

## DISSENTING OPINION OF JUDGE ONYEAMA

1. Although I agree that the Regulations concerning the Fishery Limits off Iceland (*Reglugerð um fiskveiðilandhelgi Íslands*) promulgated by the Government of Iceland on 14 July 1972, and constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines specified therein are not opposable to the Government of the United Kingdom; and, although I agree also that, in consequence, the Government of Iceland is not entitled unilaterally to exclude United Kingdom fishing vessels from areas to seaward of the fishery limits agreed to in the Exchange of Notes of 11 March 1961 or unilaterally to impose restrictions on the activities of those vessels in such areas, my reasons for reaching these conclusions are so fundamentally different from those of the Court that I feel unable to vote for the first part of the operative clause of the Judgment for the reasons given by the Court. For the rest of the Judgment, it is my view that the Court settled an issue on which the Parties were not in dispute. In my view the Court's approach to the entire case has led it to refrain from deciding the sole dispute before it, and to consider and settle an issue on which the Parties were not shown to be in difference and on which the Court's jurisdiction is very much in doubt.

2. At the jurisdiction phase of the present case<sup>1</sup>, the Court said:

"The present case concerns a dispute between the Government of the United Kingdom and the Government of Iceland occasioned by the claim of the latter *to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland*." (*I.C.J. Reports 1973*, p. 7, para. 11.) (Emphasis added.)

In the written submissions filed on behalf of the Government of the United Kingdom at the close of the oral proceedings in the jurisdiction phase it was stated, *inter alia*:

"(c) that, given the refusal by the United Kingdom to accept the validity of unilateral action by Iceland purporting to extend its fisheries limits (as manifested in the Aides-Memoires of the Government of Iceland of 31 August 1971, and 24 February

<sup>1</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court* (*I.C.J. Reports 1973*, p. 3).

1972, the Resolution of the Althing of 15 February 1972 and the Regulations of 14 July 1972, issued pursuant to that Resolution), a dispute exists between Iceland and the United Kingdom which constitutes a dispute within the terms of the compromissory clause of the Exchange of Notes of 11 March 1961". (*I.C.J. Reports 1973*, p. 6, para. 9 (c).)

3. The question which arises in the present case is what is the dispute between the Parties which has been submitted to the Court and which the Court decided on 2 February 1973 it has jurisdiction to entertain? It seems to me that the answer to this question is to be found in the discussions between the Parties preceding the Exchange of Notes of 1961, the Exchange of Notes itself, the subsequent communications between the Parties and the various enactments of the Parliament of Iceland. An examination of these materials appears to me to show that the dispute between the Parties in the case in hand is about the unilateral extension of Iceland's exclusive fisheries jurisdiction beyond the 12 miles around Iceland agreed in the Exchange of Notes of 1961.

4. The negotiations conducted between the United Kingdom and Iceland which resulted in the Exchange of Notes of 1961 were necessitated by a desire on both sides to seek adjustment of the differences between them over the proposed extension by Iceland of her fishery jurisdiction round her coast from 4 miles to 12 miles after the conclusion of the United Nations Conference on the Law of the Sea in 1958. The United Kingdom opposed this proposed extension on the ground that it had no basis in international law, but with the emergence of a general trend towards accepting a 12-mile limit of fishery jurisdiction after the Geneva Conference on the Law of the Sea it was possible for the Parties to reach the agreement constituted by the Exchange of Notes of 1961.

The record of the discussions during these negotiations is illuminating; it shows clearly what the dispute between the Parties was about, and what it was the United Kingdom was anxious to guard against by the compromissory clause of the Exchange of Notes on which it had insisted during the negotiations.

5. This record shows that at the first meeting on 1 October 1960, between the Icelandic delegation and the United Kingdom delegation, the leader of the Icelandic delegation in stating the views of the Icelandic Government made the points:

- “(a) Iceland is in a unique position in that its people are dependent entirely upon the coastal fisheries; this is universally recognized;
- (b) it is therefore essential for the Icelandic Government to safeguard its coastal fishery resources: *conservation measures applicable to all alike were not sufficient for this. It is, therefore, the policy of the Icelandic Government to secure exclusive fishery jurisdiction ‘in accordance with international law’*. The

International Law Commission of the United Nations had, in 1956, drawn attention to countries which found themselves in this special position.” (Emphasis added.)

