JOINT SEPARATE OPINION OF JUDGES FORSTER, BENGZON, JIMÉNEZ DE ARÉCHAGA, NAGENDRA SINGH AND RUDA

1. What has made it possible for us to concur in the reasoning of the Court and to subscribe to its decision is that, while the Judgment declares the Icelandic extension of its fisheries jurisdiction non-opposable to the Applicant's historic rights, it does not declare, as requested by the Applicant, that such an extension is without foundation in international law and invalid *erga omnes*. In refraining from pronouncing upon that part of the Applicant's first submission in which it requests the Court to adjudge and declare that the Icelandic Regulations of 14 July 1972 have "no basis in international law", and in reaching instead a decision of non-opposability to the Federal Republic of Germany of the Icelandic regulations, the Judgment is based on legal grounds which are specifically confined to the circumstances and special characteristics of the present case and is not based on the Applicant's main legal contention, namely, that a customary rule of international law exists today imposing a general prohibition on extensions by States of their exclusive fisheries jurisdiction beyond 12 nautical miles from their baselines.

2. In our view, to reach the conclusion that there is at present a general rule of customary law establishing for coastal States an obligatory maximum fishery limit of 12 miles would not have been well founded. There is not today an international usage to that effect sufficiently widespread and uniform as to constitute, within the meaning of Article 38, paragraph 1 *(b)*, of the Court's Statute, "evidence of a general practice accepted as law".

3. It is an indisputable fact that it has not been possible for States, despite the efforts made at successive codification conferences on the law of the sea, to reach an agreement on a rule of conventional law fixing the maximum breadth of the territorial sea nor the maximum distance seaward beyond which States are not allowed to extend unilaterally their fisheries jurisdiction. The deliberations of the 1958 Geneva Conference on the Law of the Sea revealed this failure which has been recorded in its resolution VIII of 27 April 1958. The General Assembly of the United Nations consequently laid down that these two subjects would constitute the agenda for the 1960 Conference on the Law of the Sea, which also failed to reach agreement on a text. The establishment of a rule on these two questions thus remains among the topics on the agenda of the current Third United Nations Conference on the Law of the Sea.

4. The law with respect to free-swimming fishery resources has evolved with complete independence from the question of the continental shelf: the two subjects, divorced at the 1958 Conference, have remained separate. It follows that while the provisions of the Continental Shelf Convention (or the principles it established as customary law) cannot afford *per se* a legal basis to a claim with respect to free-swimming fish in the waters above the shelf, these provisions cannot either be applied *a contrario* in order to rule as unlawful a claim to exclusive fisheries in the superjacent waters. In order to prove the lack of relationship between the two questions it is sufficient to recall that the Applicant itself has claimed since 1964 exclusive rights over free-swimming fishery resources in waters beyond and adjacent to its own territorial sea, that is to say in waters which, under the terms of Article 1 of the Continental Shelf Convention, are superjacent to part of its continental shelf.

5. It has also been contended that a 12-mile maximum fishery limit results by implication from the fact that Article 24 of the Territorial Sea Convention establishes a maximum 12-mile limit for the contiguous zone. However, the contiguous zone is also entirely unrelated to fishery questions: fishing does not find a place among the purposes of the zone referred to in that Article. It does not seem possible therefore to infer from this provision a restriction with respect to fishery limits. Moreover, when the contiguous zone concept and its limits were adopted at the Geneva Conference no-one understood at the time that by agreeing to this comparatively secondary provision, the Conference was deciding by implication the two basic questions which had been left in suspense and had in the end to be referred to a second Conference: the maximum breadth of the territorial sea and the maximum fishery jurisdiction of the coastal State. The Conference recorded in its resolution No. VIII that these two questions had remained unsettled. In the face of that decision, it does not seem plausible to contend now that the Conference in adopting Article 24 on the Contiguous Zone implied, even inadvertently, a maximum limit for fishery jurisdiction or for the territorial sea.

