JOINT DISSENTING OPINION OF JUDGES BEDJAOUI, RANJEVA AND KOROMA

[Translation]

Long-standing dispute — Recurrence — Particular difficulties of case — Appeal to Parties to transcend their frustrations through co-operation — Hope that judicial settlement will be capable of fully performing its calming, peace-making function — Judicial settlement and public opinion — Conditions for social acceptability of judicial decisions — Grounds relied on by Parties — Court's choice of single ground — Questionable and hazardous.

British decision of 11 July 1939 — Of questionable legal value — Court's examination of formal validity of British decision to exclusion of substantive validity — Risk of ruling infra petita *— Court's examination of formal validity incomplete — Vitiation of consent — British decision vitiated by fraud — Historical context and circumstances of 1939 decision — Role of local British representatives — Rush for oil and advent of offshore exploration — "Provisional" decision of 1936 — Final decision of 1939 — Political decision not having status of arbitral award and thus lacking force of* res judicata *— Decision not binding — Need for consent to 1939 proceedings — Consent must be expressed, informed and freely given, as with any territorial issue — Consent to proceedings and consent to substantive decision — Qatar's consent not express, informed and freely given — Elements establishing fraud — 1939 decision could not properly serve as valid title for award of the Hawars to Bahrain.*

Consequences of Court's failure to examine substantive validity of 1939 decision — Court's failure to proceed to logical conclusion: a minima *solution involving sharing of Hawar Islands on basis of Bahrain's* effectivités *— A* minima *solution the logical consequence of Court's chosen approach, yet not adopted — "Bahraini formula" — Meaning and interpretation in light of internal coherence — Incompatibility between Bahraini formula and application to dispute of* uti possidetis juris *— Reintroduction of* effectivités *issue, avoided by Judgment, but inevitably resurfacing as result of sole reliance on 1939 decision — Weightman report underlying British decision — Award of Jazirat Hawar justified by Weightman by reference to Bahrain's* effectivités *— Absence of* effectivités *in other Hawar Islands — Award of those islands justified by Weightman on basis of "presumption" of* effectivité *— Weightman report's internal contradictions — Double standard in application of proximity principle — Judgment* ultra petita *because* effectivités *limited to main Hawar island and totally absent in other islands and islets.*

United Kingdom's subsequent doubts — Acceptance in 1960s of re-examination of 1939 decision by "neutral" authority — Qatar's persistent protests and

refusal to acquiesce in 1939 decision and successive acts of occupation — Qatar's attitude of non-renunciation preventing formation of Bahraini title over Hawars — Issue of evidence of exercise of sovereign authority over Islands — Flimsiness of effectivités *— Failure to respect territorial status quo during period 1936-1939 when British decision was in preparation — Failure to respect status quo during Saudi mediation from 1983 and since institution of proceedings before International Court of Justice in 1991.*

Search for historical title to the Hawars — Role of historical events in dynamics of legal disputes over territory — Interplay between history and law — Court's duty — Purely descriptive and factual nature of Judgment's account of historical context: failure to apply legal rules and principles framing historical events — Judgment's failure to draw necessary legal consequences from historical facts — Legal criteria for assessing historical events — Court's investigation of historical title to Zubarah, but failure to do so for Hawar Islands, for which requirement was greater.

British presence in Gulf and its legal consequences during nineteenth and twentieth centuries — Characteristics — Creation of two distinct entities, Bahrain and Qatar, in last third of nineteenth century — Progressive formation and consolidation of Al-Thanis' historical title to Qatar peninsula.

Ottoman presence in Qatar from 1871 and its legal consequences until Turkish withdrawal in 1914 — Attitude of United Kingdom — Bahrain's conduct: silence reflecting acquiescence — Conduct of Sheiks of Qatar: extension of authority over entire peninsula — Legal consequences of Anglo-Ottoman agreements of 1913 and 1914 — Anglo-Saudi treaties of 1915 and 1927 — Legal consequences of Anglo-Qatari agreement of 1916.

Interplay of geography and law — Court's duty — Geographical proximity — Strong legal presumption of appurtenance to coastal State of all islands situated within its territorial waters — Legal concept of "distance" — Issue of State's territorial integrity.

Map evidence — Evidentiary value — Maps as reflection of general public opinion and repute — British War Office maps: their particular credibility — Qatar's title to Hawars confirmed by wide geographical and temporal spread of maps produced — Judgment's silence on map evidence.

Historical documents on territorial composition of Bahrain and Qatar — Respective territorial extents in light of historical documents — Appurtenance of the Hawars to Qatar.

Maritime delimitation — Decision infra petita *— "Bahraini formula" and single maritime boundary — Significance of enumeration of maritime areas to be delimited — Failure to apply coherence test to course of line — Multifunctional line and exercise of rights — Method of construction of provisional median line — Baselines and base points — Duality of functions and development of law — Rejection by case law of duality of functions — Equitable points and lines — Delimitation of territorial sea and equitable identification of base points — Distorting effects on course of provisional line — Enclavement of*

Hawar Islands — Right of innocent passage through Bahrain's territorial sea — Régime of international easement — Court's lack of competence to define that régime — Obligation of Parties to conclude agreement for international easement — Legal characterization of Qit'at Jaradah — Islands: definition and criteria — Historical development — "Natural" area of land: terra ferma — Single line of delimitation — Existence of two sectors — Point of separation — Adjustment of northern sector — Excessive effect accorded to Qit'at Jaradah.

Suggested solution — Precedents — Saudi-Bahraini territorial agreement: divisibility; sovereignty and resources — Algeria-Morocco agreements.

General conclusion — Attachment of Court's African judges to principle of uti possidetis juris *— No State succession — British decision of 1939: legal artifice — "Oil dominates land and sea" — Judicial ethics — British decision of 1939 to be measured by yardstick of modern methods of interpretation and in light of contemporary norms of international law.*

TABLE OF CONTENTS

I. INTRODUCTION

1. This case has divided Qatar and Bahrain for too long. For over 60 years now Qatar has ceaselessly protested at the British decision of 1939 attributing the Hawar Islands to Bahrain. We can look back on fruitless attempts at arbitration over more than 30 years. The Saudi mediation between the two countries, which was to end in disappointing failure, began more than 20 years ago. For countless decades there have been phases of direct, invariably abortive negotiations between the two States. And finally, for ten long years, punctuated with a whole variety of incidents, the case has officially been before this Court.

2. We would accordingly be more than justified in hoping that, with the Judgment delivered by the Court today, this case will be satisfactorily settled once and for all. Yet has this Judgment carefully identified and met all the requisite criteria for success? In this respect, our hope becomes clouded when we consider the treatment accorded to the question of the Hawar Islands and to that of the drawing of the single maritime delimitation line, which has, in our view, been arrived at by a somewhat novel method that breaks with the most soundly established practices. Thus, the provisional course of the equidistance line was determined by taking prior account of certain special circumstances, some of which are in fact insignificant, such as Umm Jalid, a maritime feature a few dozen metres long, projecting 30 centimetres out of the water. The fundamental rule that *"the land dominates the sea"* was not respected in drawing the provisional line, the Judgment having opted not to apply the mainland-to-mainland method. It is all of this that has prompted us to write this opinion.

3. The parties involved in a lawsuit must have the good sense to assess, calmly and realistically, their respective gains and losses — which are sometimes unavoidable in a judicial settlement. Today's Judgment is what it is. But it stands. It is our hope that the Parties will manage to draw from this situation — but above all from the infinite resources offered by their common genius — the will to set off again with confidence along the road of co-operation and to restore mutually beneficial relations through a dialogue that will transcend their difficulties or frustrations.

* * *

4. The question of the Hawar Islands is a highly sensitive one for both Bahrain and Qatar. It is a subject that carries an exceptional emotional charge for the people of the two States and one about which they feel exceptionally strongly.

5. For Bahrain, losing the Hawar Islands would be a *truly alienating-capitis diminutio* — indeed alienating in the extreme, because a *large* part of a *small* country would be amputated. It would also involve the loss of

a vestige of bygone splendour, a remnant of the now-distant era when Bahrain held sway over virtually the entire Gulf, and indeed over the Qatar peninsula itself. For Bahrain, Hawar represents a fundamental *political myth*, like those existing in many countries. In the age-old conflict between France and Germany, now fortunately laid to rest, the question of Alsace-Lorraine, among other highly flammable flashpoints, was like the flint that invariably sparked off a war. *To some extent, Hawar is Bahrain's "Alsace-Lorraine".*

6. *For Qatar*, the loss of, or failure to recover, the Hawars through the *force of law*, before a court for whose jurisdiction Qatar vigorously fought, would give rise to a sense of disappointment as intense as its confidence in international justice was great. At the end of every day for 61 years now, each and every Qatari sees his lost illusions swept away on the waves of the daily ebb. Each day, when the tide goes out, every Qatari can walk, without getting his feet wet, those few hundred metres — even less in some places — separating him from the Hawars . . .

7. Why then should anyone be surprised that the taste in the mouths of the crowd, both in Bahrain and in Qatar, is a sour one? It is more essential than ever that judicial settlement fulfil to the utmost its calming, peace-making function in a case such as this, where each Party fears being unjustly despoiled by a Judgment depriving it of the Hawars.

* * *

8. Thus, for the Court to satisfy both Parties under the circumstances is an arduous and well-nigh impossible task, and yet the decision must be rendered strictly under the law and rigorous care must be taken to avoid handing down any form of judgment *ex aequo et bono*! However, it is clear that the fact that this bitter dispute has persisted for so long in any case imposed an extra duty on the Court. What we mean by this is that in ruling, in deciding solely in accordance with international law, the Court was nevertheless duty-bound to seek out, from among the possible solutions, that which appeared to be the most pacifying and likely to cause the least dissatisfaction on either side.

9. The American judge Philip Jessup, in his dissenting opinion in the *South West Africa* case, wrote that international law must not be regarded as an antiquated compendium of dead letters, dating back to a long-gone period in the history of the world: "the standard to be applied by the Court *must be one which takes account of the views and attitudes of the contemporary international community*"[1].

[1] *I.C.J. Reports 1966*, p. 441; emphasis added.

Two authors, Garry Sturgess and Philip Chubb, have further stated that:

> "The case in question demonstrated [that] law is not something that is apart from reality, apart from politics . . . The case highlights the delicate line the Court must tread. It generally attempts in its judgment to include some statements that make the decisions at least *partly acceptable to the losers*; it is never highly critical or abusive. The trick indeed, is to try to make the decision carry as *little pain for the loser* as possible, to *try to avoid making the Court itself unpopular* with any part of the international Community."[2]

10. It would be wrong to think for a single moment that all this is peculiar to international fora. The same problem of rejection of judicial decisions by public opinion exists within States and sometimes takes on alarming proportions, ranging from displays of popular emotion to acts of violence. Whether national or international, justice is therefore bound to be concerned with ensuring that it is accepted, through decisions which, while articulating the state of the law, must not completely ignore *the state of public opinion*. One author has remarked that "Judges do not live in isolation. Their opinions are subject to criticism, and they are, and should be, influenced by popular reaction. The process often works in subtle ways . . ."[3]

11. The *South West Africa* case provides confirmation of the view held by Chaïm Perelman, who wrote: "It is indeed rare for legal reasoning to be able to lead, like . . . the proof of a mathematical theorem, to a compelling conclusion." Courts, whether domestic or international, are also faced, in a particularly acute manner, with the problem of the *"social acceptability"* of their decisions[4]. "In fact", as Stéphane Rials added, "in spite of the majesty which attaches to their decisions, courts cannot dispense with techniques which will make their judgments more persuasive and enhance their legitimacy"[5].

12. This is true *a fortiori* of the International Court, which is so dependent, for the referral of cases to it and for its jurisdiction, on the consent of States. In the *South West Africa* case, the Court had in advance robbed the technical solution put forward by it of any substance, so that it could only appear to the public as a derisory expedient once the Court had accepted jurisdiction and agreed that the Application was

---

[2] Garry Sturgess and Philip Chubb, *Judging the World Court — Law and Politics in the World's Leading Courts*, 1988, Chap. 7, "The Courts in Collision", p. 213; emphasis added.

[3] Norman Redlich, "Judges as Instruments of Democracy", in *The Role of the Courts in Society*, ed. Shimon Shetreet, 1988, Chap. 11, pp. 149-156.

[4] Chaïm Perelman, *Logique juridique, nouvelle rhétorique*, 1976, pp. 7 and 9.

[5] *Les Cours de droit*, 1950, pp. 429 and 451, quoted by Stéphane Rials, "Les standards, notions critiques du droit", in Chaïm Perelman and Raymond Vander Elst, *Les notions à contenu variable en droit*, travaux du Centre national de recherches de logique, Brussels, 1984, pp. 39-53, at p. 46.

admissible. The opinion and expectations of the "public" are an important factor, constituting what is referred to by some authors as *"infra-droit"*[6].

* * *

13. *What has the Court done in the present case?* In order to convince the Court, the Parties have argued at length on the following grounds of law put forward by each of them on the question of the Hawars:

(a) the existence of an original title;
(b) the presence of *effectivités*;
(c) the legal principle of proximity and the matter of territorial integrity;
(d) the map evidence;
(e) the principle of *uti possidetis juris*; and lastly,
(f) the British decision of 11 July 1939 awarding the Hawars to Bahrain.

Far from examining all of these grounds and according them such full value as they deserved to be given as support for the position of one or other of the Parties, the Court deliberately ignored the first five, in order to base its solution on the British decision of 11 July 1939 *alone*.

14. A choice that is both questionable and hazardous. Questionable because, particularly where territorial disputes are concerned, the first intellectual step normally undertaken is rather to seek an original historical legal title, irrespective of whether or not it is currently still effective. Questionable also because, by not responding as it should to the numerous other legal grounds argued by the Parties, the Court leaves them (and anyone reading the Judgment) with the regrettable impression that it has only given the Parties a very incomplete hearing on matters which they however considered to be crucial. In other words, the Court has thus taken the risk not only of rendering an incorrect judgment but also of failing to give a complete ruling. The Court thus exposes itself to the danger of charges of having ruled *"infra petita"*. A hazardous choice, moreover, as the nature of the present case is not such as to enable various grounds to be so easily dispensed with simply because the examination of

[6] André-Jean Arnaud, *Critique de la raison juridique. Où va la sociologie du droit?*, LGDJ, 1981, in particular his arguments entitled "Repères pour une exploration méthodique de l'infra-droit", pp. 325 *et seq.* *"L'avant-dire-droit"*, to use the term employed by the author, is made up of a number of factors, objective and subjective, which, in the popular imagination, really *shape* a court decision before it is delivered, and fuel public expectation: levels of consciousness and legal culture, i.e., conformist or revolutionary tendencies on the part of the public — together with more subjective factors made up of attitudes, opinions, types of behaviour, beliefs, images, and so on.

one ground would definitely and indisputably — so it is believed — produce the solution, thereby relieving the Court of the need to examine any other grounds. In this case, as indeed in many others, the solution derived from one ground could be strongly contradicted — effectively undermined and set at naught — by others. The science of international law does not have the rigour and logical certainty of the mathematical sciences, in which one line of reasoning must inevitably completely exclude or render superfluous any other. This is demonstrated by the fact that, in international law, one does not halt at the first result in a territorial award, but then goes on to see whether a "better title" exists.

15. Let us begin by considering the British decision of 11 July 1939, by which the United Kingdom awarded the Hawars to Bahrain and which is the legal ground on which the Court has based its entire Judgment. In our view, that decision cannot constitute the requisite "better title". And that is what we must first show. We regret that, in so doing, we are obliged to attack at the very heart of the Judgment.

* * *

II. The British Decision of 11 July 1939

16. The Court ruled on the question of sovereignty over the Hawar Islands solely on the basis of the British Government's decision of 11 July 1939. According to the Court, that decision was binding on Bahrain and Qatar at the time it was adopted and was opposable to them notwithstanding the subsequent protests of the Sheikh of Qatar. The Court states that its "conclusion . . . on the basis of the British decision of 1939 makes it unnecessary for the Court to rule on the arguments of the Parties based on the existence of an original title, *effectivités*, and the applicability of the principle of *uti possidetis juris* to the present case" (Judgment, para. 148).

17. The Court thus made the deliberate, hazardous choice, analysed above, of deciding a territorial dispute on the basis of a decision of questionable legal value and to dispense with careful consideration of the other grounds advanced by the Parties in support of their arguments, namely whether or not the principle of *uti possidetis juris* and the principles of geographical proximity and territorial unity applied to the case and whether there was an original title or *effectivités*. The Court thus chose not to apply the relevant principles of law and avoided drawing the inescapable conclusions that followed from consideration of the international treaties, of applicable customary law relating to islands, of maritime law and of the substantial map evidence.

18. The Court's treatment of the subject of sovereignty over the Hawar Islands might have been convincing had the Court carried through with its task and performed in full the judicial mission incumbent upon

it. However, not only did the Court decline to examine the substantive validity of the British decision of 11 July 1939, even though it had been invited to do so by the Parties — which in itself exposed it to the risk of ruling *"infra petita"* — but its consideration of the formal validity of that decision was, further, both incomplete and lacking in credibility.

19. With respect to the specific question of the Hawars, which entails important consequences for the maritime delimitation, the entire legal edifice constructed by the Court thus rests on a single foundation, the British decision of 1939, and that foundation is itself particularly flimsy, in that it led the Court to conclude that the consent given by both Parties in 1938 to Great Britain to take that decision was free of any defect. Yet, as we shall show, the Sheikh of Qatar's consent was clearly vitiated by the existence of fraud.

