DISSENTING OPINION OF JUDGE SHAHABUDDEEN

The Judgment of the Court opens the way to the peaceful settlement of a long-standing dispute between two neighbouring States. It is with regret that I feel prevented by my appreciation of the legal issues from joining in support of it. With many of its elements I do indeed agree. For example, I accept that the Parties have conferred jurisdiction on the Court to adjudicate on the whole of the dispute. I have the misfortune, however, to be of a different mind on the question whether the claims presented by Qatar are within the jurisdiction so conferred and, even if they are, whether the jurisdiction has been duly invoked by the method of seisin employed. Pursuant to Article 57 of the Statute of the Court, the reasons which disable me from accompanying the majority are respectfully set out below.

I. Preliminary

The limited nature of the Court's Judgment of 1 July 1994 has to be kept in view. The main question was one of jurisdiction. The Court decided certain issues having a bearing on jurisdiction; it did not decide the question of jurisdiction itself (see paragraph 23 of today's Judgment). What it decided was "to afford the Parties the opportunity", in the light of its decision on those issues, "to submit to the Court the whole of the dispute" (*I.C.J. Reports 1994*, p. 127, para. 41 (3)).

Although, as I then stated, my own "preference would have been for the issue of jurisdiction to be fully decided at [that] stage" (*ibid.*, p. 129), I would not dispute the right of the Court to proceed as it did. True, there is a "principle that it is the duty of the Court . . . to reply to the questions as stated in the final submissions of the parties . . ." (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402). But the principle, I apprehend, is not violated where, as in this phase of the case, the Court had not as yet concluded its determination; the Court introduced an intermediate procedure prior to making its final decision.

Nor, despite an appearance of novelty, is the competence of the Court to introduce that intermediate procedure open to serious question. In the *Free Zones of Upper Savoy and the District of Gex*, the Court, being duly seised of a matter and having heard arguments on the interpretation of a treaty provision, gave "indications" of its reaction to the question of interpretation, and then allowed the parties a period of time to come to a consensual solution of the main problem in the light and with the benefit

of those "indications". When they failed, it resumed consideration of the matter, and formally decided the question of interpretation along the lines previously indicated (see *P.C.I.J., Series A, No. 22*, pp. 12, 13, 16-21; *P.C.I.J., Series A, No. 24*; and *P.C.I.J., Series A/B, No. 46*, pp. 98, 102-105, 136, 141, 149, 152, 171). The distinguishing circumstance that the "indications" were given and the deferment of a final decision made at the request of the parties does not obscure a recognition by the Court that it may adopt a procedure designed to enable the parties themselves to find a solution to the particular problem before it in the light of its views on introductory issues.

As was pointed out by Sir Hersch Lauterpacht, the Court is "debarred from directly acting as an important instrument of peace" (Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 5); it is a court of justice, and must remain within the limits of such a body. But, as he also noted in the opening sentence of his major work, "the primary purpose of the . . . Court . . . lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law" (*ibid.*, p. 3). As it was put by President Basdevant, "It is asked of the Court that it should contribute to peace by deciding the disputes submitted to it" (*I.C.J. Pleadings, Reparation for Injuries Suffered in the Service of the United Nations*, p. 46; and see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, I.C.J. Reports 1986*, p. 153, Judge Nagendra Singh, separate opinion). The intermediate procedure introduced in this case, though obviously to be resorted to sparingly and in special circumstances, did not exceed the function of a court charged with the mission of applying the rule of law for the judicial settlement of international disputes on a consensual jurisdictional basis.

However, it of course remains the responsibility of the Court to return to the matter in due time in order to determine whether the intermediate procedure has yielded a solution of the problem. In today's Judgment, the Court considers that an "Act" filed by Qatar at the end of that procedure has disposed of any difficulties. With much regret, I do not feel persuaded.

II. Whether the "Act" Filed by Qatar Satisfies the Judgment of 1 July 1994

Clause 4 of the *dispositif* of the Court's Judgment of 1 July 1994 fixed a time-limit within which the Parties were, "jointly or separately, to take action" for the purpose of submitting to the Court "the whole of the dispute" (*I.C.J. Reports 1994*, p. 127, para. 41 (3) and (4)). Did the word

"separately" contemplate the possibility of "the whole of the dispute" being submitted by one Party alone?