6. No maximum rule on fishery limits, having the force of international custom, appears to have as yet emerged to be finally established. The Applicant has however contended that such a rule did crystallize around the proposal which failed to be adopted by one vote at the 1960 Conference on the Law of the Sea. It is true that a general practice has developed around that proposal and has in fact amended the 1958 Convention *praeter legem*: an exclusive fishery zone beyond the territorial sea has become an established feature of contemporary international law. It is also true that the joint formula voted at that Conference provided for a 6 + 6 formula, i.e., for an exclusive 12-mile fishery zone. It is however

necessary to make a distinction between the two meanings which may be ascribed to that reference to 12 miles:

(a) the 12-mile extension has now obtained recognition to the point that even distant-water fishing States no longer object to a coastal State extending its exclusive fisheries jurisdiction zone to 12 miles; or, on the other hand,
(b) the 12-mile rule has come to mean that States cannot validly extend their exclusive fishery zones beyond that limit.

7. In our view, the concept of the fishery zone and the 12-mile limit became established with the meaning indicated in 6 *(a)* above when, in the middle sixties, distant-water fishing States ceased to challenge the exclusive fishery zone of 12 miles established by a number of coastal States. It is for this reason that it may be said, as the Judgment does, that the 12-mile limit "appears now to be generally accepted".

8. However, to recognize the possibility that States might claim without risk of challenge or objection an exclusive fisheries zone of 12 miles cannot by any sense of logic necessarily lead to the conclusion contended for by the Applicant, namely, that such a figure constitutes in the present state of maritime international law an obligatory maximum limit and that a State going beyond such a limit commits an unlawful act, which is invalid *erga omnes*. This contention of the Applicant is an answer to a different question, which must be examined separately.

9. That question is as follows: is there an existing rule of customary law which forbids States to extend their fisheries jurisdiction beyond 12 miles? In order to reply in the affirmative to this question, it would be necessary to be satisfied that such a rule meets the conditions required for the birth of an international custom.

10. It is a fact that a continually increasing number of States have made claims to extend and have effectively extended their fisheries jurisdiction beyond 12 miles. While such a trend was initiated in Latin America, it has been lately followed not only in that part of the world, but in other regions as well. A number of countries in Africa and Asia have also adopted a similar action. The total number adopting that position may now be estimated to be between 30 to 35 coastal States, depending on the interpretation to be given to certain national laws or decrees.

11. While those claims have generally given rise to protests or objections by a number of important maritime and distant-water fishing States, and in this respect they cannot be described as being "generally accepted", a majority of States have not filed similar protests, and quite a number have, on the contrary, made public pronouncements or formal proposals which would appear to be inconsistent with the making of such protests.

12. In this respect, attention must be drawn to declarations made, or proposals filed by a number of States in relation to or in preparation for the Third Conference on the Law of the Sea. It is true that, as the Court's Judgment indicates, the proposals and preparatory documents made in the aforesaid context are *de lege ferenda*. However, it is not possible in our view to brush aside entirely these pronouncements of States and consider them devoid of all legal significance. If the law relating to fisheries constituted a subject on which there were clear indications of what precisely is the rule of international law in existence, it may then have been possible to disregard altogether the legal significance of certain proposals, declarations or statements which advocate changes or improvements in a system of law which is considered to be unjust or inadequate. But this is not the situation. There is at the moment great uncertainty as to the existing customary law on account of the conflicting and discordant practice of States. Once the uncertainty of such a practice is admitted, the impact of the aforesaid official pronouncements, declarations and proposals must undoubtedly have an unsettling effect on the crystallization of a still evolving customary law on the subject. Furthermore, the law on fishery limits has always been and must by its very essence be a compromise between the claims and counter-claims of coastal and distant-water fishing States. On a subject where practice is contradictory and lacks precision, is it possible and reasonable to discard entirely as irrelevant the evidence of what States are prepared to claim and to acquiesce in, as gathered from the positions taken by them in view of or in preparation for a conference for the codification and progressive development of the law on the subject?