The Icelandic delegation made it clear that future extensions of exclusive fisheries jurisdiction could not be ruled out, and paragraph VIII of the Icelandic Memorandum handed to the United Kingdom delegation stated:

“The Icelandic Government reserves its right to extend fisheries jurisdiction in Icelandic waters in conformity with international law. Such extension would, however, be based either on an agreement (bilateral or multilateral) or decisions of the Icelandic Government which would be subject to arbitration at the request of appropriate parties.”

6. Throughout these negotiations the question of Iceland’s preferential rights or of conservation was not discussed, although the United Kingdom delegation, on a number of occasions, suggested that it might consider restrictions on fishing by the United Kingdom outside the 12-mile zone during the phasing-out period yet to be agreed on, if such restrictions were shown to be necessary in the interests of conservation. The Icelandic delegation did not take up these suggestions, and left no doubt that outside the 12-mile zone its long-term aim remained the extension of Iceland’s exclusive fishery jurisdiction. The Records of Anglo-Icelandic Discussions of 1 November 1960 bring this out clearly as the following extract from page 33 shows:

“*Sir Patrick Reilly* then turned to the question of the assurance to be given by the Icelandic Government. He asked *Miss Gutteridge* to explain the British position on this. *Miss Gutteridge* said we were glad to know that an assurance was considered possible on the Icelandic side. We could not of course oppose any further extension of limits made by Iceland in accordance with international law. At the same time we held that extensions could only be by agreement and could not be unilateral even if a coastal State offered arbitration. For this reason we could not accept the last sentence in the text for the assurance proposed by the Icelandic Government. While in Reykjavik the British Delegation had worked out a formula which seemed to provide a possible basis agreeable to both sides and suggested that this formula should now be discussed. *Miss Gutteridge* handed over a copy of the following proposed text:

‘Except in accordance with the terms of any subsequent agreement between the United Kingdom and Iceland or any subsequent

multilateral agreement which embodies a generally accepted rule of law in relation to fishing limits, the Icelandic Government will not take any action to exclude vessels registered in the territory of the United Kingdom from fishing in any area outside the 12-mile limit.'

After studying the text *Mr. Andersen* said that it was necessary for the purpose of presentation to public opinion in Iceland to leave the Icelandic Government's hands 'untied' in respect of possible further extensions of fishery jurisdiction. The Icelandic Government would therefore as a minimum want to cover in the wording of the assurance the possibility of applying customary law, as well as international law. Opinion in the world was always changing and Iceland would want to take advantage of that if it were favourable without waiting for changes in international law which always seemed difficult to achieve (e.g., the two Geneva Conferences)."

7. The history and nature of the dispute which was then being settled leave no doubt in my mind that the assurance then demanded by the United Kingdom, and subsequently given by Iceland about future extensions, could not be anything else but an assurance that Iceland would not, in the future, seek to extend her exclusive fishery jurisdiction beyond the 12-mile limit as she was then seeking to do from 4 miles to 12 miles except in accordance with the terms of the assurance.

8. The Icelandic delegation had left no-one in any doubt that the exclusive fishery jurisdiction over the 12-mile zone, which was then conceded, was only a first step towards ultimate extension of fishery jurisdiction over the entire continental shelf of Iceland. At a meeting in Reykjavik between the two delegations on 2 December 1960, the Foreign Minister of Iceland said that the aim of the Icelandic Government was the continental shelf; they were, however, ready to state their intention to base their action on rules of international law and also their willingness to submit any dispute to the International Court.

9. In these negotiations preceding the Exchange of Notes, no mention was made of the need for conservation of the fish-stocks around Iceland nor of Iceland's preferential rights as matters on which either of the parties required assurances then or thereafter. These matters were not discussed at all as they were not the problems created by the proposed extension of Iceland's exclusive fishery jurisdiction from 4 miles to 12 miles in 1958.