The *dispositif* may be interpreted in the light of the motifs (*Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J., Series B, No. 11*, pp. 29-30). Hence, any doubt about the meaning of the word "separately" in clause 4 of the *dispositif* may be resolved by recourse to paragraph 38 of the Judgment, which reads:

> "Such submission of the entire dispute could be effected by a joint act by both Parties with, if need be, appropriate annexes, or by separate acts."

The term "separate acts" visualized acts done by each Party acting separately, but not an act done by one Party alone where the other did nothing; each Party would have to act so as to complement the act of the other and in that way to submit "the whole of the dispute".

This reading is consistent with the fact that it was to "the Parties" that the Court decided "to afford . . . the opportunity to submit to the Court the whole of the dispute" (*I.C.J. Reports 1994*, p. 127, para. 41 (3)). It is also in keeping with Qatar's post-Judgment statement to Bahrain that "the Court leaves an option to the Parties to take separate action to place the whole of the dispute before the Court" and that, failing agreement "on a joint compliance with the decision of the Court", it "will of course be open to our two countries to take appropriate separate action to comply with the Court's Judgment" (letter from the Agent of Qatar to the Agent of Bahrain, dated 6 July 1994). The implication follows that the Judgment rendered five days earlier was accepted as requiring action from each Party.

There are reasons of substance why the Court could not have intended that one Party alone could act. A special agreement, notified by one party with the authority of the other, may submit the claims of both sides; but that is not the mode pursued in this case. Also, if an agreement so provides, a dispute may be submitted in its entirety by unilateral application (e.g., *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3). That format seems to explain the Court's present Judgment; but does it correspond to the thinking underlying its Judgment of 1 July 1994? Did that Judgment contemplate that an acceptable course would be for Qatar to file another unilateral document provided that "the form of words used [in it] . . . accurately described the subject of the dispute" (cf. paragraph 48 of today's Judgment)?

The real ground on which the Judgment of 1 July 1994 held that "the whole of the dispute" was not before the Court was that the Court then had "before it solely an Application by Qatar setting out the particular *claims* of that State . . ." (*I.C.J. Reports 1994*, p. 123, para. 34; emphasis added). It seems to me that the opportunity afforded by the Court to "the Parties . . . to submit . . . the whole of the dispute" visualized that all of

the *claims* of each Party would be submitted by it or with its authority so as to ensure that the dispute in all of its component elements would be properly presented and considered. Bahrain's claim to sovereignty over Zubarah is referred to in Qatar's Act; but it has not been submitted to the Court by or with the authority of Bahrain. This is recognized in paragraph 48 of the Judgment: although the Court takes the view that it is now "seised of the whole of the dispute", it also states

> "that claims of sovereignty over the Hawar islands and over Zubarah may be presented by either of the Parties, from the moment that the matter of the Hawar islands and that of Zubarah are referred to the Court".

This looks to a possible future submission of such claims.

Meanwhile, however, the Court has held that Qatar's unilateral Application, read with its unilateral Act of 30 November 1994, is both within jurisdiction and admissible. The Court could accordingly proceed to the merits and determine Qatar's request, presented in its Act, that the Court should "adjudge and declare that Bahrain has no sovereignty or other territorial right . . . over Zubarah . . .". That request is less in the nature of a claim by Qatar than in the nature of the formal conclusion of its defence to Bahrain's claim to sovereignty over Zubarah. Were the Court to grant the request, it would be upholding Qatar's defence to Bahrain's claim without the latter having been submitted to it by or with the authority of Bahrain. The Judgment of 1 July 1994 did not contemplate that the right to sovereignty claimed by Bahrain would be submitted to the judicial process in that indirect way.

I conclude that the Judgment of 1 July 1994 did not envisage action being taken by one Party alone. In view of this, it is not necessary to go on to consider a related argument by Bahrain as to whether Qatar is attempting unilaterally to amend its original Application, and as to whether it may competently do so. It is obvious, however, that such an objection was not likely to be made if action had been taken by both Parties, as in my opinion was contemplated by the Judgment of 1 July 1994.

III. Jurisdictional Consequence of Failure to Make Due Submission of "the Whole of the Dispute"

If Qatar's unilateral Act of 30 November 1994 did not satisfy the Court's Judgment of 1 July 1994, it follows that all that the Court has before it is Qatar's unilateral Application of 8 July 1991. The Court has already found "that the subject-matter of [that] Application corresponds to only part of the dispute contemplated by the Bahraini formula" and that this "was in effect acknowledged by Qatar" (*I.C.J. Reports 1994*, p. 124, para. 36). What is the jurisdictional consequence?

