

**MARITIME DELIMITATION AND TERRITORIAL QUESTIONS  
BETWEEN QATAR AND BAHRAIN  
(Qatar v Bahrain)\***

**I. INTRODUCTION**

This is a complex case, the longest in the history of the International Court of Justice (ICJ). It began on 8 July 1991 and public hearings on the oral arguments were finally held from 29 May-29 June 2000. On 16 March 2001, the Court delivered its Judgment on the merit of the claims. The dispute's history and procedural background are reproduced in the Judgment.

**II. HISTORY OF THE PROCEEDINGS<sup>1</sup>**

In this case, Qatar had filed an Application in the Court in 1991 to institute proceedings against Bahrain. Their dispute was related to "sovereignty over the Hawar Islands, sovereign rights over the shoals of Dibal and Qitat Jaradah, and delimitation of the maritime areas of the two States".<sup>2</sup>

Qatar argued in its Application that the Court had jurisdiction to entertain the dispute by virtue of two "agreements" between Qatar and Bahrain concluded in December 1987 and December 1990. It argued also that the subject and scope of the Court's jurisdiction should be determined by a formula proposed by Bahrain to Qatar on 26 October 1988 and accepted by Qatar in December 1990 (the Bahraini formula).<sup>3</sup> By letters dated 14 July and 18 August 1991, Bahrain contested this.<sup>4</sup>

The Court held in a Judgment of 1 July 1994 that the following were international treaties that created rights and obligations for the parties:

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\* [2001] ICJ Reports (forthcoming); see also Press Release 2001/9, 16 March 2001. For a summary of the judgment and opinions see ICJ, Press Communiqué No 2001/9bis, 16 March 2001.

<sup>1</sup> For more details see [2000] Australian International Law Journal 357-359.

<sup>2</sup> Judgment of the Court para 1.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid para 3.

1. the exchanges of letters between the King of Saudi Arabia and the Amir of Qatar of 19 and 21 December 1987;
2. the exchanges of letters between the King of Saudi Arabia and the Amir of Bahrain of 19 and 26 December 1987; and
3. the document headed "Minutes" and signed at Doha on 25 December 1990 by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia.

By the terms of these treaties, the Court held that the parties had agreed to submit to the Court the whole of their dispute as circumscribed by the Bahraini formula. The Court decided to allow the parties to submit their whole dispute to the Court after noting that Qatar's Application had set out the States' specific claims in connection with the formula. After each party had filed a document on the question within the time-limit fixed, by a Judgment of 15 February 1995 the Court found that it had jurisdiction to hear the dispute submitted to it. As a result, the Court became seised of the whole dispute and Qatar's Application as formulated on 30 November 1994 was found admissible.<sup>5</sup>

During the written phase on the merits of Qatar's Application, Bahrain challenged the authenticity of 82 documents annexed to Qatar's pleadings. Both parties submitted expert reports on this issue and the Court made several Orders. By its last Order of 17 February 1999, the Court recorded Qatar's decision to disregard, for the purposes of the present case, the 82 documents whose authenticity Bahrain had challenged. In doing so, the Court noted the parties' concordant views on the treatment of the disputed documents and their agreement to extend the time limits for the filing of Replies. The Court decided that the Replies would not rely on those documents. After the Replies were filed, the Court allowed the parties to file supplemental documents.<sup>6</sup>

### III. THE PARTIES' SUBMISSIONS

In its submissions, Qatar rejected all of Bahrain's contrary claims and submissions and requested the Court as follows:<sup>7</sup>

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<sup>5</sup> Ibid para 11.

<sup>6</sup> Ibid para 24.

<sup>7</sup> Ibid para 31.

- I. To adjudge and declare in accordance with international law:
  - A.(1) That Qatar had sovereignty over the Hawar Islands;
  - (2) That Dibal and Qitat Jaradah shoals were low-tide elevations which were under Qatar's sovereignty;
  - B.(1) That Bahrain had no sovereignty over the island of Janan;
  - (2) That Bahrain had no sovereignty over Zubarah;
  - (3) That any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case;
- II. To draw a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to Qatar and Bahrain on the basis that Zubarah, the Hawar islands and the island of Janan appertain to Qatar and not to Bahrain, that boundary starting from point 2 of the delimitation agreement concluded between Bahrain and Iran in 1971 (51° 05 54" E and 27° 02 47" N), thence proceeding in a southerly direction up to BLV (50° 57 30" E and 26° 33 35" N), then following the line of Britain decision of 23 December 1947 up to NSLB (50° 49 48" E and 26° 21 24" N) and up to point L (50° 43 00" E and 25° 47 27" N), thence proceeding to point S1 of the delimitation agreement concluded by Bahrain and Saudi Arabia in 1958 (50° 31 45" E and 25° 35 38" N).

In its submissions, Bahrain stated:<sup>8</sup>

Having regard to the facts and arguments set forth in Bahrain's Memorial, Counter-Memorial and Reply, and in the present hearings;

Could it please the Court, rejecting all contrary claims and submissions, to adjudge and declare:

1. Bahrain was sovereign over Zubarah.
2. Bahrain was sovereign over the Hawar Islands, including Janan and Hadd Janan.

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<sup>8</sup> Ibid para 33.

3. In view of Bahrain's sovereignty over all the insular and other features, including Fasht ad Dibal and Qitat Jaradah, comprising the Bahraini archipelago, the maritime boundary between Bahrain and Qatar was as described in Part Two of Bahrain's Memorial.

#### IV. THE JUDGMENT

On 16 March 2001, the Court delivered its Judgment on the merits in this case. It held that Qatar had sovereignty over Zubarah, Janan Island and the low-tide elevation of Fasht ad Dibal while Bahrain had sovereignty over the Hawar Islands and Qitat Jaradah Island. More specifically, the Judgment appears in paragraph 251 as follows:

The Court,

- (1) Unanimously,  
Finds that the State of Qatar has sovereignty over Zubarah;
- (2)(a) By twelve votes to five,<sup>9</sup>  
Finds that the State of Bahrain has sovereignty over the Hawar Islands;
- (b) Unanimously,  
Recalls that vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law;
- (3) By thirteen votes to four,<sup>10</sup>  
Finds that the State of Qatar has sovereignty over Janan Island, including Hadd Janan;
- (4) By twelve votes to five,<sup>11</sup>  
Finds that the State of Bahrain has sovereignty over the island of Qit'at Jaradah;

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<sup>9</sup> In favour: Guillaume P; Shi V-P; Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khadawneh, Buergenthal JJ; Fortier J ad hoc. Against: Bedjaoui, Ranjeva, Koroma, Vereshchetin JJ; Torres Bernárdez J ad hoc.

<sup>10</sup> In favour: Guillaume P; Shi V-P; Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek, Al-Khadawneh, Buergenthal JJ; Torres Bernárdez J ad hoc. Against: Oda, Higgins, Kooijmans JJ; Fortier J ad hoc.

<sup>11</sup> In favour: Guillaume P; Shi V-P; Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khadawneh, Buergenthal JJ; Fortier J ad hoc. Against: Bedjaoui, Ranjeva, Koroma, Vereshchetin JJ; Torres Bernárdez J ad hoc.

- (5) Unanimously,  
Finds that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of the State of Qatar;
- (6) By thirteen votes to four,<sup>12</sup>  
Decides that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be drawn as indicated in paragraph 250 of the present Judgment.

Also, the Court drew a single maritime boundary between the parties by listing in paragraph 250 the following co-ordinates of the points to be joined in a specified order by geodesic lines:

1. In the southern part, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which could not be fixed, the boundary follows a north-easterly direction, then immediately turned in an easterly direction, after which it passes between Jazirat Hawar and Janan; it subsequently turned to the north and passes between the Hawar Islands and the Qatar peninsula and continues in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qitaa el Erge et de Qitat ash Shajarah on the Qatari side; finally it passes between Qitat Jaradah and Fasht ad Dibal, leaving Qitat Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side.<sup>13</sup>
2. In the northern part, the single maritime boundary was formed by a line which, from a point situated to the north-west of Fasht ad Dibal, meets the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. The boundary then follows this adjusted equidistance line until it meets the delimitation between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.<sup>14</sup>

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<sup>12</sup> In favour: Guillaume P; Shi V-P; Oda, Herczegh, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khadawneh, Buergenthal JJ; Fortier J ad hoc. Against: Bedjaoui, Ranjeva, Koroma JJ; Torres Bernárdez J ad hoc.

<sup>13</sup> Judgment of the Court para 222.

<sup>14</sup> Ibid para 249.

The Court also held that Bahrain and Qatar had concluded exclusive protection agreements with Britain in 1892 and 1916 respectively, and that this status of protected States ended in 1971. The Court referred to the disputes that arose between the parties on the occasion, *inter alia*, of the granting of concessions to oil companies, as well as the efforts made to settle those disputes.

#### V. SOVEREIGNTY OVER ZUBARAH<sup>15</sup>

The Court noted that Qatar and Bahrain had agreed that the Al-Khalifah occupied Zubarah in the 1760s and some years later had settled in Bahrain. However, the parties disagreed on the legal situation that prevailed thereafter, culminating in the events of 1937. The Court found that the terms of the 1868 Agreement between Britain and the Sheikh of Bahrain (see above) showed that Britain would not tolerate any attempt by Bahrain to pursue its claims to Zubarah through military action at sea. As a result, the new rulers of Bahrain were never in a position to engage in direct acts of authority in Zubarah.

Bahrain maintained that the Al-Khalifah continued to exercise control over Zubarah through a Naim-led tribal confederation loyal to them, notwithstanding that at the end of the eighteenth century they had moved the seat of their government to the islands of Bahrain. The Court rejected this contention.