10. In the light of the foregoing, it seems to me that what the United Kingdom and Iceland had in mind when they agreed in the Exchange of Notes of 11 March 1961 that "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" was a dispute in relation to the unilateral extension of fishery jurisdiction by Iceland beyond the limit then agreed. It was precisely such a dispute which arose following a statement of policy by the Government of Iceland on 14 July 1971. This policy statement was, in the material part, in the following terms:

"Territorial waters. That the agreements on fisheries jurisdiction with the British and the West Germans be terminated and that a decision be taken on the extension of fisheries jurisdiction to 50 nautical miles from base lines, and that this extension become effective not later than September 1st, 1972. Furthermore, that a decision be taken on 100 nautical mile pollution jurisdiction. In these matters of jurisdiction over coastal waters, the government will consult the opposition parties and give them an opportunity to follow all developments in this field."

11. In its aide-mémoire of 31 August 1971 in reply to the United Kingdom's protests over the policy statement the Icelandic Government said (*inter alia*):

"In order to strengthen the measures of protection essential to safeguard the vital interests of the Icelandic people in the seas surrounding its coasts, the Government of Iceland now finds it essential to extend further the zone of exclusive fisheries jurisdiction around its coasts to include the areas of sea covering the continental shelf. It is contemplated that the new limits, the precise boundaries of which will be furnished at a later date, will enter into force not later than 1 September 1972."

To this the United Kingdom replied in an aide-mémoire of 27 September 1971 as follows:

"The British Government have studied the contents of the Government of Iceland's aide-mémoire of 31 August 1971 concerning a proposal by the Government of Iceland 'to extend further the zone of exclusive fisheries jurisdiction around its coasts to include the area of sea covering the continental shelf'. The British Government wish to place on record their view that such an extension of the fishery zone around Iceland would have no basis in international law.

The British Government further cannot accept the view expressed in the aide-mémoire that the object and purpose of the provision, contained in the Anglo-Icelandic Exchange of Notes of March 1961, for recourse to judicial settlement of disputes relating to an extension of fisheries jurisdiction around Iceland have been fully achieved. The British Government wish formally to reserve all their rights under

that agreement including the right to refer disputes to the International Court of Justice.

The British Government note the Government of Iceland's proposal of further discussions. Without prejudice to their legal position outlined above the British Government are prepared to enter into further exploratory discussions with the Government of Iceland."

12. On 15 February 1972 the Parliament of Iceland passed the resolution which, in view of its critical importance, is set out in full:

"The Althing reiterates the fundamental policy of the Icelandic People that the continental shelf of Iceland and the superjacent waters are within the jurisdiction of Iceland and adopts the following Resolution:

1. That the fishery limits will be extended to 50 miles from base-lines around the country, to become effective not later than 1 September 1972.
2. That the Governments of the United Kingdom and the Federal Republic of Germany be again informed that because of the vital interests of the nation and owing to changed circumstances the Notes concerning fishery limits exchanged in 1961 are no longer applicable and that their provisions do not constitute an obligation for Iceland.
3. That efforts to reach a solution of the problems connected with the extension be continued through discussions with the Governments of the United Kingdom and the Federal Republic of Germany.
4. That effective supervision of the fish stocks in the Iceland area be continued in consultation with marine biologists and that the necessary measures be taken for the protection of the fish stocks and specified areas in order to prevent over-fishing.
5. That co-operation with other nations be continued concerning the necessary measures to prevent marine pollution and authorizes the Government to declare unilaterally a special jurisdiction with regard to pollution in the seas surrounding Iceland."

13. The discussions which followed between the United Kingdom and Iceland in an effort to find a "practical solution to the problem" did not alter the nature of the claim Iceland was making nor the nature of the dispute. The suggestions by the United Kingdom for mutually agreed conservation measures as a solution to the problem of possible injury to fish stocks in the area, and for limitation of the catch of demersal fish as an interim measure pending the elaboration of a multilateral agreement within the North-East Atlantic Fisheries Commission, were not accepted by Iceland which was concerned to maintain the exclusive character of its

claim to the fishery in the area, while it remained ready to consider practical arrangements under which British ships might be permitted, subject to certain conditions, to continue to fish in the area in question for a limited phase-out period. It evinced no interest in the question of its preferential rights or conservation measures in the area as a possible answer to its claim.