20. But before undertaking an examination of the questionable circumstances under which the decision was taken, it is worth quoting at this point a comment made in 1964 by Christopher Long, a senior Foreign Office official, who, in summarizing the events of 1938-1939, admitted the following:

> *"Neither of the two Rulers was asked beforehand to promise his consent to the award, nor afterwards to give it.* H.M.G. simply 'made' the award. Although it followed the form of an arbitration to some extent, it was *imposed from above*, and no question of its validity or otherwise was raised. It was quite simply a decision which was taken for practical purposes in order to clear the ground for oil concessions."[7]

21. In other words, the Foreign Office itself acknowledged in 1964 that the 1939 decision had been "imposed from above" and that the Ruler of Qatar had not promised in advance to accept the content of that decision. This clearly means that, however it might have been characterized, that decision could not be regarded as binding.

22. But statements like that of Christopher Long are not only to be found *after* the decision was taken. Critical views were also expressed within those same British diplomatic circles *before* the 1939 decision was adopted. The Minute drawn up on 30 December 1937 by Rendel, one such British senior official, states: "As regards the Hawar Islands at No. 17, I cannot help regretting that the India Office went so far as they seem to have done in allotting these islands to Bahrain."[8]

More generally, the file submitted to the Court shows that the fact that

[7] Reply of Bahrain, Vol. 2, Ann. 2, p. 4; emphasis added.
[8] Reply of Qatar, Vol. 3, Ann. III.56, p. 349.

the Hawars belonged to Qatar was not disputed prior to the "provisional" decision of 1936.

* * *

23. It is important to recall the facts and circumstances which led to the British decision of 11 July 1939. This is particularly necessary because the Judgment, far from describing the exact historical context of that decision, confined itself, in paragraphs 118 to 135, to citing the most immediate of the events occurring between 10 May 1938 and 25 September 1939. More crucial facts capable of shedding light on the British decision of 1939 are to be found in the *"qualités"*, at the very beginning of the Judgment, far removed from the discussion devoted to consideration of the 1939 decision, and thus separated from that discussion and intermingled with other points.

24. As we shall show below in considering the question of historical title, it was acknowledged, at least until 1936, that Hawar appertained to Qatar, as a result of historical consolidation and the recognition of Qatar's title. The challenge raised to Qatar's title may be explained by the conjunction of the local policy of certain British representatives and the rush for oil with the advent of off-shore exploration. A confidential letter of 30 July 1933 from Gastrell, British Political Agent in Bahrain, to the British Political Resident in the Gulf, referred to the reluctance on the part of the Ruler of Bahrain and his son to designate by name the islands to be included in the area of the oil concession granted by Bahrain. In a telegram dated the next day, 31 July 1933, to the Government of India, the Political Resident in the Gulf accepted this suggestion but did however state that "Hawar Island is clearly not one of the Bahrain group"[9].

25. On 28 April 1936, following the Ruler of Bahrain's discovery that the "unallotted area of Bahrain" for which he could grant a new oil concession comprised less than half of the land territory of the main Bahrain Island, Muharraq, Sitrah, Nabi Salih and Umm Na'asan, Charles Belgrave, the Political Adviser to the Ruler, presented to his superior, the British Political Agent, a formal claim of title to the Hawar Islands on behalf of the Ruler of Bahrain. The elements of the claim were set out in a document the text of which began as follows: *"In connection with the present negotiations for an oil concession over the territory of Bahrain which is not included in the 1925 oil concession."*[10] They related to islands the majority of which lie within the 3-mile belt of Qatar's territorial sea. This fact of geography is not disputed.

26. Here is the account given in the confidential Foreign Office minute dated 10 June 1964, entitled "Sovereignty over Hawar Island" and signed

[9] Memorial of Qatar, Vol. 6, Ann. III.88, p. 451.
[10] Memorial of Qatar, Vol. 7, Ann. III.103, p. 17.

by Christopher Long, of the events following Bahrain's claim:

> "3. The first stage was from April to July, 1936. In a letter dated April 28, 1936, (E3439) the Political Agent, Bahrain, reported that Bahrain, *stimulated by prospective oil concessionaires, had put forward a claim to Hawar. He observes that 'it might . . . suit us politically to have as large an area as possible included under Bahrain.' The Political Resident supported this attitude and the matter was discussed, together with related oil questions, at a meeting in Whitehall.* As a result, in a letter to Mr. Skliros of Petroleum Concessions Limited, dated July 14, 1936, it was stated that 'on the basis of the evidence at present before H.M.G. it appears that Hawar belongs to the Shaikh of Bahrain, and that the burden of disproving his claim would lie on any other potential claimant.' (E 4490.)" [11]

27. This decision of 9 July 1936 by the British Government was notified to Charles Belgrave, who conveyed it to the Ruler of Bahrain and to Skliros of Petroleum Concessions Limited, but not to the Sheikh of Qatar. The Sheikh was informed neither of Bahrain's formal claim of 28 April 1936 to the Hawars nor of the British decision of 9 July 1936 and was not made a participant, either directly or indirectly, in the various steps in the process, even though the British Government must have been aware that most of the islands in question lay within three miles of the coast of the Qatari peninsula and that Qatar regarded them as belonging to it. Thus, after flying over them in 1934, the Royal Air Force had stated that they were part of Qatar's territory. Moreover, between 1933 and 1934, early in the negotiations over the granting of an oil concession, British officials in the Gulf and in London had had no doubt that the islands appertained not to Bahrain but to Qatar. Although the British Government stated that the 1936 decision was based on the evidence before them, it clearly had not escaped them that neither the Annual Reports of the Government of Bahrain nor Belgrave's "Diary" contained any mention whatsoever of the Hawar Islands or of any administration of those islands by or on behalf of the Ruler of Bahrain; at most, all we find is a reference to Weightman's visit to Hawar on 15 April 1938.

28. The foregoing thus demonstrates that the 1936 decision was not taken on the basis of the available evidence, but rather in spite of and against that evidence, and, even though it was characterized as "provisional", its significance and practical effect could hardly have been underestimated. It was a definitive statement of the principles guiding British policy with respect to offshore concessions in the area concerned.

[11] Reply of Bahrain, Vol. 2, Ann. 2, p. 2; emphasis added.

29. Nevertheless, in order to soften the foreseeable reaction by the Ruler of Qatar, the British authorities stated that the decision was provisional and that a final decision would not be taken until any claims which the Ruler of Qatar might have had to those islands had been considered. These precautions came to nothing, for Belgrave was at pains to indicate that the Ruler of Bahrain would include the Hawars on the list of his possessions. Consequently, subsequent negotiations for oil concessions in Bahrain's "unallotted area" were conducted on the basis that the Hawars were part of Bahrain and that the Ruler of Bahrain alone was entitled to grant a concession covering those islands. The competent British authorities, in the Gulf and in London, also acted on the basis that the Hawar Islands belonged to Bahrain.

30. The British authorities allowed oil companies to continue to negotiate with the Ruler of Bahrain alone for a concession covering the whole of the unallotted area or just the Hawar Islands, as if they had already made a final decision that those islands belonged to Bahrain. Moreover, the inevitable consequence of the "provisional decision" of 1936 was that the burden of disproving Bahrain's claim to the islands was placed on Qatar, even though the proposal later sent to the Ruler of Qatar did not include the evidence on which Bahrain based its claim. Thus, the Ruler of Qatar was not given an opportunity to rebut Bahrain's arguments.

31. It was against this background that, on 10 May 1938, the Ruler of Qatar told Weightman, the then Political Agent of Great Britain, that Hawar "is, by its natural position, a part of Qatar" and "belongs to it"[12]. It was on this basis that he protested against Bahrain's initial occupation of the north of Jazirat Hawar. Referring to the relations between Qatar and Great Britain, he requested the latter to "do what is necessary in the matter so as to avoid any trouble which may cause a breach of peace"[13]. In his reply of 28 May, Weightman referred to Bahrain's claim to the Hawar Islands and stated the following:

> "It is indeed a fact that by their formal occupation of the Islands for some time past the Bahrain Government possess a prima facie claim to them, but I am authorised by the Honourable the Political Resident to say that even so His Majesty's Government will be prepared to give the fullest consideration to any formal claim put forward by you to the Hawar Islands, provided that your claim is supported by a full and complete statement of the evidence on which you rely in asserting that you, as Shaikh of Qatar, possess sovereignty over them."[14]

[12] Memorial of Qatar, Vol. 7, Ann. III.150, p. 255.
[13] *Ibid.*, p. 256.
[14] *Ibid.*, Ann. III.156, pp. 281 and 282.

32. Weightman added that meanwhile the British Government "will not be prepared to prohibit or restrict"[15] Bahrain's occupation of the islands. In his reply of 27 May to the Political Agent, the Sheikh of Qatar agreed in the following terms to having the proceedings for settlement of the problem conducted by the British: "I am very grateful to you for the good expressions contained in your letter and I am also thankful to His Majesty's Government who will, *as you said*, decide the matter in the light of truth and justice."[16] On 30 May Weightman and the Sheikh met in Doha. Then, on 15 June, the Sheikh wrote to Weightman reminding him that during his visit, "I thanked you for informing me that you were going to investigate the matter very thoroughly so that the facts may become clear, and His Majesty's Government may be able to decide the matter in the light of justice and equity"[17].

33. This was the specific context, further complicated by competing British and American oil interests, in which Great Britain took its decision on 11 July 1939, which it notified by means of two identical letters to the Rulers of Bahrain and Qatar and by which it attributed the Hawars to Bahrain[18].

* * *

34. We agree with the majority of the Court that the British decision of 1939 is not an arbitral award and therefore does not have the force of *res judicata*. We support the Court's reasoning and agree with it that the characteristic features of an arbitral award are lacking here. The British decision is a political or administrative decision and, as such, constitutes a simple historical fact.

35. However, according to the Judgment, that decision is still legally binding today on the two Parties, as a result of the consent given by each of them in 1938 to the local representatives of the United Kingdom. We wish to state our total disagreement on this point.

36. As the Judgment pointed out, correctly noting in passing the similarity between the present case and the *Dubai/Sharjah* case, the consent of the Rulers was of course required. We accept that, in the circumstances of this case and taking due account of the nature of the relationship between Bahrain and Qatar and the United Kingdom, such consent was necessary. But, in the Judgment now handed down by the Court, that consent is artificially examined, detached from its temporal context and, in sum, analysed in a totally abstract manner.

37. In order to reach the conclusion that the British decision was and remains binding on the Parties, the Judgment deemed the consent of the

[15] Memorial of Qatar, Vol. 7, Ann. III.156, p. 282.
[16] *Ibid.*, Ann. III.157, p. 287; emphasis added.
[17] *Ibid.*, Ann. III.160, p. 307.
[18] Memorial of Bahrain, Vol. 5, p. 1176.

Ruler of Qatar to be indivisible. Since consent to the procedure implied consent to the substantive decision, the protests of the Sheikh of Qatar were accordingly held to be without legal force: made "after the event", they simply expressed the disappointment of their author.

38. In the present case, the indivisibility of the consent has not been established; it is simply presumed. In political terms, the nature of the relationship between the protecting Power and the protected State did not permit the use of any language other than the deferential terms in which the local rulers expressed themselves; thus to interpret that language as evidence of consent to the renunciation of territorial jurisdiction is in reality to give the opposite sense to the natural meaning of the words and conduct in 1939. In legal terms, when the Judgment invokes against Qatar its consent to the substance of the 1939 decision — a consent that was in reality hypothetical — , it reproaches Qatar with its failure to abide by a decision with which it had already been threatened in veiled terms since 1937. Independently of the fraudulent nature of the manœuvres of the British representatives, the question is whether Qatar was legally bound to abide by the decision. The answer must be a negative one. *In the matter of territory, consent to a renunciation of sovereignty cannot be presumed; the renunciation must be expressed and established in unequivocal terms.* This is an absolute rule in international law. Agreement to a power on the part of the United Kingdom to dispose of sovereignty over the Hawar Islands has not been established. Consent to the proceedings, even supposing that it was validly given — *quod non* — did not signify automatic consent to the final decision. There is nothing in the evidence submitted to the Court, and in particular in the letters of Qatar cited in the Judgment, to show that Qatar gave its consent to be legally bound by the future decision.

39. We repeat that, in a case such as this, consent had to be *express, informed and freely given.* This was not the case. Paragraph 141 of the Judgment, which deals with the question of the formal validity of Qatar's consent, is determinative in that it demonstrates, with a certain surrealism, the construction, unfounded in reality, which the Judgment places upon that consent. This paragraph is worth quoting:

> "while it is true that the competent British officials proceeded on the premise that Bahrain possessed prima facie title to the islands and that the burden of proving the opposite lay on the Ruler of Qatar, Qatar cannot maintain that it was contrary to justice to proceed on the basis of this premise *when Qatar had been informed before agreeing to the procedure that this would occur and had consented to the proceedings being conducted on that basis*"[19].

[19] Emphasis added.

In effect, already in this one paragraph, the Court's Judgment stands at the threshold of the issue of fraud, only then to shy away from it.

40. What exactly happened in fact? We have to restore the entire context and not content ourselves with abstract reasoning. Under the Anglo-Qatari Treaty of 1916, and pursuant to the assurances given in the 1930s, which were linked to the agreement by Qatar in 1935 to grant an oil concession, the British Government had guaranteed the territorial integrity of Qatar. Despite this, in 1936 it took the decision falsely described as "provisional", whereby it breached this undertaking to respect territorial integrity. What is more, it saw to it that Qatar was not informed of this. Already, and by this fact alone, it may be said that *Qatar's consent to the proceedings was not an informed consent*. The British decision of 1936 was not only concealed from the Ruler of Qatar, but, further, did not retain the "provisional" status with which it had been characterized, since from 1937 Bahrain had begun to occupy the north of Jazirat Hawar with the support of the British representatives. That rendered the decision irreversible. The fraudulent intent is thus clearly established. How, in these circumstances, could the United Kingdom commence in May 1938 a procedure under which it acted as if it had never taken any prior decision? At the time of Weightman's exchange of letters on the procedure with the Ruler of Qatar in May 1938, the decision had in fact already been taken since 1936 and implemented since 1937. If one had to draw a parallel, albeit while remaining within the parameters specific to each particular case, one might compare this situation with that described in Article 17 of the Statute of the Court, which prohibits any Member of the Court from hearing a case if he had already dealt with it in the past in any capacity.

41. But there is more to it than this. When the Ruler of Qatar discovered the first signs of occupation by Bahrain of the northern part of Jazirat Hawar, he complained about this "interference" to the British Government, meeting its representative, Weightman, in February 1938. The British Government failed to disclose to him, either at that time, or in the course of the exchange of letters in May 1938, the existence of the decision taken by it in 1936, which effectively authorized these first manifestations of Bahraini occupation. This justifies a reading of the situation which prevailed at the time of the correspondence of May 1938 altogether different from that given by paragraph 141 of the Judgment quoted above. Thus everything happened as if the United Kingdom wanted to demonstrate to the Ruler of Qatar that this Bahraini occupation was an occurrence independent of Britain's wishes, that it was entirely unconnected with the 1936 decision (which Britain continued to conceal), that it was bound to regard the occupation as a fact tending rather to encourage it in the belief that prima facie the Hawars belonged to Bahrain and, finally, that it would not seek to put an end to that occupation without first hearing any arguments from Qatar showing that the occupation was contrary to law. From this we can see that the exchange of letters of May 1938, with its true context and full significance restored,

disclosed a situation which prevented Qatar's consent from being fully informed. *This was an operation in four stages: first, non-disclosure of the existence of the 1936 decision; then allowing credence to the notion that the resultant Bahraini occupation was totally independent of that decision; then, however, using that occupation as a pretext to support the view that* "at first sight" *the Hawars belonged to Bahrain; and, finally, doing nothing to interrupt that occupation unless and until arguments to the contrary were provided by Qatar.*

42. In such a context and in these circumstances, it is surreal to contend that the Ruler of Qatar, thus "informed" of the British prima facie belief, was in a position to refuse to "participate in the proceedings on that basis". Moreover, in complaining to the United Kingdom about Bahrain's illegal occupation, the Ruler of Qatar was in no way throwing open to debate or submitting for decision his sovereignty over the Hawars. And on 27 May 1938 he confirmed this view of the situation: "I now submit my formal complaint against the steps taken by the Bahrain Government in islands belonging to others . . ."[20] It is here that the equivocation, manifestation of fraud, becomes apparent. Qatar was not seeking any decision from the United Kingdom on the matter of its sovereignty over the Hawars at a time when, unknown to it, those islands had already been awarded to Bahrain under the secret British decision of 1936.

43. To complete the picture, it should be noted that it was not only the 1936 decision that was not communicated to Qatar. The official claim to the Hawars made by Bahrain in April 1936 was not conveyed to Qatar either. Moreover, Qatar was kept in ignorance of all the documents exchanged before the final decision of 1939. Belgrave's "Preliminary Statement" of 1939 had never been conveyed to Qatar, although it had already been analysed in the Weightman Report of 22 April 1939, *"Ownership of the Hawar Islands"*, on which the British decision of 1939 was founded.

44. It is thus a semblance of "consent", coloured by pretence and equivocation, that the Judgment seeks to rely on, in relation both to procedure and to substance, whereas that consent, which was in any event confined to the procedure, was tainted by fraud. A consent which — neither express, nor fully informed, nor freely given — has, moreover, been stripped of its entire vitiating context, and in particular of the whole illuminating sequence of events prior to the exchange of letters of May 1938. How could it be said that this consent to the proceedings, tainted and invalid as it was, could create an obligation to be bound by the British decision of 1939, which was in any case merely the prior decision of 1936?

45. As we have already pointed out earlier, high officials of the Foreign Office and the India Office moreover recognized subsequently that

[20] Memorial of Bahrain, Vol. 5, Ann. 260, p. 1103.

the 1939 decision had been imposed on the Ruler of Qatar, whose "consent" possessed neither the character nor the scope to render it equivalent in law to an express, informed and freely given consent.

46. The conclusion that the Court should have reached was that this consent was null and void. *In consequence, the British decision of 1939 could not properly serve as title for an award of the Hawars to Bahrain.*

* * *

47. So far, we have confined ourselves to an analysis of the formal validity of the British decision of 1939. We must now examine its substantive validity, despite the fact that its formal invalidity would have obviated the need to consider the issue of its substantive validity. However, we must now explain why we go on to deal with this second question, even though it is superfluous, for, if the Court had considered it, then it would at least have been able, in the terms of its own logic, to reach an *a minima* solution, that is to say a solution that shared the Hawars, taking account in so doing of Bahrain's *effectivités*.

