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International Court of Justice

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Cour internationale de Justice

LA HAYE

YEAR 1994

Public sitting

held on Friday 4 March 1994, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain

(Qatar v. Bahrain)

VERBATIM RECORD

ANNEE 1994

Audience publique

tenue le vendredi 4 mars 1994, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

en l'affaire de la Délimitation maritime et des questions territoriales entre le Qatar et Bahreïn

(Qatar c. Bahreïn)

COMPTE RENDU

Present:		
	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Ago
	Sir	Robert Jennings
	Judges	Tarassov
		Guillaume
		Shahabuddeen
		Aguilar Mawdsley
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
	Judges *ad hoc*	Valticos
		Ruda
	Registrar	Valencia-Ospina

Présents :		
	M.	Bedjaoui, Président
	M.	Schwebel, Vice-Président
	MM.	Oda
		Ago
	sir	Robert Jennings
	MM.	Tarassov
		Guillaume
		Shahabuddeen
		Aguilar Mawdsley
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma, juges
	MM.	Valticos,
		Ruda, juges *ad hoc*
	M.	Valencia-Ospina, Greffier

The Government of Qatar is be represented by:

H.E. Dr. Najeeb Al-Nauimi, Minister Legal Adviser,

as Agent and Counsel;

Mr. Adel Sherbini, Legal Expert,

as Legal Adviser;

Mr. Sami Abushaikha, Legal Expert,

as Legal Adviser;

Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I,

Mr. Jean Salmon, Professor at the *Université libre de Bruxelles*,

Mr. R. K. P. Shankardass, Senior Advocate, Supreme Court of India, Former President of the International Bar Association,

Sir Ian Sinclair, K.C.M.G., Q.C., Barrister at Law, Member of the Institute of International Law,

Sir Francis Vallat, G.B.E., K.C.M.G., Q.C., Professor emeritus of International Law at the University of London,

as Counsel and Advocates;

Mr. Richard Meese, Advocate, partner in Frere Cholmeley, Paris,

Miss Nanette E. Pilkington, Advocate, Frere Cholmeley, Paris,

Mr. David S. Sellers, Solicitor, Frere Cholmeley, Paris.

The Government of Bahrain is represented by:

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as Agent and Counsel;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus in the University of Cambridge,

Mr. Keith Highet, Member of the Bars of the District of Columbia and New York,

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comme *agent et conseil;*

M. Adel Sherbini, expert juridique,

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M. David Biggerstaff, Solicitor, du cabinet Trowers et Hamlins à Londres,

comme conseils.

The PRESIDENT: Please be seated. This morning the Court resumes the hearings in the Qatar/Bahrain case in order to hear Bahrain in its first round of oral arguments. I therefore give the floor to H. E. Minister Al-Baharna.

Mr. AL-BAHARNA: Mr. President and Members of the Court,

1. I have the honour to appear before you as the Agent of the State of Bahrain. In that capacity, may I begin by offering you, Mr. President, and you, Mr. Vice-President, the respectful congratulations of my country on the high offices to which you have been elected and to which you bring so much distinction. I would also like to congratulate Judge Shi, Judge Fleischhauer and Judge Koroma on their recent election to the Court and to offer them my Government's best wishes. My Government desires to express its highest hope, regards and respect for this Court - sentiments about which there has not been the slightest doubt from the moment that joint recourse to this tribunal was first contemplated by the Mediator and the Parties in 1987.

2. At such a time as this, my Government also wishes to recall its admiration and appreciation of the wise and constructive contribution made as Mediator by the Kingdom of Saudi Arabia. Its own view of its continuing activity and the role which it attributes to this Court is evidenced by the further attempt that it made in September 1991, in full knowledge of the unilateral application made by Qatar in this case, to persuade the Parties to adhere to the course which had for so long been their sole preoccupation, namely, that of concluding an agreement to submit their dispute jointly and comprehensively to this Court. The draft Agreement which Saudi Arabia proposed to the Parties in

September 1991 appears as No. 9 in the Hearing Book. This is the red loose-leaf binder that is before you and which, for convenience, I and my colleagues will call "the Hearing Book". It contains copies of a number of documents that will be referred to in the course of our arguments. All these documents are either already filed in the case or are merely outlines or lists of which we shall be making use as we speak.

3. I cannot, on such an occasion as this, even though we may be in disagreement, fail to emphasise the brotherly relationship that exists between the State of Bahrain and the State of Qatar. We are convinced that this relationship should always be maintained in the peace, affection and cohesion to which the countries of the Gulf aspire.

4. It is a high privilege for me to appear on behalf of the State of Bahrain. I and my colleagues much look forward to giving the Court all the assistance we can in the discharge of its important task.

5. So many points have been covered in the Qatari argument that it is impossible to respond to them all. Silence on our part should, therefore, not be regarded as agreement. I shall not, for example, spend time responding to the Qatari complaint that Bahrain's letter to the Court of 18 August 1991 was an irregular communication, that Bahrain has failed to comply with the Rules of the Court, that Bahrain failed to appoint an agent and that it did not make a preliminary objection. While I totally reject these charges, I must say that they have nothing at all to do with the matters now before the Court. The same goes for the historical and geographical observations of the Agent of Qatar. I shall not comment on them - not because I accept them but only because they are out of place in the present proceedings. But I would add that Bahrain's view was that it could not appoint an Agent on the basis of Qatar's

unilateral Application. However, following the helpful meeting with the then President, when it was agreed that jurisdiction would be dealt with first, then Bahrain felt able to do so.

6. It is a source of disappointment and regret to my Government that it should on this occasion - the first in which it appears in this Court - come not to sustain your jurisdiction, but to oppose it. I can assure the Court that the position that has been forced upon my Government does not reflect any objection, in principle, to the settlement by the Court of the *whole* of the dispute that presently divides the States of Bahrain and Qatar. Bahrain would be proud to be one of the first two Gulf States to join in the submission of a case to the Court. Bahrain has made plain beyond doubt on no less than five occasions its positive wish to participate in the joint submission to the Court of its differences with Qatar: in December 1987; in March 1988; in October 1988; in September 1991 and most recently on 20 June 1992, when Bahrain offered a further draft joint submission (Hearing Book, No. 10). This offer lay open for acceptance by Qatar until six weeks ago, but Qatar made no reply to it. Nor, it would seem did Qatar reply to the earlier Saudi draft of September 1991 which I mentioned a moment ago. Why not? Why should Qatar place Bahrain in a position in which Bahrain has to justify its opposition to the jurisdiction of the Court when unilaterally invoked by Qatar, yet Qatar regards itself as free to refrain from any explanation as to why it cannot either accept a perfectly reasonable proposal for a joint submission or even indicate a willingness to discuss the subject? Why should Qatar assume that if points remain to be negotiated, the discussion should be peremptorily terminated with all points being resolved in Qatar's favour? Why should

they not equally be resolved in favour of Bahrain? Do we not also share in the "justice" to which Sir Francis Vallat so appropriately referred in his closing peroration?

7. Bahrain has joined fully in the attempt to implement the 1987 Agreement in accordance with its terms. What Bahrain cannot accept is the distortion by Qatar of the 1987 Agreement by attempting to bring Bahrain before the Court without its consent and on conditions unfavourable to it on the basis of a unilateral application by Qatar that was never contemplated by Bahrain and was never discussed with it.

8. Rather than lay such heavy emphasis on the reasons for its unilateral application, as Qatar does, let us at the outset invite an answer to the question: Why did Qatar not show the same willingness as Bahrain to participate in a joint submission to the Court? Why has Qatar instead sought to gain advantage by rejecting not only the draft joint agreement presented in 1991 by the Mediator but also the draft offered by Bahrain in 1992? If Qatar wanted to expedite the resolution of its dispute with Bahrain it has gone about it in the most inefficient and counter-productive way. For one thing, it never ensured that Bahrain received direct notice of its intention to start these proceedings, as normal practice requires. Contrary to what counsel for Qatar implied in the oral pleadings no intimation whatever was received by Bahrain of the content of letters that Qatar sent to Saudi Arabia in May and June 1991. For another, it must be evident that if Qatar had responded positively to the Saudi draft joint submission of September 1991 the case would by now have proceeded even beyond the exchange of Counter-Memorials. Even if Qatar had only accepted the Bahraini offer of a joint submission in June 1992, the case would by now have passed the exchange of the

Memorials. There would not have been the delay while the present jurisdictional objection is considered. Evidently, therefore, it was not an anxiety to proceed by the speediest route that led to Qatar's unilateral action. Qatar must have been hoping for some greater benefit which it has not yet revealed.

9. But revelation by Qatar of its reasons for acting as it has are perhaps not far to seek. Qatar wanted to set up the case in a way that suits it. It wanted to control the range of the issues which the Court would be asked to decide. It wanted to be the first to file a Memorial and thus have the advantage of being able to state its case in a manner which would not be open to the immediate balancing effect of a simultaneously filed pleading by Bahrain (a preference *at that time* that is in no way affected by Qatar's statement two days ago that it is now prepared to accept simultaneous pleadings if Bahrain starts separate proceedings). It wanted to be sure to be the Party that had the first word in the oral hearings. It wished to be free of the inhibition of a specific reaffirmation of the rule prohibiting the production of evidence of proposals for settlement made during past negotiations. It wanted to get to the Court without giving the Bahrain Government time to go through the procedures required by Article 37 of the Bahrain Constitution. Those appear to be the reasons why Qatar did not honour its commitment to negotiate a joint submission under the 1987 Agreement and instead jumped the gun in July 1991 with a unilateral application. It is idle for Professor Salmon to pretend in this connection that there is no such thing as strategic and tactical advantage in international litigation. It is no disrespect to the Court to recognize that manoeuvre is an

element in the conduct of the case - and that is precisely what Qatar is engaged in.