The agreement finally reached on the subject-matter of the dispute falls to be regarded as going back to and attracting the application of a 1983 principle that all matters in dispute were "to be considered as complementary, indivisible issues, to be solved comprehensively together". Bahrain correctly argued that there was no agreement to confer jurisdiction in such a way as to enable the Court to consider part of the dispute without having to consider the remainder at the same time. Since the Court has only part of the dispute before it, it follows that it has no jurisdiction.

IV. Did Qatar Have a Right of Unilateral Application under the Doha Minutes?

Assuming the foregoing to be wrong, the Court is still faced with the fact that it is Qatar alone which has acted so far. It therefore remains necessary to deal with Bahrain's submission that Qatar has no right of unilateral application under the Doha Minutes. To that submission, Qatar responded that (i) the Parties agreed to a right of unilateral application; (ii) alternatively, once consent has been given to jurisdiction, the Court may be unilaterally seised unless this is shown to have been excluded by the Parties, and that, in this case, even if the Doha Minutes did not provide for a right of unilateral application, they did not exclude it. Holding in favour of Qatar on (i), the Court did not pass on to (ii). Being of a different view on (i), completeness of treatment of Qatar's case requires me to deal with (ii) also.

(i) *Did the Parties Agree to a Right of Unilateral Application?*

It is, of course, necessary to consider the actual terms of the texts. These include the Bahraini formula. The "Question" to be put to the Court, as it was set out in the Bahraini formula, began with the words "The Parties request the Court to decide . . .". The implication was that the case was to be submitted by both Parties.

I agree with the Court that the Bahraini formula has to be read not by itself, but in the context of the Doha Minutes, in which it is referred to. A main element of the context is set out in paragraph 2 of those Minutes. This stated that "the two parties may *submit* the matter to the International Court of Justice *in accordance with the Bahraini formula* . . ." (Judgment, para. 30; emphasis added). Hence, the Doha Minutes implied that the act of *submitting* the matter to the Court was to be *in accordance with the Bahraini formula*. At this point, the reader is thrown back by the Doha Minutes on to the text of the Bahraini formula in order to see what it required to be done for the matter to be submitted to the Court. On

being so thrown back on to the text of the formula, he would of course appreciate the need to respect the definition there laid down of the subject-matter of the dispute; but he could not miss the meaning of the opening words of the formula that the submission to the Court was to be made by both Parties. Unless the submission was made in that way, the requirement of the Doha Minutes that the submission of the matter to the Court was to be "in accordance with the Bahraini formula" could not be satisfied. Thus, the Doha Minutes themselves enjoined conformity with the implication of the Bahraini formula that the submission to the Court was to be made by both Parties.

On this point, paragraph 38 of the Judgment states that "[i]f the 1990 Minutes referred back to the Bahraini formula, it was in order to determine the subject-matter of the dispute which the Court would have to entertain", with the implication that the reference did not also operate to import the requirement of the formula as to the mode of seisin. It seems to me that more persuasive reasons speak for the prima facie meaning that the reference to the matter being submitted to the Court "in accordance with the Bahraini formula" included the admitted requirement of the formula for the submission to be made by both Parties. Since it was Qatar which introduced that reference, something in the nature of the principle of interpretation *contra proferentem* applies to the resolution of any ambiguity. As the books caution, the principle needs to be applied with circumspection to the interpretation of treaties (Charles De Visscher, *Problèmes d'interprétation judiciaire en droit international public*, 1963, pp. 110-112, referring to *Brazilian Loans, P.C.I.J., Series A, No. 21*, p. 114); yet, a certain irreducible logic in its substance is not altogether banished (see *Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58*, p. 182, last paragraph, Judge Anzilotti, dissenting opinion; and Lord McNair, *The Law of Treaties*, 1961, pp. 464-465).

The meaning suggested above seems clear. There is no need for recourse to the *travaux préparatoires*. The latter do, however, supply confirmation of that meaning. Alternatively, if indeed the text is not clear, such recourse can help to resolve the difficulty to the extent permitted by Article 32, paragraphs *(a)* and *(b)*, of the Vienna Convention on the Law of Treaties 1969.