The Court noted that in the light of the role of both Britain and the Ottoman Empire in the region it was significant that Article 11 of the Anglo-Ottoman Convention signed on 29 July 1913 (the 1913 Convention) had stated *inter alia*:<sup>16</sup>

[I]t was agreed between the two Governments that the said peninsula will, as in the past, be governed by the Sheikh Jasim-bin-Sani and his successors.

Thus, Britain and the Ottoman Empire did not recognise Bahrain's sovereignty over the peninsula, including Zubarah. They felt that Sheikh Jassim Al-Thani, formerly nominated *kaimakam* by the

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<sup>15</sup> Ibid paras 70-97.

<sup>16</sup> Ibid para 87.

Ottomans and his successors, would continue to govern the entire Qatar peninsula. Although Qatar and Bahrain agreed that the 1913 Anglo-Ottoman Convention was never ratified, they differed on its value as evidence of Qatar's sovereignty over the peninsula. On this point, the Court observed that signed but unratified treaties could constitute an accurate expression of the parties' understanding at the time of signing.

In the circumstances of this case, the Court concluded that the Anglo-Ottoman Convention did not represent evidence of the views of Britain and the Ottoman Empire on the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913. The Court also observed that Article III of the Anglo-Ottoman Treaty of 9 March 1914, duly ratified the same year, had referred to Article 11 of the 1913 Convention. The parties to this treaty therefore did not contemplate any authority over the peninsula other than that of Qatar.

The Court then examined certain events in Zubarah in 1937 after the Sheikh of Qatar attempted to tax the Naim. The Court noted *inter alia* that on 5 May 1937, the Political Resident had reported these incidents to the Secretary of State for India, stating that he was personally of the "opinion that juridically the Bahrain claim to Zubarah should fail". In a telegram of 15 July 1937 to the Political Resident, Britain Secretary of State indicated that the Sheikh of Bahrain should be informed that Britain regretted that it was "not prepared to intervene between Sheikh of Qatar and Naim tribe". As a result, the Court could not accept Bahrain's contention that Britain had always regarded Zubarah as belonging to Bahrain and the following had shown otherwise too:<sup>17</sup>

1. the terms of the 1868 agreement between Britain and the Sheikh of Bahrain;
2. the 1913 and 1914 Conventions,
3. the letters in 1937 from Britain Political Resident to the Secretary of State for India; and
4. correspondence from the Secretary of State to the Political Resident.

In effect, Britain did not consider that Bahrain had sovereignty over Zubarah in 1937. It was for this reason that Britain refused to provide

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<sup>17</sup> Ibid para 95.

Bahrain with the assistance that it requested on the basis of the agreements in force between the two States. After 1868, the authority of the Sheikh of Qatar over the territory of Zubarah was gradually consolidated, which was acknowledged by the 1913 Anglo-Ottoman Convention and established definitively in 1937. The actions of the Sheikh of Qatar in Zubarah that same year were an exercise of his authority on his territory and, contrary to Bahrain's allegations, were not an unlawful use of force against Bahrain.

For the above reasons, the Court held that Bahrain's first submission could not be upheld and Qatar had sovereignty over Zubarah.

#### VI. SOVEREIGNTY OVER THE HAWAR ISLANDS<sup>18</sup>

The Court observed that the lengthy arguments of Qatar and Bahrain on the issue of the Hawar Islands' sovereignty raised several legal issues as follows:<sup>19</sup>

- (1) the nature and validity of the 1939 decision by Britain;
- (2) the existence of an original title;
- (3) *effectivités*; and
- (4) the applicability of the principle of *uti possidetis juris* to the present case.

The Court began by determining the nature and validity of the 1939 British decision. Bahrain argued that Britain's 1939 decision should be considered primarily as an arbitral award that was *res judicata*. Bahrain claimed that the Court did not have jurisdiction to review the award of another tribunal and based this on decisions of the Permanent Court of International Justice and the present Court. Qatar denied the relevance of the judgments cited by Bahrain and argued that:<sup>20</sup>

none of them were in the slightest degree relevant to the issue which the Court had to determine in the present case, namely, whether the procedures followed by the British Government in 1938 and 1939 amounted to a process of arbitration which could result in an arbitral award binding upon the parties.

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<sup>18</sup> Ibid paras 98-148.

<sup>19</sup> Ibid para 110.

<sup>20</sup> Ibid para 112.



The Court also considered whether the 1939 British decision should be deemed an arbitral award. It observed that the word arbitration in this respect and for the purposes of public international law usually referred to "the settlement of differences between States by judges of their own choice, and on the basis of respect for law".<sup>21</sup> The Court stated that this wording was reaffirmed in the work of the International Law Commission, which had reserved the case where the parties had decided that the requested decision should be decided *ex æquo et bono*.<sup>22</sup>

The Court observed that in the present case, no agreement existed between the parties to submit their case to an arbitral tribunal made up of judges chosen by them who would rule either on the basis of law or *ex æquo et bono*. The parties had only agreed that the issue would be decided by "His Majesty's Government" but left it to the latter to determine how the decision would be made and by whom. It followed therefore that Britain's decision in 1939 that the Hawar Islands belonged to Bahrain did not constitute an international arbitral award.<sup>23</sup>

The Court found it unnecessary to consider Bahrain's argument on its jurisdiction to examine the validity of arbitral awards.<sup>24</sup> However, the Court noted that although the decision was not an arbitral award it did not mean that the decision was devoid of legal effect. In order to determine the legal effect of the 1939 British decision, the Court recalled the events that preceded and immediately followed its adoption.<sup>25</sup> The Court also considered Qatar's argument challenging the validity of the 1939 British decision.<sup>26</sup>

First, Qatar argued that it had consented to submit the question of the Hawar Islands to Britain for determination.<sup>27</sup> The Court agreed and observed that following the Exchange of Letters of 10 and 20 May 1938, the Ruler of Qatar had consented on 27 May 1938 to entrust this to Britain.<sup>28</sup> On the same day, the Ruler had submitted his complaint to

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<sup>21</sup> Ibid para 113.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid para 114.

<sup>24</sup> Ibid para 115.

<sup>25</sup> Ibid para 116.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid para 137.

<sup>28</sup> Ibid.

the British Political Agent. As such, and like the Ruler of Bahrain, the Ruler of Qatar had agreed to participate in the proceedings that led to the 1939 decision. Since Britain's jurisdiction to determine this issue derived from these two consents, the Court need not examine whether in the absence of such consent Britain had authority to so act under the treaties that made Bahrain and Qatar protected States of Britain.<sup>29</sup>

Secondly, Qatar alleged the following:<sup>30</sup>

1. British officials responsible for the question on the sovereignty of the Hawar Islands were biased and had prejudged the matter.
2. The procedure followed had accordingly violated "the rule which prohibits bias in a decision made on the international plane".
3. The Parties were not given an equal and fair opportunity to present their arguments and that the decision was not reasoned.

The Court recalled that the 1939 decision was not an arbitral award.<sup>31</sup> However, this did not mean that the decision was devoid of all legal effect. On the contrary, the pleadings, and in particular the Exchange of Letters referred to above, showed that Bahrain and Qatar had consented to Britain settling their dispute concerning the Hawar Islands. The 1939 decision should therefore be regarded as a decision that was binding from the outset on both States and continued to be binding on them even after 1971 when they ceased to be British protected States.<sup>32</sup>

The Court observed that it was true that the competent British officials had proceeded on the premise that Bahrain possessed *prima facie* title to the Islands and that the burden of proving otherwise was on the Ruler of Qatar.<sup>33</sup> However, Qatar could not maintain that it was contrary to justice to proceed on this basis since it had been informed that this would occur prior to agreeing to the procedure. Furthermore, Qatar had consented to the proceedings being conducted on that basis. During those proceedings, the two Rulers could present their arguments and each was afforded an amount of time that the Court considered was

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid para 138.

<sup>31</sup> Ibid para 139.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid para 141.

sufficient for this purpose. As a result, Qatar's contention that it was subjected to unequal treatment could not be upheld.<sup>34</sup>

The Court also observed that, while the reasoning supporting the 1939 decision was not communicated to the Rulers of Bahrain and Qatar, the lack of reasons had no influence on the validity of the decision taken. Britain was not obliged to provide reasons when it was entrusted with the settlement of the matter. Therefore, Qatar's claim that the 1939 British decision was invalid for lack of reasons could not be upheld.<sup>35</sup>

Finally, the fact that the Sheikh of Qatar had protested on several occasions against Britain's 1939 decision after being informed of it was not such as to render the decision unopposable to him, contrary to his contentions. Accordingly, the Court concluded that the British decision of 11 July 1939 was binding on Qatar and Bahrain. The Court also concluded that Bahrain had sovereignty over the Hawar Islands and Qatar's submissions on this question could not be upheld. In addition, the Court observed that its conclusion on the basis of Britain's 1939 decision made it unnecessary to rule on the parties' arguments based on the existence of an original title, *effectivités*, and the applicability of the principle of *uti possidetis juris*.<sup>36</sup>

## VII. SOVEREIGNTY OVER JANAN ISLAND<sup>37</sup>

The Court considered the claims of Qatar and Bahrain to Janan Island by first observing that they differed on the meaning of "Janan Island". According to Qatar, "Janan was an island approximately 700 metres long and 175 metres wide situated off the southwestern tip of the main Hawar island". According to Bahrain, the expression covered "two islands, situated between one and two nautical miles off the southern coast of Jazirat Hawar, which merge into a single island at low tide". After examining the arguments, the Court treated Janan and Hadd Janan as one island. It considered the effects of Britain's 1939 decision on the issue of Janan Island's sovereignty. As stated above, Britain had concluded that the Hawar Islands "belong[ed] to Bahrain and not to Qatar". However, it did not mention Janan Island nor explain what

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid para 143.