10. Perhaps even more than larger States, Bahrain has a deep interest in the rule of law in international relations. But these rules of law must operate on a predictable basis. One of the fundamental considerations in this connection is that this Court will not exercise jurisdiction over a State without its consent. While Bahrain does not deny that in the 1987 Agreement it expressed its willingness in principle to join in the submission of its differences with Qatar to the impartial adjudication of this high tribunal, it did not agree to do so on the terms or in the manner now dictated by the unilateral application of Qatar.

11. The issue is not simply one of equality and sovereign dignity. When Bahrain agreed in 1987 that this Court should be the forum of last resort it did not do so on the understanding, or in the expectation, that it would be placed in the position of a defendant, with all the implications that may attend such a position - particularly in a case involving questions of title to territory and the boundaries of maritime areas.

12. Certainly Bahrain feels affronted by what it sees as a deliberate and substantial departure by Qatar from understandings clearly established some years ago and consistently followed in subsequent years.

13. I can well understand that the Court may be asking itself the question: if Bahrain is willing to agree to a joint submission of the case to the Court, why is it not prepared to participate in a case begun by unilateral application? Will it not be asked: is not Bahrain adopting a rather formal and technical position when the substantive

issues to be considered and the substantive law to be applied may be much the same whichever procedure is followed? I believe that the Court is entitled to an answer to this question; and I hope that what follows will appear as reasonable, proper and acceptable to the Court as it seems to Bahrain.

14. First, there is a reason of principle - respect for the pledged word. Bahrain firmly believes that Qatar agreed in 1987, and confirmed by its conduct thereafter, that the procedure for the submission to the Court would be the subject of a further specific agreement. As a matter of principle, especially in view of the prospect of ongoing and, it is hoped, amicable relations between the two States, Bahrain cannot acquiesce in a unilateral alteration by Qatar of established understandings. If this is allowed to happen without the firmest opposition on this occasion, there can be no subsequent confidence in the maintenance of any undertaking given by the other side. The obligation to respect the pledged word will be equated with the right to repudiate the pledged word. That is self-evidently unacceptable.

15. The second reason for rejecting a unilateral application is that Qatar has presented the question in a self-serving and incomplete manner. Thus, in paragraph 41 of its Application, Qatar asked the Court to decide that Qatar is sovereign over the Hawar Islands and that it has sovereign rights over the Dibal and Jaradah shoals. Qatar also asked the Court, with due regard to the dividing line drawn by Britain in 1947, to draw a single maritime boundary between Qatar and Bahrain. Permit me, Mr. President, to explain the unacceptability of this presentation of the issues by Qatar.

16. It was, of course, a major element in the First Principle of Mediation that "all issues of dispute between the two countries ... are to be considered as complementary, indivisible issues, to be solved comprehensively together". Notwithstanding this, Qatar's listing of the issues in its Application disregards important questions which Bahrain had raised and which form part of the overall dispute between the two sides: principally the question of Bahrain's claims concerning Zubarah. Nor has Qatar recalled that there are issues between the Parties relating to the traditional pearling and fishing banks.

17. Coming back to the matter of Zubarah which Qatar has excluded from the issues raised by its Application, there is no mystery about it. I am confident that the files of Qatar, no less than those of Bahrain, have ample materials on the whole history of the Zubarah issue. Obviously, it would be inappropriate for me to enter into any detail on this substantive question in the course of proceedings the scope of which is limited to jurisdictional issues. But the Court may be assured that there is here an issue of substance. A general indication of the character of the dispute is given in Bahrain's Counter-Memorial on the question of jurisdiction, at pages 15-17. The principal issues as to the nature and extent of Bahrain's claims concerning Zubarah can be identified from a reading of the historical documents that appear in Volume III of the Bahraini Counter-Memorial. Bahrain's claims are rooted in its past presence in, and control over, Zubarah. They go back for virtually two centuries. There exists a treaty on Zubarah between the two countries - the "standstill" agreement concluded in 1944, of which Qatar has long been in breach. There were diplomatic exchanges on the subject between Bahrain and Britain, as the protecting Power, until the

time when in the early 1970s Britain withdrew from the Gulf. And Qatar knew of these exchanges. The existence of a dispute was acknowledged by Qatar and was duly noted in the minutes of the Sixth Meeting of the Tripartite Committee held on 6 December 1988 (CMB, Vol. II, p. 111). It is no good Qatar claiming that it is insufficiently aware of the existence and nature of Bahrain's claims concerning Zubarah.
Sir Francis Vallat's closing review of the history of relations between the two countries shows that Qatar is fully capable of recalling the events of the 1930s and 1940s, and is unlikely to have forgotten its own attack on Zubarah in 1937 or its own violations of the 1944 Agreement. The people of both Bahrain and Qatar, and particularly members of the Al Naim tribe, will be aware of this history.

18. Qatar puts forward an entirely spurious complaint when it says that

> "neither the Court nor Qatar yet knows on what basis it could be determined whether Bahrain's claims concerning Zubarah are admissible or not, under the Bahraini formula which is incorporated by reference in the 1990 Minutes".

The fact of the matter is that Qatar, as the effective respondent to any Bahraini claim concerning Zubarah, has no interest in itself bringing the Zubarah claims before the Court. Whether Bahrain's claims concerning Zubarah are admissible or not does not in any way justify Qatar in proceeding by way of unilateral submission instead of participating in a joint action. In short, if the provisions of the First Principle of Mediation are to be met and all issues of dispute between the two countries are to be considered as complementary, indivisible issues, to be solved comprehensively together, the formulation of the issues presented by Qatar in its Application is inescapably defective in this

major respect, not to mention others. The only proper way of securing the presentation of the Zubarah question to the Court is within the framework of the proper application of the Bahraini formula, with Bahrain being responsible for the expression of its own claim.

19. The distinguished Agent of Qatar has argued (CR 94/1) that it is open to Bahrain to file its own application to the Court in respect of Zubarah and that "the Court may at any time direct that ... the two cases be joined" (*ibid.*, see also RQ, para. 4.114). There are four important reasons why this argument cannot in any way justify Qatar's unilateral action.

20. Firstly, the validity and effect of an application has to be judged within the framework of the application itself and not by reference to events subsequent to the application which may or may not occur. The only exception is a *forum prorogatum* situation which is, of course, not relevant here. Qatar is not arguing that its Application in the present case is perfect to dispose of all matters in issue. What Qatar argues is that a fundamental condition of Bahrain's consent to participate in any case before the Court, namely, that that case covers all outstanding issues between the Parties, can be satisfied if Bahrain itself brings an additional and separate case against Qatar.

21. This Qatari approach is quite misconceived. The imperfection of an application is not removed by the *possibility* of subsequent curative conduct by the other party, but only by the *actual* conduct of the other party, if it chooses so to act. Sir Ian Sinclair in his argument on behalf of Qatar (CR 94/1) placed great emphasis on the rule that the jurisdictional position of a party is to be determined as at the moment of the filing of the application. True, his reference to the statements

to this effect in the *Rights of Passage* and the *Nottebohm* cases was made in support of his argument that, once a valid jurisdictional link has been invoked by an applicant, subsequent conduct by the respondent cannot divest the Court of jurisdiction. But the rule is the same whether one is testing the existence of jurisdiction under the optional clause (as in the two cases just mentioned) or determining whether the application meets the conditions agreed between the parties for the submission of the case to the Court. It is the conditions which exist at the moment of application that matter; not the possibility of some subsequent conduct on the part of the respondent.

22. Secondly, in any case Bahrain does not share Qatar's view that the 1987 Agreement and the 1990 Minutes entitle Bahrain to file its own application to the Court any more than it justifies Qatar's own application. No doubt, Qatar urges that Bahrain is so entitled because that is what Qatar itself claims to be able to do. But this presupposes that Qatar is right in its interpretation of the effect of the 1990 Minutes. Bahrain believes that Qatar is wrong. It would, therefore, be inconsistent with Bahrain's position for it to act in the manner urged by Qatar.

23. Thirdly, even if Bahrain were to make its own separate application, Qatar has kept open its right to object to the admissibility of Bahrain's claim concerning Zubarah. It is to this that Bahrain objects. The position would be quite different if the Parties had joined in formulating a joint submission to the Court. It is implicit in such a formulation that neither side will raise any question of admissibility in relation to any issue necessarily related to that question. The same principle applies when the joint submission permits each Party to

formulate its own questions (as the Bahraini Formula does). But the insistence of Qatar on reserving the right to object to the admissibility of any claim that Bahrain may make in respect of Zubarah immediately places Bahrain in a position of disadvantage and inequality; and thus emphasizes the inadequacy of Qatar's "two applications" approach as a substitute for a single agreed joint submission in the terms of the Bahraini formula.

24. Fourthly, Qatar repeats in its oral arguments what it says in its Reply, namely, that "there should ... of course be no obstacle to joinder if Bahrain were to file its own application" (RQ, para. 4.115). This is, of course, an admission both that joinder would be necessary and that joinder is not a certainty. Joinder is a matter for the Court, in its discretion, and neither party is entitled to assume the certainty of joinder for the purpose of validating an earlier defective application.

25. In the light of these comments, it can be seen why the gap in the Qatari Application cannot be cured by a subsequent Bahraini application limited to the question of Zubarah. It is no mere technicality which leads Bahrain thus to object to Qatar's unilateral application.

26. Nor is this the end of the list of reasons why Bahrain's objection to Qatar's unilateral Application is real and substantial. The Court will, of course, know that the general practice of States in relation to territorial and boundary disputes is to bring them before the Court by special agreement. In this way neither party is plaintiff or defendant. The initiation of proceedings in relation to such matters under pre-existing clauses of compulsory jurisdiction or under the Optional Clause is exceptional. For this there is good reason. States likely to be faced by boundary questions are reluctant to accept

compulsory jurisdictional clauses permitting the unilateral institution of proceedings relating to such matters. Such cases are widely deemed to be so sensitive that international tribunals can deal with them only on the basis of deliberate, clear and unequivocal consent to jurisdiction. No such consent has been given in the present case.