* * *

III. An "*A Minima*" Solution

48. Let us now undertake an alternative reading of the Court's Judgment on the Hawars, that Judgment having confined itself to examining *the purely formal validity* of the British decision of 1939, stopping short of the issue of vitiation of consent which, though manifest, it refused to acknowledge. But, in addition, the Judgment avoided examining *the substantive validity* of the decision. This aspect is touched upon in a somewhat superficial manner in paragraph 140 of the Judgment, which does, however, rightly point out that the British Government had undertaken to give its decision "in the light of truth and justice", although no conclusion is drawn from this albeit significant point. It is clear that, in so doing, the majority of the Court sought to avoid evaluating the strength of the *effectivités* relied upon by Bahrain. These, in the general view, are too weak to justify the award of the Hawars to that State. It is thus not through recourse to this matter of *effectivités* that a better title in favour of Bahrain may be found.

49. But let us linger a little longer over this question to see if the Court could not have found some solution other than the award of the Hawars *in toto* to one Party alone, taking as our starting point the very logic which inspired the Court.

50. The famous "Bahraini formula" unreservedly accords us the power to rule on the fate of the 1939 decision, and thus, where necessary, to confirm it, annul it, amend it, adjust it, or quite simply to interpret it in

such a way as would restore its internal coherence. The formula reads as follows: "The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them . . ."

51. Let us digress for a moment. Is it not clear that this "Bahraini formula" (which, as its name suggests, had been proposed by Bahrain) can and must be regarded as an invitation to the Court not to take any account of the principle of *uti possidetis juris* and thus to submit the British decision of 1939 to whatever examination, criticism, or even sanction that it might merit? Thus it seems to us that, whereas the principle of *uti possidetis juris* could tie our hands and oblige us purely and simply to confirm the 1939 decision, the Bahraini formula on the contrary fully relieved us of that obligation and invited us freely to examine that decision. It will also be noted in passing that to argue that the Hawars belonged to Bahrain by virtue of *uti possidetis juris* exposed Bahrain, which had sought to do so, both to a difficulty and to a risk. It would have been difficult to show that there was a Bahraini presence on the Hawars at the date of independence — a presence based on *effectivités* that are sparse, not to say insignificant, and hence incapable of substantiating that presence. And, above all, Bahrain risks undermining from within its legal strategy founded on the principle of *uti possidetis juris*. Bahrain has claimed both Hawar and Zubarah: the former was under Bahraini authority at the date of independence, the latter under the authority of Qatar on the same date. The legal strategy chosen by Bahrain would thus have enabled it to gain Hawar only by losing Zubarah, if *uti possidetis juris* — which Bahrain could not invoke in the former case without doing so in the latter — were applied consistently. We now return to the matter at hand.

52. It should be noted that the 1939 decision on which the Judgment has opted to found itself leads us back, whether we like it or not, as far as its content is concerned, to the question of the "*effectivités*" that the Judgment has sought to avoid examining. Weightman's report, in which he proposed to his Government that the Hawars be attributed to Bahrain, in fact relies solely on the *effectivités* accomplished in 1937-1938 following the secret decision of 1936. In this regard let us once again recall that it was the duty of the Court to decide on the competing historical titles invoked by the Parties; but, after taking the trouble faithfully to reproduce the arguments of each of them on this question of title, it curiously did not rule at all on the validity of those arguments, any more — incidentally — than it ruled on the Parties' right to invoke that ground[21].

[21] As will be observed below, the Parties argued this ground at length. All that the Court has done in this Judgment is to refer to it in a number of paragraphs, *but at no time making any attempt to settle this question of title*. See, for example, paragraphs 100 and 101, in which Bahrain invoked a historical title dating back two centuries, and paragraphs 99 and 107, in which Qatar invoked "the primacy of its original title" "over the *effectivités* relied upon by Bahrain".

53. It would be understandable that the Court sought to avoid embarking on the relatively difficult task of examining the historical title. However, this was to fall from Charybdis to Scylla, for it then exposed itself to having to tackle the *effectivités* issue raised by the Weightman report, which, inevitably, it had to fudge. At least, having given the appearance of basing itself solely on the 1939 British decision, while carefully stopping short of the *effectivités* issue involved in that decision, the Court, for the sake of consistency, could have opted for a compromise solution: going beyond an examination of the purely formal validity of the 1939 decision, while at the same time stopping short of a full examination of the substantive validity of that decision. Acting *a minima*, the Court could in effect have avoided seeking to call into question the underlying reasoning of the Weightman report (which was based not only on excessively flimsy *effectivités* but also on mere presumptions of *effectivités*); it could instead simply have sought to draw all the conclusions necessarily flowing therefrom, rather than only certain of them, as the British Government had already done.

Let us explain more fully what would be involved in this compromise solution, which must logically follow, whether one likes it or not, from the Court's choice of starting point.

54. Let us start then from the assumption, inevitably implied by the Court's reasoning, that the 1939 British decision, on which it based itself, was reasoned, the grounds having been clearly set out in the Weightman report, in the light of which the British Government decided the matter in the way we know it did. We are then bound to recognize that the Court's Judgment was only able to ignore the *effectivités* issue, on which the grounds put forward by Weightman are based, by confining itself, as we have indicated, to examining the formal aspect of the British decision to the exclusion of its material content. In so doing, the Court was unconcerned about:

(a) thus halting halfway, despite the fact that the grounds for the decision set out in the Weightman report are not without relevance for resolving the issue of the award of the Hawars;

(b) ruling *"infra petita"*: falling short of what the Parties expected of it when they empowered it to make a full and complete examination of the substance of the dispute under the "Bahraini formula".

55. The basic document, analysis of which should have been of primary concern to the Court, is thus the Weightman report, which appears on the face of it

(a) to have provided only a partial foundation for the decision, in justifying the award of the main Hawar Island on the basis of *effectivités*; but

(b) to have committed an error of fact and law in simply "presuming" that *effectivités* also existed for the remainder of the Hawar Islands, whereas

(c) Bahrain, in its written pleadings, and in particular in map No. 4 in Annex 7 to its Memorial (see p. 215 below), locates the *effectivités* EXCLUSIVELY on the main Hawar Island; and, moreover,

(d) makes frequent reference in its written pleadings to "Hawar" or to "Hawar Island" (in the singular). Indeed, the nomenclature speaks for itself, since only the main island is called "Jazirat Hawar" ("Hawar Island"), and has given its name of "Hawar" to the entire group of islands, even though each one of the islands other than "Jazirat Hawar" has its own name.

56. If the Court had undertaken an examination of the Weightman report, on which the 1939 decision was based, it would thus immediately have appreciated the element of *internal contradiction which it contains.*

57. It is that internal contradiction which has up to the present time affected *the full implementation* of the 1939 decision, since on the one hand Bahrain has been able to occupy only the largest of those islands, whilst on the other hand Qatar has refused for 61 years to acquiesce in that decision. *The Court could fully accomplish the mandate conferred upon it by the Bahraini formula only by bringing this situation to an end and rendering it possible for the Parties to implement the decision under a solution which it was incumbent upon the Court to devise, in order to eliminate the internal contradiction which we have noted in the Weightman report and which was reflected in the British decision.*

58. It can readily be appreciated that the British decision of 1939 was inspired by *political considerations* and by oil interests. But the Weightman report also gave it *a legal motivation* or veneer, by invoking Bahrain's *effectivités*. Without having to return to the weakness of those *effectivités*, we will confine ourselves to noting that the British decision of 1939 could not on that basis justify the award of the Hawars in their totality, but only the largest Hawar Island, and even then the physical possession implied by those *effectivités* was — particularly when Weightman was writing — both very weak and very recent.

59. But the Court could have observed that, in paragraph 13 of his report, Mr. Weightman ventured to formulate *a hypothesis, which was false and which remains so to this day*, in *"assuming"* that the islets and rocks other than "Jazirat Hawar" ("Hawar Island") must *"presumably"* fall to the authority of the ruler establishing himself on the main island. Thus Weightman clearly recognized that Bahrain had no *effectivités* over the other islands.

60. We cannot therefore see *what legal basis* could be relied upon to justify *in its totality* the 1939 decision and the award to Bahrain of the entirety of the Hawar Islands. This is all the more so in that, for the islands other than the main one, Qatar has in its favour not only the lack of physical possession of those islands by Bahrain, but also geographical proximity and the presumption of international law concerning the sov-

ereignty of islands which are situated wholly or in part in the territorial sea of Qatar.

61. By using the expression *"the small barren and uninhabited islands and rocky islets which form the complete Hawar group"*, Weightman clearly implies in his report that the islands other than the main one should follow the fate of the latter. This could be interpreted as an invitation to apply in international law the adage *"the accessory follows the principal"*.

62. But:

(a) no principle of this kind exists in international law;

(b) this would be to apply to the main island of "Jazirat Hawar" a *"gravitational power"* over the others, whereas the *effectivités* pushing it towards Bahrain were already very weak in themselves, particularly in 1937-1938; and

(c) above all, it would be to apply in favour of "Jazirat Hawar" "a gravitational force" denied to the mainland mass of Qatar, which has in its favour the legal presumption that islands situated within the territorial sea of the coastal State appertain to that State; and finally:

(d) in this regard, we would recall the observation already quoted above by Max Huber in the *Island of Palmas* case, to the effect that (i) the "act of first taking possession . . . can hardly extend to every portion of the territory", and (ii) the display of sovereignty, which is "a continuous and prolonged manifestation, must make itself felt through the whole of the territory"[22].

63. Nothing could therefore justify awarding the entirety of the Hawar Islands to Bahrain simply because it was entitled to the main Hawar Island. The 1939 decision ought at the very least to have been interpreted subject to the limits of internal consistency of the Weightman report which underlay it. *It would therefore have been consistent with the logic of that report, paragraph 4 of which stated that the principle of proximity favoured the coastal State(!), to envisage a compromise solution to the issue of the Hawars.* In not doing so the Judgment has further weakened itself, for the Court has implicitly ruled *"ultra petita"* on the basis of *effectivités* limited to the main Hawar island and totally absent in the other islands and islets.

64. Thus, to resume and conclude:

— *a first approach*, starting from an analysis of the *content* of the British decision of 1939, ought to have consisted in leaving Bahrain with sovereignty over the main island of *"Jazirat Hawar"* and recognizing Qatar's sovereignty over the other small islands, where there was no

[22] United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 855, and French translation in *Revue générale de droit international public, op. cit.*, 1935.

evidence of any Bahraini *effectivités*; that would have been a *"vertical"* division of the Hawar coastal archipelago;

— *a second approach*, also based on analysis of the *content* of the 1939 decision, could have been a *"horizontal"* division of Jazirat Hawar, or even of the whole of the Hawars. What we mean by this is that this second approach would have been based essentially on the notion that Bahraini *effectivités* are not only weak in some areas and non-existent in others, but also and above all that they are specifically distinguished by having been *too late* as regards certain of them, which disqualifies them from serving as a basis for a claim to sovereignty. The *effectivités* established in 1937-1939 in the northern part of the main Hawar island would have formed the basis for this "horizontal" division.

* * *

IV. *Effectivités* and Refusal to Acquiesce

65. In any event, the absence of consent by Qatar to the 1939 decision, and the subsequent doubts expressed by the United Kingdom, continued to weaken that decision from the legal standpoint. It would seem that, even to its own author, the decision was not fully justified. It was more than likely that it was inspired rather by oil interests than by considerations based on materials in the case file. But what is particularly significant in the British conduct is the fact that:

— the United Kingdom began by taking in 1936 a purely *"provisional"* decision, which it did not disclose to Qatar, as if it was not altogether certain of its legal correctness — conduct, it should be noted, which should in principle have disqualified the United Kingdom from dealing with this case again in 1938-1939; as we have already pointed out, there was here a blatant "conflict of interests";

— the United Kingdom, when pressed by Qatar, which had protested against the final decision of 1939, had cited *inter alia* the World War situation as justification for its refusal to reopen the question;

— in the 1960s the United Kingdom accepted the idea of a re-examination of the 1939 decision by a "neutral" authority, within the framework of an international arbitration.

66. Note should be taken, moreover, of the absence of any acquiescence by Qatar and of its persistent protests against the 1939 decision. That decision has not been accepted by Qatar and has from that time until the present day been the subject of repeated protests on its part. We shall return later to the legal consequences of Qatar's protests over a period of 61 years against the occupation of the Hawar Islands by Bah-

rain subsequent upon notification of the 1939 decision. At this point we shall confine ourselves to analysing the purported acceptance of that decision by Qatar.

67. Reference has been made to a letter of August 1939 from the Ruler of Qatar to the British Political Resident, a passage from which, dictated by considerations of courtesy and deference, has been interpreted as acquiescence by the Ruler in the British decision. What should really be noted is the letter of 18 November 1939 from the Ruler to Prior, British Political Agent in Bahrain, the terms of which are crystal clear:

> "I therefore beg to inform Your Honour that *I neither recognize nor submit that the Bahrain Government have the least lawful connection with the Hawar Islands*, and that I view that whatever measure which have been lately taken by the Bahrain Government as a challenge and an encroachment upon my rights *against which I most strongly protest*, and therefore, *as I have informed you before, I reserve my rights to the Hawar Islands while not recognizing any measure which may be taken in them* . . ."[23]

68. In these circumstances we may ask ourselves if and why Qatar's protests should be inoperative and whether Bahrain has succeeded in conducting for 61 years an effective, continuous and peaceful occupation of the Hawar Islands. It is to this that we must now turn.

69. International jurisprudential practice sets great store by the conduct of States. A State's silence, its consent, its acquiescence, any waiver of its rights, any protest, any effect of estoppel upon its actions, all represent important elements in the creation or extinction of a title over a territory. In the present case, Qatar has always protested, and never ceased to do so, on the one hand against the British decision of 1939 and on the other against the activities of Bahrain in the Hawar Islands. This consistent course of conduct by Qatar is such as to prevent any title arising in favour of Bahrain.

70. Qatar's refusal to acquiesce in Bahrain's potential *effectivités* over the Hawar Islands is manifest. It cannot be disputed that since 1938 Qatar has never ceased to protest against the "illegal occupation" of the Hawars. In 1939, when the British decision was notified to him, the Ruler of Qatar protested. Given the unequal relationship between his country and the United Kingdom, and looking beyond the language of courtesy and deference, Qatar's position could not be interpreted otherwise than as a refusal to acquiesce and as a request for a re-examination of the decision, all of which prevented Bahrain's *effectivités* — assuming that there was any substance to them — from producing any effects in law.

71. Since then, a number of clear manifestations of lack of acquies-

[23] Memorial of Qatar, Vol. 8, Ann. III.213, p. 59; emphasis added.

cence can be noted. They have taken various forms, such as proposals for mediation, arbitration or judicial settlement.

72. Thus in the 1960s Qatar put forward the idea of an arbitration, which in itself could only have been with a view on the one hand to re-examining, indeed calling into question, both the British decision of 1939 and the line of 1947 and, on the other, to expressing a refusal to acquiesce in these two decisions. Thus it was envisaged that the proposed arbitration would settle the questions of the maritime delimitation, of the status of Fasht ad Dibal and Qit'at Jaradah and of sovereignty over the Hawar Islands. This refusal to acquiesce in the acts of occupation by Bahrain in the Hawars was particularly noteworthy in that it must be regarded as having been recognized by the United Kingdom itself, author of the two decisions, inasmuch as the proposal for arbitration by Qatar had been approved by the British, who still exercised protective authority over the two countries.

73. We are bound to recognize that Qatar demonstrated perseverance in its refusal to acquiesce in the award of the Hawars, for, when the proposal for arbitration failed, it replaced it with another, equally unsuccessful, for mediation. This task was entrusted to Saudi Arabia, despite the latter's being traditionally regarded as closer to Bahrain than to Qatar, with which it had a territorial dispute. That mediation, conducted in principle since 1976, in fact from 1983 to 1990, and still regarded as not extinguished by the seisin of the Court in 1991, has up to the present day, after 24 years, failed to achieve a result. It has still not been terminated, for it continues in principle to this day, as an adjunct to the work of the Gulf Cooperation Council, which is also seised of the matter.

74. Finally, the refusal to acquiesce in the decisions of 1939 and 1947 is clearly implied by Qatar's wish to bring Bahrain before the Court on the basis of the 1987 and 1990 agreements, which are in themselves manifestations and evidence of this refusal to acquiesce, and which served as the basis for our jurisdiction. The Court is well placed to attest to the perseverance with which Qatar succeeded in overcoming the objection to jurisdiction raised by Bahrain and in having the Court declare itself competent. The difficult episode of the jurisdiction phase (1991-1995) is indeed particularly significant in this regard. Nor should we lose sight of the fact that notwithstanding, or looking beyond, the procedural arrangements before the Court, Qatar clearly remains the applicant Party in this case, a fact which patently demonstrates that Qatar has never accepted the relevance of Bahrain's *"effectivités"* on the Hawar Islands. By the very fact of its seisin, the Court is thus itself placed in a position to recognize Qatar's persistent refusal to acquiesce in the two British decisions of 1939 and 1947.

75. In sum, Qatar's protests, in all their forms, with regard to all kinds of actions undertaken by Bahrain in the Hawar Islands, are both numerous, varied and persistent. They show that Qatar did not allow Bahraini *effectivités* to be acquired by remaining silent. Moreover, ever since the case was brought before the Court, Qatar has consistently protested

against the non-observance of the status quo by Bahrain. Between the filing of its Memorial and that of its Counter-Memorial, that is to say over a period of a mere two years (1996-1997), we note no less than 13 protests in the form of Notes Verbales concerning:

(i) Bahraini legislation whenever it affects the Hawar Islands;
(ii) violations of airspace in those islands;
(iii) advertisements published by Bahrain in the press relating to its activities in the islands and its claims to sovereignty over the group[24].

