DISSENTING OPINION OF JUDGE PETRÉN

[Translation]

To my regret, I have felt obliged to vote against the Judgment and to append this dissenting opinion.

The main reason why I felt unable to vote for the Judgment lay in the broad construction placed by the Court on the agreement concluded between the Parties by their 1961 Exchange of Notes, which constitutes the sole basis of the Court's jurisdiction to deal with the present case. In that respect I, like my colleague Judge Ignacio-Pinto, share the view expressed by our colleagues Judges Gros and Onyeama in their dissenting opinions, to which I may therefore refer the reader. I need here say no more than that the only question upon which the 1961 agreement entitles the Court to adjudicate is whether a measure whereby Iceland extends its zone of exclusive fisheries jurisdiction beyond a distance of 12 nautical miles from the baselines of its territorial waters is well founded in international law. Certain passages of the Judgment appear to partake of the notion that the disputed extension by Iceland of its fishery zone from the 12-mile to the 50-mile limit is without foundation in international law. Thus paragraph 53 of the Judgment, after alluding to the contemporary tendencies of a number of States to extend their fishery zones beyond the 12-mile limit, concludes by observing that "the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down". Paragraph 67 reflects the same attitude even more clearly, for it states that "Iceland's unilateral action . . . constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas", and that presupposes that the waters lying between the 12-mile and the 50-mile limit do not form part of Iceland's fishery zone. This notwithstanding, the operative paragraph of the Judgment confines itself in subparagraph 1 to finding that the Regulations on fishery limits promulgated by the Government of Iceland are not opposable to the United Kingdom, and it appears from the paragraphs immediately preceding the operative part that this finding is based on considerations which are wholly different in nature from the question whether the extension of Iceland's fishery zone is in conformity with international law. In the reasoning which leads up to the operative paragraph of the Judgment the Court notes the existence, beyond the 12-mile limit, of historic British fishing rights which debar Iceland from opposing to the United Kingdom the extension of its fishery zone. To this the Court adds that, as a coastal State, Iceland enjoys preferential rights in the waters adjacent to the 12-mile limit and that the two Parties are under an obligation to negotiate with a view to striking a just balance between these two categories of right.

In short, the operative paragraph does not give any reply to the primordial question raised by the first submission of the British Government, namely whether the challenged extension of Iceland's fishery zone has or has not any foundation in international law. All that the British Government is told is that the United Kingdom possesses historic rights in waters concerning which the operative part of the Judgment fails to indicate whether they form part of Iceland's fishery zone or are adjacent thereto. It seems to me that the Parties were entitled to receive clarification on that point, more especially because, as the Court itself admits in paragraph 69 of the Judgment, the historic rights which a non-coastal State may assert within the fishery zone of a coastal State have an inherently shorter lifespan than those applying to the adjacent waters. Furthermore, it is obvious that one may speak of the preferential rights of the coastal State only with reference to waters beyond the fishery zone, an area within which that State enjoys a jurisdiction that is in principle exclusive.

The absence of any reply to the question whether the extension by Iceland of its fishery zone is in conformity with international law leaves in the Judgment a void which is all the more conspicuous for the fact that the problem is raised by the United Kingdom's very first submission. It is true that counsel for the United Kingdom was led, by a question put by a Member of the Court, to state during the oral proceedings that his Government's second and third submissions could stand without the first and that it was in its view therefore open to the Court to adjudicate upon them without adjudicating upon the first. But that does not mean that the first submission was withdrawn or in any way detract from its primordial importance in the present case, considering the position adopted by Iceland in extending its fishery zone.

Even if the United Kingdom had withdrawn its first submission during the oral proceedings, that would not have dispensed the Court from adjudicating upon the conformity of Iceland's present extension of its fishery zone with international law, for Iceland, which has constantly asserted that this measure is well founded in international law, has not consented to the Court's not examining the validity of that contention. Both Parties were therefore entitled to expect the Court to make a finding upon it.

While the documentation placed at the Court's disposal shows that the dispute concerns the breadth of fishery zone which Iceland is entitled to claim, there is on the other hand nothing to indicate any disagreement between the Parties as to the principles which should govern the regulation, in the waters adjacent to the fishery zone and in a framework of agreed conservation measures, of the relationships between the preferential rights of Iceland as the coastal State and the rights of other States whose vessels fish in the same region. It is by no means certain that the Court's intervention will be necessary to help the Parties regulate their fishery relations once the limit of the fishery zone attributable to Iceland is fixed. The present difficulties are caused by the recent extension of the

fishery zone and the challenge brought against it by the United Kingdom.