In the course of drafting the Doha Minutes, the words "either of the [two] parties" were changed by Bahrain, with the knowledge and consent of Qatar, to read, in the Arabic original, *"al-tarafan"*, meaning "the parties" (according to Qatar) or "the two parties" (according to Bahrain). Accepting Qatar's version for present purposes, the question is whether the agreed provision nevertheless visualized that "either of the [two] Parties" could make an application, just as if no change had been made.

The fact that the amendment was made, with the words "either of the [two] parties" being consensually discarded, signified that Bahrain continued to adhere to its previous opposition to the idea of either of the two

Parties having a right of unilateral application; nothing suggests that at the last moment it capitulated on that important point. The situation brings to mind the words of the Court in the *Aegean Sea Continental Shelf* case:

> "When read in that context, the terms of the Communiqué do not appear to the Court to evidence any change in the position of the Turkish Government in regard to the conditions under which it was ready to agree to the submission of the dispute to the Court." (*I.C.J. Reports 1978*, p. 43, para. 105.)

Reaching further back, one might also recall the statement of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex:*

> "It is scarcely reasonable to suppose — indeed, such a supposition would be irreconcilable with the documents before the Court — that, at the moment when the dispute was about to be submitted to a judicial organ, Switzerland abandoned the legal position which she has constantly maintained in regard to the very point on which the two Parties are now divided." (*P.C.I.J., Series A/B, No. 46*, p. 138.)

Weighty circumstances are required to establish that a party intended abruptly to abandon a position long held by it.

In *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court*, in the course of negotiating the terms of an agreement for referring a possible dispute to the Court, the United Kingdom proposed to insert, at the appropriate place in the text,

> "the words 'at the request of either party' in order to make it clear that the jurisdiction of the Court could be invoked by means of a unilateral application and need not require a joint submission by both parties" (*I.C.J. Reports 1973*, p. 11, para. 19).

Iceland preferred the words "at the request of the several parties". The United Kingdom insisted on its own wording, and Iceland finally accepted it as part of the agreed compromissory clause. It could scarcely be suggested that the acceptance by Iceland of the United Kingdom wording was a matter of no consequence to the meaning of the final text. In proceedings unilaterally instituted by the United Kingdom, the Court carefully recalled the exchanges between the parties relating to the alteration which was made; it did so in a branch of the Judgment which, in the absence of Iceland, concluded with a finding "that the Court has jurisdiction" (*ibid.*, p. 14, para. 23). In the somewhat opposite situation here, the amendment proposed by Bahrain and accepted by Qatar falls to be interpreted as intended to exclude the possibility of a right of unilateral application.

Comparison may also be made with the Act of Lima (*Asylum* case, *Judgment, I.C.J. Reports 1950*, pp. 267-268). The Act referred to the inability of the parties to reach agreement on a joint reference and then

recorded their agreement "that proceedings . . . may be instituted on the application of either of the Parties". It would have been natural for some such language to be used in the Doha Minutes if this was intended to be read as proposed by Qatar. On the contrary, an attempt to make the Minutes read that way failed; it is difficult to read the text which finally emerged as if the attempt had all the same succeeded.

The danger of relying on inadequate preparatory material must not be overlooked. On the other hand, however full the material may be, it is almost always possible to say that it could be still fuller. The *travaux préparatoires* in this case are not as ample as they might be; but I am not persuaded that, on the pertinent points concerning the fashioning of the text of the Doha Minutes, they are so fragmentary as to be useless. They show the state of the original draft; who presented it; who changed what; and in what sequence the changes were made. Those are the steps which normally occur in the drafting of a negotiated text. The material indicates that Bahrain maintained its previous opposition to the idea of a right of unilateral application. The *travaux préparatoires* are therefore confirmatory of the interpretation of the Doha Minutes proposed above; alternatively, they operate to resolve any ambiguity in favour of that interpretation.