<sup>36</sup> Ibid para 148.

<sup>37</sup> Ibid paras 149-165.

"Hawar Islands" meant. Accordingly, the parties debated at length the issue of whether Janan fell to be regarded as part of the Hawar Islands and whether as a result it pertained to Bahrain's sovereignty by virtue of the 1939 decision, or whether it was not covered by that decision.

In support of their arguments, Qatar and Bahrain each cited documents that existed before and after the 1939 decision. In particular, Qatar relied on a "decision" by Britain in 1947 relating to the seabed delimitation between the two States while Bahrain recalled that it had submitted four lists to Britain on the composition of the Hawar Islands – in April 1936, August 1937, May 1938 and July 1946. The Court noted that the three lists submitted prior to 1939 by Bahrain on the composition of the Hawar group were not identical. Significantly, Janan Island appeared by name in only one of them. Regarding the fourth list, which was different to the others, it expressly referred to Janan Island but had been submitted to Britain in 1946 only, several years after the adoption of the 1939 decision. Thus, no definite conclusion could be drawn from the various lists.

The Court then considered the letters sent on 23 December 1947 by the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain. By these letters, the British Political Agent informed both States of Britain's delimitation of their seabeds. Britain, responsible for the 1939 decision on the Hawar Islands, had sought in the last sentence of paragraph 4(ii) of those letters to make clear that "Janan Island was not regarded as being included in the islands of the Hawar group". As such, Britain did not "*recognise*" the Sheikh of Bahrain had "sovereign rights" over that island. In determining the points fixed in paragraph 5 of those letters, including the drawing of the enclosed map, Britain had also regarded Janan as belonging to Qatar. Consequently, the Court found that Britain had in these proceedings provided an authoritative interpretation of the 1939 decision and of the situation resulting from it.

Having regard to all of the foregoing, the Court did not accept Bahrain's argument that in 1939 Britain had *recognised* "Bahrain's sovereignty over Janan as part of the Hawars". The Court found that Qatar had sovereignty over Janan Island, including Hadd Janan, on the basis of the decision taken by Britain in 1939 as interpreted in 1947.

VIII. MARITIME DELIMITATION<sup>38</sup>

On the issue of maritime delimitation, the Court noted that Qatar and Bahrain had agreed that the Court should render its decision according to international law. Since they were not party to the 1958 Geneva Conventions on the Law of the Sea, the Conventions were inapplicable. Similarly, the 1982 United Nations Convention on the Law of the Sea (the 1982 Convention) was inapplicable because although Bahrain had signed and ratified it, Qatar had only signed it. As a result, the Court held that customary international law was to be applied. In any case, Qatar and Bahrain had agreed that most of the 1982 Convention provisions were relevant in the present case as reflecting customary law.

(a) *Single Maritime Boundary*<sup>39</sup>

The Court noted that under the "Bahraini formula", the parties had requested the Court in December 1990 "to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters". The Court observed that this should be kept in mind and that the concept of a "single maritime boundary" could encompass a number of functions.

In the present case, the single maritime boundary would result from the delimitation of various jurisdictions. In the southern part of the delimitation area, situated where the coasts of the parties were opposite one another, the distance between the coasts was nowhere more than 24 nautical miles. The boundary the Court was expected to draw would therefore delimit exclusively their territorial seas and, consequently, an area over which they enjoyed territorial sovereignty. However, further north where the coasts of the two States were no longer opposite to each other but were more adjacent coasts in nature, the delimitation out would be one between the continental shelf and exclusive economic zone (EEZ) belonging to each of them. In these areas States had sovereign rights and functional jurisdiction only. Thus, the parties had differentiated between a southern and a northern sector.

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<sup>38</sup> Ibid paras 166-250.

<sup>39</sup> Ibid paras 168-173.

The Court observed that the concept of a single maritime boundary did not stem from multilateral treaty law but from State practice. The Court relied on the wish of the States to establish one uninterrupted boundary line delimiting the various partially coincident zones of maritime jurisdiction appertaining to them. On coincident jurisdictional zones, the Court's Chamber in *Gulf of Maine*<sup>40</sup> had stated the following when asked to draw a single line to delimit both the continental shelf and the superjacent water column:<sup>41</sup>

[It] can only be carried out by the application of a criterion, or combination of criteria, which did not give preferential treatment to one of these...objects to the detriment of the other and at the same time was such as to be equally suitable to the division of either of them...

**(b) *Delimitation of the Territorial Sea***<sup>42</sup>

The delimitation of territorial seas did not present comparable problems since the rights of the coastal State in the area concerned were not functional but territorial in nature and entailed sovereignty over the sea-bed, the superjacent waters and air column. Therefore, in this task, the Court had to first apply the principles and rules of international customary law on the delimitation of the territorial sea. The Court considered that its ultimate task was to draw a single maritime boundary that served other purposes as well. The parties agreed that Article 15 of the 1982 Convention, entitled "Delimitation of the territorial sea between States with opposite or adjacent coasts", was part of customary law. Article 15 provided:<sup>43</sup>

Where the coasts of two States were opposite or adjacent to each other, neither of the two States was entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which was equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two States was measured. The above provision did not apply, however, where it was necessary by reason of

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<sup>40</sup> [1984] ICJ Reports 246.

<sup>41</sup> [1984] ICJ Reports 327 para 194.

<sup>42</sup> Judgment of the Court paras 174-223.

<sup>43</sup> Ibid para 175.

historic title or other special circumstances to delimit the territorial seas of the two States in a way which was at variance therewith.

The Court noted that Article 15 was virtually identical to Article 12(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone that was regarded to have a customary character. It was often referred to as the "equidistance/special circumstances" rule. The most logical and widely practised approach was to provisionally draw an equidistance line first of all, and then consider whether that line should be adjusted in the light of existing special circumstances. The Court explained that once it had delimited the parties' territorial seas it would determine the rules and principles of customary law to be applied to the delimitation of their continental shelves, EEZs or fishery zones. After that, the Court would decide if the method chosen for the delimitation differed from or was similar to the approach outlined above.

#### **IX. THE EQUIDISTANCE LINE<sup>44</sup>**

The Court began by noting that the equidistance line was the line every point of which was equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States was measured. This line could only be drawn when the baselines were known. Neither party had as yet specified the baselines that were to be used for the determination of the breadth of the territorial sea, nor had they produced official maps or charts that reflected such baselines. It was only during the present proceedings that they provided the Court with approximate basepoints that in their view the Court could use to determine the maritime boundary.

##### **(a) *The Relevant Coasts*<sup>45</sup>**

The Court indicated that it would first determine the relevant coasts of Qatar and Bahrain to enable it to determine the baselines' location and the pertinent basepoints for the measurement of the equidistance line. Qatar argued that the mainland-to-mainland method should be used to measure the equidistance line. It claimed that the notion of "mainland" applied to both the Qatar peninsula (which should be understood to

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<sup>44</sup> Ibid paras 177-216.

<sup>45</sup> Ibid paras 178-187.

include the main Hawar island) and Bahrain. In relation to the latter, al-Awal (also called Bahrain Island), al-Muharraq and Sitrah were islands to be considered. The use of this mainland-to-mainland method had two main consequences for Qatar. First, it excluded the islands (except for the above-mentioned islands, Hawar on the Qatar side and al-Awal, al-Muharraq and Sitrah on the Bahrain side), islets, rocks, reefs or low-tide elevations lying in the relevant area. Secondly, it meant that the equidistance line had to be drawn by reference to the high-water line.

Bahrain contended that it was a *de facto* archipelago or multiple-island State, characterised by various maritime features of diverse character and size. The features were closely interlinked and together formed Bahrain. To reduce Bahrain's territory to a limited number of so-called "principal" islands would distort reality and re-fashion geography. Since it was the land that determined maritime rights, the relevant basepoints were situated on all the maritime features over which Bahrain had sovereignty. According to conventional and customary international law, it was the low-water line that determined the territorial seas breadth and used to delimit overlapping territorial waters. Thus, as a *de facto* archipelagic State, Bahrain could declare itself an archipelagic State under Part IV of the 1982 Convention and draw the permissive baselines under Article 47 of this Convention. These were "straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago".

Qatar contested Bahrain's claim that Bahrain could declare itself an archipelagic State under Part IV of the 1982 Convention. The Court observed that since this claim was not part of Bahrain's formal submissions, it was not an issue between the parties in the proceedings. In other words, the Court had not been requested to take a position on this issue. The Court emphasised that under Article 59 of the Statute of the Court its decision would be binding on the parties. Accordingly, it rejected any unilateral actions by the parties, especially Bahrain's decision to declare itself an archipelagic State.

The Court had been called upon to draw a single maritime boundary according to international law but it could only do so by applying the rules and principles of customary law that were pertinent under the prevailing circumstances. As a result, the Court determined the parties' relevant coasts from where the breadth of their territorial seas was



measured. Under applicable rules, the normal baseline for measuring this breadth was the low-water line along the coast pursuant to Article 5 of the 1982 Convention. In earlier cases, the Court had made it clear that maritime rights derived from the coastal States' sovereignty over the land, a principle that could be summarised as "the land dominates the sea". Thus, a coastal State's terrestrial territory should be the starting point for the determination of maritime rights.

To determine what constituted Bahrain's relevant coasts and the relevant baselines on the Bahraini side, the Court stated that it should first establish which islands were under Bahraini sovereignty. Earlier, the Court had concluded that while the Hawar Islands belonged to Bahrain, Janan belonged to Qatar. Other islands that were identifiable in the delimitation area and relevant for delimitation purposes in the southern sector were Jazirat Mashtan and Umm Jalid. These were islands that were very small in size at high tide but had a surface that was considerably larger at low tide. Bahrain had claimed sovereignty over these islands, a claim that Qatar did not contest.