27. I should now like to turn to a quite different matter: the question of the diplomatic quality and role of the 1990 Minutes (Hearing Book, No. 8). At a later stage in the argument, Professor Lauterpacht will present to the Court more detailed submissions regarding the interpretation and effect of this document.

28. As the Court no doubt already appreciates, the nature and effect of the 1990 Minutes lie at the centre of this case. Without the 1990 Minutes, it is inconceivable that Qatar could have launched the present proceedings. Even with the 1990 Minutes, it is Bahrain's contention that there is no basis for Qatar's unilateral application.

29. I shall consider two aspects of the 1990 Minutes. The first is the intention and understanding of Bahrain in the discussions at Doha in December 1990 leading to the signature of the 1990 Minutes. It is a matter of record that the principal Bahraini representative involved in these talks was the Bahraini Minister for Foreign Affairs, H. E. Shaikh Mohammed. The Foreign Minister's account of the course of the relevant discussions at the Doha Meeting is set out in his statement appended to Bahrain's Counter-Memorial (Hearing Book, No. 12). Professor Lauterpacht will refer to it more fully later. The point that I should like to stress from the outset is the significance of the changes that were made in the successive drafts of the text that eventually emerged as the 1990 Minutes. As Mr, Shankardass rightly

emphasized in his argument, there is no more cogent an indication of intention than, as he put it, "the categorical rejection" of a proposal.

30. As appears from the Foreign Minister's statement, he was, on 24 December 1990, presented by Saudi Arabia with a first draft of the Minutes. This is included in the Hearing Book, No. 5. This draft contained a statement to the effect that the consultations

> "had concluded with the agreement of the two parties on the formulation of the question which will be presented to the International Court of Justice *by each of them*".

Although the Minister added the words "as specified in the Bahrain memorandum" in order, as he put it, "to emphasize that the question formed part of a larger document (i.e., the Special Agreement) and was not an independent item", he rejected the Saudi draft as a whole. For the Minister, the only way of coming to the Court was by Special Agreement, that is to say, by a joint submission. The presence of the words "which will be presented to the Court by *each* of them" was incompatible with this basic concept and rendered the whole draft unacceptable.

31. Later the same day, 24 December, the Foreign Minister of Oman presented the Foreign Minister of Bahrain with the document that we call "the Omani draft" (Hearing Book, No. 6). This draft also contained the words "either of the two Parties" - words which could have opened the way to the commencement of proceedings by unilateral application. This time the Foreign Minister of Bahrain specifically changed the words "Either of the two parties" to the words "the two parties" *("al tarafan")*. The purpose of making this change to "the two parties", as excluding the commencement of proceedings by either party alone, could not have been lost upon anyone involved.

32. Qatar asserts that it was not aware of the original Saudi draft. This is quite strange but if such be the case, it makes little difference, for what matters is that Qatar does not deny knowledge of the Omani draft. It seems, therefore, inconceivable that Qatar could have failed to notice, or understand the significance of, the change from the words "either of the parties" to the words "the two parties" *("al tarafan")*. Professor Lauterpacht will deal presently with the suggestion by the Agent for Qatar (CR 94/1) that the change of words was quite acceptable to Qatar.

33. As appears from my statement, when the final Omani version of the draft appeared on 25 December, I recommended the addition of the words "and the procedures arising therefrom" after the words "accepted by the State of Qatar" at the end of the second sentence of paragraph 2. That is to say, I proposed words which, when properly translated into English, could only mean "the procedures arising from the implementation of the Bahraini formula". As I have said in my Statement,

> "these words were intended to refer to the procedures to be followed in order to implement the Bahraini Formula, meaning that after the expiry of the period mentioned in the agreed Minutes, the Parties together with Saudi Arabia - the Mediator - had to conduct further consultations aimed at concluding a Special Agreement on the basis of which the two Parties might refer the matters of difference between them to the Court".

The suggestion was accepted and was incorporated into the text without objection, qualification or comment by Qatar. It should be noted that Professor Badawi and Dr. Holes, Bahrain's experts, considered that the correct translation of the relevant Arabic word in paragraph 2 of the 1990 Minutes was "procedures" not "proceedings" as proposed by Qatar. The connection between the word "procedures" and the Bahraini Formula is even clearer in the Arabic than it is in English. The United Nations

translation used the word "arrangements" - closer, in this context, to "procedures" than to "proceedings".

34. Mr. President, at one point in his argument on 1 March (CR 94/2, p. 33), Sir Ian Sinclair sought to attach, as he put it, "some significance" to my appearance in Doha on 25 December 1990. Sir Ian suggested that

> "one [that is Bahrain] does not suddenly summons one's most senior law officer to participate in the drafting of a mere diplomatic document not intended to have any legal effect".

The answer to this point is so obvious that I am surprised that Sir Ian troubled to make it. If you don't want to enter into a legal commitment, who better than a lawyer to tell you how to avoid it? That's myself. There was a danger that whatever Shaikh Mohammed might sign could be given legal weight. He was obviously anxious to avoid being caught in a legal trap. What could have been more natural and prudent than to summon some legal advice?

35. Mr. President and Members of the Court, I now turn to the second matter on which I should like to address you, namely, the constitutional requirements of Bahrain relating to the conclusion of treaties and international agreements *in so far as these could have affected the intention of the Foreign Minister*. Although the subject is one within my special knowledge as Minister of State for Legal Affairs, I am not here to give expert evidence on the law of Bahrain, but to speak, as may any other counsel representing a State, about the constitutional law within that State.

36. I emphasize the words that I have just said - "in so far as these constitutional requirements could have affected the intention of the Foreign Minister". The context within which these comments are relevant

is as follows. In addition to the evidence of the understanding and intention of the Bahraini Foreign Minister, both subjective and objective, in subscribing to the 1990 Minutes which will be more fully recalled later by Mr. Lauterpacht, there are a number of further items that support the statements made by Shaikh Mohammed and myself regarding the political and non-legal quality of the 1990 Minutes. One of these is the consideration mentioned by Shaikh Mohammed in his Statement (Hearing Book No. 12, para. 13), when he said the following:

> "Nor did I forget that my authority as Foreign Minister was limited and that I was not permitted to sign a treaty taking effect on signature. The Bahrain Constitution quite clearly provides that treaties 'concerning the territory of the State' can come into effect only after their positive enactment as law. That was why the Bahraini draft Special Agreement of 19 March 1988 [Hearing Book No. 3, Article VIII] included the provision that the agreement would only enter into force on 'the date of the exchange of instruments of ratification in accordance with the respective constitutional requirements of the Parties'."

37. I should emphasize one point at the outset. The Foreign Minister of Bahrain does not here refer to the terms of the Bahraini Constitution for the purpose of invoking Article 46 of the Vienna Convention on the Law of Treaties. This Article, as the Court has been reminded, presupposes both the consent of the State and the intention of the State's representatives to bind the State. In the present case, Bahrain maintains that there was no consent and no intention to be bound. That is the difference.

38. The relevance of the reference to the Bahrain Constitution is that the Minister for Foreign Affairs had in mind the pertinent provisions of that Constitution. He knew that he did not have the authority to commit Bahrain in the manner alleged by Qatar. That knowledge operated to exclude any intention on his part so to commit

Bahrain. If *he* did not have such an intention, where is the intention of Bahrain to be found? The disembodied person of the State cannot be entirely separated from the intention of some relevant real person.

39. Qatar must also have known of the limitation on the Minister's authority immediately to bind Bahrain. Qatar could not have been unfamiliar with the Constitution of its near neighbour. Even more to the point, however, it had seen the Bahraini draft agreement of 19 March 1988 (Hearing Book, No. 3) in which Bahrain had expressly provided in Article VIII, that the agreement would "enter into force at the date of exchange of instruments of ratification in accordance with the respective constitutional requirements of the Parties". The comparable provision in the Qatari draft special agreement of 15 March 1988, Article V, stipulated that "the present agreement shall enter into force on the date of its signature". If Qatar had compared the two drafts, as surely it must have, it would undoubtedly have noticed this difference of approach and would have been put on notice of Bahrain's constitutional requirements in relation to this kind of undertaking.

40. This point, about the relationship between a constitutional provision and the intention of the negotiator, is indeed, virtually the same as the one made by El Salvador in the *Land, Island and Maritime Frontier Dispute* case, to the effect that the constitutional position of El Salvador was material as excluding the likelihood of an intention on the part of the Foreign Minister of El Salvador to have agreed to sign a special agreement providing for the delimitation of a maritime boundary within the Gulf of Fonseca. Sir Ian Sinclair argued on 1 March (CR 94/2, p. 48) that the Chamber in that case did not rely on the Foreign Minister's statement regarding his intention. But, as Sir Ian stated,

the Tribunal found that Honduras had not discharged the burden of demonstrating that a special meaning had been intended by the parties when using the phrase "determine the legal situation of the maritime spaces". It is a fact that the El Salvador Foreign Minister's statement was directed towards his intention when using this expression - an intention reflecting his wish not to violate his country's Constitution. The Chamber did not have to specify every consideration pertinent to its conclusion that Honduras had not proved its point. If the Chamber had wanted to establish that such evidence of the Minister's intention was without weight, it could have said so. But it did not.

41. Having said that, I should emphasize that there is a clear distinction between referring to a constitutional limitation as a factor likely to exclude an intention on the part of a Foreign Minister to conclude a particular treaty, on the one hand, and the question of the Minister's full powers on the other. Bahrain does not contend that its Foreign Minister did not have full powers to conclude a treaty. Bahrain says that such a contention has no relevance here, where the sole issue is whether the Minister had any intention to enter into a treaty. But since Sir Ian Sinclair saw fit to cite Dr. Blix, it is appropriate that I should recall what that learned authority had to say on the subject of a Foreign Minister's full powers:

> "The rule seems to have emerged in practice, however, and to have received the support of some countries, that at present, by his position, in which no full power is required, a foreign minister is competent under international law - *unless there is evidence in the particular case to the effect that manifestly he is not competent, or this is known to the other party* - to bind his state by an agreement falling within the treaty making powers of the executive ..." (*Treaty-Making Power*, p. 40).