The Court's key argument is that paragraph 2 of the Doha Minutes envisaged that the matter could be submitted to the Court as soon as the period of good offices expired. I accept this view; but it does not follow that a unilateral application was the only method by which that could be done. The matter could be so submitted if the Parties were to proceed on the basis that the Doha Minutes themselves constituted a special agreement which could be jointly notified as soon as the period ended. The Court is not limited to choosing between different interpretations proposed by each side (*Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 138; *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 51, Judge Winiarski, dissenting opinion; and *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 354, Judge Jessup, dissenting opinion). Elaborate provisions are not needed for a special agreement (see the relevant elements of the agreement in *Territorial Dispute (Libyan Arab Jamarihiya/Chad), Judgment, I.C.J. Reports 1994*, pp. 9-10). Whether a case is brought by notification of a special agreement or by written application, all that Article 40, paragraph 1, of the Statute requires is that "the subject of the dispute and the parties shall be indicated". To use the language of Article 39, paragraph 2, of the Rules of Court, the Doha Minutes, together with their incorporated instruments, make apparent "the precise subject of the dispute and identify the parties to it". Article 46, paragraph 2, of the Rules of Court provides for a case in which a special agreement is silent on the number and order of the pleadings.

The solution suggested (of treating the Doha Minutes as themselves

constituting a special agreement) attracts the criticism that it offers an in-built veto to one party over the other. That is so, but no more so than in the case of any other special agreement which has to be jointly notified. Account being taken of the principle of good faith, the veto is not absolute; this helps to answer the questions raised in paragraph 36 of the Judgment relating to the continued availability of the mediation process.

In any case, the criticism would not justify recourse to the principle of effectiveness in order to support a right of unilateral application. The literature acknowledges the concept of "a treaty embodying a compromise attempted but not actually achieved" (Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 227). The principle of effectiveness does not assist in such cases. Discussing the principle, Lord McNair observed:

> "Many treaties fail — and rightly fail — in their object by reason of the words used, and tribunals are properly reluctant to step in and modify or supplement the language of the treaty." (Lord McNair, *The Law of Treaties*, 1961, p. 383.)

Thus, the fact that a treaty has a discernible object does not mean that it has to be interpreted so as to accomplish that object at all costs. A treaty must of course be interpreted "in the light of its object and purpose"; but it is not for the Court to make it more effective for achieving its apparent purpose than the parties themselves saw fit to do (see De Visscher, *op. cit.*, p. 77). It is apposite to recall the words of Judge Lauterpacht in the *Admissibility of Hearings of Petitioners by the Committee on South West Africa* case:

> "The clauses of the Peace Treaties of 1947 relating to settlement of disputes were, as shown in their wording and the protracted history of their adoption, formulated in terms which clearly revealed the absence of agreement to endow them with a full measure of effectiveness." (*I.C.J. Reports 1956*, p. 58, separate opinion.)

(ii) *Is It Correct to Say that, Once Consent Has Been Given to Jurisdiction, the Court May Be Unilaterally Seised unless the Right to Do So Is Shown to Have Been Excluded by the Parties?*

The argument for Qatar was put by counsel thus:

> "As for the mode of seisin — notification of a special agreement or filing of an application — it does not necessarily have the same voluntarist basis. The method of seisin may, to be sure, be agreed between the parties; but, in the absence of any agreement between them on that point, as is the case here, it is for the Court to appreciate the regularity of the seisin, the mode of submission of a case to the Court being regulated by the provisions governing its functioning.
>
> Appreciation of the regularity of the act by which proceedings are instituted consist accordingly in verifying, as was done in the *Corfu*

Channel case (*I.C.J. Reports 1947-1948*, p. 28), that a particular method of seisin is not ruled out by a text that is binding on the parties to the case.

In the light of that preliminary observation, one can say that Qatar has been able validly to bring the present case before the Court by an application instituting proceedings, because unilateral seisin is the inevitable corollary of compulsory jurisdiction. For such a seisin to be possible, it is necessary that the States concerned should have accepted the jurisdiction of the Court and it suffices that that possibility not be expressly or implicitly ruled out by the provisions conferring compulsory jurisdiction on the Court.

In consequence, if Qatar has been able validly to seise the Court by means of a unilateral application, it is because the competence of the Court was definitively accepted by both States and because that method of seisin was not ruled out by the relevant texts, even if the latter have not expressly provided for it." (CR 94/2, pp. 63-64, Professor Quéneudec.)

The question whether, in a particular case, jurisdiction under Article 36, paragraph 1, of the Statute is compulsory really depends on whether the parties have agreed, expressly or impliedly, to its being capable of exercise by unilateral seisin. Thus, the proposition that "unilateral seisin is the inevitable corollary of compulsory jurisdiction" does not show that a right of unilateral seisin can rest on anything other than the agreement of the parties. The question whether there is such an agreement in this case has been examined and answered in the negative under (i) above. Accordingly, I would now pass on to consider the alternative question whether, absent such an agreement, a right of unilateral seisin is available provided jurisdiction has been accepted and the parties have not excluded that right.