14. In the jurisdiction phase of the present case, the Court considered what the issue before it was, and said:

“Account must also be taken of the fact that the Applicant has contended before the Court that to the extent that Iceland may, as a coastal State specially dependent on coastal fisheries for its livelihood or economic development, assert 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 the unilateral arrogation 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.C.J. Reports 1973*, p. 20, para. 42.)

This “latter point” was covered in the first submission of the United Kingdom in its Application.

15. Regarding the second submission in the Application the Court, in the jurisdiction phase, dealt with it in paragraphs 41 and 42 of the Judgment. Paragraph 41 is as follows:

“It should be observed in this connection that the exceptional dependence of Iceland on its fisheries for its subsistence and economic development is expressly recognized in the 1961 Exchange of Notes, and the Court, in its Order of 17 August 1972, stated that ‘it is also necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development as expressly recognized by the United Kingdom in its Note addressed to the Foreign Minister of Iceland dated 11 March 1961’. The Court further stated that ‘from this point of view account must be taken of the need for the conservation of fish stocks in the Iceland area.’” (*I.C.J. Reports 1972*, pp. 16 and 17.) “This point is not disputed.” (*I.C.J. Reports 1973*, p. 20, para. 41.)

It is to be noted with reference to this second submission, which is repeated in more elaborate form in the Memorial and in the submissions at the end of the oral proceedings, that it is hypothetical, and based on the assumption that Iceland, as a coastal State in a special situation, raises questions concerning conservation of fish stocks and preferential rights; but Iceland has not raised these questions in any of the negotiations or in any of the documents it saw fit to transmit to the Court. I understand the statements of the Court cited above to mean that the exceptional dependence of Iceland on its fisheries for its subsistence and economic development, and the principle of conservation (including a conservation régime under which Iceland enjoys preferential rights) were recognized by the United Kingdom, and were, therefore, not in issue. The issue before the Court was whether it had jurisdiction to determine whether Iceland was competent unilaterally to assert an exclusive fisheries jurisdiction extending beyond the 12-mile limit. It was on this dispute, about the validity of the extension, that the Court decided it had jurisdiction.

16. In the forefront of the submissions of the United Kingdom in the Application and in the Memorial on the merits was a request for a decision by the Court that there is no foundation in international law for the claim by Iceland to be entitled to extend its fisheries jurisdiction by establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles. This, it seems to me, was the gravamen of the dispute, but the Court now declines to decide it. The decision appears to approach the dispute, not from the point of view of the conflict of the extension with any conventions or with customary international law, but from the point of view that the extension was an exercise of preferential rights which did not give due regard to established rights. This was not the dispute between the Parties and it forms no part of the claim made by Iceland.

17. I am of the opinion that Article 2 of the High Seas Convention and Article 3 of the Continental Shelf Convention<sup>1</sup> provide a basis in positive international law for deciding that the extension has no basis in international law; and the Court, having found that the concept of the fishery zone, and the extension of that fishery zone up to a 12-mile limit from baselines, appear now to be generally accepted<sup>2</sup> as customary international law, should have drawn the conclusion that the unilateral extension to a 50-mile limit by Iceland with which this case is concerned is contrary to international law, and stated that conclusion in the operative clause of the Judgment.

By introducing the concept of preferential rights into the case and linking its Judgment<sup>3</sup> with this concept, the Court, in my view, took

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<sup>1</sup> "The coastal State has no jurisdiction over the superjacent waters" [of the continental shelf] (*I.C.J. Reports 1969*, p. 37, para. 59).

<sup>2</sup> See para. 52 of the Judgment.

<sup>3</sup> Operative part, subparas. 3 and 4.

cognizance of matters which were not in dispute between the Parties and which were not covered by the compromissory clause of the Exchange of Notes of 1961.

As I have endeavoured to point out, the discussions preceding the Exchange of Notes did not indicate that any concern was felt about the future application of conservation measures outside the 12-mile limit then agreed.