Furthermore, I consider that the 1961 agreement between the Parties does not confer jurisdiction upon the Court to make any pronouncement with regard to such preferential or historic rights as may exist within the waters adjacent to the Icelandic fishery zone. I am therefore unable to concur in the reasoning expounded by the Court in paragraphs 65 and 67 of the Judgment, according to which the agreement concluded between the Parties in 1961 recognized the existence of the historic rights of the United Kingdom, thus conferring a title upon the United Kingdom and correlative jurisdiction upon the Court. In paragraph 69 the Court even finds it possible to treat these rights as being as perennial as those of Iceland. Yet the substantive provisions of the 1961 Exchange of Notes do not contain any reference to recognition of the United Kingdom's historic rights in the waters adjacent to the 12-mile fishery zone attributed to Iceland. Although it is reasonable to suppose, as paragraph 65 of the Judgment does, that it was out of regard for British interests that Iceland undertook to give the United Kingdom six months' notice of any new measure for the extension of its fishery limits, it is not in my view possible to say that recognition of the United Kingdom's historic rights in the area now in dispute was covered by the agreement of 1961, where they are not even mentioned. It is true that pending its final judgment the Court indicated interim measures of protection restricting the British catch in the disputed waters; but that obviously could not signify that it regarded itself as competent also to order such measures in its final judgment. What other type of interim measures would appear more natural, pending a judgment fixing the breadth of a fishery zone? The argument which paragraph 46 of the Judgment seeks to draw from paragraph 12 of the Order of 17 August 1972 is in my view based on a false interpretation of the latter. If the Court had found that the extension of Iceland's fishery zone was in itself consistent with prevailing international law, the question of the treatment proper to any interests of the United Kingdom within that zone—whether, for example, they should be dealt with by means of a period of adjustment—might have arisen as a related question calling for an answer from the Court. But there is no basis in the 1961 agreement for the Court to broach questions concerning certain historic rights of the United Kingdom and measures of conservation without first settling the question of the limits of Iceland's fishery zone.

By not settling the primordial question submitted to the Court in the present case, the Judgment also sidesteps the question whether the 1961 agreement prohibits Iceland from implementing a measure extending its fishery zone without waiting for the Court's judgment, once the United Kingdom has referred the matter to the Court. If Iceland is so prohibited, the enforcement of a measure extending its fishery zone might constitute a breach of the obligation to wait for the Court's pronouncement, without the measure in itself being contrary to the law of the sea. In such event, would the measure still be non-opposable to the United Kingdom? The content of the British record of the negotiations which led up to the 1961

agreement seems to me rather to indicate that the only guarantee the agreement offers the United Kingdom against the immediate application of a further extension of the Icelandic fishery zone is the six months' notice. This is evidently designed to enable the United Kingdom to seise the Court in time for it to indicate interim measures of protection before the date fixed for the entry into force of the disputed extension. Thus the immediate protection of the interests of the United Kingdom would depend on the Court's appraisal of the situation and the effect, binding or otherwise, to be attributed to the interim measures.

For years Iceland has been pursuing a consistent policy aiming at the gradual extension of its fishery zone. This policy is in tune with the similar trends, referred to in paragraph 53 of the Judgment, which have been emerging in many parts of the world in recent years and whose importance at the present time is clear from the preparatory documents of the Third Conference on the Law of the Sea, as also from the statements which have already been made at the Conference itself by numerous governments. Iceland considered that it could rely upon the rising trend of customary law towards the recognition of extended fishery zones. Whether Iceland was or was not mistaken in this, the question remains whether, by enforcing the extension of its fishery zone vis-à-vis the United Kingdom without waiting for the Court to give judgment, it was guilty of an infringement of the 1961 agreement which was sufficient in itself to render the measure extending the fishery zone non-opposable to the United Kingdom. To answer this question in the affirmative could have the result of preventing Iceland, through long years of judicial proceedings, from benefiting like other coastal States from an evolution in its favour of customary law. The present case itself would afford an example of this, if Iceland eventually proved to be legally entitled to extend its fishery zone.