It is necessary to bear in mind the distinction between jurisdiction and seisin. The use of the correct method of seisin is a condition-precedent to the exercise of jurisdiction. If seisin is not properly effected in a case that is sought to be brought, the agreed jurisdiction becomes unavailable to the Court, with the result that, in that particular case, the Court has no jurisdiction (see *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 45, para. 109; and *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (*Tunisia* v. *Libyan Arab Jamahiriya*), *Judgment, I.C.J. Reports 1985*, p. 216, para. 43). But, despite this functional link between the concepts, it remains true that seisin is not jurisdiction. Thus, consent to jurisdiction does not by itself include consent to seisin being effected by any particular method.

This is so even in a case in which, the agreement to litigate being silent on seisin, the parties proceed to effect seisin jointly; in such a case, they are acting not pursuant to any right to act jointly which has been conferred by the giving of consent to jurisdiction (such a right is scarcely

needed), but in exercise of their normal freedom to act as they both see fit. This freedom is exercised through the consensual act by which the case is jointly submitted; the mutual consents involved are distinct from consent to jurisdiction. A right of unilateral application likewise depends on consent other than consent to jurisdiction, even if, as is likely, consent is in both respects given in the same instrument.

What, if anything, do the cases show? In *Certain German Interests in Polish Upper Silesia*, Germany made a unilateral application under a treaty which provided that "differences of opinion . . . shall be submitted to the Permanent Court of International Justice". On that wording, a question could have arisen as to whether a joint submission or a unilateral one was visualized. However Poland, the Respondent, did "not dispute the fact that the suit [had] been duly submitted to the Court in accordance with Articles 35 and 40 of the Statute" (*P.C.I.J., Series A, No. 6*, p. 11). The case is slight authority for the proposition that the mere existence of jurisdiction operates to confer a right of unilateral application.

In the case of *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya)*, notwithstanding the words in a special agreement that "the two Parties shall together go back to the Court . . .", the Court held that there was a right of unilateral application. It is clear, however, that the Court was relying on Article 60 of the Statute, under which there is such a right and under which the application was in fact made (*I.C.J. Reports 1985*, p. 216, para. 43). The case is distinguishable.

A case more in point is that of *United States Diplomatic and Consular Staff in Tehran*. There, as in *Certain German Interests in Polish Upper Silesia*, the relevant treaty provision was silent on the specific method of seisin to be used, merely stating that any dispute between the parties "shall be submitted to the International Court of Justice . . .". By construing it as intended by the parties to operate in the same way as standard provisions in other treaties of the same character, the Court was, however, able to interpret it as signifying that "what the parties intended" was that "either party may bring a case to the Court by unilateral application" (*I.C.J. Reports 1980*, p. 27, para. 52; and see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 81). The case betrays no hint that the Court would have been prepared to regard the mere existence of jurisdiction as sufficient to confer a right of unilateral application; on the contrary, in the absence of the respondent, the Court sought *proprio motu* to satisfy itself that the applicant's unilateral application rested on the agreement of both parties that proceedings could be instituted by such a method.

The *Corfu Channel* case is not helpful. First, the Court proceeded on

the basis of *forum prorogatum*. In such a situation, the application has of necessity to be made without the prior consent of the respondent; that is because it is really in the nature of an offer to litigate. Second, even if the respondent is prepared in principle to litigate, it could conceivably be opposed to the idea of doing so on the basis of a unilateral application; in this event, it is really because of its rejection of that method of seisin that the respondent will be declining the offer to litigate. Where the respondent accepts the applicant's offer to litigate, it is therefore also acquiescing, albeit *ex post facto*, in the bringing of the case by unilateral application; thus, absence of consent is more apparent than real. Third, when the Court in that case said that it "cannot . . . hold to be irregular a proceeding which is not precluded by any provision in these texts", what it was considering at that point of its reasoning was not the regularity of the seisin as such, but only its use as part of a two-stage procedure for conferring jurisdiction on the Court: could *jurisdiction* be conferred "by two separate and successive acts, instead of jointly and beforehand by a special agreement" (*I.C.J. Reports 1947-1948*, p. 28)? It was in that context that the Court observed that "the method of submitting the case to the Court is regulated by the texts governing the working of the Court . . .". The statement first mentioned possessed no such property of universality as would qualify it to lend support to the materially different proposition that, in a case in which jurisdiction already exists, the existence of that jurisdiction is enough to confer a right to make a unilateral application unless the right to do so has been excluded by the parties.