**(b) *Fasht al Azm***<sup>46</sup>

Qatar and Bahrain were divided on the issue of whether Fasht al Azm should be deemed part of Sitrah Island or whether it was a low-tide elevation that was not naturally connected to the island. In 1982, Bahrain undertook reclamation works to construct a petrochemical plant during which an artificial channel was dredged to connect the waters on both sides of Fasht al Azm. Even after a careful analysis of the various reports, documents and charts submitted by the parties, the Court could not establish whether a permanent passage separating Sitrah Island from Fasht al Azm existed before the reclamation works began. Nonetheless, for the reasons given below, the Court was still able to delimit in this sector without having to determine this question.

**(c) *Qitat Jaradah***<sup>47</sup>

Qatar and Bahrain had opposing views on whether Qitat Jaradah was an island or a low-tide elevation. The Court recalled the legal definition of an island, namely, "a naturally formed area of land, surrounded by

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<sup>46</sup> Ibid paras 188-190.

<sup>47</sup> Ibid paras 191-198.

water, which was above water at high tide".<sup>48</sup> It analysed carefully the parties' evidence and weighed the experts' conclusions, in particular the admission of the experts appointed by Qatar that they could not prove scientifically that Qitat Jaradah was a low-tide elevation. As a result, the Court found that since Qitat Jaradah's maritime feature satisfied the criteria established for the creation of an island, this should be taken into consideration when drawing the equidistance line. In addition, Qitat Jaradah's size and Bahrain's activities on that island had supported further Bahrain's claim that it had sovereignty Qitat Jaradah.

*(d) Fasht ad Dibal*<sup>49</sup>

Although both Qatar and Bahrain had agreed that Fasht ad Dibal was a low-tide elevation, Qatar maintained (as it did with regard to Qitat Jaradah) that as a low-tide elevation it could not be appropriated. On the other hand, Bahrain contended that low-tide elevations by their very nature were territory and as such could be appropriated according to criteria that governed territorial acquisition. Bahrain argued that "[w]hatever their location, low-tide elevations were always subject to the law which governs the acquisition and preservation of territorial sovereignty, with its subtle dialectic of title and *effectivités*."

The Court observed that according to the relevant provisions of the Law of the Sea Conventions that reflected customary international law, a low-tide elevation was a naturally formed area of land that was surrounded by water, above water at low tide or submerged at high tide.<sup>50</sup> When a low-tide elevation was situated in the overlapping area of the territorial sea of two States, whether with opposite or with adjacent coasts, the States in principle could use their own low-water line to measure their territorial sea's breadth. Also, the same low-tide elevation formed part of their coastal configuration. This was so even if the low-tide elevation was nearer to the coast of or island belonging to another State. For delimitation purposes, the competing rights derived by both coastal States from the relevant provisions of the law of the sea would, by necessity, seem to neutralise each other.

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<sup>48</sup> Refer Article 10(1) of the 1958 Convention on the Territorial Sea and Contiguous Zone; Article 12(1) of the 1982 Convention on the Law of the Sea.

<sup>49</sup> Judgment of the Court paras 199-209.

<sup>50</sup> Refer Article 11(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone; Article 12(1) of the 1982 Convention on the Law of the Sea.

Bahrain argued that the *effectivités* presented by the two coastal States determined which of them had a superior title to the low-tide elevation in question. If it had superior title, it was entitled to exercise the right attributed by the relevant provisions of the law of the sea, just as in the case of islands that were situated within the limits of the breadth of the territorial sea of more than one State.

In the Court's view, the decisive question for the present case was whether a State could acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation was also within the breadth of the territorial sea of another State. International treaty law was silent on whether low-tide elevations could be considered to be "territory" and the Court was unaware of a uniform and widespread State practice that could give rise to a customary rule that unequivocally permitted or excluded appropriation of low-tide elevations. It was only within the context of the law of the sea that a number of permissive rules had been established with regard to low-tide elevations that were situated at a relatively short distance from a coast. These few existing rules did not justify a general assumption that low-tide elevations were territory in the same sense as islands. It had never been disputed that islands constituted *terra firm* and were subject to the rules and principles of territorial acquisition. In fact, the difference in effect that the law of the sea attributed to islands and low-tide elevations was great. Thus, it was not established that in the absence of other rules and legal principles, low-tide elevations could be fully assimilated with islands or other land territory from the viewpoint of the acquisition of sovereignty.

In this respect, the Court recalled the rule that a low-tide elevation that was situated beyond the limits of the territorial sea did not have its own territorial sea. Therefore, a low-tide elevation did not generate the same rights as islands or other territory. Consequently, the Court held that in the present case there was no ground for recognising Bahrain's right to use as a baseline the low-water line of those low-tide elevations that were situated in the zone of overlapping claims, or for recognising Qatar as having such a right. The Court accordingly held that to draw the equidistance line, such low-tide elevations should be disregarded.

**(e) Method of Straight Baselines<sup>51</sup>**

The Court observed that the use of straight baselines, which Bahrain applied in its reasoning and in the maps provided to the Court, was an exception to the normal rules that determined baselines that could only be applied if certain conditions were met. Thus, this method should be applied restrictively. The primary consideration was a coastline that was deeply indented and cut into or a fringe of islands existed along the coast in the immediate vicinity. The fact that a State deemed itself a multiple-island State or a *de facto* archipelagic State did not allow it to deviate from the normal rules that determined baselines unless the relevant conditions were met. The coasts of Bahrain's main islands did not form a deeply indented coast and neither did Bahrain claim this.

Bahrain had argued that the maritime features off the coast of the main islands could be assimilated to a fringe of islands constituting a whole with the mainland. Although the Court did not disagree that the maritime features east of Bahrain's main islands were part of the overall geographical configuration, however, it would be going too far to call them a fringe of islands along the coast. The Court therefore held that Bahrain could not use the straight baselines method. Each maritime feature had its own effect for the determination of the baselines on the understanding that, on the grounds set out above, the low-tide elevations found in the overlapping zone of territorial seas would be disregarded and the equidistance line was therefore drawn on this basis.

The Court noted that Fasht al Azm required special mention. If this feature were to be regarded as part of Sitrah Island, the basepoints used to determine the equidistance line would be situated on Fasht al Azms eastern low-water line. If not, Fasht al Azm could not provide such basepoints. As the Court had not ruled on whether this feature formed part of Sitrah Island, it had drawn two equidistance lines reflecting each of these hypotheses.

**(f) Special Circumstances<sup>52</sup>**

The Court then turned to the question of whether there were special circumstances making it necessary to adjust the equidistance line as

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<sup>51</sup> Judgment of the Court paras 210-216.

<sup>52</sup> *Ibid* paras 217-223.

provisionally drawn in order to obtain an equitable result on this part of the single maritime boundary to be fixed.

On the issue of Fasht al Azm, the Court considered that using either of the above hypotheses, special circumstances existed that justified choosing a delimitation line passing between Fasht al Azm and Qitat ash Shajarah. The Court had found that Qitat Jaradah was a very small island, uninhabited and without any vegetation. This island, found to be under Bahraini sovereignty, was about midway between Bahrain's main island and the Qatar peninsula. However, if its low-water line was used as a basepoint to construct the equidistance line, and this line was taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature. Thus, the Court held that this case was a special circumstance that warranted choosing a delimitation line that passed immediately to the east of Qitat Jaradah.

The Court had observed earlier that since it did not determine whether Fasht al Azm was part of Sitrah Island or a separate low-tide elevation, it was necessary to draw provisionally two equidistance lines. If no effect was given to Qitat Jaradah and if Fasht al Azm was considered part of Sitrah Island, the equidistance line thus adjusted would cut through Fasht ad Dibal leaving the greater part of it on the Qatari side. However, if Fasht al Azm were deemed a low-tide elevation, the adjusted equidistance line would run west of Fasht ad Dibal. In view of the fact that under both hypotheses, Fasht ad Dibal was largely or totally on the Qatari side of the adjusted equidistance line, the Court considered it appropriate to draw the boundary line between Qitat Jaradah and Fasht ad Dibal. Since Fasht ad Dibal would therefore be situated in Qatar's territorial sea, it fell under Qatar's sovereignty.

On these considerations, the Court found that it could determine the course of that part of the single maritime boundary to delimit the parties' territorial seas. However, before doing so, the Court noted that it could not fix the boundary's southern-most point since its definitive location depended on the limits of the maritime zones of Saudi Arabia and the parties respectively. The Court also considered it appropriate, according to common practice, to simplify what would otherwise be a very complex delimitation line in the region of the Hawar Islands. Taking into consideration all of the foregoing, the Court decided that the maritime boundary to be drawn would take the following course:

1. From the point of intersection of the respective maritime limits of Saudi Arabia on the one hand, and Bahrain and Qatar on the other (which could not be fixed), the boundary would follow a north-easterly direction.
2. Then it would immediately turn in an easterly direction, after which it would pass between Jazirat Hawar and Janan.
3. Next, it would turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur and Fasht al Azm on the Bahraini side, and the low-tide elevations of Qita a el Erge and Qitat ash Shajarah on the Qatari side.
4. Finally, it would pass between Qitat Jaradah and Fasht ad Dibal, leaving Qitat Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side.

On the issue of navigation, the Court noted that the channel connecting Qatar's maritime zones situated to the south of the Hawar Islands and those situated to the north of the islands was narrow and shallow and not suited to navigation. It emphasised that the waters lying between the Hawar Islands and other Bahraini islands were not Bahrain's internal waters but its territorial sea. Consequently, all vessels, including Qatari vessels, could enjoy in these waters the right of innocent passage accorded by customary international law. Similarly, Bahraini vessels, like those of all other States, could enjoy the same right of innocent passage in Qatar's territorial sea.