13. The least that can be said, therefore, is that such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on fisheries jurisdiction and their *opinio iuris* on a subject regulated by customary law. A number of pronouncements of States in the aforesaid circumstances reveals that while the fundamental principle of freedom of fishing in the high seas is not challenged as such, a large number of coastal States contest or deny that such a principle applies automatically and without exception to adjacent waters in all parts of the world as soon as the 12-mile limit is reached. Such an attitude is not only based on the clear consideration that two conferences have failed to agree on a maximum limit but also because of additional factors which have emerged in the intervening period between the Second and Third United Nations Conferences. For example, it is contended that the 12-mile fishery limit ensures, in fact, a clear privilege and a distinct advantage to the few States equipped to undertake distant-water fishing, thus widening the gulf between developed and developing States; a second fact is that technological advances and the pressure on food supplies resulting from the population explosion have caused a serious danger of depletion of living resources in the vicinity of the coasts of

many countries. In this respect, economic studies on fisheries have shown that the principle of open and unrestricted access to coastal waters inevitably results in physical and economic waste, since there is no incentive for restraint in the interest of future returns: anything left in adjacent waters for tomorrow may be taken by others today. While the better-equipped States can freely move their fleets to other grounds as soon as the fishing operations become uneconomical, the coastal States, with less mobile fleets, maintain the greatest interest in ensuring that the resources near their own coasts are not depleted.

14. While granting that proposals and preparatory documents are *de lege ferenda* and made with the purpose of reaching future agreements on the basis of concessions and compromise, the following inferences could, however, be legitimately drawn from their existence:

(a) States submitting proposals for a 200-mile economic zone, for instance, which includes control and regulation of fishery resources in that area, would be in a somewhat inconsistent position if they opposed or protested against claims of other States for a similar extension. Such would be the case, in particular, of those States that have, in the Council of Ministers of the Organization of African Unity, voted in favour of the declaration on the Issues of the Law of the Sea, Article 6 of which says:

> ". . . that the African States recognize the right of each coastal State to establish an exclusive economic zone beyond their territorial seas whose limits shall not exceed 200 nautical miles, measured from the baselines establishing their territorial sea".
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> Another instance is that of the People's Republic of China. In the joint communiqué of establishment of diplomatic relations with Peru of 2 November 1971, the People's Republic of China recognized "the sovereignty of Peru over the maritime zone adjacent to her coasts within the limits of 200 nautical miles". The same recognition was expressed in a similar communiqué with Argentina on 16 February 1972.

(b) it would not seem justified to count States which have agreed to or made such declarations and proposals as figuring in the group of States concurring in the establishment of an alleged practice in favour of a 12-mile maximum obligatory limit.

15. If, to the 30 to 35 States which have already extended their fisheries jurisdiction beyond 12 miles, there is added the further number of 20 to 25 States which have taken the attitudes described in the preceding paragraph, the conclusion would be that, today, more than half the maritime

States are on record as not supporting in fact and by their conduct the alleged maximum obligatory 12-mile rule. In these circumstances, the limited State practice confined to some 24 maritime countries cited by the Applicant in favour of such a rule cannot be considered to meet the requirement of generality demanded by Article 38 of the Court's Statute.

16. Another essential requirement for the practice of States to acquire the status of customary law is that such State practice must be common, consistent and concordant. Thus contradiction in the practice of States or inconsistent conduct, particularly emanating from these very States which are said to be following or establishing the custom, would prevent the emergence of a rule of customary law.

17. Certain States, whose conduct is invoked as showing the existence of the 12-mile maximum rule, have not hesitated to protect their own fishing interests beyond that limit, when they felt that it was required for the benefit of their nationals by the existence of important fisheries in waters adjacent to their coasts. Various methods have been utilized to achieve that result, but the variety of methods should not obscure the essential fact. It could be observed for instance, that the United States and the USSR have lately carried out this form of protection not unilaterally but through bilateral agreements *inter se* and with other States [1]. However, these Powers began by adopting unilateral measures which created for the States whose nationals were fishing in adjacent waters the need to enter into fishery agreements if they wished that their nationals could continue their fishing activities in those grounds. Once the need for an agreement was thus created, it was not difficult for these Powers, because of their possibilities in offering various countervailing advantages, to reach agreements which assured them of a preferential or even an exclusive position in those fishing grounds in which they had special interests in areas adjacent to their shores well beyond the 12 miles. This