It hardly needs repeating that in our case the limitation on the Foreign Minister's power was known to Qatar.

42. I should at this point also mention an aspect of the preparation of the 1990 Minutes that is relevant in the present connection. In its Reply (para. 4.57), Qatar stated that

> "When the two States were engaged in the drafting of the Doha Agreement at the initiative of Saudi Arabia and with the assistance of Oman, Qatar heard nothing about any reservation which Bahrain might have had concerning the binding character of the instrument."

This sentence conveys a false impression of the circumstances surrounding the preparation of the Minutes.

43. It is not correct to say that "the two States (Qatar and Bahrain) were *engaged in the drafting* of the Doha Agreement". What happened at Doha cannot be likened to a treaty-drafting exercise. I leave aside the fact that the document in question is called an "agreement" only by Qatar. The point is that the words used by Qatar suggest a process of "drafting" that involved significant face-to-face discussions between the two sides. In fact there was never any direct, face-to-face discussion between the two sides other than at the first open meeting of the Gulf Co-operation Council Summit. Thereafter, the two Foreign Ministers met only to sign the Minutes. The whole discussion was carried on by each side separately with the Saudi and Omani representatives, who acted as go-betweens. Although Qatar cannot prove a negative, it remains unlikely that there is any basis for its statement that it "heard nothing about any reservation which Bahrain might have had concerning the binding character of the instrument". But the real point is that it was not up to Bahrain to spell out the character of a document which was seen by it as nothing more than a part of a series of documents in comparable form

which had never previously been specifically characterized, or thought of, as individually giving rise to legally binding obligations. It was Qatar which was seeking to alter the whole pattern of the negotiating relationship that had hitherto prevailed between the two sides. So it was up to Qatar to ensure that wording was used which manifestly demonstrated in clear and unequivocal language the legally binding quality of the document and equally manifestly expressed the substantive objective that it sought to achieve, namely, that *either* side might proceed alone.

44. The Court may consider it strange that such a document, which Qatar would now have the Court believe had such far-reaching effects, should have been "negotiated" without prior notice by Qatar and without any direct contact between the two sides - and I put the word "negotiated" in quotation marks so as not to accord the outcome of the discussions a status that it does not possess.

45. Mr. President, I cannot end without referring to the insistent Qatari demand to know what would have been the object and purpose of the 1990 Minutes if it were not to achieve a change of approach to the question of bringing the case to the Court - a change from joint action to separate action.

46. Bahrain has already answered this question in paragraph 6.70 of its Counter-Memorial and paragraphs 5.42-5.48 of its Rejoinder. Our present reply remains a simple and a common sense one. The Minutes represented a minimal response to an ill-timed and ill-conceived initiative on the part of the State of Qatar. At a moment when the rest of the Gulf community was entirely taken up with the far more pressing and urgent situation arising from Iraq's invasion and seizure of Kuwait -

an event which posed a direct threat to the integrity and stability of the whole of the region - the State of Qatar was preventing consideration of these vital problems by raising the matter of its relations with Bahrain. Apart from Saudi Arabia and Bahrain none of the other Gulf States had any real knowledge of the problem.

47. In doing so, Qatar was trying to push Bahrain into accepting a formula which would have enabled Qatar to proceed unilaterally to the Court on any terms it wished, - notwithstanding the fact that there was no agreement between the two sides on the admissibility of the Zubarah issue, on the exclusion of evidence relating to settlement proposals, or on meeting Bahrain's constitutional requirements. In effect, Qatar was wanting Bahrain to place itself in Qatar's hands.

48. This development was quite unacceptable to Bahrain. It dug its toes in. It insisted on a change in the wording of the proposed text in order to protect itself against unilateral action. Bahrain could, of course, have refused to sign any document at all. But such a complete refusal would have been diplomatically difficult as being something that the other Gulf States might not have understood. Moreover, there were two aspects of the proposals contained in the draft text which Bahrain was glad to see. The first was the Qatari acceptance of the Bahraini formula. The second was the further extension of the mandate given to the Mediator to continue his efforts towards achieving a substantive settlement of the dispute.

49. Given the nature of personal relationships in the region, Bahrain was willing to make a gesture. Provided that the gesture would not result in Bahrain being taken to the Court unilaterally by Qatar, on terms that Bahrain could not accept, Bahrain was willing to participate

in a face-saving device that reopened the way to the renewal by the Mediator of his attempts to reach a substantive settlement. If those attempts failed, then it was agreed that the two parties could together take their case to the Court with the blessing of the Mediator.

50. That, in the final result, was the object and purpose of the 1990 Minutes. The fact that events did not subsequently turn out that way could not have been foreseen in December 1990. And it is by reference to the understanding of the Parties at that time that the Court should now take a view of the matter. What the Court should not do, however, is to impose upon Bahrain an agreement that it never intended to make and that it did not make. Bahrain did nothing whatsoever to change the pre-existing objective of the Parties which was to negotiate a special agreement providing for a joint submission.

51. Bahrain will be happy to come to the Court, but not as a captive of Qatar. An agreement is an agreement. From 1987 we had been in agreement that we would come to the Court on the basis of a special agreement for a joint submission. For this there were, and remain, good substantive reasons. And on this, with all respect to the Court, we venture to continue to insist.

52. This brings me to the end of my opening remarks. I should be grateful, Mr. President, if you would call upon Counsel for Bahrain in the following order:

Professor Bowett will address you first on the 1987 Agreement and the meetings of the Tripartite Committee. Professor Lauterpacht will examine the nature, content and effect of the 1990 Minutes, after which Professor Bowett will return to consider the relationship of the 1987 Agreement and the 1990 Minutes. He will be followed by

Professor Jiménez de Aréchaga, who will demonstrate the absence of concordance between the questions as formulated by Qatar and the requirements of the Bahraini formula purportedly accepted by Qatar. Next, Professor Weil will speak on the extent of the consent given by Bahrain to the jurisdiction of the Court and the inability of Qatar to bring its unilateral Application within the scope of that consent. The disadvantages to Bahrain of being placed in the position of a defendant, in contrast with the advantages of being an equal party to a joint submission, will then be developed by Mr. Highet.

Mr. President and Members of the Court, I thank you for the patience with which you have heard me. I should be grateful, Mr. President, if you would now call upon Professor Bowett. Thank you.

The PRESIDENT: Thank you, Your Excellency. It is about 11.15 a.m., a little bit early for our customary break. I would like to ask Professor Bowett if he would like to start after the break or right now for let us say, about 20 minutes.

Mr. BOWETT: I would prefer to start after the break.

The PRESIDENT: All right. The Court will adjourn for 15 minutes.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

Mr. PRESIDENT: Please be seated. I give the floor to Professor Derek Bowett.

Mr. BOWETT: Thank you, Sir. Mr President, Members of the Court, my task this morning is twofold. I shall first explain how the 1987 Agreement came about, and what it involved for the two Parties to this dispute. And then I shall go on to consider the work of the Tripartite Committee.

As you will already realize, there were two successive stages in the evolution of the dispute: in the first stage the hopes of a successful resolution of the dispute, through the mediation of Saudi Arabia, were high; in the second stage those hopes, although not abandoned, were tempered by failure, and far more attention was paid to securing agreement on the method of resorting to this Court as a means of obtaining a binding settlement.

1. THE PRINCIPLES FOR THE FRAMEWORK FOR REACHING A SETTLEMENT OF 1983

The origins of the 1987 Agreement go back several years, to the principles on which the mediation proposed by Saudi Arabia in 1978 were finally accepted by both Parties in 1983.

Those mediation principles (CMB, Vol. III, p. 3) contained certain obligations of restraint for both Parties - not to engage in hostile propaganda, not to impede negotiations, and so on - and they provided for a Committee which was to attempt to reach a negotiated solution. But there were two principles of direct relevance to the possibility of third-party settlement, and to which I should like to direct the Court's

attention. The first principle embodied the commitment to solve all issues of dispute comprehensively.

And the fifth principle, as amended and accepted by the Parties in 1983, provided that if negotiations for a political solution failed negotiations would start on determining the best means of settlement on the basis of international law.

Now, it is these two principles in particular which are of interest. The first demonstrates that what was intended was a *comprehensive* settlement or solution. It was to embrace "all issues of dispute", so that they could be solved "comprehensively". That was the essential aim. The descriptive words contained in the first principle of the Saudi proposal - that is the phrase "relating to sovereignty over the islands, maritime boundaries, and territorial waters" - were not intended by Saudi Arabia to be a definitive, exclusive definition of the dispute. The Saudis at this stage did not know enough about the dispute to attempt a precise definition so as to bind and limit the Parties, nor was this their intention. Any precise definition would be a matter for the Parties to agree upon. The overriding aim was to settle *all* issues in dispute. It follows from this that any idea that one Party, by unilateral act or application, could limit the matters in dispute was never contemplated. It would have been totally at variance with the primary aim of seeking a comprehensive settlement.

Second, at this early stage there were some hopes of a political settlement. The resort to legal settlement, envisaged in the fifth principle, was an option to be considered only if political negotiation failed. And, clearly, the form of legal settlement had not been decided upon. There was no express mention of the International

Court - indeed the earlier talk had been about arbitration. The possibility of arbitration was mooted in 1986, following the Dibal incident (CMB, Vol. 1, p. 30). And, of course, with arbitration any notion of a unilateral application was out of the question. A special agreement, a *compromis d'arbitrage*, would be needed.