***(g) The Continental Shelf and Exclusive Economic Zone***<sup>53</sup>

The Court then dealt with the drawing of the single maritime boundary in that part of the delimitation area that covered both the continental shelf and the EEZ.

Referring to its earlier cases on the drawing of a single maritime boundary, the Court observed that it would follow their approach in the present case. To delimit the maritime zones beyond the 12-mile zone, it would have to first provisionally draw an equidistance line and then consider whether there were circumstances that would lead to an adjustment of that line. It noted also that the equidistance/special

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<sup>53</sup> Ibid paras 224-230.

circumstances rule and the equitable principles/relevant circumstances rule were closely inter-related. The former was applicable to the delimitation of the territorial sea in particular whereas the latter had been developed since 1958 in caselaw and State practice with regard to the delimitation of the continental shelf and the EEZ.

The Court examined the existence of circumstances that necessitated the adjustment of the equidistance line in order to achieve an equitable result. On Bahrain's claim regarding the pearling industry, the Court noted that effectively this industry ceased to exist a long time ago. From the evidence submitted to the Court, it was clear that pearl diving in the Gulf area was traditionally considered a right that was common to the coastal population. As a consequence, the Court did not have to consider the existence of pearling banks. However, since Bahraini fishermen predominantly had exploited this industry in the past, it was a circumstance that justified an eastward shifting of the equidistance line as requested by Bahrain.

The Court considered it unnecessary to determine the legal character of the "decision" contained in the letters of 23 December 1947 of the British Political Agent to the Rulers of Bahrain and Qatar on the division of the seabed, which Qatar claimed as a special circumstance. The Court noted that both parties did not accept it as a binding decision and had invoked only parts of it to support their arguments. Since the Court had decided that Bahrain had sovereignty over the Hawar Islands, it found that the disparity in length of the parties' coastal fronts could not, as Qatar had claimed, be considered as requiring the equidistance line to be adjusted.

Finally, the Court recalled that in the northern sector the parties' coasts were comparable to adjacent coasts abutting on the same maritime areas extending seawards into the Gulf. Their northern coasts were not markedly different in character or extent as both were flat and had very gentle slopes. The only noticeable element was Fasht al Jarim appearing as a remote projection of Bahrain's coastline in the Gulf area but if was given full effect it would "distort the boundary and have disproportionate effects".<sup>54</sup> As a maritime feature, it was located well out to sea causing the "distortion" that, at most, was a minute part

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<sup>54</sup> Ibid para 248.

above water at high tide. The Court found that to consider this distortion would not result in an equitable solution that was in accordance with all the other relevant factors referred to above. Therefore, equitable considerations required that Fasht al Jarim should have no effect in determining the boundary line in the northern sector.

Accordingly, the Court concluded<sup>55</sup> from all of the foregoing that the single maritime boundary that divided the various maritime zones of Qatar and Bahrain should be formed by a series of geodesic lines joining, in the order specified, the points with the co-ordinates shown on sketch-map No 7 attached to the Judgment.<sup>56</sup>

#### **X. SEPARATE OPINION OF ODA J**

Oda J voted in favour of the Court's delimitation of a maritime boundary between Qatar and Bahrain in the hope that they would find the maritime boundary mutually acceptable in the spirit of co-operation between friendly, neighbouring States. However, Oda J disagreed with the Court's methods for the determination of the maritime boundary and its decision to demarcate the boundary's precise geographic co-ordinates. Accordingly, he set out his views in a separate opinion.

Oda J noted that the Zubarah region occupied a procedurally distinct place. He was pleased that the Court was unanimous on Qatar's sovereignty over this territory and commented on the relevance of oil reserve exploitation to many aspects of the dispute. This included the parties' joint decision by Special Agreement to ask the Court to rule on certain land masses, maritime features and the parties' expectations concerning the types of boundary they expected the Court to delimit. He especially mentioned the Court's treatment of low-tide elevations and islets and revisited at length the negotiation history of the law of

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<sup>55</sup> *Ibid* para 251.

<sup>56</sup> This was how the Court delineated the boundary: below point 1, the single maritime boundary should follow, in a south-westerly direction, a loxodrome having an azimuth of 234° 16 53", until it met the delimitation line between the respective maritime zones of Saudi Arabia on the one hand, and Bahrain and Qatar on the other. Beyond point 42, the single maritime boundary should follow, in a north-north-easterly direction, a loxodrome having an azimuth of 12° 15 12", until it met the delimitation line between the respective maritime zones of Iran on the one hand, and Bahrain and Qatar on the other: refer *World Geodetic System*, 1984.



the sea to demonstrate nuances of this issue not fully dealt with by the Court. He particularly noted the incongruity between the expansion of the territorial sea from three to twelve nautical miles and the régime under which low-tide elevations and islets were accorded territorial seas of their own. He felt that such a régime, addressed indirectly by the relevant provisions of the 1982 Convention, might not be deemed customary international law.

Oda J disagreed with the Court's use of the phrase "single maritime boundary" and noted the distinction between the régimes governing the EEZ and the continental shelf on the one hand and the territorial sea on the other. Accordingly, the Court's use of a "single maritime boundary" was inappropriate. Oda J objected to the Court's decision to delimit the southern sector as a territorial sea. He stated that even if the Court's approach to the southern sector was appropriate, nonetheless, the Court had misinterpreted and misapplied the rules and principles governing the territorial sea. He therefore noted that the Court had mistakenly employed the "equidistance/special circumstances" rule to delimit the territorial sea because the rule applied to the continental shelf régime.

Oda J approved of the Court's attempt to determine a continental shelf boundary in the northern sector, but felt that the Court did not explain adequately the methods it used to arrive at its final line of demarcation in this sector. He concluded his criticism of the Court's approach by noting that the Court should have indicated principles to guide the drawing of a maritime boundary without actually indicating the precise contours of the boundary itself. He recalled his separate opinion in *Case concerning Maritime Delimitation in the area between Greenland and Jan Mayen (Merits)*<sup>57</sup> where he noted that the application of equitable principles afforded an infinite variety of possible boundaries.<sup>58</sup> As a result, the Court should exercise moderation and self-restraint and avoid unjustifiable precision when deciding maritime boundaries. Precise demarcation of the boundary could be left to a panel of experts appointed jointly by the parties for such purpose.

Having identified the flaws in the Court's approach, Oda J then presented his own views. Noting the region's political history and the

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<sup>57</sup> [1993] ICJ Reports 38, for example at paras 48 and 70.

<sup>58</sup> *Ibid* paras 481-482.

importance of oil exploitation in the region, he felt that this case should concern only the demarcation of the continental shelf boundaries and those of the territorial seas. After reviewing extensively the development of the continental shelf régime and referring to the negotiation of the relevant provisions of the 1958 and 1982 treaties on the law of the sea, Oda J reiterated his preference for an equitable solution to the dispute. He noted that his view accorded with positions taken consistently throughout his judicial career as evidenced, for example, in his argument as Counsel for the Federal Republic of Germany before the Court in *North Sea Continental Shelf cases*.<sup>59</sup> He acknowledged the geographically complex situation presented to the Court and suggested principles to guide delimitation based on a macrogeographical approach. To facilitate a clearer understanding of his method of delimitation, he appended two sketch maps representing one line from among the many lines that could reasonably be proposed.

#### XI. BEDJAOUI, RANJEVA & KOROMA JJ: JOINT DISSENTING OPINION

In the introduction to their joint dissenting opinion, Bedjaoui, Ranjeva and Koroma JJ regretted that they had no choice but to distance themselves from the majority opinion of the Court. They pointed out that the dispute was recurring and long standing in nature involving special difficulties. They called on Qatar and Bahrain to draw upon the infinite resources offered by their common genius to find the will to transcend their frustration through co-operation. In this connection, they hoped that the judicial settlement would meet all the conditions necessary to make the solutions arrived at socially acceptable and would fulfil its calming, peace-making function to the maximum.

##### *(a) Territorial Delimitation*

Bedjaoui, Ranjeva and Koroma JJ referred to the parties' respective judicial strategies before the Court and set out the legal grounds argued by the parties. They regretted that the Court had applied itself to only one of those grounds, namely, the British decision of 1939. This had virtually served as the sole basis for the Court's Judgment. As a result, they feared that the Court was handing down an *infra petita* ruling only because the Court had ignored all the other grounds relied upon by the

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<sup>59</sup> [1969] ICJ Reports 3.

parties. Moreover, they felt that the Court's analysis of the formal validity of the 1939 British decision was incomplete and questionable.

Bedjaoui, Ranjeva and Koroma JJ agreed with the Court that the 1939 decision was a political decision and not an arbitral award having the authority of *res judicata*. They agreed also that the first condition for the validity of the 1939 decision was the consent of Qatar and Bahrain. The circumstances of the case and the historical context demonstrated clearly that the consent given by one of the parties, which should have been express, informed and freely given in the case of any territorial dispute, had been tainted with elements of fraud.

Thus, restricting themselves to an examination of the purely formal validity of the British decision of 1939, Bedjaoui, Ranjeva and Koroma JJ held that that decision could not properly serve as a valid legal title for an award regarding the Hawar Islands. Further, that decision was not binding upon Qatar and Bahrain because the consent of one of them, which was fundamentally flawed as well, was only a consent to the proceedings and in no sense a consent to the decision on the merits.

Bedjaoui, Ranjeva and Koroma JJ found that the Court failed to examine the substantive validity of the British decision of 1939. This prevented the Court from taking the case through to its logical conclusion and reaching a compromise or "*a minima*" solution that would see the Hawar Islands shared on the basis of Bahrain's *effectivités*. The true significance and construction of the Bahraini formula had to be determined in order to restore its internal coherence.