The question of the prolongation of the effects of the jurisdictional clause of the 1961 agreement has, however, several aspects. One might for example enquire whether that clause, which was framed with the next, already foreseen stage of the extension of Iceland's fishery zone in view, was meant to restrict the Icelandic Government's freedom of action for so long as the 1961 agreement remained in force and thus to open the door to repeated applications to the Court. The circumstances in which the agreement was concluded do not appear to me to indicate that such was the intention of the Icelandic Government. Even from the standpoint of the present Judgment, the problem of the duration of the effects of the jurisdictional clause of the 1961 agreement is not absent. It arises, in particular, in connection with the negotiations which the Parties, the Judgment stipulates, have an obligation to undertake; for in my view the Parties are entitled to know whether the Court would consider itself competent to continue to deal with their dispute in the event that the negotiations did not take place or were unsuccessful. What, for example, will be the situation if the dispute is not settled before the expiry of the interim agreement between the Parties (13 November 1975)? Would the

present Judgment then have the effect of prohibiting Iceland from proceeding, without waiting for a new judgment of the Court, and with effect vis-à-vis the United Kingdom, to the extension of limits to which it might be entitled on account of the evolution of international law?

It appears to me that the question whether the Court could again exercise jurisdiction if the negotiations which should take place by virtue of the Judgment came to nothing can be answered by analysing the interpretation of the 1961 agreement on which the Judgment is based.

Without settling the question whether the recent extension by Iceland of its fishery zone is in conformity with international law, the Court finds that it is not opposable to the United Kingdom on account of the latter's historic rights, and that it is necessary to establish, within a framework of agreed measures of conservation, a régime wherein these historic rights will be balanced against the preferential rights of Iceland as the coastal State. The Court therefore considers itself competent to pronounce upon questions of preferential and historic rights and measures of conservation in the disputed waters independently of any consideration of the basis, if any, in international law of an extension of Iceland's fishery zone. At the same time the Court creates an obligation upon the Parties to undertake negotiations on these points while taking into consideration a series of recommendations enunciated in the Judgment. Yet these are matters which, if they concern waters outside the fishery zones of coastal States, require by their very nature to be regulated on a multilateral basis with the participation of all those States whose interests are at stake. There are international instruments which provide procedures to that end without envisaging reference to the Court. So far as the North-East Atlantic is concerned, the Federal Republic of Germany is the only State, apart from the United Kingdom, to have expressed any desire that the Court should deal with such questions, but the Court, by deciding not to join the parallel cases instituted by these two States, deprived itself of the possibility of prescribing joint negotiations between them and Iceland.

In its Judgment of 2 February 1973 the Court found that the 1961 agreement was still in force. Iceland will doubtless be inclined to maintain the extension of its fishery zone, since the Court has declared it unlawful only vis-à-vis the United Kingdom and—by its Judgment in the other case—the Federal Republic of Germany. Hence the possibility must be foreseen of further disputes between the Parties over the exercise of their rights in the belt between the 12-mile and the 50-mile limit. It is also possible that disputes may arise between the Parties over the interpretation or application of the guidelines laid down by the Court for the conduct of the negotiations it has directed them to undertake. As the Judgment shows that the Court, by considering it could leave aside the question of the conformity with international law of Iceland's extension of its fishery zone, regards itself as competent to deal with questions of fishing rights and conservation measures beyond the 12-mile limit, there is no escaping the conclusion that, according to the logic of the Judgment, a

whole series of disputes born of the situation created by the Judgment would be referable to the Court.

In the light of the foregoing considerations, I am of the view that in the present Judgment the Court has considerably exceeded the jurisdiction conferred upon it by the 1961 agreement.

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While not pronouncing upon the above-mentioned questions, the Court has devoted a considerable part of its Judgment to the effects, for the present proceedings, of the interim agreement concluded between the Parties on 13 November 1973. There again, I regret to have to record that my opinion does not coincide with that of the Court.