* * *

76. International jurisprudence refers to acts capable of constituting manifestations of the peaceful and continuous exercise of State authority over a territory. The acts of occupation of the Hawars by Bahrain took place immediately after the "provisional" British decision of 1936. It is necessary to assess the nature of those acts and to ascertain whether they represent *effectivités* capable of establishing a title by Bahrain over those islands. We must also examine the conduct of Qatar throughout that period in order to determine whether or not that conduct could effectively prevent Bahrain from establishing such title. However, the circumstances in which Bahrain undertook its acts of occupation between the date of the provisional decision of 1936 and that of the final decision in 1939 are such that a distinction must be drawn between the acts of occupation for the period 1936 to 1939 and the other manifestations of authority after 1939.

77. First, the period 1936 to 1939. The United Kingdom had provisionally ruled in July 1936 in favour of awarding the Hawars to Bahrain. The British authorities failed to inform the Ruler of Qatar of this. This was a period marked by rivalry over oil interests. The Ruler of Bahrain was preparing to grant an additional oil concession in respect of a sector that was still unallotted, in which, according to his declaration of April 1936, he included the Hawar Islands. For his part, the Ruler of Qatar had in 1932 granted exploration rights over the entire peninsula, while in 1933 he had authorized geological surveys over the whole territory of Qatar, expressly including the Hawar Islands and ultimately, in 1935, granting a full concession over the whole of the peninsula and its adjacent islands.

78. Bahrain admits that it established various military facilities on the main island of Hawar during this period. That is a form of occupation, but it was unlawful in so far as it was carried out in a somewhat clandestine manner. Thus these activities were not conducted peacefully and cannot therefore be numbered among those constituting the manifestation of an exercise of sovereign authority. On the other hand, however, at

[24] See Counter-Memorial of Qatar, Vol. 5, Appendices 1 and 2.

the period in question the Sheikh of Qatar was supposed to be exercising exclusive authority over the entire peninsula, including the Hawars, and his lack of vigilance in remaining unaware of the existence of foreign activities on his territory might at first sight seem somewhat puzzling. It is true, though, that the Hawars were an inhospitable desert region. The rulers of Qatar knew that they remained open to seasonal fishing practised by individuals of any origin, who were traditionally free of any controls. In modern terms, the régime of the Hawar Islands could be assimilated to that of a free zone.

79. The lack of vigilance was not, however, total. The Ruler of Qatar, Sheikh Abdullah bin Qasim al-Thani, as soon as he became aware of the acts of Bahraini occupation, protested orally in February 1938, then in writing on 10 May 1938 to the British Political Agent in Bahrain[25].

80. Note should also be taken of the difficulty in which Bahrain finds itself in, on the one hand, arguing in favour of the legal nature of the 1939 decision while, on the other, recognizing the existence of the military facilities installed by it in 1937-1938. Is this not in a sense an acknowledgment of the fact that it failed to respect the status quo during the preparatory phase of what it voluntarily characterizes as the arbitral award of 1939? At a time when the case was, from Bahrain's standpoint, *sub judice*, it carried out acts of occupation.

81. In view of all of these circumstances and above all of, on the one hand, the failure by the United Kingdom to inform the Ruler of Qatar of the "provisional" decision of 1936 to award the Hawars to Bahrain, and, on the other, of the necessarily non-pacific nature of those clandestine operations, we would be justified in taking the view that *the acts carried out by Bahrain over the period 1936-1939 do not constitute* effectivités *opposable to Qatar or capable of generating a title in favour of Bahrain.*

82. Bahrain has provided the Court with a table setting out 80 types of activity which it had undertaken on the Hawar Islands since the eighteenth century. If we confine our attention to the period since the 1939 decision, it will be noted that according to this table the activities in question number 20. But, in general terms, to quote the Arbitration Tribunal in the *Eritrea/Yemen* case, they are "voluminous in quantity but sparse in useful content" (para. 239). We must therefore not be deluded by the number of *effectivités*, even assuming that they merit being described as such. One by one, the *"effectivités"* invoked evaporate upon examination, the quantity failing to make up for the lack of quality. Three centuries before Christ, Euclid said: "a pile of wheat remains a pile of wheat if you take away one grain, then another grain and so on. And yet there comes a time when, by removing one grain, there is no longer any pile."

[25] Memorial of Qatar, Vol. 7, Ann. III.150, p. 253, and Agent's reply in Memorial of Qatar, Vol. 7, Ann. III.156, p. 279.

The lesson for lawyers to reflect upon is that degrees of quantity must not conceal variations in quality. As one court put it, "a vast mass of evidence will not suffice to constitute proof, any more than a hundred hares will make a horse".

83. Furthermore, a number of those activities were undertaken after the acceptance of the status quo to which both Parties had committed themselves on commencement of the Saudi mediation in 1983, or indeed after acceptance of the status quo subsequent upon the Court being seised of the case in July 1991. But any act capable of modifying the status quo must be considered as null, and devoid of effect in law.

84. While there are military facilities on the main Hawar Island which date back to the 1930s, the *civilian* works, by contrast, date back only a few years, in particular since the institution of proceedings before this Court (roads, port, hotel, bungalows, palace and associated buildings). These facilities, necessarily unproductive on an island without any fresh water, which has to be imported at great expense from Bahrain, are in all likelihood intended to give the impression of effective occupation.

85. In conclusion, all of the above analysis leads to the conclusion that Bahrain has not succeeded in demonstrating the existence in its favour of a better title than that formed and consolidated by Qatar over the Hawar Islands. These should therefore be awarded to Qatar, or alternatively, in a peacemaking solution which would moreover not be without basis in law — assuming that we abide by the logic of the choice made by the Court, which confined the ground for its ruling to the British decision of 11 July 1939 — they should be shared between the two States. But that would nonetheless be to lose sight of the existence of another far more decisive ground: the fact that Qatar possesses a historical title to the Hawars that has been established progressively, consolidated and recognized. That is what we must examine now.

* * *

V. The Historical Title

86. We believe that the flaws noted in the British decision of 1939, together with the overall structure of the Court's Judgment, founded as it is solely on that decision, already could not justify the award of the Hawars to Bahrain. But, in addition, Qatar holds a better title, consisting of its original title to the Hawars. That is what must now be shown.

87. What first strikes the man in the street when glancing at a map of the region is the indisputable fact that, physically, the Hawar "Islands" belong to the same continental mass as Qatar. When the tide goes out each day, Qatar's whole land mass resembles a hand, whose thumb is the Hawars. As shown by British Admiralty Chart No. 2886 of 1994 (see p. 215

below), entitled "Jazîreh-Ye Lavan and Jazîrat Dâs to Ra's Tannūrah"[26], there is no break between the thumb and the rest of the hand. The Hawar "Islands" are not actually islands but an indivisible part of the land mass of Qatar, cut off by the sea when the tide comes in and joined to the land again when the tide goes out. This elementary lesson in macrogeography seems to have escaped the Court. In reality, and with a certainty beyond the power of even the most rigorous Thomist to dispute, the Hawar Islands are simply a peninsula which, in geographical terms, forms an integral part of the rest of the mainland.

88. It would even be superfluous in this connection, not to say inappropriate, to invoke the principle based on the strong legal presumption that islands situated in a coastal State's territorial sea belong to that State, because the Hawars cannot be said to be "islands" in the true sense, but rather a peninsula — firmly attached to the mainland — emerging daily when the tide goes out.

89. No legal reasoning, however ingenious — and certainly no reasoning in this Judgment — can overcome this inescapable fact. Long before the Court, macrogeography determined, and for all time, that the peninsula of the Hawars belongs to the Qatari mainland, of which it is an integral part. Such a decree of nature cannot be abrogated. The enormous map file submitted to the Court by Qatar, containing maps from a wide variety of sources and eras, confirms this geomorphological reality and clearly shows, as will be seen below, that the Hawars were and are recognized to belong to Qatar.

90. And yet the extent of the effort devoted by the Court's Judgment to seek to justify the contrary conclusion must be admired. However, let us first recall that the Judgment has, very damagingly, avoided examining the absolutely crucial issue of historical title. We ourselves shall examine that question, for, like a number of other issues, it totally contradicts the solution adopted by the Court, particularly since in our view the Court examined the ground based exclusively on the British decision of 1939 from one standpoint only — and a superficial and purely formal one at that — to the exclusion of other more decisive aspects, notably substantive ones. In these circumstances, our concern to consider all of the legal grounds advanced by the Parties, including in particular *the argument based on historical title*, can readily be understood. It is to this latter argument that we shall now turn.

* * *

91. Did Bahrain hold, and does it still hold, a historical title to the Hawars? Both more and less can and should be said on this subject. Even

[26] The chart bears the imprint: "Published at Taunton 29th April 1994 under the Superintendence of Rear Admiral N. R. Essenhigh, Hydrographer of the Navy."

the most superficial historical review shows that, when the Al-Khalifa dynasty was thriving, Bahrain had dominion over a large part of the Gulf region, and in any event and for many years, over Qatar. But Bahrain also long ago (we shall set out the significant dates below) lost all historical title to any part of the Qatari peninsula, including the Hawar Islands. The branch of the Utubi tribe from Arabia which gave birth to the Al-Khalifa dynasty in Bahrain first settled in the south-west of the Qatar peninsula, certainly in the vicinity of Zakhnuniyah and perhaps on the Hawar Islands as well, at least in winter, but in any event definitely in the north-west in the Zubarah area.

92. These semi-sedentary *"Arabian"* tribes who settled on the west coast of Qatar were not "Bahrainis" occupying Qatar. They had not yet entered Bahrain. They were to become *"Bahraini"* when they left Qatar in order to establish themselves in turn in Bahrain, where other tribes, also from central Arabia, had already settled. The Al-Khalifa branch, natives of Arabia and settled in Zubarah, the cradle of the future dynasty, became Bahraini *when they left Zubarah to settle in Bahrain from 1783 onwards*. It can therefore be said in this respect that the Arabian tribes which were the forebears of the Bahrainis and of today's ruling dynasty in Bahrain were first Qataris, by virtue of their settlement in Zubarah, before becoming Bahrainis as a result of spreading out to Bahrain and through the Gulf region.

* * *

93. Before investigating any further Bahrain's or Qatar's historical title to the Hawars and what was to become of it, we wish to express our deep regret that the Judgment avoids giving due consideration to this question. The Judgment has timidly shied away from undertaking the essential research which was, ultimately, determinative for the award of the Hawars. Admittedly, the Court is not a learned assembly of historians and is not technically equipped to embark on historical research concerning the past of two litigant States. Yet *a court is obliged to meet the challenges with which history confronts it* in a particular case. It must take account of the interplay between historical events and territorial disputes, notwithstanding all the various difficulties which the juridical approach may face. In the course of its up-and-down, indecisive relationship with history, a right will in effect arise on the basis, *inter alia*, of the various possible stages in the establishment of a title, such as its formation and subsequent consolidation or disappearance. The jurist has thus had to learn to identify the criteria and conditions for the creation of a title, to choose "the better" of two competing titles, to distinguish an "original title" from a "derivative title", an "absolute title" from an "inchoate title", and so on.

94. International fora have found themselves faced with the issue of historical titles far more often than is thought, and the law has thus been

obliged to deal with the matter. It follows that, however limited their qualifications in the discipline of history and however poor the tools at their disposal, judges are under a duty to decide the territorial disputes submitted to them. There are many instances of international arbitral awards where the arbitrators have had to deal with historical titles[27]. Nor have the Permanent Court of International Justice and the International Court of Justice, for their part, been able to avoid ruling on historical titles, for example in the following cases: *Legal Status of Eastern Greenland* (1933), *Fisheries (United Kingdom* v. *Norway)* (1951), *Minquiers and Ecrehos* (1953), *Sovereignty over Certain Frontier Land* (1959), *Right of Passage over Indian Territory* (1960), *Temple of Preah Vihear* (1962), *Frontier Dispute (Burkina Faso/Republic of Mali)* (1986), *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (1994) and *Kasikili/Sedudu Island* (1999); and by way of advisory opinion, in the *Western Sahara* (1975) case. Furthermore, the Central American Court of Justice also dealt with historical issues in the *Gulf of Fonseca* case (1917).

95. We have made a point of citing these various cases in a virtually exhaustive manner in order to show how numerous they have been and to counter the erroneous notion that our relative lack of the scientific ability to form accurate historical judgments should incline us to exercise caution by confirming the status quo in the present case. We do not share that point of view.

96. It is thus regrettable that the Judgment has confined itself to a recitation of historical data without ever — or hardly ever — drawing legal conclusions from them, despite the fact that this is the Court's role. The historical narrative in the Judgment is a linear succession of events, presented in a way that raises questions as to its usefulness in terms of the general reasoning. Thus the Judgment presents us with a blurred X-ray, a one-dimensional scan, of the history of the two countries, from which a determination of the historical title to the Hawars and the identification of the holder of that title is missing, and remains still to be undertaken.

97. And yet international law today possesses principles and rules whereby it can create a *"framework"* for historical facts — bring them under control, interpret them, give them a *legal meaning* and draw from them all of the conclusions that they entail in law. This is clearly an essential role of a court, a role which it has a duty to fulfil and one which it cannot shirk on the convenient ground that it is not a master of the discipline of history. In reality it is not a question of historical knowledge, but rather of the *application of the legal rules and principles which*

[27] See the *Alaskan Boundary Dispute* (1903), *Anglo-Brazilian Boundary Dispute* (1904), *Island of Bulama Arbitration* (1870), *Delagoa Bay Arbitration* (1875), *Grisbadarna Arbitration* (1909), *Chamizal Arbitration* (1911), *Island of Palmas Arbitration* (1928), *Colombia-Venezuela Boundary Arbitration* (1922), *Guatemala-Honduras Boundary Arbitration* (1933), *Walfish Bay Arbitration* (1911), *North Atlantic Fisheries Arbitration* (1910) and *Eritrea/Yemen* case (1998).

frame the historical facts. In this respect the court's approach should not be thought of as a hazardous venture into what for it may be *"terra incognita"*; quite to the contrary, it is a *purely juridical operation* appertaining to a court's function and jurisdiction.

98. As part of this juridical operation, the court has to weigh up the manifestations of authority which a State power has imposed in the past on a given territory. It is in the warp and weft of history that it discerns these "effectivités *in action*" and ascertains the degree of consolidation which they impart to the State's historical title to that territory. This operation, juridical by nature, is often difficult when applied to historical material, but that has never dissuaded or discouraged

> "the international adjudicator, who has often had to tackle it in dealing with situations rendered obscure by distant historical origins which defied any precise chronological determination. What experience has shown is the necessity to assess the *effectivité* in the overall light of its historical development."[28]

It is interesting to observe that in carrying out this juridical operation the International Court of Justice in many cases has not shrunk from a penetrating analysis of historical detail where that was necessary. In the *Minquiers and Ecrehos* case, for example, "the Court comprehensively and in great detail weighed up the probative force of numerous manifestations of governmental activity"[29].

99. Over and above this juridical operation regarding the formation, consolidation or extinction of a *"historical title"* to a territory, the court may find that a *"legal title"* exists as well, created in most cases by a treaty relating to the territory in question. Here too it undertakes an operation of a fundamentally juridical nature by employing legal criteria in order to assess the weight to be given respectively to the *effectivités*, the historical titles and the legal titles invoked by the parties in their conflicting claims. Certain of these legal criteria of assessment have been identified by the Court. For example, the Chamber in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* established a scheme of the dialectical relationships which may exist between *effectivités*, historical titles and legal titles. In this respect four situations can be identified that may enable the court to settle a territorial dispute:

(a) *the title and the* effectivité *correspond:* this situation will simply confirm "the exercise of the right derived from a legal title"[30]. This identity of *effectivités* and title eases the court's task, and it will have no difficulty in making a determination;

(b) *the title and the* effectivité *do not correspond:* "preference should be

[28] Charles De Visscher, *Les effectivités du droit international public*, 1967, p. 107.
[29] Charles De Visscher, *op. cit.*, p. 105.
[30] *I.C.J. Reports 1986*, p. 587, para. 63.

given to the holder of the title"[31]. This too is a situation presenting little difficulty for the court, which will normally have to give priority to the legal title over the *effectivité*;

(c) *the title is unclear* as evidence of sovereignty: in this case the *effectivités* play an important role in interpreting the title; when combined with it, they give the title its true aspect and help the court to reach a decision;

(d) *the title is non-existent:* in this case, which requires more active intervention by the court, the *effectivités* play a role of absolutely prime importance; they constitute a kind of *residual* title.

100. International arbitral and judicial jurisprudence has developed yet other rules and principles for attributing legal consequences to historical facts and actions. Effective possession, the objective element of a *"corpore possessio"*, should be accompanied by a subjective element consisting of the *"animus possidendi"*:

> "it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist . . .: the *corpus* and the *animus possidendi* or *occupandi*" (*Legal Status of Eastern Greenland, 1933, P.C.I.J., Series A/B, No. 53*, Counter-Memorial of the Norwegian Government, Ann. No. 38; and dissenting opinion of Judge Anzilotti, p. 78).

101. *We fear in this respect that today's Judgment has not fulfilled the function* which could have been expected of it, that of a juridical review and interpretation of the sequence of historical events, with a view to determining whether a historical title to the Hawars existed and identifying its holder. The Court's only effort at historical enquiry and analysis concerned Zubarah, though it is regrettable that the Court in fact failed to draw all the conclusions from the result which it reached, namely that Qatar held a *historical title* to its own peninsula! The Court thus recognized the territorial integrity of the peninsula as far as Zubarah was concerned, only to dismantle it when it came to the Hawars. Moreover, as for the methodology employed, why, it may be asked, did the Court determine the historical title to Zubarah, the first issue addressed in the Judgment, and not do the same for the Hawars, in the next part of the Judgment? We believe that we are fully justified in beginning, as is proper, by placing the matter of the Hawars in its historical context.