This, then, is the background against which the 1987 Agreement must be seen. We know that the political negotiations failed, and so, in 1987, the time had come to implement the idea of a legal settlement, the idea contained in the fifth principle of mediation.

2. THE 1987 AGREEMENT

The 1987 Agreement also stemmed from a Saudi proposal. The proposal was contained in two identical letters, dated 19 December 1987, sent by King Fahd of Saudi Arabia to the Amirs of Qatar and Bahrain (CMB, Vol. II, p. 5).

Having noted the failure to reach an agreed solution, and referring back to the previous agreement to resort to legal settlement in that event - that, of course, was the fifth principle of mediation - the King proposed reference of the dispute to this Court. The proposal was in quite general terms:

> "1. The issues subject to dispute shall be referred to the International Court of Justice at the Hague for the issuance of a final and binding judgement whose provisions must be applied by the two parties."

Now, the Qatar translation of this proposal indicates quite clearly how Qatar understood this proposal. "Firstly, *all* the disputed matters shall be referred to the International Court of Justice at the Hague ..." (CMB, Vol. II, p. 17).

The word "all" is significant. It conforms to what I have suggested was the clear intention of the earlier Principles of Mediation: the settlement was to be a comprehensive settlement, comprising *all* the disputed issues.

You will note that the King of Saudi Arabia made no attempt to define what these issues were. Although, I may add, he clearly knew by this stage that, for Bahrain, the disputed matters included Zubarah. I say this because, in October of 1986, in response to a Saudi request, Bahrain had submitted a Memorandum to the King of Saudi Arabia, clearly identifying Zubarah amongst the disputed matters (CMB, Vol. I, p. 17). Bahrain has not filed this Memorandum with the Court for the reason that it goes to the merits of Bahrain's claims, and so would be quite out of place in a hearing confined to jurisdiction and admissibility.

There can be little doubt that King Fahd saw no reason for him to identify all the disputed matters. That would be for the Parties to do when they agreed on the reference to the International Court.

Certainly the modality of this reference to the Court was not laid down by the King in his proposal. This was a task assigned to the Committee envisaged in paragraph 3 of the proposal. Its task consisted of "completing the requirements for the referral of the dispute thereto [that is, to the Court] in accordance with the Court's regulations and instructions ..." (U.N. Translation, CMB, Vol. II, p. 18).

I will shortly take the Court through the Minutes of the meetings of the Tripartite Committee, to show how they saw their task. The essential point to be made now is that the 1987 Agreement was not seen as a binding, unconditional agreement to refer the dispute to the Court. The

agreement was one of principle: the parties agreed, *in principle*, to refer their dispute to the Court.

But the agreement was conditional, for as paragraph 3 recognised, the requirements for the referral remained to be completed. This was precisely the task assigned to the Committee. Had the obligation of referral been unconditional, there would have been no need for the Committee. And, indeed, as we shall see, much remained to be done: first and foremost, the Parties had to agree on what the disputed matters were. Regrettably, the Qatari Application to the Court suggests that, to this day, they have failed to agree on this, so the most fundamental requirement of all remains unsatisfied.

Before the Tripartite Committee first met both Parties had prepared documents which revealed how they understood the 1987 Agreement.

In December 1987 Bahrain presented to the Gulf Cooperation Council, meeting in Riyadh, a draft "procedural" agreement (MQ, Vol. III, p. 113, Annex II.17). This was an attempt to set out Bahrain's own views of how the Tripartite Committee should be composed, and how it should set about its task. The crucial phrase is found in paragraph 1: in Qatar's translation of the document the aim of the Committee was

> "the aim of contacting the International Court of Justice and fulfilling all the requirements necessary to have the dispute submitted to the Court ...".

The phrase may be vague, but it does recognise that there were requirements still to be fulfilled: the 1987 Agreement was not operative as a basis of jurisdiction as it stood, and this Qatar accepts.

The second document, also put before the GCC Summit Meeting, was a draft by Qatar: not a draft of an agreement, like Bahrain's, but a draft of a letter dated 27 December 1987, which Qatar proposed the two Foreign

Ministers of Qatar and Bahrain should send to the Registrar of this Court (MQ, Vol. III, p. 119, Annex II.18). For the convenience of the Court the operative paragraphs of this letter are set out as the first item in Annex 1 in your Hearing Book. This was much more explicit: the two operative paragraphs recited the agreement of the Parties:

> "1. To submit their aforesaid differences, to the International Court of Justice (or a Chamber composed of five judges thereof), for settlement in accordance with International Law.
>
> 2. To open negotiations between them with a view to preparing the necessary Special Agreement in this respect, and transmitting to you a certified copy thereof when it is concluded."

That could scarcely be clearer. Qatar certainly saw the 1987 Agreement as merely an agreement in principle, an understanding to negotiate in good faith so as to conclude a Special Agreement. So two further steps needed to be taken. *First*, to decide whether to go to the Full Court, or to a Chamber; and *second*, to negotiate a Special Agreement.

Qatar's recognition that a Special Agreement was needed is important. For if the obligation to negotiate a Special Agreement flowed from the 1987 Agreement, and was agreed by the Parties to be the means of implementing that Agreement, and if the 1987 Agreement remains in force - as both Parties say it does - it must follow that, in the absence of some new agreement on a different mode of implementation, the Parties are legally bound to refer their dispute to the Court via a Special Agreement, *and in no other way*! And from this it follows that an attempt by one Party to take the dispute to the Court by unilateral application *is a violation of the 1987 Agreement*.

Let us now turn to the negotiations in the Tripartite Committee to see how, in that body, the Parties saw their task.

3. THE MEETINGS OF THE TRIPARTITE COMMITTEE

Mr. President, I now turn to the work of the Tripartite Committee. It held six meetings, between January and December 1988. As the Court has heard, its task was defined in the 1987 Agreement as that of

> "communicating with the International Court of Justice and completing the requirements for the referral of the dispute thereto in accordance with the Court's regulations and instructions ..." (U.N. translation).

In my submission, it is vital that we see exactly how the two Parties understood that task. It is for this reason that I will take the Court carefully through the Minutes of each meeting. In your Hearing Book, at Annex 1, I have reproduced, for your convenience, the most crucial of the extracts from what Qatar said in those Minutes. What they show, beyond a shadow of doubt, is a common intention to proceed to the Court by way of a Special Agreement. At no stage was a unilateral application ever contemplated, even by Qatar.

The First Tripartite Committee Meeting, 17 January 1988

When the first meeting began the Parties had already exchanged drafts indicating, in their view, what the Committee should do. I refer to Bahrain's "procedural" agreement and Qatar's draft letter which had been before the GCC and which I mentioned earlier. As we have seen, both the Bahraini draft, as amended and Qatar's draft letter envisaged the negotiation of a special agreement.

Not surprisingly, therefore, in the First Tripartite Committee Meeting there was no disagreement on this point. The only disagreement

was over whether, *in addition to a Special Agreement*, there was a need for a letter of "contact" to be sent to the Court. Bahrain said this was not necessary and even unwise: because the Qatari draft of a letter of "contact" sought to specify the subjects of the dispute before that had been agreed and embodied in the Special Agreement. Bahrain thought it would be sufficient to notify the Special Agreement to the Court in due course. Qatar thought an initial letter of "contact" should be sent, followed later by the Special Agreement.

There was never any doubt about this. I want to cite the Qatari representative, the late Dr. Hassan Kamel - the citations are reproduced in your Hearing Book.

> "an agreement should be made to submit the case to the Court..." (p. 6).
>
> "Commitment to submit the case to the Court is a moral commitment rather than a legal commitment. There will be a legal commitment when I register at the Court to submit the dispute to the Court." (P. 22).

There you see a clear recognition by Qatar that the 1987 Agreement, in so far as it related to taking the dispute to the Court, was only a "moral" commitment. It required something more to translate it into a binding legal commitment. Dr. Hassan Kamel was absolutely right on that point.

But he was confused over what he regarded as the necessary "registration" or "notification" of the dispute to the Court. Whatever his confusion was, the agreed and signed Minutes, drawn up by the Mediator, left no doubt as to what the Parties had to do. I cite from the text.

> "It was agreed ... that each side will submit the draft agreement it proposes for referring the dispute to the International Court of Justice..." (CMB, Vol. II, p. 39.)

And this they did. Qatar submitted a detailed draft Special Agreement on 15 March 1988: the full text is in the written pleadings (CMB, Vol. II, p. 43) and in your Hearing Book. Bahrain's draft came four days later, on 19 March (*ibid.*, p. 47).

So, when the Parties next met this preliminary misunderstanding had been cleared away. The idea of a letter of "contact" was dropped and both Parties were working on the basis that a special agreement was necessary.

Second Meeting of the Tripartite Committee, 3 April 1988

When the Parties met on 3 April they went straight to the two drafts of a special agreement. Let me again quote Dr. Hassan Kamel, Qatar's representative:

> "I concur that the aim of this most important meeting is to discuss means to achieve an agreed formula to put our differences before the Court." (P. 71.)

Qatar had no doubt that this was to be done via a special agreement. The written observations on Bahrain's draft of a special agreement, submitted by Qatar on 27 March 1988 said this:

> "*First*, with regard to Article II:
>
> (1) What was agreed between our three States was to prepare a joint Special Agreement to refer the matters of the difference existing between us to the ICJ ..." (RejB, P. 87.)

The problem was rather that the Parties could not agree on how, within the Special Agreement, they should define these matters in dispute.

As the record shows, Qatar's objections centred on Article 2, defining the subject matter of the dispute, and Article 5, designed to exclude evidence of compromise proposals made during earlier attempts at

reaching a settlement. And, as to Article 2, it was Zubarah which Qatar objected to: Qatar did not want Zubarah to be part of the dispute. Equally, Bahrain did not want the Hawars to be part of the dispute, for Bahrain felt that its sovereignty over the Hawars was beyond question.