The interim agreement was concluded by an Exchange of Notes, the first of which was a communication from the Minister for Foreign Affairs of Iceland to the British Ambassador in Reykjavik, setting out the agreed terms, while the second consists of the Ambassador's reply accepting the contents of the agreement on behalf of the United Kingdom. The Minister begins by noting that the arrangements in question were worked out in the course of discussions between the two Governments with a view to concluding an interim agreement relating to fisheries in the disputed area, pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either Government in relation thereto. Iceland's negative attitude towards the Court precludes the idea that the settlement envisaged by the Parties was that which might result from a judgment of the Court. That is also clear from paragraph 7 of the Note, according to which the agreement would run for two years from the date of the Exchange of Notes (13 November 1973). Even the greatest pessimist could not suppose that the present proceedings before the Court would last until 13 November 1975. One must therefore conclude that in fixing this time-limit the Parties must have had something else in mind. Circumstantial evidence suggests that this must have been the third United Nations diplomatic Conference on the Law of the Sea, which was to open on 22 June 1974. For example, the United Kingdom, in paragraph 297 of its Memorial on the merits, had held that Iceland, rather than acting unilaterally to extend its fishery zone, ought to have awaited the outcome of the Conference.

That being so, one may, I consider, legitimately ask whether the pursuit of the proceedings before the Court during the period covered by the interim agreement is compatible with that treaty. In the United Kingdom, the Prime Minister stated to the House of Commons that the Government's position before the Court remained exactly what it was before the conclusion of the interim agreement, which had been concluded without prejudice to the case of either Party. It is thus evident that the United Kingdom does not interpret the interim agreement as implying that the proceedings before the Court should be interrupted. In Iceland, the

interim agreement was the subject of an Althing debate on 12 November 1973. When the Prime Minister was criticized for not having insisted on the United Kingdom's discontinuing its proceedings before the Court, he pointed out that it would have been illogical of him to do so, given his position in regard to the 1961 Exchange of Notes and vis-à-vis the Court: would he not have appeared to be recognizing the continuing, validity of the 1961 Exchange of Notes? (*Alþingistíðindi Umræður* 1973, p. 536.) It follows that the interim agreement takes no account of the proceedings before the Court and could not constitute a bar to the United Kingdom's pursuance of them. That, however, does not mean that the agreement should have no effect on the Court's findings.

The interim agreement lays down, in respect of the period from 13 November 1973 to 13 November 1975, the conditions under which British vessels will have the right to fish in the disputed area. Counsel for the United Kingdom was asked whether that agreement definitively regulated, for the period indicated, the relations of the two Parties, so far as the fisheries in question were concerned, or whether it would be possible for the Court to replace that regulation with another. The reply was that the judgment would state the rules of customary international law between the Parties, defining their respective rights and obligations. However, that would not mean that the judgment would completely replace the interim agreement with immediate effect in the relations between the Parties, for, as the British Government saw the matter, the agreement would remain as a treaty in force. In any event, the Parties would be under a duty fully to regulate their relations in accordance with the terms of the judgment as soon as the interim agreement ceased to be in force, i.e., on 13 November 1975, or at such earlier date as the Parties might agree. On the other hand, the judgment would have immediate effect in so far as it dealt with matters not covered in the agreement.

Thus the British Government hinted at the possibility that the Court might regulate, with immediate effect, certain matters which were left outside the scope of the interim agreement. But it failed to indicate the possible substance of these matters, which must at the same time be covered by the Application and be relevant to the manner in which British fishing vessels pursue their activities in the disputed area. Compare the Application and the interim agreement as one may, one still fails to see what matters these might be.

It must be concluded that the interim agreement definitively regulated the conditions under which British vessels have the right to fish in the disputed area between 13 November 1973 and 13 November 1975. A judgment of the kind sought by the British Government could therefore not be implemented before the expiry of the interim agreement. What the United Kingdom is requesting of the Court is to state the law which would have been applicable to the relations between the Parties in the event that they had not concluded that agreement. Yet the essence of the judicial function is to declare the law between the Parties as it exists, and not to declare what the law would have been if the existing law had

not existed. The conclusion of the interim agreement has therefore had the effect of rendering the Application of the United Kingdom without object so far as the period covered by the agreement is concerned.

As for the period which will begin on the expiry of the interim agreement, i.e., on 13 November 1975, it is clear to me, above all after the explanations obtained during the oral proceedings, that the Application of the United Kingdom is tantamount to a request that the Court should define the customary international law which should govern the conditions under which British vessels will then be able to fish in the disputed area. Is it possible for the Court to accede to such a request?