In passing, Bedjaoui, Ranjeva and Koroma JJ noted that there was a manifest incompatibility between the application of the Bahraini formula to the case and the application of the principle of *uti possidetis juris*, which the Court correctly did not apply in this case. But the question of *effectivités*, which the Court sought to avoid examining, was inevitably bound to come up again by reason of the very fact that the Court chose to base its judgment on a legal ground deriving from the 1939 decision. Thus, any examination of the substantive validity of that decision would require the Court to examine the *effectivités* issue.

The Weightman Report, the basis of Britain decision, had based the award of the main Hawar Island ("Jazirat Hawar") on *effectivités* while

the award of the remaining Hawar Islands was based on a simple presumption of *effectivités*. In this regard, the dissenting Judges noted an internal contradiction in the Weightman Report and the application of a double standard regarding the principle of proximity. Nevertheless, they stated that the Court's Judgment should be noted because it ruled "*ultra petita*" on the basis of *effectivités* that was limited to "Jazirat Hawar", which was totally absent in the other islands and islets of the Hawar archipelago.

Bedjaoui, Ranjeva and Koroma JJ observed that subsequent to Britain's 1939 decision, that State had shown some hesitation and expressed doubts on the correctness of that decision. It went so far as to agree in the 1960s that the decision should be re-examined by some "neutral" authority, such as an arbitral tribunal. In addition, Qatar had protested persistently and refused to accept the 1939 decision or Bahrain's successive acts to occupy Jazirat Hawar. This permanent attitude of non-renunciation of Jazirat Hawar by Qatar, combined with the weakness of the *effectivités* on the islands (other than Jazirat Hawar) were, in the co-authors view, such as to prevent the creation of a title in favour of Bahrain over the Hawars.

The Court should also have considered the failure to observe the territorial *status quo* during these periods: (1) between 1936-1939 when the final British decision was being prepared, (2) in the course of the Saudi mediation from 1983, and (3) since 1991 when the case had been *sub judice*. According to Bedjaoui, Ranjeva and Koroma JJ, there was no choice but to return to the crucial ground argued at length by Qatar and Bahrain on the identification of the historical title to the Hawars, which the Court had disregarded.

Bedjaoui, Ranjeva and Koroma JJ stated that the adjudicating forum had a compelling duty to meet the challenge that history had presented to it even though it was inexperienced in this. The reason was the major importance and the role that historical facts played in the dynamics of legal disputes over territory. In addition, although contemporary international law provided standards for the legal assessment of historical facts, the Court had merely offered a descriptive, factual narrative of the case's historical context and did not apply the legal rules and principles that provided the framework for the assessment of historical facts.

The dissenting Judges were of the view that the only occasion during which the Court had sought to identify the historical title was in connection with the attribution of Zubarah. However, this fact made it worse and even more unjustified since the same was not applied to the issue of the Hawars where historical research was a greater imperative. A legal consequence of Britain presence in the Gulf in the nineteenth and twentieth centuries was the creation of two separate entities, Bahrain and Qatar, in the last third of the nineteenth century. The historical title of the Al-Thani to the peninsula of Qatar and its adjacent natural features was thus gradually formed and consolidated. Thereafter, the Ottoman presence in Qatar, from 1871 to 1914, had legal consequences that established definitively the historical title of the Al-Thani dynasty to Qatar. Britain's conduct constituted explicit recognition of Bahrain's loss of any title to any part of Qatar, including the Hawar Islands. This conduct by Britain was combined with that of Bahrain, whose long tacit acquiescence marked the loss of its title, and with the diametrically opposite conduct of the successive Sheikhs of Qatar, who extended their authority throughout the peninsula of Qatar. All of the above had been reflected in treaties. The Anglo-Ottoman Conventions of 1913 and 1914, the Anglo-Saudi Treaties of 1915 and 1927 and, most importantly, the 1916 Agreement between Britain and Qatar showed most clearly that since 1868 Qatar had gradually established a historical title to the entire peninsula. This included its adjacent features that were definitively consolidated through the Anglo-Qatari Agreement of 1916.

According to Bedjaoui, Ranjeva and Koroma JJ, the convergence of history and law as interpreted in accordance with law was matched in this case by the convergence of geography and law. This served as a countercheck to confirm the existence of Qatar's valid and certain title to the Hawars. They stated that the question of geographical proximity had given birth to a legal concept that would be perilous if ignored and the notion of "distance" had been given legal expression in various ways in the modern international law of the sea. These included the establishment of a strong legal presumption that all islands lying in a coastal State's territorial sea belonged to that State. They believed that a coastal State's territorial integrity deserved the Court's closer attention. From this perspective, the solution for a legally unassailable award of the Hawar Islands was obvious, and the law would have been in perfect harmony with both history and geography.

Bedjaoui, Ranjeva and Koroma JJ regretted the Court's silence on the map evidence. Although it was true that the evidentiary importance of cartographic material was only relative, nevertheless maps were the expression or reflection of general public opinion and of repute. In this respect, the following all helped to confirm Qatar's historical title to the Hawars:

1. the voluminous map file submitted by Qatar;
2. the fact that those maps were produced in a large variety of countries and at widely varying dates;
3. the particularly credible British War Office maps; and
4. the many historical documents establishing the respective territorial extent of each Party

**(b) *Maritime Delimitation***

As far as the maritime delimitation was concerned, Bedjaoui, Ranjeva and Koroma JJ focused their critical remarks on four points.

First, the Judgment had ruled *infra petita* having regard to the Bahraini formula as applied to the course of the single maritime boundary, described by the Judgment as a single multifunctional line. Recourse to the technique of enumerating the areas to be delimited had a dual aim: (a) to specify individually the areas for delimitation and (b) to emphasise the distinct nature of each area in relation to the others. This was so since each possessed its own coherent character in law. As such, it was incumbent upon the Court to ensure that the result it achieved was coherent over the entire maritime area that was delimited.

This test of coherence was necessary given the impact of the award of the Hawar Islands to Bahrain and mere confirmation in the operative part of the Judgment<sup>60</sup> of the right of innocent passage through Bahrain's territorial waters was not enough. The dissenting Judges considered that it was wrong to underestimate the risk of conflicts arising in connection with the implementation of the right of innocent passage. Although it had not been specifically seised of this issue, the dissenting Judges felt that the Court, as it did in *Kasikili/Sedudu Island*

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<sup>60</sup> Judgment of the Court paras 250-251.

(*Botswana/Namibia*),<sup>61</sup> should have regarded an agreement between the two parties as part and parcel of the settlement of the present dispute. This agreement should provide for the legal enclavement of the Hawar Islands under a régime of "international easement".

Secondly, Bedjaoui, Ranjeva and Koroma JJ criticised the method used by the Court to draw the provisional median line contrary to the basic principles of delimitation. Under the adage "the land dominates the sea", it was essentially *terra firma* that had to be considered and special circumstances should not be allowed to influence prematurely the course of the theoretical provisional median line. The law did not require the baselines and points used for delimitation to be the same as those used to fix the external seaward boundaries of maritime areas. It was this interpretation of the law that prevailed in the work of the Law of the Sea Conferences, contrary to the position of the International Law Commission and caselaw had failed to espouse the trend towards an interpretation that favoured a duality of function.

Contrary to its present decision, the Court had always favoured the choice of equitable points, so that both the method used for drawing the line and its result would be fair. This was because "[t]he equitableness of an equidistance line depends on whether the precaution was taken of eliminating the disproportionate effect of certain islets, rocks and minor coastal projections",<sup>62</sup> a general rule that applied equally to the calculation of the equidistance line in a territorial sea delimitation. Thus, Bedjaoui, Ranjeva and Koroma JJ were surprised to find the sea not dominated by *terra firma* but by quite insignificant maritime features that lacked any solid base, such as Umm Jalid.

Thirdly, Bedjaoui, Ranjeva and Koroma JJ did not support the Court's legal characterisation of Qitat Jaradah because of its geophysical characteristics. The issue of islands hinges upon considerations of hydrography (high tide) and geomorphology (natural area of land). According to an old decision, *The Anna*,<sup>63</sup> the land's origin was immaterial to characterise a feature as an island. However, since the adjective "natural" was included in the 1958 Geneva Conventions on

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<sup>61</sup> For an extract of this case refer [2000] *Australian International Law Journal* 281.

<sup>62</sup> *Continental Shelf (Libya/Malta)* [1986] ICJ Reports 48 para 64.

<sup>63</sup> (1805) 5 Ch Rob 373, 1 Eng Pras 499.

the Law of the Sea the approach had changed. A feature appearing above the waterline for the purposes of delimitation should be an area composed otherwise than of rocks or atolls, and the unstable land composing such features were specifically mentioned in the provision on deltas in the 1982 Convention. Thus, Qitat Jaradah did not meet the requirements of Article 121 of the 1982 Convention. Further, Bedjaoui, Ranjeva and Koroma JJ disputed the award of this island to Bahrain, which island was closer to Qatar's coast than Bahrain's coast according to the calculations of the hydrographer appointed by the Court.

Fourthly, this anomaly was aggravated by the fact that Qitat Jaradah was accorded an effect of 500 metres, even though the Court had decided not to give it any effect at all and had drawn the delimitation line at a strict tangent to Qitat Jaradah. This had distorting results for the northern part of the line. The position was further aggravated by the fact that the Court had established a single maritime boundary on the basis of two contradictory maps, an American map for the southern sector and a British map for the northern sector. This duality in the Court's approach was somewhat puzzling. It would have been more normal to rely on a single map for the entire course of the line and to choose the most recent one for the most up-to-date data.