* * *

102. The British presence in the Gulf had the legal effect, *inter alia*, of creating two separate political entities, Bahrain and Qatar, in the late

[31] *I.C.J. Reports 1986*, p. 587, para. 63.

nineteenth century. The British had established themselves in the Gulf in order to protect their maritime trade and safeguard the route to India. From 1797 to 1819 they rebuffed tribal attacks and piracy and in 1820 imposed a "General Treaty" establishing perpetual maritime peace between Great Britain and the sheikhs, tribes and individuals of what was now the "Trucial Coast". The salient characteristics of the British presence may be summarized as follows:

(a) They established neither sovereignty nor suzerainty over the sheikhdoms or territories of the Trucial Coast, as we shall see later.

(b) Within the limits dictated by the needs of maritime peace and the protection of their interests, the British did indeed find themselves intervening in tribal conflicts or supporting one tribe against another, but they did not interfere to any greater extent in their affairs. This will be clear from the evolution in the respective statuses of Bahrain and Qatar, a subject we shall consider later in detail as we move from one treaty to another.

(c) On the one hand the British maintained the Al-Khalifa in power in Bahrain, protecting them against Muscat in 1820, the Wahhabis in 1835 and 1859, and the Persians in 1843 and 1869. On the other hand, however, they refused to back Bahrain's intermittent claims to the west coast of Qatar, or to the Hasa coast in 1861. They imposed a treaty on Bahrain in 1861 by which the Al-Khalifa renewed their commitment to refrain from any maritime aggression.

(d) The British policy was above all pragmatic and took account of shifting balances in the region. Throughout the first half of the nineteenth century and up to the 1860s, the legal impact of this policy, formalized in two treaties with Bahrain in 1867 and 1868 (after others in 1820, 1847, 1856 and 1861) and a treaty with Qatar in 1868, was *to establish the existence in the 1860s of two quite distinct political entities, Bahrain and Qatar, neither of which was in any way subordinate to the other.*

103. Thus, throughout the nineteenth century Qatar benefited from the relative weakness of Bahrain, which allowed the Qatari sheikhs *to form and consolidate their title* to their peninsula, secure from Bahraini claims to the west coast of Qatar. The Ottoman presence on the peninsula for 44 years was to have very much the same result.

104. *The formation*, and then *the progressive consolidation, of the Al-Thanis' title* was greatly facilitated by two things: not only did the British impose treaties on Bahrain (to be discussed later) forbidding it to carry out any form of aggression — and thus, in the context of the time, to undertake any territorial conquests, in particular on the west coast of Qatar and its adjacent islands — but they also physically prevented or resolutely punished any intervention by Bahrain in the Qatar peninsula.

In Qatar, therefore, the authority of the Al-Thani gradually spread, while that of the Al-Khalifa progressively shrank.

* * *

105. The two years 1867 and 1868 are significant in this regard. Each marked a decisive turning point. *The year 1867* witnessed the collapse of Bahraini authority in Qatar following the arrest of a Qatari Bedouin in the peninsula and his transfer to Bahrain for trial. *The year 1868* then demonstrated even more forcefully the emergence of a Qatari political entity which was completely separate from Bahrain, following a punitive Bahraini expedition to Qatar which was met by a Qatari attack on Bahrain. All this was reflected in the agreements concluded between Great Britain and Bahrain and Qatar respectively with a view to stopping the "*war*" — this was the word used in the official British documents — dealing with its consequences and establishing conclusively that two separate political entities existed, Bahrain and Qatar, each independent of the other and each governed by an "independent Ruler", the expression thenceforth customary in all the treaties concluded by Great Britain with each of the two countries.

These two years are therefore crucial. Briefly, what took place was as follows.

106. *(a)* In 1867 Bahrain arrested a Qatari Bedouin in the peninsula and transferred him to Bahrain for trial: the subsequent violent reactions marked *the end of one title and the formation of another*. In response to the arrest, the Qatari authorities, led by the Naim, a tribe that was however supposedly faithful to the Ruler of Bahrain, revolted, defeated Bahrain's representative in Qatar at the head of his troops and expelled him from Wakrah. In legal terms, this historical episode, which put an end to the Bahraini presence in Qatar, reflected the cesser of Bahrain's title to the Qatari peninsula and the commencement of the formation of a title by Qatar to that entire area.

107. *(b)* The war between Qatar and Bahrain in 1867-1868 was settled by the 1868 treaties between Great Britain and each of the two now mutually independent political entities. In October 1867 Sheikh Mohammed of Bahrain had despatched his brother Ali to punish Qatar. With the help of 2,000 men mobilized by the Sheikh of Abu Dhabi, Zeid bin Khalifa, Ali destroyed a large number of Qatari vessels and sacked the towns of Biddah (Doha) and Wakrah [32]. Qatar launched a counter-attack against Bahrain. The naval action by Qatar resulted in the destruction of a number of Bahraini vessels and in Bahraini dead. But Bahrain resisted.

[32] Cf., in addition to the pertinent references in the Court's case file, Gholam-Reza Tadjbakhche, *La question des iles Bahreïn, op. cit.*, pp. 122 *et seq.*, and the following official British sources: *Disturbances in Persian Gulf. Account of the Violation of the Maritime Truce by the Chiefs of Bahrain and Abuthaby (Abu Dhabi)*, publication of the Foreign Department of the Government of India, No. 19.

Faced with this war between two now clearly distinguished political entities and convinced that the sheikhs of Bahrain and Abu Dhabi had been the first to disturb the Maritime Truce, the British Resident, Lieutenant-Colonel Pelly, acting on instructions from his Government, then sent an ultimatum to Sheikh Mohammed of Bahrain on 2 September 1868[33], accusing him of having *violated his undertakings through his acts against Qatar* and demanding reparation from him.

108. Pursuant to an undertaking signed on 6 September 1868, Sheikh Ali declared that Sheikh Mohammed, having repeatedly committed irregularities at sea, and having now fled, had "forfeited all claims to his title as principal Shaikh and Chief of Bahrain"[34]. Sheikh Ali became the "Independent Ruler" of Bahrain in the place of his brother Sheikh Mohammed.

109. By this Anglo-Bahraini Agreement of 1868, which took note of the change in ruler, *Bahrain admitted that it held no rights of sovereignty over the Qatar peninsula.* In legal terms, this Agreement of 6 September 1868 imposing various British penalties, both financial and otherwise, supplemented the Anglo-Bahraini Convention of 18 May 1861, which already tied the hands of the Sheikhs of Bahrain and required them to abstain from all maritime aggressions[35]. The legal undertaking of 18 May 1861 thus received specific application in the Agreement of 6 September 1868 and *its clear legal consequence was to prevent Bahrain from maintaining or extending its authority over Qatar. Clearly therefore, through these two instruments, the 1860s demonstrated that Bahrain was losing its title to the peninsula of Qatar. Such were the legal effects of the British presence.*

110. But those effects did not stop there. Having received the surrender of Sheikh Ali of Bahrain on board ship on 6 September 1868, the British Resident Pelly, in a letter dated 11 September 1868, invited Sheikh Mohammed bin Thani of Qatar to join him in turn on board. In itself this political initiative was significant of the existence of two separate entities to which Great Britain addressed itself. *The British Government declared itself an "arbitrator of the Truce" between two sheikhdoms which were now independent of each other. Its new capacity deserves to be borne in mind in our subsequent analysis.*

111. The Agreement of 12 September 1868 which capped this shipboard visit obviously contained the customary warning not to attack Bahrain or disturb the maritime peace. It also contained an undertaking by Sheikh Mohammed bin Thani of Qatar to "maintain towards Shaikh Ali bin Khalifeh" the peaceful relations which had previously existed

[33] Cf. Foreign Office 248/252, Pelly to Mohammed bin Khalifa and, in his absence, to Ali bin Khalifa.

[34] Cf. Foreign Office 248/252, *op. cit.*, Pelly to C. Gonne, and Aitchison, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries*, 1933, Vol. XI, pp. 236-237.

[35] Memorial of Qatar, Vol. 5, Ann. II.20, p. 47.

between Bahrain and Guttur (Qatar) and to refer any difference of opinion arising between them to the British Political Resident[36]. *From the legal perspective, this Agreement thus established clear equality between Qatar and Bahrain, neither of which was entitled to take unilateral action to resolve in its own favour any conflict between them.*

* * *

112. The period after the significant events of 1867 and 1868 saw the gradual consolidation and the recognition of the title of the Al-Thani to the territory of the entire peninsula and adjacent islands (1868-1916). The two Agreements of 1868, one with Bahrain and the other with Qatar, which followed the British intervention of 1867-1868, bear witness to *the conduct* of the British Government. This conduct, which expressed a recognition of the title of the Sheikh of Qatar, manifested itself in the same way in connection with:

(a) the arrival of the Ottomans in the Gulf in 1871;
(b) the Anglo-Ottoman agreements of 1913 and 1914 and the Anglo-Saudi agreements of 1915.

(a) *The Arrival of the Ottomans in the Gulf in 1871*

113. After the death of the King of Arabia, Wahhabi Amir Faisal bin Turki, his two sons Abdullah and Saud disputed the throne, a situation which created unrest; this justified an Ottoman military expedition to Hasa and Nejd in 1871, the Ottoman Empire being the suzerain of Arabia. On this occasion the Turks offered their protection to the Sheikh of Qatar, Mohammed bin Thani, and his son Jassim, both of whom accepted it. As a result, a Turkish garrison was established at Biddah (Doha) in January 1872. *Thus began the 44-year-long Ottoman presence in Qatar, from 1871 to 1915. This made it impossible for Bahrain to maintain any presence there, the British having already voiced their satisfaction that the Ottomans had not expressed any designs on Bahrain itself.* The Ottoman administration gradually established itself *throughout the peninsula of Qatar.* Qatar became a "kaza", in other words a province, of the Ottoman Empire, and was administered accordingly; the Sheikh of Qatar was appointed "kaimakam", head of the administrative province. The Ottoman "kaza" constituted the entire peninsula of Qatar. It is therefore interesting to examine *the conduct both of Bahrain and of Great Britain.*

[36] Memorial of Qatar, Vol. 5, Ann. II.28, p. 85. "Sealed in our presence by Mahomed bin Sanee of Guttur and signed by Lewis Pelly, the British Political Resident, and R. A. Brown, Captain of H.M.'s Ship "Vigilant"".

(i) *First, the conduct of Great Britain*

114. As soon as the Ottomans began to penetrate Qatar, Great Britain attempted to ascertain their intentions. It made it known to Constantinople that it would not remain indifferent to any Ottoman penetration of *Bahrain and Oman, but it said nothing about Qatar.* Great Britain's attitude in this respect was perfectly logical, in so far as its main concern was to ensure maritime peace in the Gulf, and at that time it was not bound by any obligations of protection other than against conquest or attack *by sea.* Bahrain, being an insular entity, could therefore count on such protection. That was not so for Qatar, which could be invaded by land. What is more, in the case of Qatar, there had been no attack by *"sea"*, nor even any *"attack"* by the Ottomans, who had established themselves there at the invitation of the Sheikh of Qatar. Also, at the time of the Turkish penetration in 1871, Great Britain was not bound by the same kind of agreement with Qatar as with Bahrain. The former did not sign any "exclusive agreement" with Great Britain at any time during the Ottoman period.

115. Great Britain quickly obtained assurances from the Ottoman Empire that its ambitions were confined to Qatar: "The Ottoman Porte explicitly denies all intention of extending supremacy *over Bahrain, Maskat, or the independent tribes of Southern Arabia, and contemplates no attack against them.*"[37] The *vali* (Ottoman governor) of Baghdad, for his part, informed the British *"that Qatar was not covered by a previous Turkish assurance that there should be no interference with Bahrain"*[38].

116. Thus Great Britain's conduct was to refrain from opposing Ottoman policy in Qatar. An understanding between the two Powers meant that this policy would be implemented in the area occupied by the Qatar peninsula as such, since the Ottoman assurances referred to "Bahrain" but not to any part of Qatar by name, such as Zubarah, Hawar or Janan. *This conduct on the part of the British unquestionably consolidated Qatar's title to the whole of the peninsula and its adjacent islands, thus supplementing the conduct which Great Britain had demonstrated in the crucial years 1867-1868 in such a way as to perfect Qatar's title.*

117. The conduct of the British was an acknowledgment of the Ottomans' *de facto* control of the peninsula and its adjacent islands from 1871 to 1915, something which the British never seriously challenged during that period as long as Bahrain's security and the maritime peace were not involved. This conduct was exemplified by the rejection by Britain of the offer made to it in 1891 by Sheikh Jassim of Qatar to conclude a treaty with it on the same terms as it had done with the Trucial Chiefs. *Britain*

[37] Memorial of Qatar, Vol. 4, Ann. II.7, p. 48.
[38] Lorimer, in Memorial of Qatar, Vol. 3, Ann. II.5, p. 210.

sought to avoid upsetting the Ottomans unnecessarily by ending its recognition of their control over the peninsula[39].

(ii) *The conduct of Bahrain during the period of Ottoman establishment in Qatar: Bahrain's tacit acquiescence*

118. A perusal of the evidence before the Court reveals *no protest on the part of Bahrain*, either directly or through Great Britain, against the authority exercised by the Ottomans and the Qatari sheikhs over the whole of the Qatar peninsula.

119. Bahrain's *silence* during the Ottoman period from 1871 to 1915 will be discussed in detail later, and expanded to cover the period 1915-1937. Even in the Ottoman period, however, *this conduct on Bahrain's part fell below the standards required in international law* if Bahrain had wished to retain or recover its authority over the Hawar Islands, that is to say, over islands which there was *a strong legal presumption* (we shall revert to this later) to place in Qatar's sphere of sovereignty by reason of their proximity (territorial sea) to the peninsula.

120. By this conduct, Bahrain failed to halt the *consolidation* of Qatar's title to Hawar (and Zubarah and Janan) and recognition of that title by other Powers. Like his predecessors, Major Prideaux was anxious to limit the Ottoman presence to the Qatar peninsula. In 1909 he visited Zakhnuniyah to meet the Dowasir — whose allegiance was being solicited by the Ottomans — and then proceeded to Hawar. On his return to Bahrain he acquainted its Sheikh with his visit, out of concern that the Sheikh might lay claim to both these places. The Sheikh of Bahrain's response, in a letter of 30 March 1909, was a claim to Zakhnuniyah, *but none to Hawar*[40]!

(iii) *The conduct of the Sheikhs of Qatar and the spread of their authority to the entire peninsula*

121. The Al-Thani gained in authority by the Ottoman presence. Under the umbrella of the Ottoman Empire, Sheikh Jassim gradually strengthened his title to Hawar. The Turks having appointed him "kaimakam" of the "kaza" or province of Qatar, he had jurisdiction over Odeid as well. Shielded by the Ottomans, he succeeded in imposing himself on all the various tribes in the peninsula. By controlling Qatar through the sheikh, the Turks lost nothing themselves while being of maximum benefit to him. The Ottoman protection was both sufficiently effective to enable him to command the obedience of the tribes and sufficiently light-handed to leave him master of the peninsula and its adja-

[39] Memorial of Qatar, Vol. 5, Ann. II.8, p. 121.
[40] Memorial of Qatar, para. 5.40, and Vol. 6, Ann. III.52, p. 241.

cent islands. Lorimer, such an astute political observer, wrote that "little or no change was produced by the presence of a Turkish post at Dohah . . . the Al Thani Shaikhs of Dohah were still the principal factor in politics"[41].

122. Bahrain[42] has, however, observed that the power seemingly exercised by Sheikh Jassim of Qatar was no more than illusory. Great Britain had once warned him about having failed to maintain order in the peninsula and prevent or suppress piracy throughout the west coast of Qatar. It should be noted from this that:

— by thus attributing responsibility to Sheikh Jassim, Great Britain again *recognized* his authority over and title to Qatar;
— in international law, a State is not subject to *objective responsibility* for everything which may occur in its territory; there are circumstances in which it can be relieved of its responsibility;
— finally and above all, what is more important is that Great Britain held Qatar responsible for the disturbances on the west coast, but not Bahrain, thus ceasing to recognize any Bahraini authority over the Hawar Islands or Zubarah on that same coast.

* * *

123. The Anglo-Ottoman agreements of 1913 and 1914, the Anglo-Saudi agreement of 1915 and the Anglo-Qatari agreement of 1916 marked the completion of the consolidation of the Al-Thanis' title and its recognition by treaty.

(b) *The Convention of 29 July 1913 Respecting the Persian Gulf and Adjacent Territories*

124. This Convention, because of its Articles 11 and 13, is of great importance for our purpose.

(i) *First, Article 11*

125. This Article is worded as follows:

> "The Ottoman sanjak of Nejd, the northern boundary of which is marked by a line of demarcation defined in article 7 of this Convention, ends on the south at the gulf opposite the island of Zakhnuniyah, which belongs to the said sanjak. A line starting from the extreme end of the said gulf shall run due south to Ruba-al-Khali, and shall separate Nejd from the El-Katr peninsula. The boundaries

[41] Memorial of Qatar, Vol. 3, Ann. II.5, p. 210.
[42] Memorial of Bahrain, para. 133.

of Nejd are marked by a blue line on the map annexed to this Convention (annex Va). The Imperial Ottoman Government having renounced all their claims with regard to the El Katr peninsula, *it is agreed between the two Governments that the said peninsula shall be governed, as heretofore, by Sheikh Jassim-bin-Sami [bin Thani] and his successors.* His Britannic Majesty's Government declare that they will not permit the Sheikh of Bahrein to interfere in the internal affairs of El-Katr, to infringe the autonomy of the country, or to annex it."[43]

126. What is the import of this Article?

1. In the first place the two major Powers in the region, Great Britain and the Ottoman Empire, recognize the territorial integrity of Qatar. Article 11 above talks of the "peninsula" of Qatar as a political and geographical entity.
2. The two great Powers also recognize, and consolidate, *the title of the Al-Thani dynasty*, who are mentioned by name. By speaking of the *"heretofore"* of their title, Article 11 gives it a temporal foundation and authenticates it.
3. The Ottoman Empire records Great Britain's renewed undertaking *to oppose any interference* by Bahrain in the Qatar peninsula, thus acknowledging the end of the Bahraini presence in the Hawars (and in Zubarah and Janan) as set forth in the 1868 Agreements.