18. In the discussions after the promulgation of the Regulations which purported to extend Iceland's fishery jurisdiction to 50 miles from the existing baselines, Iceland appeared to be interested only in a temporary arrangement with the United Kingdom, and not in any permanent bilateral or multilateral conservation or catch-limitation arrangement in which it would be entitled to exercise preferential rights and other interested States would continue to fish in the area.

19. Thus, in a Note dated 11 August 1972, that is after the filing of the Application in this case and the hearing of oral argument on the Request for the indication of interim measures of protection, the Government of Iceland made certain proposals to the Government of the United Kingdom and requested "positive replies to two fundamental points"<sup>1</sup>.

This Note forms part of a series of proposals and counter-proposals which passed between the two Governments in their endeavour to work out an acceptable interim arrangement "which would last only until the Court had given its decision on the legality of the proposed action by the Government of Iceland or until that question had been disposed of in some other way"<sup>2</sup>.

It would, I think, be wrong to regard these proposals and counter-proposals, which were clearly related to negotiations for an interim régime, as indicative of the nature of the original dispute which had, in fact, crystallized with the filing of the Application.

20. Iceland's disinclination to contemplate the concept of preferential rights in the waters in question was brought out very sharply at the eleventh meeting of the North-East Atlantic Fisheries Commission in London on 9 May 1973. On the question of the activation of Article 7 (2)<sup>3</sup> of the Convention<sup>4</sup> the Summary Record of the Second Session has the following, *inter alia*:

"The Icelandic delegate reported that on account of the extension of Icelandic fishery limits to 50-miles and the activities of some

<sup>1</sup> See Annex 10 to the Memorial on the merits.

<sup>2</sup> Memorial on the merits, para. 31.

<sup>3</sup> "Measures for regulating the amount of total catch, or the amount of fishing effort in any period, or any other kinds of measures for the purpose of the conservation of the fish stocks in the Convention area, may be added to the measures listed in paragraph 1 of this Article on a proposal adopted by not less than a two-thirds majority of the Delegations present and voting and subsequently accepted by all Contracting States in accordance with their respective constitutional procedures."

<sup>4</sup> The North-East Atlantic Fisheries Convention of 1959.

countries within the limits the Icelandic Government had reconsidered the position and had decided to postpone the activation of Article 7 (2). In reply to a question from the President, the Icelandic delegate said he was unable to say when his Government would ratify Article 7 (2) powers. *The Icelandic Government believed that coastal States had prime responsibility to manage and prior rights to use marine resources off their coasts. Catch quotas appeared to conflict with these rights* and the problem would be raised at next year's Law of the Sea Conference which was the only forum for discussion of it. It would be very difficult for Iceland to accept a catch quota system which did not harmonize with its policy in regard to fishery limits." (Emphasis added.)

21. Iceland has not, so far as I can see, asserted any claim to preferential rights in the area in question; on the other hand, the United Kingdom has always stood ready to concede such rights if they were asserted on conservation grounds and in circumstances of catch-limitations. It does not appear to me to be possible to have a dispute where there is no difference on a common issue between the parties, or where a right is conceded. The Permanent Court of International Justice defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"<sup>1</sup>. As I understand it, for a dispute to exist, it should clearly appear that the claim of one party is positively opposed by the other, and it is not sufficient merely for it to appear that the interests of the two parties are in conflict.

22. The claim clearly put forward and positively opposed in this case is Iceland's entitlement under international law to extend its exclusive fishery jurisdiction to 50 miles from the baselines around its coast; that was the point which this Court decided it had jurisdiction to determine.

23. The Court derives its jurisdiction in this case from the compromissory clause of the Exchange of Notes of 1961. I think the words "in relation to such extension" in that clause cannot reasonably be interpreted as including disputes about conservation, catch-limitations and preferential rights (which are not susceptible of unilateral delimitation) within the range of disputes the Parties agreed to refer to the Court; and in deciding that the Parties were obliged to negotiate these matters, the Court, to my mind, exceeded the jurisdiction conferred on it by the Exchange of Notes and settled a non-existent dispute.

(Signed) Charles D. ONYEAMA.

<sup>1</sup> *P.C.I.J., Series A, No. 2*, p. 11.