Bedjaoui, Ranjeva and Koroma JJ observed that the Court had not used a British map prepared in 1994 by the Admiralty of the State that had for many years been the protecting power in the region although the map was quite well informed of the true situation. This British bathymetric chart had demonstrated clearly the geographical continuity between the Hawars and Qatar, which formed a single entity and together constituted the Qatari peninsula. As a result, the judges felt that the Court had chosen to rely arbitrarily on an American map for this southern sector of the single boundary to show the low-water line. This raised fears regarding the legibility of the decision and, above all, the creation of a real risk of amputating the territory of Qatar proper. Thus, the choice of the less suitable map for the southern sector left serious doubts not only as to the fairness but also as to the simple accuracy of the line obtained. Further, having failed to choose a British map, it would have been better if the Court had not assumed responsibility for errors when drawing the course of the line. Instead, the Court should have invited the parties to negotiate that course by applying the indications it provided.



Bedjaoui, Ranjeva and Koroma JJ regretted that the voting by the Court's Members was not based on dividing the final single maritime line into two parts given the parties' positions and the award of the Hawar Islands to Bahrain. The Judges could not accept this. On the other hand, they found the northern part to be acceptable generally, although the line could be improved by shifting slightly to the west.

**(c) *The 'Uti Possidetis Juris' Principle***

Bedjaoui, Ranjeva and Koroma JJ shared the Court's analyses of the inapplicability of the *uti possidetis juris* principle to which they were committed as representatives of the various legal systems of the African continent. They noted that there was no State succession in the present case since no new subject of international law was created and simple reasons of legal ethics required them to deny the application of the principle owing to the real motives behind the 1939 decision. It seemed to them that the expression "oil dominates the land and the sea" was the watchword of that decision. Artifice and deception were also bound to colour any legal edifice founded on that notion, to the detriment of the rights of the peoples.

Lastly, Bedjaoui, Ranjeva and Koroma JJ felt that the Court should apply the *uti possidetis juris* principle to the boundaries of Qatar and Bahrain taken "as a whole" instead of focussing its examination on a single text. As a result, they preferred to critically examine the validity of the 1939 decision as measured by the yardstick of contemporary international norms and modern methods of interpretation.

**XII. DECLARATION OF HERCZEGH J**

In his declaration, Herczegh J stressed the importance of paragraph 2(b) of the operative part of the Judgment<sup>64</sup> in which the Court stated that vessels of Qatar enjoyed the right of innocent passage in Bahrain's territorial sea separating the Hawar Islands from the other Bahraini islands. This statement in paragraph 2(b) had enabled him to vote in favour of paragraph 6 of the operative part of the Judgment<sup>65</sup> which defined the single maritime boundary that divided the maritime areas of Qatar and Bahrain.

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<sup>64</sup> Judgment of the Court para 251.

<sup>65</sup> *Ibid.*

### XIII. DECLARATION OF VERESHCHETIN J

In his declaration, Vereshchetin J briefly expounded the reasons that prevented him from concurring in the Court's findings on the legal position of the Hawar Islands and the maritime feature, Qitat Jaradah. The Court's finding on the Hawar Islands rested exclusively on the 1939 decision by the former "protecting Power", Britain. This implied that the 1939 British decision was viewed by the Court as a sort of legally binding third-party settlement of a territorial dispute between two sovereign States. It also implied that the two States under British protection at the relevant time could, and actually did, freely express their sovereign will to be legally bound by Britain decision. In turn, the deciding "third party" should be presumed neutral and impartial. In Vereshchetin J's opinion, none of the above prerequisites necessary for the affirmation by the Court of the formal validity of the 1939 decision existed in the context of the "special relationship" between the "protected" and "protecting" States obtaining at the relevant time.

The inevitable uncertainty as to the formal validity of the 1939 decision, especially in an absolutely new political and legal setting, required the Court to revert to the legal grounds forming the basis of the 1939 decision. By abstaining from analysing whether the 1939 decision was well founded in law and rectifying it if appropriate, the Court failed in its duty to take into account all the elements necessary for determining the legal position of the Hawar Islands.

On Qitat Jaradah's legal position, Vereshchetin J took the view that this tiny maritime feature that constantly changed its physical condition could not be considered an island within the meaning of the 1982 Convention. Rather, it was a low-tide elevation whose appurtenance depended on its location in the territorial sea of one or other State. Therefore, the attribution of Qitat Jaradah should have been effected after the delimitation of the parties' territorial seas and not *vice versa*.

### XIV. DECLARATION OF HIGGINS J

Higgins J considered that Bahrain had sovereignty over Janan for the reasons elaborated by Kooijmans J and Fortier J *ad hoc*. Therefore, she voted in the negative on paragraph 3 of the *dispositif*. However, since the Court found that Qatar had sovereignty over Janan, she agreed

generally with the delimitation line drawn by the Court and hence voted in favour of paragraph 6. Higgins J felt that had it so chosen, the Court could also have grounded Bahraini title in the Hawars on the law of territorial acquisition. Among acts occurring in the Hawars were some that did have relevance for legal title. These *effectivités* were no sparser than those on which title had been founded in other cases. Even if Qatar had by the time of these early *effectivités* extended its own sovereignty to the coast of the peninsula facing the Hawars, it performed no comparable *effectivités* in the Hawars on its own. These elements were sufficient to displace any presumption of title by the coastal State.

#### **XV. SEPARATE OPINION OF PARRA-ARANGUREN J**

Even though he voted in favour of the operative part of the Judgment, Parra-Aranguren J stated that his vote did not mean that he shared every part of the Court's reasoning. In particular, he considered paragraph 2(b) of the operative part to be unnecessary and made it clear, to avoid misunderstandings, that in his opinion Qatar enjoyed the right of innocent passage accorded by customary international law in all the territorial sea under the sovereignty of Bahrain. Furthermore, he explained that his vote for paragraph 4 of the operative part was the consequence of his agreement with the maritime delimitation line between Qatar and Bahrain drawn in paragraph 6.

In Parra-Aranguren J's opinion, the drilling of an artesian well advanced by Bahrain to demonstrate its sovereignty over Qitat Jaradah could not be characterised as an act of sovereignty. Nor could the acts of sovereignty alleged in respect of the low-tide elevation of Fasht ad Dibal, namely, the construction of navigational aids and the drilling of an artesian well, be characterised as such. Therefore, he felt it was not necessary to take a stand, as the Judgment did, on the question whether from the point of view of establishing sovereignty low-tide elevations could be assimilated fully with islands or other land territory.

#### **XVI. SEPARATE OPINION OF KOUIJMANS J**

Kooijmans J took issue with the Court regarding that part of the Judgment dealing with the territorial issues the divided Qatar and Bahrain over Zubarah, the Hawar Islands and Janan. Nevertheless, he

voted in favour of the Court's findings on sovereignty over Zubarah and the Hawars, and dissented with regard to Janan only. However, he disassociated himself from the Court's reasoning on all three issues. He felt the Court had taken an unduly formalistic approach by basing its reasoning mainly on the position taken by the former Protecting Power (Britain) and not on substantive rules and principles of international law, in particular those on the acquisition of territory.

Kooijmans J began his separate opinion by describing the political and legal situation in the Gulf region in the nineteenth and early twentieth century. At the time, the formation of States as territorially based sovereign entities had not yet occurred. It was following the discovery of oil in the 1920s that led to the need for clearly defined boundaries to be drawn and the notion of exclusive spatial jurisdiction.

Kooijmans J noted that the legal character of the relations between the main Western Power in the region (Britain) and the local rulers did not change after the exploitability of natural resources became a dominant factor. In fact, the character of their relations had been laid down in several treaties signed during this early period. The local sheikhdoms were not colonised but kept their character as independent legal entities even if political control by the Protecting Power had tightened.

Thus, Kooijmans J was of the view that the principle or rule of *uti possidetis juris* invoked by Bahrain was not applicable. Crucial in this respect was whether, first of all, there was a transfer of sovereignty from a State to another State, and secondly, as a result of which administrative boundaries were transformed into international boundaries. In the present case, neither of these criteria was met. When Britain as Protecting Power settled territorial issues it did so by determining international boundaries between two entities with which it had treaty relations. Under those treaties, Britain had no right to determine unilaterally the boundaries of the sheikhdoms or to decide upon matters of territorial sovereignty. But it could do so because it had the consent of the local rulers.

Kooijmans J disagreed with the Court on the sovereignty of the Hawar Islands. When Britain in 1939 attributed the Hawar Islands to Bahrain, this decision was the result of a dispute settlement procedure that the Ruler of Qatar had freely agreed to at the relevant time. However, he

did not consent nor subsequently accept or acquiesce in relation to this decision. Consequently, Britain's decision had no legal validity *in se*. All territorial issues, and not only that concerning Zubarah, where the Protecting Power did not take a formal decision should be resolved in the light of the general principles of international law.

As for Zubarah, this part of the dispute dated back to the nineteenth century when tribal loyalties had a more important role than territorial claims. Bahrain based its claim mainly on historic rights and ties of allegiance with (a branch of) the Naim tribe. Such ties as could have existed between the Ruler of Bahrain and certain tribes in the area were insufficient to establish any tie of territorial sovereignty: *Western Sahara*.<sup>66</sup> On the other hand it can be observed that Qatar gradually succeeded in consolidating its authority over the area. Further, there was evidence of acquiescence by conduct by Bahrain in the period before it revitalised the dispute in the second half of the twentieth century. Kooijmans J therefore agreed with the Court's finding that Zubarah appertained to Qatar, although in his view the Court relied too much on the position taken by Britain and the Ottoman Empire.