4 These three elements confirm the end of the Bahraini title and its replacement by the title of the Al-Thani — events which had been recorded and proclaimed 45 years earlier in the 1868 Agreements between Great Britain and Bahrain and Qatar respectively.

5. *Another important point: the map attached to Annex V* (a) *of the Convention confirms the provisions of Article 11 and shows that the Hawar Islands belong to Qatar.*
6. It would be impossible for the denomination "El-Katr peninsula" to exclude any portion of that peninsula unless the Convention expressly said so — which it does not — especially where the question is one of excluding the Hawar Islands, situated as they are in the territorial sea of that peninsula and, better still, physically being an integral part of it.

(ii) *Article 13 of the Convention*

127. As we have just said, Article 11 and the map annexed to the Convention show that the Hawars are not part of Bahrain but definitely part of the peninsula of Qatar. Article 13 demonstrates this just as clearly:

"The Imperial Ottoman Government renounce all their claims with regard *to the Bahrein islands*, including the two islets of

[43] Emphasis added.

> Lubainat-el-Aliya and Lubainat-es-Safliya, and recognise the *independence* of that country. His Britannic Majesty's Government on their part declare that they have no intention of annexing *the Bahrein islands* to their territory."[44]

The reason why the Convention took care to mention by name, so as to include them in "the Bahrein islands", islands such as the two Lubainat, north and south, close as they are to the main island of Bahrain, is that it did not seem natural and self-evident that they should be included in Bahrain unless they were expressly named. *A fortiori*, then, the Hawar Islands, situated further away and therefore not mentioned by name, could not be regarded as forming part of Bahrain, not having been expressly mentioned in the Convention.

128. The Convention of 29 July 1913 was signed, but never ratified. It should be noted, however, that its Article 11, which we have discussed above, was referred to expressly in the Anglo-Turkish Convention respecting the Boundaries of Aden of 9 March 1914, an instrument which was duly ratified. This Article 11 of the Convention of 29 July 1913 was also referred to in Article III of the Anglo-Turkish Convention of 1914, which was also ratified.

(c) *The Anglo-Turkish Convention of 1914*

129. Just as important as the preceding Convention of 1913, this instrument makes several references to "El-Katr" as an entity ("peninsula"). The fact that it does not exclude the Hawar Islands by name from that peninsular entity implies that the two contracting Powers recognized and placed on record the fact that Bahrain had lost any title to the Hawars. These belong to the peninsular entity of Qatar as adjacent islands.

130. In conclusion, the two Conventions of 1913 and 1914 represented a further element to be added to all the others which, since the 1860s, had come together to create and consolidate the title of the Al-Thani to the Hawar Islands.

(d) *The Anglo-Saudi Treaties of 1915 and 1927*

131. Finally, after the British and the Ottomans, it was Arabia's turn to recognize the Al-Thanis' title. This recognition was particularly important in that Ibn Saud of Arabia had long expressed an *animus possidendi* to the whole of Qatar. Having conquered Hasa, he claimed the peninsula again in 1913. He finally renounced his claim as a result of British pressure and concluded a treaty to that effect with Great Britain on

[44] Emphasis added.

26 December 1915[45]. This treaty was followed by a further treaty concluded at Jeddah on 20 May 1927, likewise renouncing any territorial ambitions to Qatar.

(e) *The Anglo-Qatari Agreement of 1916*

132. This agreement is important for several reasons:

(i) *The respective capacities of the contracting parties*

133. Qatar was represented by Sheikh Abdullah Al-Thani as "Independent Ruler" of the *whole* of Qatar and *all* his subjects. Great Britain was represented by Lieutenant-Colonel Sir Percy Cox, the initial signatory, pending subsequent signature of the Agreement by the Viceroy and Governor-General of India. Great Britain appears in a new capacity: it undertakes to offer its *"good offices"* in the event of aggression (by land). *Good offices apply solely as between two entities which are autonomous and independent of each other:* Qatar thus achieved recognition of that status vis-à-vis Bahrain. What is more, Great Britain could not have offered "good offices" to those two countries if they had been its colonies or protectorates.

(ii) *The nature and extent of the protection*

134. Until that time Great Britain's treaty undertakings had been limited to protection in the event of aggression *"by sea"*, which in the context of the time meant protection against actions by Bahrain. The new agreement, in addition to providing for that protection, contained an obligation by Great Britain in Article XI to grant its "good offices" in the event of an aggression *by land*, and "within the territories of Qatar".

(iii) *The territorial area involved*

135. Article XI refers to aggression "within the *territories* [in the plural] of Qatar". The Treaty covers the entire peninsula. This is confirmed in various ways:

— by an article entitled "El Katr, 1908-1916" in *Persian Gulf Historical Summaries, 1907-1928*;
— by a British military publication, the *Handbook of Arabia*, which clearly shows that "Qatar" means the entire peninsula;
— Bahrain nevertheless cited a report dated 12 March 1934 by the British Resident on the subject of his interview with the Sheikh of Qatar. The latter indicated to the Resident that the 1916 Treaty related to

[45] Memorial of Qatar, Vol. 5, Ann. II.46, p. 179.

the "*coastline*" but not the "*interior*." This interpretation on the part of the Sheikh was inspired by special considerations, in particular a desire not to have the choice of a British oil company dictated to him. But it was not consistent with Article XI of the 1916 Treaty, which speaks of the "*territories*" of Qatar. Furthermore, if the Treaty envisaged the "*coastline*" it was thus necessarily referring to the Hawar Islands. Finally, this same 1934 report by the Resident records the appropriate reply he gave to the Sheikh: "And you are the Ruler of *ALL* Qatar and the Treaty extends to the *WHOLE of* Qatar."[46] *Thus, it is legally established that the territory referred to in Articles X and XI of the Anglo-Qatari Treaty of 1916 was the entire Qatar peninsula.* This interpretation is also consistent with Articles 11 and 13 respectively of the Convention of 1913 and the Anglo-Turkish Convention of 1914.

* * *

136. In conclusion to this analysis of the *convergence of history and law*, we believe it apparent that, *assuming that Bahrain had in the past held a historical title to the Hawars*, the Anglo-Bahraini and Anglo-Qatari treaties of 1868 established that it had lost sovereignty over the Qatar peninsula. These agreements marked the end of one title and the birth of another, belonging to Qatar, a new entity separate from Bahrain. Qatar's title was progressively strengthened, to such a degree that the 1916 treaty between Great Britain and Qatar recorded the definitive consolidation of that title. *It is striking, and we believe unfortunate, that the present Judgment has avoided addressing and resolving the question of the historical legal title*, an analysis of which was particularly vital since this constitutes the traditional key to deciding territorial attribution. We do not think that undertaking the historical research was beyond the capability of the Court, especially since each historical juncture was marked out by international treaties and the Court has extensive experience in interpreting instruments of that kind. Moreover, if the Court had taken the trouble to analyse the issue of the historical legal title, that is the *convergence of history and law*, it would have found confirmation of the results of that analysis in considering the *convergence of geography and law*, that is, in:

1. the legal concept of geographical proximity in relation to the question of a coastal State's territorial integrity;
2. the universal agreement, according to the map evidence, on the appurtenance of the Hawars; and
3. the identification and determination of the territorial extent of Bahrain and Qatar, respectively.

[46] Counter-Memorial of Bahrain, Vol. 2, Ann. 122, p. 412; emphasis added.

It is these points which should now be examined, as a form of countercheck to confirm the conclusion drawn from consideration of the historical legal title.

* * *

VI. Proximity and Territorial Integrity

137. The Court's Judgment has almost as little to say on the issues of *proximity, contiguity and territorial integrity* as it does on the question of historical title.

There exists, however, a *strong legal presumption* under international law that islands lying within the territorial waters of a State belong to that State.

> "There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal State, unless there is a fully-established case to the contrary (as, for example, in the case of the Channel Islands). But there is no like presumption outside the coastal belt, where the ownership of the islands is plainly at issue."

So states the Award of 9 October 1998 made by the Arbitration Tribunal in the *Eritrea/Yemen* case under the presidency of Sir Robert Jennings (para. 474). This Award applied the principle of international law that *an island situated in the territorial waters of a State is deemed to form part of the territory of that State.*

138. This is a *"strong presumption"* in law — one which admittedly is not irrebuttable but which cannot be overcome except:

— *in terms of procedure*, by reversing the burden of proof; and

— *substantively*, by invoking a superior title.

139. *The presumption concerns islands situated within territorial waters.* Today the breadth of the territorial sea is 12 miles. The *Eritrea/Yemen* Award of course took this into account. If we go by this figure, *all* the Hawar Islands belong to Qatar. And if we go by the 3-mile breadth which applied at the time of the Anglo-Qatari Treaty of 3 November 1916, the *majority* of the islands and islets of the Hawars lie totally or partially within Qatar's territorial sea. The claim made by Bahrain on 29 May 1938 concerned 17 islands and islets, 11 of which are within the 3-mile limit.

140. Bahrain denied the existence of this principle in positive law and cited no fewer than 11 instances worldwide in which the principle has not prevailed. But Bahrain's argument is irrelevant, since the situations mentioned all derive from special circumstances and were *created by treaty.* Anything — almost anything — can be done by treaty, since the

contractual freedom of sovereign States is a fundamental principle. The *Eritrea/Yemen* Award took good care to say "unless there is a fully-established case to the contrary".

141. What is more, proximity *alone* does not constitute a title. It supplements or combines with other elements to constitute a title. This is clearly the case here.

It will also be noted that the concept of proximity is not as alien to the law as might at first be thought. The notion of "distance" is clearly present in the law of the sea. That of "proximity" derives from it. After all, the title of a coastal State to its territorial sea stems exclusively from proximity. What is more, an *"archipelagic"* State, which is what Bahrain claims to be, is nothing more than a collection of islands having in common *"proximity"* alone.

142. In the present case we are simply recalling the strong presumption that an island belongs to a coastal State if it is situated within the limits of its territorial sea. This presumption exists, and calling it the "principle of proximity" or by any other name cannot detract from its existence merely because the principle comes cloaked in a new guise, such as "contiguity", or because a section of the doctrine — in truth, a rather small one — on occasion challenges it.

143. Bahrain appears to be putting forward the *Island of Palmas* jurisprudence as being opposed to the concept of proximity. That decision is not relevant to the present case. The arbitrator Max Huber discounted the matter of proximity simply because the islands concerned were situated *beyond* the limit of territorial waters, which is not the case here.

* * *

VII. The Map Evidence

144. We shall now turn to the *map evidence*. Since the Court's jurisprudence has determined quite clearly the relative importance of cartographic material as evidence, we shall not revert to this point. Even quite recently, the Arbitration Tribunal established in the *Eritrea/Yemen* case spelled out the importance of maps, which are, as it were, a reflection of general opinion and repute: "Although the Tribunal must be wary of this evidence in the sense that it cannot be used as indicative of legal title, it is *nonetheless 'important evidence of general opinion or repute'* in the sense advanced by Yemen."[47]

145. While the cartographic material submitted by Bahrain was insignificant, Qatar took great trouble to present a substantial collection of map evidence confirming its position in regard to ownership of the Hawar Islands. A large number of maps from Turkey, the United King-

[47] Paragraph 381 of the Award; emphasis added.

dom, Germany, France, Italy, Poland, Russia, the United States, Australia and Iran show that, according to general opinion in various parts of the world at widely differing periods, the Hawar Islands belonged to Qatar.

146. In particular, the maps subsequent to 1868 (the Bahrain-Qatar war and Great Britain's treaties with Qatar and Bahrain respectively) demonstrate the existence of two by-then separate political entities: Bahrain, a compact set of five islands, and Qatar, made up of a peninsula with its adjacent islands and islets, including the Hawar Islands.

147. The map evidence produced by Qatar therefore seems to us far the more persuasive. We take particular note of the maps prepared by the British War Office in 1901, 1908 and 1911, and the sketch-map prepared by that Office in 1934, all of which show that the entire peninsula, including the Hawar Islands, was under Qatar's sovereignty.

148. The existence of a collection of map evidence as extensive as that presented to the Court by Qatar, drawn from such varied sources and covering both the nineteenth and the twentieth centuries, cannot fail to be significant. Where this evidence gives a virtually uniform description of the political and geographical situation of Qatar and Bahrain over such a long period, *it is impossible not to accord it substantial weight in confirming the existence of a title which Qatar possesses to the Hawar Islands* (and to Zubarah as well). *It is in any event impossible to ignore that evidence completely, as the Court's Judgment does, without providing any explanation.*

* * *

VIII. Historical Documents concerning the Territorial Extent of Bahrain and Qatar

149. We have a final countercheck confirming that the Hawars belong to Qatar. This consists of the territorial description of Bahrain and Qatar respectively in various documents and works.

(a) *The Territorial Extent of Bahrain*

(i) *Lorimer's description*

150. Lorimer's description is extremely important. Among other works he published a study entitled "Bahrain Principality" which, over and above its scholarly character, had been approved by the British officials serving in the Persian Gulf, including the influential Captain Prideaux,

the Political Agent in Bahrain, who revised various drafts[48], a point which undoubtedly enhances its importance. According to Lorimer, the "Bahrain Islands" constitute a compact group of islands consisting of five islands, and does not include the Hawar Islands.

151. Lorimer was writing in 1905 and thus took into account the political situation in the region after the major turning point of 1867-1868.

(ii) *J. T. Bent's description*

152. In the *Proceedings of the Royal Geographical Society and Monthly Record of Geography*[49], Theodore Bent published a study entitled "The Bahrein Islands, in the Persian Gulf", accompanied by a map[50]. Both the study and the accompanying map indicate clearly that Bahrain consists of a "group of islands . . . in a bay of the same name about 20 miles off the coast of El Hasa, in Arabia, in the Persian Gulf"[51].

(iii) *Three confidential British memoranda*

153. The first confidential memorandum was drawn up on 25 March 1874 by the British Foreign Service. Two other confidential memoranda were prepared by the India Office, one on 27 August 1928 and the other on 14 July 1934, both signed by J. G. Laithwaite.

The first memorandum, that of 1874, concerns the Ottoman and Persian claims to Bahrain or the "Bahrain Islands". It does not include the Hawar Islands in that term.

Laithwaite's 1928 India Office memorandum is of great interest, dealing as it does with the "Status of Certain Groups of Islands in the Persian Gulf"[52]. It states that the "[Bahrain] archipelago consists of the islands of Bahrein, Muharraq, Umm Na'assan, Sitrah and Nabi Salih, and a number of lesser islets and rocks forming part of the same compact geographical group". The second of Laithwaite's two confidential memoranda, that of 1934[53], gives the same description.

Thus there was no change in the 60 years from 1874 to 1934.

(iv) *Three British military reports*

154. The first is the *Handbook of Arabia,* 1916[54], which offers exactly the same description of Bahrain as a compact group of five islands.

---

[48] Memorial of Qatar, Vol. 3, Ann. II.3, Lorimer, p. 87.

[49] Vol. XII, No. 1, January 1890, p. 1.

[50] *Ibid.*, p. 56.

[51] Reply of Qatar, Vol. 4, Ann. IV.35, p. 211.

[52] Reply of Qatar, Vol. 4, Ann. IV.2, p. 5.

[53] Reply of Qatar, Vol. 2, Ann. II.61, p. 359.

[54] "General. Admiralty War Staff. Intelligence Division. For Official Use only. Attention is called to the penalties attaching to any infraction of the Official Secrets Act", in Reply of Qatar, Vol. 4, Ann. IV.1, p. 3.

155. The second document is the *Military Report on the Arabian Shores of the Persian Gulf, Kuwait, Bahrain, Hasa, Qatar, Trucial Oman and Oman,* 1933[55]. This too offers the same description of Bahrain as a "compact group" forming an archipelago of five islands, whose names are given[56].

156. The third document is the *Military Report and Route Book — the Arabian States of the Persian Gulf 1939*[57] with the same description — 23 years after the first document.

(v) *Numerous other official British documents*

157. It is impossible to examine all of these. Picking a few almost at random, we shall confine ourselves to citing:

— the 1933 letter from Laithwaite of the India Office;
— the letter of 1933 from the Officiating Political Resident to the Secretary of State for India, which contains the following simple, forthright assertion: "Hawar is clearly not one of the Bahrain group";
— a further letter of 1933 from the incumbent Political Resident to the Secretary of State for India expressing a decision to the same effect;
— the Minute drawn up by Mr. Rendel dated 30 December 1937, "Arabian Boundary Disputes: Bahrain-Qatar, 1818-1991", which contains the following statement: "As regards the Hawar Islands . . . *I cannot help regretting* that the India Office went so far as they seem to have done in allotting these islands to Bahrein. They are obviously, from the geographical point of view, a part of Qatar . . ."[58];
— the well-known and highly critical point of view expressed by Prior, Political Agent (1929-1932) and Political Resident (1939-1945), to the effect that the Hawar Islands "belong to Qatar, a view supported by Lorimer"[59].

(b) *The Territorial Extent of Qatar: Its Gradual Identity with the Territorial Area of the Peninsula, Including the Adjacent Islands*

158. This aspect need not detain us long, since the exclusion of the Hawar Islands from the Qatar peninsula as a whole cannot be either supposed or presumed. On the contrary, the presumption must be in favour of their inclusion, by virtue of geography and the unity of the peninsula, as well as by virtue of law, of the principle of proximity and of the presence of these islands in the territorial waters.

159. Moreover, by reason of history too, their inclusion is something more than a presumption: it is an established fact. The history we have

[55] "For Official Use only. This document is the property of the Government of India."