Like all domains of law, the law of the sea is subject to evolution. New multilateral or bilateral international conventions come into being, and customary law is modified. It is undeniable that one of the possible results of the Third Conference on the Law of the Sea, which is being held at this moment, will be a clarification or modification of the rules governing the fisheries jurisdiction of coastal States. In paragraph 297 of its Memorial on the merits, the British Government argues that Iceland, rather than take precipitate and unilateral action, ought properly to have awaited the outcome of the Conference, which will be considering such issues as the breadth of exclusive fishery zones, the conservation of the living resources of the high seas, and the special rights of coastal States. According to the Memorial, the precedent of the 1958 and 1960 Geneva Conferences does not justify Iceland in assuming that it will be impossible to reach agreement or decide upon concerted measures to meet those needs of Iceland which the community of States as a whole recognizes to be just and deserving of legal protection. In fact, the British Government continued, the 1958 and 1960 Conferences laid the basis for a general recognition of the validity of exclusive fishery zones up to a 12-mile limit and, on that basis, many States negotiated international agreements, of which the Anglo-Icelandic Exchange of Notes of 1961 was a case in point. The 1974 Conference might well provide an even greater measure of agreement over new rules to be incorporated into international law. The Government of the United Kingdom stressed, however, in paragraph 298 of its Memorial, that what the Conference might agree about changes in the existing law was irrelevant to the present case before the Court.

At the stage of the oral proceedings, the British Government showed much less optimism with regard to the results which might be expected from the Third Conference on the Law of the Sea. This is clear from the written reply given by counsel for the United Kingdom to the question whether it was compatible with the position adopted in paragraph 297 of the Memorial to request of the Court a decision intended to regulate the Parties' relations with regard to fishing in a non-immediate future. The reply was to the effect that the 1974 session was widely expected to be followed by a second session in 1975, and that it appeared far from certain that any clear outcome would have been produced before the

expiry of the interim agreement; that was why the British Government had indicated in paragraph 298 of its Memorial that whatever a new Conference might agree about changes in the law was beside the point. In the same reply the Government of the United Kingdom explained that it intended to take a positive attitude towards the negotiations on the many interrelated items with which the Conference would be dealing, with a view to contributing to the adoption of a new convention that might clarify a number of existing issues and further the progressive development of international law. Nevertheless, the British Government continued, even if a convention were to be concluded reasonably quickly, it would remain to be seen how long it would take to enter into force or have an impact upon the development of international law through State practice, and it would also remain to be seen whether Iceland—which had not yet adhered to any of the Geneva Conventions of 1958—would become a party to it. Hence, according to the British Government, the Court's judgment would constitute an authoritative statement of the rights and obligations of the Parties under existing law and might provide a basis for the negotiation of arrangements to follow those contained in the interim agreement. For those reasons, the British Government considered it quite compatible with the view expressed at the beginning of paragraph 297 of its Memorial that it should seek of the Court a judgment on the United Kingdom's submissions.

Dating as it does from 31 July 1973, the United Kingdom's Memorial on the merits of the case could not have taken into account the effects of the interim agreement of 13 November 1973. The circumstances in which the Memorial was prepared gave way to a profoundly different stituation once the interim agreement had been signed, for it is only on 13 November 1975 that customary international law will again govern the conditions under which fishing is carried out in the disputed area. It is true that the British Government is now of the opinion that, in all probability, the Third Conference on the Law of the Sea will still not have changed anything by 13 November 1975. But, given the impossibility of foreseeing the changes which, even in the near future, may affect an actively evolving field of law, I find that there is no certainty on which the Court can base its judgment: there is a very real possibility that a claim which at the present moment has no legal justification may prove tomorrow to be well founded. The Court ought therefore to decline any request which in effect calls upon it to declare the customary law of the future.

I am unable to agree with the view, expounded in paragraph 41 of the Judgment, that for the Court to espouse the above conclusions would inevitably result in discouraging the making of interim arrangements in future disputes with the object of reducing friction and avoiding risk to peace and security. To my mind this argument, applied to the present case, overlooks the fact that the interim agreement between the Parties will remain in force after the delivery of the Judgment and that the Application does not request the Court to interpret a treaty of immutable

verbal content but to pronounce upon the future of a customary law in active evolution. If the interim agreement were destined to expire on the date of the Judgment, no difficulty would have arisen, and if the dispute concerned the interpretation of a treaty, an interim agreement concerning its application over a given period would not hinder the Court from ruling before the end of that period on the interpretation and future application of the treaty.