With regard to the Hawar Islands, Qatar based its claim on original title as *recognised* by Britain (and the Ottomans) in conjunction with the principle of proximity or contiguity, since the islands were situated close to the coast of the peninsula and geographically were part of it. According to Kooijmans J, it would be an anachronism to construe the 1868 Agreement as providing the title to the whole of the Qatar peninsula. Britain had concluded the Agreement with the chief in Doha. As to the principle of contiguity, this was in international law no more than a rebuttable presumption that should yield to a better claim.

Bahrain invoked long-standing ties of allegiance with the Dowasir of Hawar, a tribe that had its principal domicile on Bahrain's main island, and a number of *effectivités* that allegedly evidenced a genuine display of authority. Although it was plausible that links had existed between the inhabitants of the Hawar Islands and Bahrain, it was less certain that these links translated themselves into ties of "allegiance" with the Ruler of Bahrain. Nor could the *effectivités* presented by Bahrain be interpreted as evidence of continuous display of authority. However,

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<sup>66</sup> [1975] ICJ Reports 12.

Kooijmans J also noted the fact that Qatar did not present any *effectivités* in evidence. On this point, Kooijmans J referred to *Eastern Greenland*.<sup>67</sup> In that case, the Permanent Court of International Justice observed that tribunals often had to be satisfied with very little in the way of the actual exercise of sovereign rights and on condition the other State had not made out a superior claim. This held true for the present case too. Consequently, Kooijmans J held that the Hawars should be considered to appertain to Bahrain, and the 1939 British decision as being intrinsically correct.

Sovereignty over Janan was now a separate issue only because Britain had excluded it from the Hawar group in its 1947 decision on the division of the seabed between Qatar and Bahrain. Nor was it given separate mention in the 1939 decision. Nevertheless, it was clear from the facts that when the dispute regarding the Hawars arose both parties, including Britain (the Protecting Power), had considered Janan to be part of the Hawar group. Since the 1947 decision was ambiguous on Janan's legal character and could not be seen as attributing sovereign rights, Janan should be considered part of the Hawars over which Bahrain had sovereignty already at the time of the 1947 decision. For this reason, Kooijmans J voted against the operative provision in which the Court found that Qatar had sovereignty over Janan. In his opinion, the single maritime boundary should consequently run between Janan and the Qatar peninsula and not between Hawar Island and Janan.

#### **XVII. SEPARATE OPINION OF AL-KHADAWNEH J**

While Al-Khadawneh J concurred with the majority decision on the territorial issues concerning Zubarah and the Hawars, he criticised the Court's exclusive reliance on the 1939 British decision "as a valid political decision that binds the parties" with regard to the latter. He felt that the approach was too restrictive and unduly formalistic. Moreover, he believed that reasonable doubts lingered over the reality of Qatari consent when set within the factual context showing Britain's almost total control over Bahrain and Qatar at the time. Moreover, he was of the view that the Judgment did not adequately answer Qatar's accusations that there were "bias and prejudgment" by some British officials. The absence of any reference to substantive law in this part of the Judgment dealing with the Hawars was also unwarranted.

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<sup>67</sup> [1933] Permanent Court of International Justice Series A/B, No 53.

Al-Khadawneh J stated that the Court should have explored alternative lines of reasoning if the decision was to stand on firmer ground. These were *uti possidetis*, historic or original title, *effectivités* and the concept of geographic proximity.

Al-Khadawneh J concluded that *uti possidetis juris* was inapplicable because Britain, unlike the Spanish Crown in Latin America, had not acquired title. Further, the doctrine of inter-temporal law argued against it. In general, he felt that too ready a reliance on this principle was inimical to other legal principles, such as the right of self-determination. It could also detract from the proper function of international courts whose role was to correct illegalities when they occurred and not to simply declare pre-existing territorial situations legal without regard to title and other legally relevant criteria in order to avert conflicts.

Al-Khadawneh J acknowledged the difficulty of determining original titles that stem partly from the inherent limitation of historical enquiries and partly from the paucity of information on the crucial question of Qatar's territorial extent. However, he held that some historical facts emerged with relative clarity. Among these was that Bahraini sheikhs exercised considerable control over the affairs of the Qatar peninsula until 1868. Notions of Qatari independence as of that date (when Mohammad Al-Khalifah was punished by Britain) were, however, greatly exaggerated but the fact that Britain dealt directly with the Sheikhs of Qatar did not in itself create title. Moreover, Qatar was an Ottoman territory. The real date for Qatari independence was 1913 when the Ottomans concluded a treaty with Britain. Even then, the territorial expanse of Al-Thani rule remained unclear.

On the other hand, Bahrain had claimed a number of *effectivités* on the Hawars; some were modest and did not carry much probative value. However, the *effectivités* carried out from 1872-1913 were important for no one could doubt the authority of the Ottoman rule over the whole peninsula. The fact that the Ottomans acquiesced to such *effectivités* showed that the Ottomans, while they did not *recognise* any Bahraini territorial sovereignty on the Qatari mainland, had considered the Ruler of Bahrain to have ownership rights on the islands on Qatar's western coast. Bahrain had demonstrated additional *effectivités* until 1936. When the spatial expanse of title was not clear, such *effectivités*

played an essential role in interpreting that expanse. Notwithstanding their small number, Qatar could show no comparable *effectivités*, indeed none at all over the islands. For these reasons, Al-Khadawneh J agreed with the Court's majority view.

**XVIII. DISSENTING OPINION OF TORRES BERNÁRDEZ J AD HOC**

Torres Bernárdez J *ad hoc* referred to the operative part of the Judgment<sup>68</sup> and voted in favour of paragraphs (1), (2)(b), (3) and (5). The conclusions here gave Qatar sovereignty over Zubarah, Janan Island (including Hadd Janan), the low tide elevation of Fasht ad Dibal. Since he could not support the findings of the majority on sovereignty over the Hawar Islands and Qitat Jaradah, he voted against paragraphs (2)(a) and (4). His conclusions on these two territorial questions were exactly opposite to those of the majority.

Torres Bernárdez J *ad hoc* voted against the whole of subparagraph (6) on the single maritime boundary based on procedural reasons because a vote by division was not allowed. He stated that his position on this matter was unrelated to the findings of the Court on the territorial questions. In his opinion, the result of the delimitation of the single maritime boundary should give Qatar sovereignty over the following:

1. the low-tide elevations of Qit'at ash Shajarah and Qita'a el Erge; and
2. most of the continental shelf and superjacent waters of the parties' northern sector of the maritime delimitation area in dispute, including its living and non-living resources.

Torres Bernárdez J *ad hoc's* dissenting judgment related essentially to the finding of the Court on the Hawar Islands dispute, the legal basis of that finding, and the effect the consequences had on the maritime delimitation. According to him, the Court failed to acknowledge:

1. the *original title* and corresponding sovereignty of Qatar over the Hawar Islands, a title established through a process of historical consolidation and general recognition; and
2. the absence of any superior *derivative title* of Bahrain over the Hawar Islands.

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<sup>68</sup> Judgment of the Court para 251.



**XIX. SEPARATE OPINION OF FORTIER J AD HOC**

In his separate opinion, Fortier J made a number of observations.

**(a) Preliminary Issue**

The only reference in the Judgment to the Qatari documents whose authenticity was challenged by Bahrain was a narrative found in the section setting out the history of the proceedings before the Court. These documents played an essential role in Qatar's written memorial, serving as almost the only basis for Qatar's claim to the Hawar Islands. Once the authenticity of these documents was challenged by Bahrain, Qatar did not abandon its claim to the Hawar Islands. It adduced a new argument that was not even developed in its original Memorial as an alternative argument. Qatar's case could not be considered without considering the damage that would have been done to the administration of international justice, indeed to the Court's very position, if Bahrain's challenge to the authenticity of these documents had not led Qatar eventually to inform the Court that it had decided to disregard all the challenged documents.

**(b) Zubarah**

The documents originating between 1869 and 1916 on which Qatar relied in support of its claim to Zubarah did no such thing. By 1916, Bahrain had not lost its title to Zubarah on the Qatar peninsula. The allegiance of the Naim tribes that inhabited the northwest of the Qatar peninsula and who remained loyal to Bahrain and the Al-Khalifah until 1937 confirmed Bahrain's title over the Zubarah region. International law *recognised* that in certain territories that were possessed of exceptional circumstances, such as low habitability, a ruler could establish and maintain title to his territory by manifestation of dominion or control through tribes that gave him their allegiance and looked to him for assistance.

In 1937, the Naim tribesmen who lived in Zubarah were attacked by the Al-Thani and forcibly evicted from the region. The events of July 1937 should be characterised as acts of conquest by Qatar. If the seizure of Zubarah in 1937 by an act of force were to occur today, it would be unlawful and ineffective to deprive Bahrain of its title.

However, forcible taking of territories in the pre-United Nations Charter days could not be protested today. The principle of stability was a significant factor in questions concerning territorial sovereignty. The Court was not competent to judge and declare today, more than 60 years after the forcible taking, that Bahrain at all material times had remained sovereign over Zubarah.

**(c) *Janan Island***

The critical issue in relation to Janan was whether, by the normal canons of interpretation, the 1939 British decision was to be understood as having included Janan at that time. The Court's sole task was to interpret the 1939 decision. The 1939 British decision could only be understood as including Janan.

The Court had attached a great deal of importance to the letters sent on 23 December 1947 by Britain to the Rulers of Qatar and Bahrain. The letters purported only to express the policy of the United Kingdom and had no legal significance whatsoever regarding ownership of Janan Island. Janan Island, including Hadd Janan, should be considered to be part of the Hawars over which Bahrain had sovereignty.

**(d) *Maritime Delimitation***

Fortier *J ad hoc* had serious reservations with the Court's reasoning in respect of certain aspects of the maritime delimitation. He disagreed with that part of the single maritime boundary that ran westward between Jazirat Hawar and Janan. He did not, however, express his reservations or disagreement by casting a negative vote.