It is difficult to see how a right to make an application without the consent of the respondent can co-exist with the right of a State not to have its case determined without its consent if this means that, at the stage when it appears before the Court, it should be there because it consented to be there, even if it did so reluctantly. Conceivably, it may be prepared to be there on the basis of the case being submitted jointly, but not unilaterally; it may have legitimate concerns in these respects. It is not for the Court to assess the sufficiency of the concerns; the judge of that is the State involved. It exercises its judgment by way of consenting to seisin being effected in a particular manner. Consent may be impliedly given, but it is always required. For the reasons offered above, even *forum prorogatum* cases are not true exceptions.

In sum, the role of consent is not the negative one of excluding a right of unilateral application which would exist once jurisdiction has been accepted, but the positive one of creating a right of unilateral application which could not otherwise exist. In my opinion, it has not been shown that the Parties to this case consented to such a right.

V. The Standard of Proof

It would not be correct to suggest that all of the evidence points in one direction; on certain aspects, the material lies on both sides of the dividing line. Not surprisingly, one of the things discussed at the Bar was

the standard of proof (see paragraph 43 of the Judgment). It is important to consider this, both as it applies to jurisdiction proper and as it applies to seisin in relation to jurisdiction.

It is of course the law that acceptance of jurisdiction is not "subordinated to the observance of certain forms" (*Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 23). But that relates to the form in which consent is given; it is without consequence for the need to establish consent itself, whatever the form it takes. What is the applicable standard of proof?

Generally speaking, the standard of proof varies with the character of the particular issue of fact. A higher than ordinary standard may, for example, be required in the case of a charge of "exceptional gravity against a State" (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 17). What, then, is the importance of the matter in this case? The Court lacks the compulsory jurisdiction of municipal courts; judicial settlement is an optional means, among others, of settling international disputes. A State has a right not to have its case submitted to the Court unless it consents to that particular means of settlement; it may not properly be held to have given up that important right unless its consent is clearly established. How clearly?

The received test is whether, in the opinion of the Court, "the force of the arguments militating in favour of [jurisdiction] is preponderant" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 32). The precise meaning of this is another matter.

Two questions arise. First, how "preponderant" should the force of the arguments be? Counsel for Qatar cited the *Oxford English Dictionary* definition of the word "preponderant" as "meaning, in the first place, 'surpassing in weight; outweighing, heavier' and, in the second place, 'surpassing in influence, power, or importance; predominant'" (CR 94/1, p. 44, Sir Ian Sinclair, Q.C.). That is not materially different from judicial dictionary definitions (see *Vocabulaire juridique*, 3rd ed., p. 621; *Black's Law Dictionary with Pronunciation*, 6th ed., p. 1182; and *West's Law and Commercial Dictionary in Five Languages*, Vol. "K-Z", pp. 328-329). But "surpassing" by what margin?

In the same case in which the test of preponderance was put forward, the Permanent Court of International Justice went on to indicate that the intention to confer jurisdiction had been "demonstrated in a manner convincing to the Court" (*P.C.I.J., Series A, No. 9*, p. 32). A year later it spoke of consent being "inferred from acts conclusively establishing it", and of submission of arguments on the merits falling to be "regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits of the suit" (*Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 24). In

the *Corfu Channel* case, this Court described Albania's letter as constituting "a voluntary and indisputable acceptance of the Court's jurisdiction" (*I.C.J. Reports 1947-1948*, p. 27). Nor did the test of preponderance stand in the way of its more recent reaffirmation of the criterion of "'an unequivocal indication' of a 'voluntary and indisputable' acceptance of the Court's jurisdiction" (*Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, I.C.J. Reports 1993*, p. 342, para. 34). A similarly high test had been proposed by Judge Lauterpacht in 1957, when he spoke of

> "the established practice of the Court — which, in turn, is in accordance with a fundamental principle of international judicial settlement — that the Court will not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt" (*Certain Norwegian Loans, I.C.J. Reports 1957*, p. 58, separate opinion; and see Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. II, p. 437).