However, in subparagraphs 3 and 4 of the operative part of the Judgment, the Court finds that the Parties are under mutual obligations to undertake negotiations concerning their respective fishery rights in the disputed area, negotiations in which they must take into account *inter alia* certain preferential rights attributable to Iceland. As the Court's jurisdiction to deal with the present case is founded solely on the jurisdictional clause of the 1961 Exchange of Notes, and as that clause concerns only the question whether a future extension by Iceland of its zone of exclusive fisheries jurisdiction would be in conformity with international law, I consider that the Court, by imposing on the Parties an obligation to negotiate in respect of something else, has exceeded the limits of its jurisdiction.

But that is not the only reason why I consider that the Court is not competent to prescribe negotiations between the Parties.

The written reply to a question put to the Agent of the United Kingdom reveals that the British negotiators first proposed the following form of words for paragraph 7 of the interim agreement of 13 November 1973:

> "The agreement will run for two years from the present date. The Governments will reconsider the position before that term expires unless they have in the meantime agreed to a settlement of the substantive dispute. In the absence of such a settlement, the termination of this agreement will not affect the legal position of either Government with respect to the substantive dispute."

The Government of Iceland, however, requested the deletion of the central portion of this text, and paragraph 7 was finally drafted in the following terms:

> "The agreement will run for two years from the present date. Its termination will not affect the legal position of either Government with respect to the substantive dispute."

To my mind, the deletion, at the request of the Icelandic Government, of the reference to a reconsideration of the position before the expiry of the interim agreement and to the possibility of agreeing in the meantime to a settlement of the substantive dispute constitutes incontrovertible evidence that Iceland did not accept any obligation to enter into fresh negotiations with the United Kingdom for so long as the interim agreement remained in force. Consequently, if Iceland prefers to concentrate upon the new

Conference on the Law of the Sea without at the same time negotiating bilaterally with the United Kingdom, there is nothing to oblige it to enter into such negotiations.

In my view, it is impossible to overthrow this conclusion by quoting the *North Sea Continental Shelf* Judgment, as paragraph 75 of the present Judgment does. It must be recalled that the circumstances of the present case are very different from those of *North Sea Continental Shelf*, in which the Parties, by common agreement, had requested the Court to indicate the principles and rules of international law applicable to their dispute and had undertaken to conclude an agreement in accordance with the Court's decision. Neither is it, I feel, possible to regard my interpretation of the interim agreement of 13 November 1973 as contrary to the Charter of the United Nations, which also is appealed to in paragraph 75 of the Judgment. However great the importance ascribed by the Charter to negotiations as a peaceful means for the settlement of disputes, States remain perfectly free to choose other peaceful means. There is nothing surprising in the fact that Iceland, on the eve of the new Conference on the Law of the Sea, should have refused to accept an obligation to continue negotiations with the United Kingdom at bilateral level. As for the Althing resolution of 15 February 1972, cited in paragraph 77 of the Judgment as ruling out my interpretation of the interim agreement, I consider, like my colleague Judge Gros and for the same reasons, that the Court attributes to this resolution a meaning which it does not possess. My view, in brief, is that the particular circumspection and special care with which the Court considers it has acted in regard to Iceland (see para. 17 of the Judgment) should have precluded its outright rejection of an interpretation of the agreement, on that point, which, given the prenatal history of that instrument, I personally find inescapable.

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For all these reasons, I consider that the Application of the United Kingdom is without object with regard both to the period from 13 November 1973 to 13 November 1975 and to the subsequent period.

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There remains the period between the putting into effect of the Icelandic Regulations which are in dispute (1 September 1972) and the coming into force of the interim agreement (13 November 1973). In my view, it is only so far as that period is concerned that is it necessary to consider whether Iceland's extension of its fishery zone was from the beginning, and subsequently remained, contrary to international law. It was, moreover, solely in relation to the situation during that period that I found it necessary to consider those aspects of the present case with which I dealt in the first part of this dissenting opinion.

As there does not exist between the two States any convention on which the Icelandic decision could be founded, Iceland could seek its justification only in customary international law. The first two United Nations Conferences on the Law of the Sea amply demonstrated that no such general rule of customary international law existed in 1958-1960. If there is any general customary rule that Iceland can rely on, it must have come into being since 1960. Let us therefore consider what evolution may have taken place.