There was no agreement at this point in time for both Parties' drafts were self-serving. And so a further meeting was agreed and the issues to be put before it were summarized by the Mediator, Prince Saud, as follows:

> "The question to be put to both countries is the following: could all the points evoked by the two countries be included in a common document to be put before the Court?" (P. 87.)

The emphasis on the need for a *common* document is clear. Neither side disputed this, indeed, this was the aim. The need for a special agreement was accepted. The question was: what should be the terms of that agreement?

The Third Meeting of the Tripartite Committee, 17 April 1988

The Committee met for a Third Meeting, two weeks later on 17 April.

Qatar continued to oppose both Articles 2 and 5 of the Bahraini draft, and no real progress was made. But it is absolutely clear that both Parties saw their task as trying to agree a special agreement.

Again, I cite Dr. Hassan Kamel.

> "We are meeting ... to pursue our task. That is to come to an agreement on the format of the special agreement by which the substantive aspects of the dispute between our two countries can be referred to the International Court of Justice ..." (P. 113.)

> "it was agreed between us that by special agreement we refer our dispute to the International Court of Justice" (p. 114).

> "this special agreement must be acceptable to both sides" (p. 115).

"we have to agree on a reasonable formula acceptable to both sides" (p. 116).

"We have come here to formulate a special agreement..." (P. 132.)

In the whole meeting there is not one word about either Party being entitled to proceed by unilateral application.

The Fourth Meeting of the Tripartite Committee, 28 June 1988

The Fourth Meeting had before it two new proposals. One was Bahrain's revised draft of Article II of the earlier draft Special Agreement of March 1988 (CMB, Vol. II, p. 83). The other was Qatar's draft for the same Article II (Qatar's T.C.M. Documents, p. 189). Thus, both Parties were again concerned with one thing: to agree on the text of a special agreement.

There was no doubt about this. As Prince Saud, the Mediator said "the main aim of this Committee is the preparation of a Draft Agreement" (p. 171). Unhappily, as the Minutes make clear, no progress was made.

Nevertheless, prior to the next meeting, Bahrain tried again, submitting a new formula for Article II in October 1988 (CMB, Vol. II, p. 91). This was a short, general formula of a "neutral" character, designed to allow each Party to formulate its own claims in its own way. It was this which became known as "the Bahraini formula". But, and I stress this because it is important, it was designed as Article II of a Special Agreement.

The Fifth Meeting of the Tripartite Committee, 15 November 1988

Qatar welcomed Bahrain's new formula for Article II, and Dr. Hassan Kamel responded on behalf of Qatar with a written statement, which he read out. In his words

> "Qatar welcomes discussing it as a possible basis for negotiations aimed at reaching a mutually acceptable text for Article II of the draft special agreement." (P. 199.)

Now that is important! The Court will observe that the Bahraini formula was to be discussed, not as an isolated draft, and not as the basis for any unilateral application, but as part of the draft of a special agreement.

Later in the same meeting Dr. Hassan Kamel was to repeat the need for a special agreement, as the basis for any reference to the Court.

> "the duty of our Tripartite Committee is to draft a mutually acceptable text for the special agreement under which we will refer the matters of dispute ... to the I.C.J." (p. 204).

> "the special agreement under which we will refer our dispute to the Court should include a clear complete presentation of the matters of our dispute..." (p. 204).

However, whilst Qatar fully accepted that the Bahraini formula was to find its place within a special agreement, Qatar raised a number of questions as to the meaning of this formula (pp. 199-200, 204-206). It was felt that, since these were questions of a legal nature, the next meeting should be preceded by a meeting of the legal advisers of the two Parties.

The Sixth Meeting of the Tripartite Committee,
6 December 1988

And this is what happened. When the Sixth Meeting took place on 6 December, the meeting was in two parts. First, there was a meeting of legal experts, followed by a meeting of the political representatives.

In the meeting of legal experts Dr. Hassan Kamel represented Qatar, and Dr. Husain Al Baharna, Bahrain. Dr. Hassan Kamel had no doubt about the aim.

> "It is hoped that a joint formula be found for Article II of the agreement which will be submitted to the International Court of Justice." (P. 233.)

Dr. Husain Al Baharna explained that, with a "neutral" formula for Article 2, each Party could formulate its own claims in its written pleadings. Mr. Shankardass (CR 94/2, pp. 10-11) has unfortunately misread what Dr. Al Baharna said. He did *not* say each Party would be free to file its own application, bringing its own separate case. There is a world of difference between two separate cases, filed unilaterally, and two sets of pleadings *in the same case*, brought under an agreed formula jointly.

Moreover, Dr. Hassan Kamel wanted to know whether the Bahraini formula would allow Bahrain to claim sovereignty over Zubarah: he also wanted clarification of the archipelagic baselines.

When the main political meeting met later on the same day Qatar clearly felt it had not received the clarification it sought.
Dr. Hassan Kamel again sought clarification as to Bahrain's claim in relation to Zubarah: it seemed as though Qatar was prepared to allow matters of private rights to be submitted to the Court, but not the question of sovereignty.

Qatar proposed a solution. This would lie in having Bahrain's general formula as Article II, but then allowing each Party to submit its own annex in which it would spell out its claims more precisely. But, of course, these would be annexes to a special agreement.

The discussion produced no final, agreed draft, but the Minutes, signed by both Parties, recorded the following:

> *"There followed a discussion aimed at defining the subjects to be submitted to the Court, which shall be confined to the following subjects:*
>
> 1. Hawar Islands, including Janan Island.
> 2. Dibal Shoal and Qit'at Jaradah.
> 3. Archipelago baselines.
> 4. Zubarah.
> 5. Fishing and pearling areas and any other matters related to maritime boundaries.
>
> *The two parties agreed on these subjects.* Qatar's delegation proposed that the agreement which would be submitted to the Court should have two annexes ..." (P. 282.)

It should be added that the Minutes continued by noting Bahrain's wish to study Qatar's proposed amendment - that is the idea of the two annexes. And Qatar again placed on record the fact that it could not agree to the question of sovereignty over Zubarah being raised.

But the important thing to note is the reference to "the agreement which would be submitted to the Court". That could only mean a special agreement. One can safely conclude that, whatever else remained in dispute, the Parties were agreed on the fact that they would come before this Court under a special agreement.

Now that was the last of the meetings of the Tripartite Committee.

During the next two years, as Qatar's Reply has noted (RQ, Vol. I, pp. 32-33) Saudi Arabia, as Mediator, renewed attempts to reach a settlement on the substance of this dispute, but without success.

However, the six meetings of the Tripartite Committee had made some progress. At least some points were agreed. These were the following:

(1) The Parties would use the full Court, not a Chamber.

(2) The Parties were to take their dispute to the Court by means of a Special Agreement.

(3) The idea of a unilateral application was not within the contemplation of either Party.

(4) The Bahraini formula - the general formula for Article II - represented a possible solution to the principal matter in dispute. But it remained to be settled whether this was to be supplemented by one annex, or two, and whether Qatar would consent to Bahrain having the right to question Qatar's sovereignty over Zubarah.

Bahrain requested time to study the Qatari proposal for two annexes to accompany the amended text for Article II. And the expectation was that further meetings of the Tripartite Committee would be held. The records contain nothing to suggest that the work of the Tripartite Committee was at an end.

The fact that in 1989 and 1990 no further meetings were held was due, quite simply, to the renewed attempt by Saudi Arabia to produce a settlement on the merits. As Qatar explains in its own Memorial (Vol. I, p. 55) King Fahd of Saudi Arabia proposed a period of six months, and later a period of two months, during which he would seek to bring about an agreed settlement on the merits. It was for this reason that the work of the Tripartite Committee in trying to agree the terms of a special agreement was suspended. But that work never terminated, and the

Tripartite Committee had made considerable progress towards agreeing the terms of a special agreement.

Clearly both parties were anxious to preserve this area of agreement. It was not complete, and of course it remained provisional until such time as the text of the whole Special Agreement was negotiated and accepted by both parties with binding effect according to their constitutional requirements. Nevertheless, it was because both parties wished to hold on to this area of agreement - including their agreement to proceed by way of a special agreement - that they recorded in the Minute of their meeting in Doha on 25 December 1990, as Point 1, the following: "1. That which had previously been agreed between the two parties was reaffirmed." (CMB, Vol. II, p. 118.)

That linkage between the measure of agreement reached in the Tripartite Committee meetings, and what was agreed at Doha, is vital to an understanding of this case. And I will return to that point in due course.

But first, Mr. President, I believe the Court should hear Bahrain's version of what really happened at Doha.

That concludes all I need to say at this stage. Could I now ask that you now call on Mr Lauterpacht?

The PRESIDENT: Thank you, Professor Bowett. I give the floor to Professor Elihu Lauterpacht.

Mr. LAUTERPACHT: Mr. President and Members of the Court.

1. May I begin by expressing my sense of privilege at appearing before you on this occasion on behalf of the Government of Bahrain. Mr. President, it is a great pleasure to all friends of the Court to see

you installed in your high office, and likewise Vice-President Schwebel in his. May I offer you both my congratulations and good wishes - as I do also to Judge Shi, Judge Fleischhauer and Judge Koroma upon their recent election.

This time of morning, Mr. President, is not the best one at which to start a submission to any tribunal, even one so tolerant as this Court. Nonetheless, I hope that I may sufficiently engage the Court's interest for it to be patient with me - I hope not to go beyond 1 o'clock.

2. Mr. President, I pick up the matter at the point at which my colleague, Professor Bowett, has left it. He has made it quite plain that prior to the events of December 1990 there was nothing in the relationship of the Parties on which Qatar could have claimed to rest a unilateral application to the Court. Everything that had been done between the Parties was on the basis that they were trying to reach agreement on a joint submission.