[56] Memorial of Bahrain, Vol. 6, Ann. 330, document submitted by Bahrain.
[57] Reply of Qatar, Vol. 4, Ann. IV.3, p. 11.
[58] Reply of Qatar, Vol. 3, Ann. III.56, p. 349; emphasis added.
[59] Memorial of Qatar, Vol. 8, Ann. III.229, p. 129.

traced throughout this opinion shows that the State of Qatar gradually came into being within the limits of the peninsula.

160. The State of Bahrain is certainly an older edifice than the State of Qatar, but in its territorial extent the State of Bahrain, which in earlier centuries controlled almost the entire Arabian shore of the Gulf as far as Muscat, has shrunk. And from the end of the nineteenth century the State of Qatar has seen its territorial area gradually expand so as to coincide with the territory of the peninsula.

161. The evidence furnished by a well-connected specialist who commanded great authority in his time, *Lorimer*, confirms the territorial extent of Qatar in the study which he devoted to that Principality. In particular, in this erudite and well-researched work, he gives a precise, documented list of the islands and islets making up Qatar; it is not surprising to find that the list contains the Hawar Islands (and Janan as well).

* * *

162. We conclude that:

— the ruling dynasty of Qatar *created a title for itself in 1868* over the entire peninsula and the adjacent islands, including the Hawar Islands;

— this title *replaced* the title which Bahrain undoubtedly possessed and which it lost through its silence and *failure to claim* after 1868;

— this title was gradually *consolidated*, from 1868 to 1916;
— this title was *recognized* by treaty in 1913, 1914, 1915 and 1916 by the British, the Ottomans and the Saudis, the regional Powers;

— this title has been *confirmed* by the map evidence and, as far as Hawar is concerned, by, *inter alia*, the legal principle of proximity.

* * *

IX. The Maritime Delimitation

163. As regards the section of the Judgment dealing with delimitation by a single maritime boundary, we disagree with this on four points:

(a) the Judgment rules *infra petita* in terms of the Bahraini formula as applied to the course of the single median line;
(b) the method adopted in order to draw the provisional median line;
(c) the legal characterization of Qit'at Jaradah;
(d) the course of the final line of delimitation.

* * *

(a) *The Judgment Rules* infra petita *in Terms of the Bahraini Formula as Applied to the Course of the Single Median Line*

164. The Bahraini formula represents the cornerstone of the maritime delimitation which the Court must carry out at the express request of the Parties. As paragraph 67 of the Judgment recalls: "The Parties request the Court to . . . draw a single maritime boundary between their respective maritime areas, sea-bed, subsoil and superjacent waters."

An analysis of the section dealing with the maritime delimitation enables us to identify three distinct elements:

(a) a definition of the Court's task: to draw a maritime boundary;
(b) the nature of that boundary: a single maritime boundary;
(c) a statement of the maritime areas to be delimited: the sea-bed, the subsoil and the superjacent waters.

165. We would moreover recall the following three facts:

(a) The Bahraini formula was accepted by Qatar in December 1990 at the Doha meeting (see paragraph 69);
(b) Qatar, in 1991, and Bahrain, in 1993, have extended the breadth of their respective territorial seas to 12 miles (see paragraph 174);
(c) Finally, Qatar's Application was filed on a date, 8 July 1981, prior to the decisions extending the breadth of the territorial sea; at that particular date, the limits were then three miles, so that no problem of delimitation of territorial waters arose.

166. The present Judgment has, indisputably, satisfied two of the stipulations set out in the Bahraini formula. By contrast, as far as the third element is concerned, and more precisely the relationship between it and the two preceding ones, the statement in the Judgment that this is to be "a single maritime boundary that serves other purposes as well" (see paragraph 174) falls clearly *infra petita* having regard to the terms of the formula. Thus the question is whether identification of the course of the single maritime boundary has the effect of restricting its scope to a purely delimitational function. The answer will depend on the impact, in terms of the definition of the Court's task, to be attributed to the fact that the maritime areas for delimitation have been expressly enumerated.

167. On examination, it is apparent that the course of the single maritime boundary, whilst constructed within the terms of the formula, does not entirely satisfy the structural balance established in that compromissory clause. Recourse to the technique of enumerating the areas to be delimited has a dual aim: *first*, to specify individually the areas for delimitation and, *secondly*, to emphasize the distinct nature of each type of area in relation to the others, since each possesses its own coherent character in law. The Judgment is correct in speaking of a "single maritime boundary that serves other purposes as well". The single maritime boundary is not a composite line but a multifunctional one; that is to

say, it serves simultaneously as a line of demarcation for each specific category of area to be delimited throughout its length. It follows that the single boundary line must not have the effect of changing the nature of the areas divided by it, or of affecting their legal status. It must cumulatively and simultaneously delimit each area, independently of the régime governing the maritime zone through which it passes, without any special preference or diminution in favour of a particular régime or zone. This is a condition based not simply on considerations of theory or expediency. Maximalist tendencies can only be counter-productive, given the requirements which governed the general conditions of equilibrium of the Montego Bay Convention: a line resulting in the application to that zone of the sole régimes of the territorial sea and the contiguous zone would have no chance of being generally accepted by States. Conversely, a "free-for-all" in regard to the régimes governing these maritime areas would run counter to the security considerations which, *inter alia*, underpinned the projection of territorial jurisdiction into the sea adjacent to coastlines. Thus, and by analogy with the test of equity which the Court applies in all maritime delimitations, the specific enumeration of areas in the Bahraini formula required the Court to ensure that the result it achieved was coherent over the entire maritime area delimited.

168. Maritime delimitation by means of a single multifunctional line implies, moreover, that the enjoyment and exercise of rights, facilities and privileges recognized and accorded by law, in particular to neighbouring or riparian States of the area to be delimited, be guaranteed and secured. This is an element inherent in the act of maritime delimitation, the purpose of which is to determine the imaginary line separating the maritime areas over which each State exercises the respective powers held by it under the law, and constituting the external boundary of each such area. Delimitation implies neither a discretionary power nor a power of disposal over the rights attaching to those areas. In failing to investigate the impact upon the legal status and régime of the various areas delimited by the single maritime boundary, the Judgment does not fully meet the requirements of the Bahraini formula and rules *infra petita*.

169. In the present case, the Court was bound to investigate whether the various maritime régimes remained valid in light of the course of the single maritime boundary, given that it had awarded the Hawar Islands to Bahrain and that the sea between the Hawars and the Qatar peninsula is not deep enough for navigation. As a result, it is impossible in practice for Qatar to communicate between the northern and southern parts of its land territory along its western seaboard. To this objection, it was replied that coastal traffic along Qatar's western seaboard was insignificant or of no importance. But that argument is unacceptable. Factual considerations cannot, in themselves, suffice to defeat firmly established positive law rights; navigation, along with fishing, represents one of the primary uses of the sea. The Judgment has sought to respond to this problem, but

unfortunately in a reductionist manner in terms of the litigant Parties' rights. The passage of Qatari vessels, it is said, is protected under the rules governing the right of innocent passage through Bahrain's territorial sea. The narrowness of the relevant area for delimitation poses the problem of passage through the superjacent waters of the continental shelf and beyond the external boundaries of each territorial sea. The Bahraini formula implies a test of validity: it was for the Court to assure itself that the course of the provisional line had no adverse effect *ab initio* upon the nature of these areas. A simple factual observation demonstrates that, even at that stage, coastal shipping rights were jeopardized.

170. In strict law, there can be no criticism of the enshrinement of Qatar's right of innocent passage — like that indeed of any other State — through Bahrain's territorial sea between the Hawars and the other Bahraini islands. The restatement, in the second subparagraph of point (2) of the operative part of the Judgment, of this right of innocent passage in terms of the relations *inter partes* has to be assessed at its true worth: on the one hand, the definitive and perpetual nature of these rights, and on the other their autonomy and inviolability against any attempt to proclaim these areas internal Bahraini waters. However, this solution, which could have benefited from a bolder approach, ignores an element of fact and law.

171. The relations between the Parties are not affected by any problems other than those of maritime delimitation. The peaceful and harmonious use of this area, and the cohabitation of the inhabitants of these two States, must not suffer undesirable effects as a result of the implementation of the right, that is to say the lawful and legitimate introduction of the régime of innocent passage. Without losing sight of the question whether a régime of acquired rights of Qatari fishermen and users is conceivable or possible, it was necessary to make specific provision to deal with the effects of the delimitation.

172. In the present case, the Court could have envisaged a legal solution involving the establishment of a régime for the enjoyment and exercise of rights of user in respect of the sea, the most sensitive outstanding question being passage between the northern and southern parts of the Qatar peninsula along the western seaboard. The Court could have considered securing such enjoyment of rights and communication by applying within the delimited area a régime analogous to that of an "international easement". This would have meant according a foreign State rights and powers exercisable over a maritime area falling within the jurisdiction of a riparian State[60]. The result of such an easement régime would have been to enclave the Hawar Islands and to determine how this was to affect Bahrain's rights in regard to the need for a passage between its

[60] See the definition given by H. Lauterpacht in "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 62, 1937, pp. 327-328.

main island and Hawar. These questions merited being examined in depth prior to identifying any consequences which they might have for the present proceedings.

173. The creation of a legal enclave, which serves to guarantee the enjoyment and exercise of a right of passage following a maritime delimitation, is no novelty in international jurisprudence.

In the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 30 June 1977, the Court of Arbitration stated[61]:

> "the substantial point at issue is whether the presence of the British archipelago of the Channel Islands close to the French coast is a 'special circumstance' or a circumstance creative of inequity that calls for a departure from or variation of the equidistance method of delimitation which the Parties agree to be in principle the applicable method"[62].

The solution adopted by the Court was a "twofold" one:

> "throughout the whole length of the Channel comprised within the arbitration area the primary boundary of the continental shelf will be a mid-Channel median line. In delimiting its course in the Channel Islands region . . ., the Channel Islands themselves are to be disregarded, since their continental shelf must be the subject of a second and separate delimitation.
>
> 202. The second part of the solution is to delimit a second boundary establishing, vis-à-vis the Channel Islands, the southern limit of the continental shelf held by the Court to be appurtenant to the French Republic in this region to the south of the mid-Channel median line. This second boundary must not, in the opinion of the Court, be so drawn as to allow the continental shelf of the French Republic to encroach upon the established 12-mile fishery zone of the Channel Islands. The Court therefore further decides that this boundary shall be drawn at a distance of 12 nautical miles from the established baselines of the territorial sea of the Channel Islands. The effect will be to accord to the French Republic a substantial band of continental shelf in mid-Channel which is continuous with its continental shelf to the east and west of the Channel Islands region; and at the same time to leave to the Channel Islands, to their north and to their west, a zone of seabed and subsoil extending 12 nautical miles from the baselines of the two Bailiwicks. The result, so far as the Channel Islands are concerned, is to enclose them in an enclave formed, to their north and west, by the boundary

[61] See United Nations, *RIAA*, Vol. XVIII, pp. 3 ff.
[62] *Ibid.*, pp. 76-77, para. 148.

> of the 12-mile zone just described by the Court and, to their east, south and south-west by the boundary between them and coasts of Normandy and Brittany, the exact course of which it is outside the competence of the Court to specify."[63]

It should be recalled that in that case the issues of the creation of enclaves or semi-enclaves were discussed by the litigant Parties in their arguments before the Court.

174. In international practice, enclaves on the high seas are to be found "in the North Atlantic, around Jan Mayen Island and in the Barents Sea" and also in

> "the Sea of Okhotsk . . . off the eastern coast of the Russian Federation, bordered by the Kamchatka peninsula and the island of Sakhaline . . ., an enclave is subject to the régime of the high seas, whilst being entirely surrounded by one or more EEZs under national jurisdiction"[64].

It should also be noted that a decision to create a "maritime corridor" is not unprecedented either: see *Case concerning the Delimitation of Maritime Areas between Canada and France*, arbitration presided over by Judge Jiménez de Aréchaga, former President of this Court[65].

175. In the present case, the circumstances are such that the basic issue is not that the course of the median line is creative of inequity, but rather that this is an inequity which prevents one of the Parties from enjoying and exercising rights enshrined in international law. A legal adjustment is required, involving the creation of an "international easement" constituting a "navigation corridor" in the navigable part of the sea between the main island of Bahrain and the Hawar Islands. The waters of this area would then remain Bahraini, whilst the enclaved corridor would be subject to "easements" relating to the traditional uses of the sea.

176. It of course goes without saying that the creation of this corridor must not, however, be a cause of prejudice or source of inequity for Bahrain in regard to the enjoyment and exercise of its rights of navigation and overflight when it has to communicate between the two parts of its land territory and cross the navigation corridor. Bahrain's rights to continuity between the component parts of its territory and to security are of equal rank with those accorded by positive law to Qatar. It follows that the régime for the said navigation corridor traversing Bahrain's territorial sea between its main island and the Hawars also needs to be subject to some form of legal provision more specifically adapted to the circumstances.

---

[63] United Nations, *RIAA*, pp. 94-95, paras. 201-202.

[64] E. Nemoz, "Les mers enclavées: l'exemple de la Mer d'Okhotsk: multilatéralisme et unilatéralisme", in *Espaces et ressources maritimes*, No. 9, 1995, p. 197.

[65] United Nations, *RIAA*, Vol. XXI, p. 267.

177. Having established the *sui generis* nature of this area produced by the legal enclavement of the Hawar Islands, we now have to outline the general scheme of its régime. This legal régime could be represented in vectorial terms as lying between that of innocent passage and the traditional régime of the high seas. Thus, in the zone currently delimited, a tradition of usage has arisen which the passage of time has consolidated; both Bahraini and Qatari nationals using this area have been the direct joint beneficiaries of this situation. The problem thus concerns the effect, in terms of right creation, of the delimitation established by the present decision: the breach of legal continuity, that is to say the break with the previous situation, must not in itself be a source of tension in the relations between the Parties to the dispute or of disturbances in use for the nationals concerned. In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court made an award of sovereignty in respect of the disputed island, determined the course of the frontier and established the usage régime governing navigation on the River Chobe. Delimitation cannot, in our view, be reduced to an abstract exercise confined to a theoretical definition of the line marking the meeting point of the external boundaries of the area over which each Party exercises its jurisdiction. When it so acts, the Court is not seeking to make considerations of expediency prevail, but to encourage the establishment of peaceful relations, both in bilateral relations between the States party to the dispute and in the day-to-day activities of the populations concerned.

178. The Court's power to state the conditions which it considers indispensable for the restoration and consolidation of peaceful relations between the Parties is a matter requiring examination. Thus it is not for the Court to substitute itself for States with a view to defining the terms of a legal régime directly opposable to them; moreover, the principal judicial organ of the United Nations has no specific competence to exercise judicially powers pertaining to preventive diplomacy. On examination, however, it is clear that the scope of these remarks requires qualification. The powers conferred upon the Court require it to adopt an approach that is not exclusively a juridical one, but also encompasses considerations of expediency, of the factual circumstances. Articles 41 of the Court's Statute and 37-38 of its Rules, concerning provisional measures, place particular emphasis, *above all else*, on the importance of the factual circumstances. The Court does not base itself exclusively on reasons of pure law in order to indicate such measures; the above-mentioned provisions accord it a special power: a discretional power to determine whether the circumstances require the indication of such measures and what the most appropriate measures are. It would be something of a paradox if a jurisdictional decision founded on urgency were to be deprived of the desired effect because of constraints relating to the exercise by the Court of its jurisdiction. In order to act, the Court first assesses the risks to the Parties' rights in the case and then indicates the measures required in order to protect those rights, for which the Court is responsible by reason of its seisin of the case.

179. *Secondly*, in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court enriched the case law on the peaceful settlement of disputes. Previously, it had espoused the traditional doctrine. Thus in the case concerning *Passage through the Great Belt (Finland* v. *Denmark)*, the Court stated that it would welcome an agreement between Finland and Denmark for the friendly settlement of the dispute[66]. It forcefully restated this wish in the case concerning the *Aerial Incident of 10 August 1999 (Pakistan* v. *India)*[67].

The contribution of the decision in the *Kasikili/Sedudu Island (Botswana/Namibia)* case lies in the fact that, *proprio motu*, the Court regarded as an element in the settlement of the merits of the dispute the arrangements for navigation on the Chobe. In the present case, there has been a development which is worth underlining: the second subparagraph of paragraph 2 of the operative part of the Judgment. However, given the particular circumstances, and with a view to securing appropriate enjoyment and exercise of user rights within the delimited area, it would have been preferable to recall a further obligation incumbent upon Bahrain and Qatar: the conclusion of an agreement, the terms of which it would be for the Parties themselves to prescribe.

180. It follows from the foregoing that, by reminding the Parties to these proceedings of the obligation to respect both the legal régimes governing the areas delimited and their own rights, the Court would have carried out in full the task required of it by the Bahraini formula if it had applied the validity test and identified its consequences. However, the Court was not invited in this case to prescribe detailed terms and conditions guaranteeing the enjoyment and exercise by the Parties of their respective rights. The Court is accordingly not competent to do this.

Responsibility for the conception, formulation and implementation of this dual guarantee régime, through the creation of a maritime navigation corridor and the establishment of rules for the crossing of that corridor, are a matter for the two Parties. In accordance with its established case law, it was incumbent upon the Court to instruct the Parties to endeavour to reach an equitable solution through negotiations carried on in good faith and to rectify by treaty or agreement the inequitable result noted.

* * *

(b) *The Method Adopted in Order to Draw the Provisional Median Line*

181. The two principles upon which the law governing the delimitation of the territorial sea hinges must, in our view, be interpreted as follows:

[66] See *I.C.J. Reports 1991*, p. 20, para. 35.
[67] Judgment of 22 June 2000, *I.C.J. Reports 2000*, pp. 33-34, paras. 51-55.

— "the land dominates the sea" relates to terra firma, a notion well-known to international law and to jurisprudence;
— "equidistance/special circumstances": special circumstances may be taken into account *only after* the true median line has been drawn, and only with a view to adjustment in order to achieve an equitable solution.