The test of preponderance has to be construed in accordance with this established jurisprudence.

The second question is how does the preponderance test impact on a situation in which the Court is in a state of doubt. When the Permanent Court of International Justice said that the

> "fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction",

it obviously recognized that the Court could find itself in a state of "doubt calculated to upset its jurisdiction" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 32). That recognition was also apparent when it went on to say:

> "The question as to the existence of a doubt nullifying its jurisdiction need not be considered when . . . this intention [to confer jurisdiction] can be demonstrated in a manner convincing to the Court." *(Ibid.)*

Counsel for Bahrain, however, spoke of case-law having "rejected what a judgment called 'a doubt nullifying . . . jurisdiction'" (CR 94/6, p. 12, Professor Prosper Weil). Could that have happened in *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment (I.C.J. Reports 1988*, p. 76, para. 16)? There the Court had before it the "question . . . whether in case of doubt the Court is to be deemed to have jurisdiction or not". It answered by citing the jurisprudence of the *Factory at Chorzów* to the effect (already alluded to) that

> "the Court will, in the event of an objection — or when it has automatically to consider the question — only affirm its jurisdiction pro-

> vided that the force of the arguments militating in favour of it is preponderant" (*P.C.I.J., Series A, No. 9*, p. 32).

What this means is that in all situations, other than those in which "the force of the arguments militating in favour of [jurisdiction] is preponderant", the Court will *not* affirm its jurisdiction. These other situations, in which the force of the arguments militating in favour of jurisdiction is *not* preponderant, will logically include situations in which the Court is in doubt. Accordingly, where there is doubt the Court will not affirm its jurisdiction.

I have considered the references to "doubt" in the *Free Zones of Upper Savoy and the District of Gex (P.C.I.J., Series A, No. 22*, p. 13) and the *Corfu Channel, Merits* (*I.C.J. Reports 1949*, p. 24). The way in which the matter was considered in those cases does not overthrow the conclusion to be drawn from the Court's jurisprudence that the Court can be in a state of "doubt nullifying its jurisdiction". The point is not academic. In my opinion, the attempt to establish jurisdiction in this case does not meet the requisite standard of proof; and thus the Court has no jurisdiction. At best, however, on that standard, it is doubtful that it has; in this event also, it cannot find in favour of jurisdiction.

VI. Conclusion

I am of opinion that the Court lacks jurisdiction. The reasons are that (i) "the whole of the dispute" is not before the Court in the substantial sense that Bahrain's claim to sovereignty over Zubarah has not been duly submitted to the Court; and (ii) there is no right of unilateral application.

If I am wrong on jurisdiction, I would hold against admissibility on the ground that, even if Bahrain's claim to Zubarah is before the Court, it has not been submitted in a manner which enables the Court to deal with it judicially.

Thus, on either view, the Court may not act. In the special circumstances of the case, it afforded the Parties an opportunity, by action to be taken "jointly or separately", to place the whole of the dispute before it. That opportunity could have been used to adjust the situation; this has not happened.

It has been rightly said that

> "it is the duty of the Court at all costs to safeguard the fundamental purpose which it is designed to achieve, namely, the advancement of the application between nations of the principle and method of judicial decision" (*Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, P.C.I.J., Series A/B, No. 65*, p. 60, separate opinion of Judge Anzilotti, referring to a memorandum of Judge Moore).

However, in pursuing that high purpose, care needs to be used not to

import the principle *boni judicis est ampliare jurisdictionem*; it is not considered to be applicable to the Court (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 180, Judge *ad hoc* Chagla, dissenting opinion; and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 226, Judge de Castro, separate opinion). Rather, there is substance in Judge Armand-Ugon's view that "[t]o attempt to force the meaning of texts relating to the jurisdiction of the Court would be to risk consequences that might affect its authority and prestige" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 147, dissenting opinion). The risk should not be exaggerated; but neither should it be underestimated. A prudent regard for it regretfully disables me from concurring with the Judgment of the Court.

This conclusion has been reached with great deference to the Judgment. The respect due to the authority of the Court from which it proceeds obliges recognition that it points the way to a resolution of the dispute between two neighbouring countries being at last achieved.

(Signed) Mohamed SHAHABUDDEEN.