[1] International Convention (with annex and Protocol) for the High Seas Fisheries of the North Pacific Ocean signed on 9 May 1952 by the United States of America, Canada and Japan (*United Nations Treaty Series*, Vol. 205, p. 65); Convention concerning the High Seas Fisheries of the North-West Pacific Ocean signed on 14 May 1956 by Japan and the Union of Soviet Socialist Republics (*AJIL*, 1959, p. 763); Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems in the North-Eastern Part of the Pacific Ocean off the Coast of the United States of America, signed on 13 February 1967 (*United Nations Treaty Series*, Vol. 688, p. 157); Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean, signed on 25 November 1967 (*United Nations Treaty Series*, Vol. 701, p. 162); Agreements effected by Exchange of Notes signed on 23 December 1968 between the United States and Japan on Certain Fisheries off the United States Coast and Salmon Fisheries (*TIAS* of the United States, No. 6600).

demonstrates the fact that even for States which cannot claim a special dependence on their fisheries for their livelihood or economic development, 12 miles may not be sufficient. It would not seem fair or equitable to postulate on the basis of such divergent conduct a rule of law which would deny the power to protect much more vital fishing interests to countries lacking the same possibilities of offering attractive terms by way of compensation for abstaining from fishing in their adjacent waters.

18. The practice of France offers another interesting example with respect to the question of uniformity of custom. France extended its fishing limits, in 1972, to 80 miles in the French Guiana. Law No. 72-620 of 5 July 1972 established this zone of 80 miles "with a view to ensure the conservation of biological resources". However, Article 2 laid down:

> "In that part of the zone defined in Article 1 which extends beyond territorial waters, measures shall be taken as needed, in accordance with conditions laid down by decree, for the purpose of limiting the fishing of the various species of marine animal. The application of these measures to the vessels of foreign States shall be carried out with due regard for the geographical situation of those States and the fishing habits of their nationals.
>
> In the same part of the zone, fishing by the vessels of States not authorizing fishing by French vessels in comparable circumstances may be prohibited by decree."

Thus France is reserving its right to forbid foreign vessels to fish in the zone between the 12 and 80-mile limit off Guiana, if French vessels are not authorized to fish in zones beyond 12 miles off the coast adjacent to another country. It is hardly possible to count France among the States whose practice invariably supports an alleged 12-mile maximum limit, when it is reserving the right to forbid foreign fishing outside 12 miles off the shore of the French Guiana, under certain conditions.

19. Likewise, archipelago States which have claimed or established fishery limits according to the geographical characteristics of their territories could hardly be counted as States accepting the existence of a maximum 12-mile obligatory limit. The same observation could be made in regard to States which have fixed an exclusive fishing zone far beyond the 12-mile limit off their coasts by establishing "fisheries closing lines" in certain bays.

20. Consequently, it is not possible to find today in the practice of

States what the Court described in the *Asylum* case as "a constant and uniform usage, accepted as law" (*I.C.J. Reports 1950*, p. 277). The alleged 12-mile limit maximum obligatory rule does not fulfil "an indispensable requirement", namely, "that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform" (*North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 43).

21. It could therefore be concluded that there is at present a situation of uncertainty as to the existence of a customary rule prescribing a maximum limit of a State's fisheries jurisdiction. No firm rule could be deduced from State practice as being sufficiently general and uniform to be accepted as a rule of customary law fixing the maximum extent of the coastal State's jurisdiction with regard to fisheries. This does not mean that there is a complete "lacuna" in the law which would authorize any claim or make it impossible to decide concrete disputes. In the present case, for instance, we have been able to concur in a Judgment based on two concepts which we fully support: the preferential rights of the coastal State and the rights of a State where a part of its population and industry have a long established economic dependence on the same fishery resources.

22. Admittedly, this situation of legal uncertainty is unsatisfactory and conducive to international friction and disputes. It is to be hoped however that the law on the subject may be clarified as a result of the efforts directed to its codification and progressive development which are now being made at the Caracas conference.

(Signed) I. FORSTER.
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