3. In particular, Professor Bowett has emphasized that the Bahraini Formula had one function and one function only - to permit each of the two parties to *express* the contents of the question that it wanted to put to the Court (and I stress the wording "*express the content* of the question") in its own way, but within the framework of a single case. The Formula was, indeed, comparable to that used in the *Beagle Channel* Arbitration, in which each party was enabled to state its claim in its own words within a single agreed framework. The Bahraini Formula was emphatically not a device which permitted each party to initiate a distinct claim by a separate application. If it had been, Qatar would, on its own analysis of the situation, have been free to have accepted the Formula at any time after it was presented by Bahrain and to have started

proceedings unilaterally without any need for the 1990 Minutes. Qatar's initiative in promoting the adoption of the 1990 Minutes is yet another indication of the fact that in December 1990 it had not occurred to Qatar to read the Bahraini Formula in the extended way that seemingly it is now doing.

The Approach to the 1990 Minutes

4. Notwithstanding this, Qatar's principal argument still accords a central and dominant role to the 1990 Minutes. On this basis, Qatar must satisfy two requirements. The first is to show that the 1990 Minutes constitute a legally binding agreement. The second is to show that its contents constitute a consent under Article 36, paragraph 1, of the Statute of the Court to the exercise by the Court of jurisdiction on the basis of a unilateral application. Each requirement is essential to Qatar's case. If it does not meet either one its case must fail. Bahrain submits that Qatar fails to satisfy both requirements.

5. It is, of course, open to the Court to approach these two questions in whichever order it pleases. If the Court decides that the Minutes do not constitute a legally binding agreement, then it will be unnecessary for it to examine the question of whether the Minutes accord to Qatar the right unilaterally to commence the present proceedings. Conversely, if the Court begins with the second question and decides that the Minutes do not give Qatar the right unilaterally to commence proceedings, there will be no need to consider whether the Minutes amount to an agreement.

6. In truth, however, there is a certain amount of material common to both questions - in particular, the evidence of those on the Bahraini side who were most closely involved in the adoption of the Minutes,

namely, the Bahraini Minister for Foreign Affairs, H. E. Shaikh Mohammed, and the Bahraini Minister of State for Legal Affairs, H. E. Dr. H. M. Al-Baharna, who is our Agent in the present case. This evidence covers both the legal quality and the legal content of the Minutes. It will, therefore, be convenient if, in preference to choosing to take one or the other question first, I begin by concentrating on the evidence of the Foreign Minister. The text of his statement is reproduced as Item 12 in your Hearing Book. After that I shall return to the remaining points connected, first, with the legal status and, second, with the legal content of the 1990 Minutes.

The Bahraini Foreign Minister's Statement

7. Two conclusions are to be drawn from the Foreign Minister's statement. First, the 1990 Minutes are not an international agreement because, when the Minister discussed and signed this text, he had no intention that it should create legally binding obligations of the kind now asserted by Qatar. Second, the Minutes do not accord to Qatar a right unilaterally to institute proceedings principally because that possibility was expressly considered and equally expressly excluded in the process of establishing the text of the Minutes.

8. The Minister's statement sets out his recollection and understanding of what transpired at Doha in late December 1990. It is of great importance. Unfortunately, time does not permit me to read it to you word by word and to comment on it as I go along. However, it needs to be studied carefully and that is why I have put it in the Hearing Book. Now, I limit myself to some comments on it.

Accuracy never challenged

9. My first comment is that the accuracy of the statement has never been challenged, with the exception of one small factual detail of no material importance, which I shall mention later. Qatar could, of course, have filed a responsive statement in its Reply, but it did not do so. Bahrain, in its Rejoinder, pointed to Qatar's non-responsiveness on this central matter. Qatar could still then have sought leave to file additional evidence prior to this hearing, but it did not do so. Qatar could even have introduced oral testimony at the present hearings but, yet again, it has not done so.

10. There is another important point supporting the cogency of the statements of both Shaikh Mohammed and Dr. Al-Baharna. When these statements were filed with the Bahraini Counter-Memorial in June 1992, it was not known to Bahrain that they would be the only first-hand accounts presented to the Court by persons who had actually been involved in the Doha negotiations. True, at the date of the filing of the Counter-Memorial it was not known that there would be a written Reply and Rejoinder. But it was known that there would be an oral hearing and Bahrain certainly could not have assumed that Qatar would refrain from introducing any oral testimony to contradict what Bahrain had said. The Court will, therefore, appreciate that neither H. E. Shaikh Mohammed nor H. E. Dr. Al-Baharna would have risked making any mis-statement that could subsequently have been contradicted in any material respect by Qatar, by Oman or by Saudi Arabia.

11. In consequence, it is now impossible for Qatar, with any pretence at persuasiveness, to contend that the Court should qualify, question or reject the evidence of these statements regarding what happened at Doha,

or the understanding that the Minister had of the effect of the texts or the nature of his intentions. And Qatar has rightly chosen not to advance any such contentions. Instead, Qatar has on the whole bypassed the statements. Instead, Qatar has preferred to rely on an assessment of the 1990 Minutes by reference to other considerations alleged to be more relevant or cogent. I shall come to these in due course. For the moment, I concentrate on the Foreign Minister's statement.

No prior notice of Qatari initiative at Doha

12. My second comment is that the Minister's Statement shows that the introduction at the Gulf Co-Operation Council Summit Meeting of the issue of the dispute between Bahrain and Qatar came virtually without notice. Qatar's attempt to place the matter on the agenda at the Foreign Minister's preliminary meeting early in December was rejected - a fact not even mentioned in Qatar's narrative of developments as expounded in these hearings. Between that meeting and the main summit two weeks later, Qatar gave no indication that it would raise the matter again. Qatar never approached the Mediator with a request for a further Tripartite Committee Meeting. Qatar never approached Bahrain directly or indirectly to propose an agreement in the terms that Qatar now says has come into effect. Such lack of warning and of diplomatic preparation is hardly consistent with Qatar's claim that it intended to secure at the Doha Conference a legally binding instrument containing a fundamental change of approach to the method of referring the dispute to the Court: from an approach by a joint agreement to one permitting unilateral application. Nor did Qatar give any prior indication of its new found inclination to accept the Bahraini Formula or of the extended interpretation that it now seems inclined to place upon that formula. It

would have been easy for Qatar to have sent both the Mediator and Bahrain notes in the period between 8 December and 22 December 1990, to give some warning of the new approach. But no such notes were sent. Such an absence of initial preparation hardly suggests an intention to procure by legal agreement a radical change of position. Instead, just before the opening of the summit meeting at which, as host in his own capital, the Amir of Qatar was presiding, he unexpectedly insisted that the matter be discussed.

Absence of knowledge of matter on part of GCC

13. Third comment: Qatar chose to raise the matter in a body whose members - apart from Saudi Arabia and Bahrain - knew nothing of the subject. I shall explain the significance of this point in a few minutes.

Sequence of events at Doha meeting

14. Fourth comment: The Statement sets out very clearly the sequence in which the various drafts were presented to the Bahraini Foreign Minister.

Saudi Arabian draft

15. First, on 24 December Saudi Arabia presented Draft Minutes on headed paper of the Saudi Arabian Foreign Ministry. This draft contained two important elements: one was the text of the Bahraini Formula, which the Amir of Qatar had said that he was accepting.

16. The other important element in the Saudi draft appeared in the paragraph introducing the full quotation of the Bahraini formula. This was the statement that "the question ... will be presented to the International Court of Justice by each of them", that is to say, each of the Parties.

Rejection by Bahrain of Saudi draft

17. While in itself the statement of Qatar's acceptance of the Bahraini Formula was obviously a step forward, it could not be accepted by Bahrain because it was coupled with the second element in the draft Minutes, namely, the reference to the submission of the question to the Court *by each* of the Parties. These words were read as opening up the possibility that each State might *unilaterally* institute proceedings before the Court.

18. After consultation with his colleagues, Shaikh Mohammed tells us that he rejected the draft as unacceptable - and this is stated in paragraph 8 of his statement.

The Omani draft

19. Mr. President, I turn then to the next step which was the presentation by Oman, later on the same day, of a fresh proposal which you will find also attached to the Minister's statement as Attachment B (Hearing Book No. 12). Mr. President I have given you the wrong references for the Saudi Arabian and the Omani draft minutes. Although they were initially presented to the Court as annexes to Shaikh Mohammed's statement, they are separately reproduced in the Hearing Book as items 5 and 6, respectively. This draft contained three provisions:

Reaffirmation of what was previously agreed

(i) The first provision contained in the Omani draft resolution was "To reaffirm what was previously agreed between the two parties". This provision was wide enough to cover the earlier agreement of the Parties to negotiate a joint agreement to submit the case to the Court. In this connection I may explain the significance of the point that I made a few

moments ago about the fact that the only members of the GCC Summit who knew anything about the problem were Saudi Arabia and the two Parties themselves. Other members could hardly have been expected to make any significant contribution to the settlement of the problem. This point is directly relevant to the role which, within hours of the matter being raised by Qatar, Oman began to play. The Court will recall that the distinguished Agent of Qatar stated two days ago that the Omani draft, presented to Bahrain on the night of 24 October, had been "prepared quite independently by Oman" (CR 94/3, p. 38). Yet, prior the open discussion in the Summit Meeting that morning Oman had not previously been involved in any significant, if any at all, discussions on the matter, whether with the Parties directly or in the Tripartite Committee. Bahrain is left wondering how Oman could, in a matter of hours, have acquired sufficient knowledge of the whole history of the matter to have been able to produce a draft without interest from some interested party which could not, in the circumstances, have been either Saudi Arabia or Bahrain. And this in its turn must have some effect on what Oman could have had in mind when it proposed the first operative paragraph of the Minutes that I have just read. Someone unaware of the details of the previous discussions (as Qatar implies that Oman was) could hardly have intended to limit the scope of the phrase "what had previously been agreed" to the 1987 Agreement alone (as Qatar contends is the case). Such a person could not possibly have intended the phrase to refer to anything other than "*whatever* had been previously agreed" - including, of course, the various matters agreed in the earlier meetings of the Tripartite Committee. In the absence, as we are told, of detailed knowledge of the whole course of discussions from 1987 to the end of

1988, Oman simply would not have been able to know whether or not other things had been agreed additional to the 1987 Agreement itself; and the Omani draft could not, therefore, have intended to exclude from its ambit the possibility that other matters had been agreed unless, of course, it was reckless, which is not to be contemplated.