It is true that an increasing number of coastal States, whether by proclaiming the extension of their territorial waters or by claiming fishery zones beyond those waters, have claimed an exclusive fisheries jurisdiction extending up to the 50-mile or even the 200-mile limit. Nevertheless, even if one confines one's attention to the zone lying between the 12-mile and the 50-mile limits, the number of States that have claimed exclusive fisheries jurisdiction therein cannot be considered sufficiently large to justify the conclusion that a new rule of law, generally accepted as valid by the international community, is being applied. Furthermore, the States whose interests are threatened by these claims have constantly protested. Hence another element which is necessary to the formation of a new rule of customary law is missing, namely its acceptance by those States whose interests it affects.

In the course of the proceedings before the Court, attention has been drawn to the recent resolutions of United Nations organs concerning permanent sovereignty over natural resources. In its resolution 3016 (XXVII) of 18 December 1972, the General Assembly reaffirmed the right of States to permanent sovereignty over all their natural resources, on land within their national boundaries as well as those found in the sea-bed and the subsoil thereof within their national jurisdiction *and in the superjacent waters*. Approved by 102 votes to 0 with 22 abstentions, this resolution was followed by a recommendation and another resolution in similar terms, the first being adopted by the Committee on Natural Resources of the Economic and Social Council, and the second by the Economic and Social Council itself. The content of these texts, which are of more recent date than the Application instituting the present proceedings, differs on one fundamental point from the Geneva Convention on the Continental Shelf, whose provisions are generally regarded as codifying the law accepted around 1958: the Convention does not attribute to the coastal State any exclusive fishing rights with regard to fish swimming in the waters above the continental shelf.

The General Assembly resolution is of special interest in the present proceedings, for Iceland has referred to the doctrine of the continental shelf as being the legal basis of the contested extension of its fishery zone. The question is therefore whether the innovation represented by the reference to superjacent waters in the General Assembly resolution has had the effect of conferring upon the coastal State a jurisdiction not inherent in the original concept of the continental shelf, which would be

equivalent to the sudden creation of a new rule of customary law. Now, without having to go into the general question of whether a resolution of the General Assembly can create new law, I must at all events stress one prerequisite of such creation, namely that the States voting for the resolution must truly have envisaged and accepted the possibility of its immediately acquiring binding force. But the complexity of the circumstances in which resolution 3016 (XXVII) was adopted, the statements accompanying the vote and the well-known attitude of certain States regarding fishery zones do not justify the conclusion that the resolution was passed by a large majority of States with the intention of creating a new binding rule of law and of prejudging whatever decision the Third Conference on the Law of the Sea might take on the subject. However revelatory the resolution may be of a current of opinion flowing in favour of the claims of Iceland and other States, its adoption by the General Assembly could not have sufficed to transform the existing law and give birth to a new general rule of customary law conferring on the coastal State exclusive fisheries jurisdiction in the waters above its continental shelf. This remark applies *a fortiori* to the various expressions of doctrinal position or opinion volunteered by States during the preparatory stage before the Conference.

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For the foregoing reasons I consider that the submissions put forward and maintained by the United Kingdom should have been rejected as without object, except in relation to the period between Iceland's implementation of the extension of its zone of exclusive fisheries jurisdiction up to the 50-mile limit (1 September 1972) and the coming into force of the interim agreement between the Parties (13 November 1973). Considering as I do that the measure decided by Iceland was without foundation in international law, I find that its application to British fishing vessels during the above-mentioned period constituted an infringement of international law vis-à-vis the United Kingdom. In the light of the considerations I have put forward above, this finding does not mean that, on the termination of the interim agreement concluded between the Parties on 13 November 1973, the extension of Iceland's fishery zone should automatically be considered as still inconsistent with international law.

The system of the Judgment did not however enable me to cast a vote expressing my position in regard to the period from 1 September 1972 to 13 November 1973. The reason is twofold: no distinction is made between different periods of application of the Icelandic measure and, in declaring that measure non-opposable to the United Kingdom, the Court bases itself solely on considerations concerning the historic rights

of the United Kingdom and studiously avoids pronouncing upon the only question in respect of which the 1961 agreement conferred jurisdiction upon it, that of the conformity with international law of the extension of Iceland's fishery zone.

No other course was therefore left to me but to vote against the Judgment in its entirety.

(Signed) S. PETRÉN.