republic raises two preliminary questions for the Court, which should be examined separately.

I do not see how the Court can agree to this claim by the Federal Republic. In its judgment on a case the Court does not have to make declarations of principle. To say that an illegal act which has caused injury gives rise to an obligation to make reparation is a mere truism, and there is therefore no point in saying it. But for that very reason, to say as much would suggest that the Court has, at least *prima facie*, accepted the existence of illegal acts and of damage.

A claim for reparation, if it is to be admissible before a court, must include an offer of evidence, as to the fault of the defendant, and as to the existence and the amount of each head of damage; the possibility must also be considered of balancing of fault on each side, or set-off of damages. It is after hearing evidence that the Court can satisfy itself that the submissions as to reparation are well founded in fact and in law.

The other question to be examined concerns the Court's jurisdiction to entertain the claim for reparation.

I should observe first of all that I do not consider that the Court has to settle the question of jurisdiction before stating that the claim is inadmissible. It is open to the Court to take no action on the claim because it is not properly made. The Court always has jurisdiction to

decide that a claim is inadmissible because its formulation is wholly defective.

I think also that I should make no secret of my doubts as to the Court's jurisdiction to examine the question of reparation. My hesitation arises from the fact that I do not see how it can be argued from the compromissory clause that the task entrusted to the Court includes the question of reparation. The clause was accepted unwillingly by Iceland, and it would appear that there is nothing to justify its being interpreted extensively. The 1961 agreement is confined to the establishment of fishing zones; the compromissory clause relates to "the matter" of the extension. The Court can and must give a decision on the extension. Can it do so also on connected questions? In my view, the damage and injury relied on by the Federal Republic derive from something other than the extension. The unlawfulness of the activities of the Iceland coastal patrol boats which has been asserted might be deduced from the fact that they occurred either *pendente lite* or in disregard of the Court's Order as to interim measures; they would thus arise not from non-compliance with contractual obligations (arising from the same treaty) but *ex delicto*.

It is not easy to interpret the compromissory clause so extensively. The extension of fisheries jurisdiction is not the cause of the damage; the acts of the coastal patrol boats are new facts, not foreseen at the time of conclusion of the agreement.

The old saying that *boni judicis est ampliare jurisdictionem* is not applicable to the Court's jurisdiction (United Nations Charter, Art. 2, para. 7). I consider that the compromissory clause in the 1961 Exchange of Notes should not be interpreted restrictively, but should not be interpreted extensively either; it should be read in accordance with the ordinary meaning to be given to the terms of the Notes in their context and in the light of their object and purpose (Vienna Convention on the Law of Treaties, Art. 31).

(Signed) F. DE CASTRO.