Either of the parties might submit

(ii) I turn to the second paragraph of the Omani draft. This provided that the good offices of the Custodian of the Two Holy Mosques will continue between the two countries until the following May. Thereafter either of the two parties might submit the matter to the International Court of Justice. The good offices of the Kingdom of Saudi Arabia would continue during the period when the matter is under arbitration. I shall be coming back to this paragraph in a moment.

Effect of a solution

(iii) Lastly, in the third paragraph, the Omani draft provided that "if a brotherly solution acceptable to the two parties is reached, the case will be withdrawn from arbitration".

Amendments made by the Bahraini Foreign Minister

20. Shaikh Mohammed, in his Statement, paragraph 10, tell us that he raised two objections, both relating to the wording in the second paragraph, and made two handwritten amendments.

21. As regards one of the amendments said by Shaikh Mohammed to have been made by him, namely, the insertion of the words "in accordance with the Bahraini Formula, which has been accepted by Qatar", Qatar has pointed out that this change was in fact made by its own legal adviser, Mr. Sherbini. On reconsidering the matter, Shaikh Mohammed does not dispute the point, having confused this second change with the one which

he himself had made in the previous draft, the one put forward by Saudi Arabia.

Replacement of "either of the two parties" by "the two parties"

22. The other amendment made by Shaikh Mohammed, which is not questioned, was the removal of the words "either of the two Parties" in the phrase "either of the two parties may, at the end of this period, submit the matter to the International Court of Justice". In their place he inserted the words "the two parties". This change indicated clearly that it was not acceptable to Bahrain that at the end of the period "either" party should be able to proceed unilaterally. The use of the words "the two parties" in substitution for "either party" reflected in the clearest manner the intention of the Bahrain Foreign Minister that proceedings could only be begun jointly by the two Parties together.

23. Qatar does not deny that this change was introduced by the Foreign Minister of Bahrain. Instead, Qatar has stated in its Reply (RQ, para. 3.66) that it

> "found the word *'al tarafan'* (the parties) ... perfectly acceptable because both Parties had distinct claims to make before the Court, and because this language would enable each Party to present its own claims to the Court".

The distinguished Agent of Qatar used almost identical language in his speech two days ago (CR 94/3, p. 29).

24. Mr. President, Bahrain feels bound to observe that this explanation by Qatar of why it accepted the change of words is more than a little disingenuous. Given that Qatar concedes that it knew of the change of words from "either of the Parties" to "the parties" in a usage in Arabic that Qatar actually asserts was open to the interpretation that

it meant "the parties together", what did Qatar think it was doing in accepting the change without making its own position clear?

25. Qatar appears to anticipate this question with the remark that "there was no suggestion in the amendments proposed by Bahrain either that Bahrain was thinking of further negotiations or that it was considering a special agreement". Of course there was no such suggestion "in the amendments". How could there be such a suggestion "in the amendments" since the amendments were limited to changing critical words in the text? But the suggestion was manifestly implicit in the change of wording. What else could the change from "either of the parties" to "the parties" have envisaged except that any reference to the Court would not be either party alone? And if either party could not proceed alone, how could the matter be submitted to the Court "by the two parties together" unless it was preceded by an agreement along the lines that the parties had discussed in detail since 1987.

Extent of Qatari Knowledge of Developments

26. With a view to reducing even further the necessarily adverse conclusions that must be drawn from the changes in language in both the Saudi and the Omani drafts, Qatar has insisted that it was unaware of the Saudi Arabian draft and therefore of any changes proposed in that draft by Bahrain. Bahrain finds this difficult to believe. Sir Ian Sinclair said on Tuesday that it was difficult for Qatar to believe that Bahrain never even had a hint from Saudi officials that Qatar was meaning to start proceedings unilaterally in June 1991 (see Sir Ian Sinclair's statement on Tuesday, CR 94/2, pp. 26-67). Well, Qatar's claim that it was unaware of the Saudi draft is even more difficult to believe. After

all, at Doha everyone was in close proximity to everyone else throughout the short period of activity involved in the discussions. It seems almost inconceivable that security should have been so tight within the delegations that Qatar was left unaware of a step which so immediately affected its interests.

27. In connection with this claimed "unawareness" on the part of Qatar and, indeed, generally in connection with all the Qatari statements regarding its knowledge and intention at this time, Bahrain must once again repeat the point that it made in its Rejoinder, that nowhere does Qatar, in the accounts which it gives in its written pleadings of what happened between 23 and 25 December 1990, identify any particular Qatari negotiator other than Mr. Adel Sherbini, the legal adviser to its delegation. Qatar has not thought it necessary or desirable to support its account of the relevant events by any statement for which Mr Sherbini would have been prepared to accept personal responsibility, if necessary in cross-examination.

Who Negotiated for Qatar?

28. Moreover, apart from the eventual signature of the Minutes by the Qatari Foreign Minister, it would appear that this distinguished personage played no role in the discussions after the opening meeting in the fall GCC Summit. No reference at all is made to him in the Qatari narrative. And yet, notwithstanding this the Qatari Reply states: "as will have been apparent from the above description of events, Qatar played a significant part in the finalization of the text of the Doha Agreement" (RQ, para. 3.67). Well, one must ask, who on the Qatari side played this significant part? No one is named and no one appears to be

ready to come forward and accept responsibility. The Court is entitled to ask itself why. Is it far-fetched to suggest that no one on the Qatari side is prepared to say that Qatar remained silent in the face of the changes because some particular individual either did not understand the changes in the wording, or did not care about their implications, or even thought that they were so clear in their changed form that they could give rise to no difficulty?

Limited Effect of the 1990 Minutes

Mr. President, let me turn, finally, to the Foreign Minister's answer to the question raised by Qatar of the effect of the 1990 Minutes if it is not what Qatar claims it to be.

29. Qatar has reacted with annoyance to Bahrain's suggestion regarding the reasons why the Minutes were eventually adopted in a form that gave Qatar nothing substantive for all the effort that it had made. But the fact remains that the only plausible explanation is the one suggested by the Bahraini Foreign Minister in paragraph 24 of his Statement. There, he says:

> "Once I had made it plain by my strong opposition to the wording both in the original draft conveyed by Saudi Arabia and the further draft emanating from Oman that this course was completely unacceptable to Bahrain, the problem became simply one of producing a face-saving text that would avoid conveying the impression to the other Gulf Co-operation Council Heads of State that the Amir of Qatar had entirely failed to secure his objective."

30. And this unpalatable fact must also have been obvious to the Qatari negotiators, whoever they may have been. In the end they chose to accept whatever words they could get, rather than insist further on an untenable position and thereby risk a public revelation of the failure of their initiative. In effect, they deliberately took a chance on the

wording. They must have considered that even a defective Minute was better than no minute at all. They must have thought that they could lose nothing by accepting the text as it then stood. Perhaps they even thought that the text would at least serve as a platform from which to catapult the present unilateral application in the direction of the Court. Well, I must submit, Mr. President, that if this was the line of their thinking, they showed no lack of optimism. And if this was *not* their line of thought, then the Court is entitled to expect, first, a more convincing explanation of why Qatar accepted the change of wording and, second, an explanation of why Qatar has not produced a single individual who is prepared to come forward and testify as to why language was accepted that was at the very best, from Qatar's point of view, ambiguous.

The Bahrain Foreign Minister's Conclusions

31. I conclude my reference, Mr. President, to the Foreign Minister's statement by recalling what he said regarding the legal status, as opposed to the legal content, of the text that he signed:

> "At no time did I consider that in signing the Minutes I was committing Bahrain to a legally binding agreement. Naturally, I was prepared to subscribe to a statement recording a political understanding between the Parties, in the same way as I had signed the Minutes of previous meetings of the Tripartite Committee. But even so I was not willing to accept a form of words that suggested any willingness on the part of Bahrain to depart from its basic position that the only way in which the case could come before the Court was by a joint submission based on a properly concluded formal agreement between the Parties."

Significance of Direct and Uncontradicted Evidence of Intention

32. In a situation of this kind, where - both as to the interpretation and the legal status of the instrument - the principal

ingredient in the Court's analysis of the situation must be the intention of the Parties, one cannot disregard the primary role that must be accorded to the actual intention of the very negotiators involved. Of course other factors also have a role to play - and I shall return, with your leave, to that aspect of the matter on Monday. But objective factors, as they are called in this case, do not replace the evidence of the very person whose intentions matter.

33. And this is particularly so because that evidence is not contradicted. If it had been, the Court might have felt that it was difficult to choose between two conflicting statements. But that is not the case here. Here the evidence is quite explicit: when the Foreign Minister signed the Minutes he did not consider that he was signing a treaty. When he insisted on the use of the words "the two parties" instead of "either of the two parties" he intended to record the conclusion that proceedings could be commenced only by the two parties together.

34. But to conclude in this way is not to say that the remaining considerations, the factors "intrinsic" to the text, the so-called "objective" factors, do not fully support what the Foreign Minister says. In my submission they certainly do support him. It is to those factors that, with your permission, Mr. President, I should like to return on Monday. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Professor Lauterpacht. The Court will now rise, and will resume to hear the delegation of Bahrain next Monday morning, 7 March, at 10 a.m.

The Court rose at 1 p.m.