Thus we dispute the method used to draw the provisional equidistance line, for it is not the appropriate one.

182. The method used to determine "the location of the baselines, and the pertinent basepoints from which the equidistance line must be drawn" (paragraph 178 of the Judgment) is not correct. The interpretation of the consequence of the maxim "the land dominates the sea", to the effect that,

> "[i]n accordance with Article 121, paragraph 2, of the 1982 Convention . . ., islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights as other land territory" (paragraph 185 of the Judgment),

is not correct according to the law of the sea and to the international jurisprudence generated by that law. The proposition, although reasonable on the face of it, does not necessarily favour the search for an equitable solution, cardinal principle of the law of delimitation for all maritime areas.

183. International customary law does not stipulate that the lines and basepoints used for the delimitation of maritime areas must necessarily be the same as the lines and basepoints used to fix the external boundaries between maritime areas and the high seas.

184. The Judgment refers to paragraph 2 of Article 121 of the 1982 Convention to justify a method consisting in assimilating islands to terra firma for the purposes of the rules governing the delimitation of maritime areas. Moreover, through the use of the phrase *in accordance with*, the passage cited from paragraph 185 invokes the notion of a general régime common to both terra firma and islands. The question to which the Judgment was bound to give a reply was whether such a general régime is indeed prescribed by positive law.

185. Article 5 of the Montego Bay Convention reflects the contemporary expression of customary law: adoption of the low-water line and the reference to charts recognized by the coastal State. The absence of a comparable provision in regard to other maritime areas might suggest that this represents the initial stage of that general régime invoked in the preceding paragraph. But the applicability to other maritime areas of the baseline rule for the territorial sea does not imply that the same baseline should serve both for purposes of delimitation and in order to fix the external boundaries of maritime areas. Nowhere is there any express provision to this effect.

186. Examination of the respective *travaux préparatoires* for the Geneva instruments and for the Third United Nations Conference on the Law of the Sea discloses a change in approach. The International Law Commission seems to have demonstrated a preference for having baselines serve both to fix the boundary with the high seas and also to fix the equidistance line. But this stance by the Commission was not confirmed at the Third United Nations Conference on the Law of the Sea. Within negotiating Group VII, which dealt with the question of the delimitation of the continental shelf and the exclusive economic zone, the problem of basepoints was a matter on which the delegations were unable to agree: some favoured adoption of the equidistance line, others an equitable solution. The former wished not only purely and simply to extend application of the normal baseline to all areas, but also to accord it this dual function; the merit of this solution lay in its mathematical simplicity. For the latter group, on the other hand, the search for an equitable solution did not require from the outset the adoption of criteria that were a source of inequity, or the automatic application of one principle or method in particular. In some cases this approach would have such distorting effects that there could be no question of raising it to the status of an absolute rule. To do so would be to create an obstacle to the conclusion of delimitation agreements between neighbouring States. The disagreement on this point, both within negotiating Group VII and within the Conference itself, calls into question the proposals and interpretations espoused by the International Law Commission in 1953 and 1956.

In conclusion, it is not established that in law baselines serve both for purposes of delimitation and for the fixing of the external boundaries of maritime areas.

187. As far as case law is concerned, the Court has had to rule on this question on a number of occasions; it has not however endorsed the principle that the normal baseline be accorded a dual function. During the period immediately following the adoption of the Montego Bay Convention, the Court, aware of the results of the work of the Third United Nations Conference on the Law of the Sea, and in particular of the work of negotiating Group VII, did not follow the proposals and conclusions of the International Law Commission.

188. Already in 1984, in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the Chamber excluded:

> "any method which takes tiny islands, uninhabited rocks or low-tide elevations, sometimes lying at a considerable distance from terra firma, as basepoint for the drawing of a line intended to effect an equal division of a given area"[68].

The decision in the case concerning the *Continental Shelf (Libyan*

[68] *I.C.J. Reports 1984*, pp. 329-330, para. 201.

Arab Jamahiriya/Malta) made the position even clearer when it excluded the island of Filfla as basepoint for the drawing of the provisional median line, even though it was used by Malta to measure the breadth of its territorial sea. Thus, for the Court:

> "the baselines as determined by coastal States are not *per se* identical with the points chosen on a coast to make it possible to calculate the area of continental shelf appertaining to that State. In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain 'islets, rocks and minor coastal projections', to use the language of the Court in its 1969 Judgment, quoted above."[69]

The term *equitable* characterizes both the result to be achieved and the means to be applied to reach that result[70].

189. Admittedly, it might be asked whether the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)* does not represent a break with the previous jurisprudence, when the Court states:

> "The area of overlapping claims in this case is defined by the median line and the 200-mile line from Greenland, and those lines are both geometrical constructs; there might be differences of opinion over basepoints, but given defined basepoints, the two lines follow automatically. The median line provisionally drawn as first stage in the delimitation process has accordingly been defined by reference to the basepoints indicated by the Parties on the coasts of Greenland and Jan Mayen."[71]

Here, the use of the subjunctive "might" instead of the present indicative denotes the absence of disagreement between the Parties over the identification of the basepoints, their disagreement being confined to the issue of the breadth of the maritime areas. It should, moreover, be noted that in "macrogeographic" terms the areas in question are vast, having nothing in common with the area between Qatar and Bahrain. Should we then accord general scope to the statement that, "given defined basepoints, the two lines follow automatically"? The use of the adverb *automatically* would justify an affirmative reply, which would find support in the work of the International Law Commission. However, on examination this conclusion cannot be upheld: in the first place both Denmark and Norway are parties to the Geneva Conventions of 1958 and 1960, and participants in a network of regional agreements which have favoured the development of a law and practice shared by the States of the region. In the second place, in the absence of disagreement between the Parties,

[69] *I.C.J. Reports 1985*, p. 48, para. 64.
[70] See *I.C.J. Reports 1982*, p. 59, para. 70.
[71] *I.C.J. Reports 1993*, p. 78, para. 89.

the Court did not consider it necessary to deal with the question of a "difference of opinion", since this was in any case a hypothetical issue here. The Court was content to place on record the respective basepoints and lines proposed by each Party, satisfying itself that no challenge to those proposals had been made. In these circumstances, the Court's conclusion is to be contrasted with the test of inequity *ab initio* applied in the cases *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* of 1982 and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* of 1985. In effect in 1993, in its decision in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, the Court proceeded in the same manner, relying on the lack of challenge to the basepoints and lines designated by each Party. Thus the Court proceeds on a case-by-case basis and reserves the right to decide on the equitableness of basepoints and lines, irrespective of whether or not these are proposed by the parties to a dispute.

190. Contrary to what the Judgment appears to suggest, the systematic use of basepoints and lines to calculate the extent of the continental shelf and the exclusive economic zone, and to fix the external boundaries of those areas, is not prescribed by law, or by the Court's case law. The final solution is based on a specific appreciation of the factual circumstances, which courts assess at their discretion with the assistance of a minimum of mathematical apparatus and of a sense of equity.

191. In a delimitation of the territorial sea, this sense of equity is also a requirement of law. We can only criticize, and most particularly so in the present case, the interpretation which the Judgment gives to the "equidistance/special circumstances" rule, which is the norm applicable here. Contrary to the solution reached in the Judgment, the relationship between the two notions of equidistance and special circumstances is one between equal and opposite forces, to borrow a term from mathematics. In 1958, a Yugoslav proposal hostile to the reference to "special circumstances" was rejected not on conceptual grounds, but because of the difficulties involved in interpreting this notion, which was regarded as too vague and too subjective. However, we would recall the masterly presentation of the theory of special circumstances by the United Kingdom delegate, Sir Gerald Fitzmaurice, subsequently judge of this Court. In Sir Gerald Fitzmaurice's view, special circumstances comprised considerations of equity and the particular configuration of a coast; to these two initial circumstances was added a reference to historical titles, which had been the subject of an amendment proposed by the Federal Republic of Germany. By contrast, there was no mention of islands, either in the speeches or in the final version of Article 5. From 1958, and the *travaux préparatoires* confirm this, equidistance could be applied as the standard criterion, as long as this did not produce a result contrary to the requirements of an equitable solution, for, in general:

"while international law requires that a delimitation be rooted in title, it also imposes the requirement of an equitable result. Both conditions . . . are necessary; neither is enough on its own."[72]

192. As far as equidistance is concerned, the real question concerns the identification of the basepoints. No systematic answer can readily be given on this point. In the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, the Court was not faced with any problem, since the points utilized by each of the Parties were not disputed, and the choice appeared acceptable to them, because it was regarded as equitable. In the absence of agreement between the States concerned, it is difficult to speak of a general solution or applicable principle in circumstances where island features are situated close to a coast; in some cases islands are disregarded, in others taken into account, for purposes of drawing the median provisional line. In 1973, certain African States had proposed that the attribution of maritime areas to islands in general, and in particular to small islands, must be made in accordance with equitable principles; all factors and circumstances should be taken into account, including surface area, population, distance from the principal territory, geological configuration and particular interests of island and archipelagic States (Seabed Committee, doc. A/AC.138/89 and Rev.1). The objections in the *Gulf of Maine* case to the equidistance line proposed by Canada on the basis of points which it had itself chosen demonstrate the limits encountered in practice where there is confusion between the points utilized in order to calculate the breadth of maritime areas and those adopted to determine the external boundaries of those areas[73]. Thus equity must also govern the choice of the basepoints utilized for purposes of maritime delimitation. The search for an equitable solution implies that considerations deriving from the requirements of equity be consistently taken into account at every stage of the act and operation of delimitation. It was necessary for the Court to recall that the choice of basepoints must also be equitable, as must be the method used and the result sought. "[T]he equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain islets, rocks and minor coastal projections."[74] This requirement also reflects the provisional character of the equidistance line, since allowance for special circumstances merely implies a simple adjustment of the line thus drawn on a provisional basis. Inequitable basepoints will affect the course of the true median line, and hence the equitable nature of the solution adopted.

[72] P. Weil, *Perspectives du droit de la délimitation maritime*, 1988, p. 90.
[73] See *I.C.J. Reports 1984*, pp. 329-330, para. 210.
[74] *I.C.J. Reports 1985*, p. 48, para. 64.

193. Following the award of the Hawar Islands, and above all of Qit'at Jaradah, to Bahrain and, to a lesser degree, of Janan to Qatar, the Court, given the narrowness of the delimited area was bound to ask itself whether the choice of the traditional basepoints was an equitable one. Grounds of law are in this case opposed by equity. Thus, in giving effect to islets or features located at a greater distance from the main island of Bahrain than the Hawar Islands are from Qatar, the Judgment failed to take account of any element other than those relating to title. The test of equitableness used to adjust the single line was applied by reference to basepoints which had not first been examined to ensure that their choice was equitable. In the event, the final choice of basepoints resulted in the equidistance line being located too far to the west, because of the exaggerated effects accorded to tiny, unimportant features. The drawing of the provisional equidistance line on the basis of the points chosen here, namely what are called "maritime features" or *"les formations maritimes"*, had the effect of distorting the general direction of the coastline. *It is surely curious that the sea should be dominated not by terra firma but by minor maritime features, precisely lacking firm foundations.* If the principle of the pre-eminence of terra firma over the sea had been respected, the direct result would have been a baseline which faithfully followed the coastline, and an equidistance line which respected the topography of the land and its coastlines.

The provisional equidistance line should, in the circumstances of the case, have been constructed by reference to equitably chosen baselines, which would have required its being moved to the west of the line proposed by the Judgment. In the circumstances of the case it was incumbent upon the Judgment to satisfy this requirement if the method for drawing the provisional line was to be an equitable one, based on points which were also equitable.

* * *

(c) *Legal Characterization of Qit'at Jaradah*

194. The conclusion, in paragraph 195 of the Judgment, that

> "the maritime feature of Qit'at Jaradah satisfies the above-mentioned criteria [in Article 10, paragraph 1, of the 1958 Convention on the Territorial Sea and Contiguous Zone and Article 121, paragraph 1, of the 1982 Convention on the Law of the Sea] and that it is an island which should as such be taken into consideration for the drawing of the equidistance line"

is disputable given the geophysical characteristics of this feature.

195. There are a number of factors which cast doubt upon the view that Qit'at Jaradah is geographically an island: the inconsistency of the

experts' opinions; the fact that it is not indicated as an island on British Admiralty charts (see attached map, p. 215, below) (see paragraph 193 of the Judgment); the removal of the upper surface of the feature in 1986 (paragraph 192 of the Judgment); and, finally, the sedimentation which has taken place since then. In the absence of precise information, it would appear that there is currently a tiny maritime feature of very small size appearing above the waterline at the location known as Qit'at Jaradah.

196. It is not for the Court to settle a dispute involving theoretical discussions of physical geography. But, irrespective of the legal and political dimension of the question whether or not Qit'at Jaradah is an island in law, we must not lose sight of a consideration of basic common sense: one cannot have contradictory answers to one and the same question. According to the *Dictionnaire Robert*: "An island is an area of terra firma which emerges permanently from the water"; the *Cambridge International Dictionary of English* speaks of "a piece of land completely surrounded by water". For its part, the first paragraph of Article 121 of the Montego Bay Convention defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide". Over and above editorial differences inherent in the aims of the respective disciplines, it will be noted that the problem turns on considerations of hydrography (high tide) and geomorphology (a naturally formed area of land).

197. First, the hydrographic element: "high tide" is an important factor in the definition of an island under the 1982 Convention; this criterion is more precise than that used in everyday language. Here, appearance above the waterline at high tide is the essential condition in order for a naturally formed area of land to be characterized as an "island" rather than as a low-tide elevation.

198. Next, geomorphological considerations, which entail examination of the question of the composition of the "land" comprising an island: "natural area of land", "area of terra firma". The "naturalness" of an insular feature has been the subject of fierce debate, both in doctrine and in the work of codification. Is the land — a product of nature — the consequence of geological action or of sedimentation? A proposal by H. Lauterpacht to insert the adjective "natural" before "area of land" was rejected by the International Law Commission in 1954[75]. It was on a proposal by the United States, who were hostile to any artificial, abusive extension of the territorial sea and to any encroachment on the freedom of the high seas, that an amendment was adopted providing for the insertion of the word "natural" in the paragraph dealing with the definition of an island[76]. The sense of the term has itself changed. Since the *Anna* case, it would seem that it had been accepted that the geomorphological com-

[75] *Yearbook of the International Law Commission*, 1954, Vol. I, pp. 92 and 94.

[76] See the final Article 10 of the Law of the Sea Convention, doc. A/Conf.13/C1/L.112, *Official Documents*, Vol. III: First Committee, pp. 180 and 265.

position of a feature was irrelevant: sediment, mud, coral, madrepore, or terra firma properly so-called[77]. But contrary to the judgment of Sir William Scott in that case, the Montego Bay Convention departed quite significantly from those principles.

The fact that the land lies above the high-water line is not enough in itself for a feature to be characterized as an island; only areas of terra firma can be accorded the status of island under Article 121 of the Law of the Sea Convention. *In the first place*, Article 121 introduces a distinction between islands and "rocks", whose legal régime is dealt with in the third paragraph. The treatments of rocks and islands are not identical, even though both are features permanently above the high-water line and of stable geomorphological composition.

Secondly, areas of land lying above the high-water line are not confined to islands. The 1982 Convention expressly refers to atolls, but provides no legal definition of these; in geographical terms, they are "ring-shaped coral reefs in warm seas, enclosing a lagoon communicating with the high sea" *(Dictionnaire Robert)*. In terms of their geomorphological composition, atolls are not terra firma, and therefore cannot be accorded the status of islands. In short, atolls are features or elevations consisting of a mixture of sediment, mud, coral and madrepore.

Cays are also areas of land lying permanently above sea level. "A cay is an islet or elevation composed of sand compacted to a greater or lesser degree" *(Grand Larousse universel)*. This is a category of maritime feature which remains above the waterline at high tide but which is not terra firma in the ordinary, traditional sense of the term. Unlike islands, atolls, or even artificial islands, the Montego Bay Convention does not refer to cays as a geographical category recognized by law.

199. As regards Qit'at Jaradah, the various changes which this feature has undergone can be explained on the one hand by the absence of terra firma and on the other by the fact that it has been formed by accretion, that is to say, "a process of agglomeration of inorganic elements, solid or liquid" *(Dictionnaire Robert)*. Thus the question is whether it can be assimilated to an island within the meaning of Article 121 of the 1982 Convention. The answer must be a negative one, for its geomorphological characteristics place it in a category not provided for in the Montego Bay Convention.

200. The assimilation of islands to land territory is moreover explicable purely in terms of geomorphological considerations: in both cases, by contrast with atolls and cays, the stable underlying element is terra firma; thus they have a physically durable base which ensures their per-

[77] *Reports of Cases argued and determined in the High Court of Admiralty commencing with the Judgments of Sir William Scott, Michaelmas Term 1798*, ed. Chr. Robinson, 1799-1808, Vol. V, 1806, pp. 337-385.

manence. In the case of Qit'at Jaradah, how otherwise to explain the ease with which the upper surface could be removed and subsequently restored? In law, this assimilation must be understood in conjunction with the notion of effectiveness of sovereignty; sovereignty, in international law, implies a minimum stable terrestrial base, which is not to be found in maritime features above the waterline which are not islands.

In support of this difference in treatment as between an island and other maritime features which appear above the waterline at high tide, we may cite official marine charts. These documents, because of the need to meet the safety requirements of marine navigation, offer the best descriptions and evidence of the location and status of features situated within maritime waters.

201. Finally, what makes the Court's solution for Qit'at Jaradah even more debatable is the fact that not only did it treat it as an island, but it then awarded it to Bahrain, whereas the precise calculations of distance carried out by the Court-appointed hydrographer indicate that it is closer to Qatar than to Bahrain.

* * *

(d) *The Course of the Final Delimitation Line*

202. It is regrettable that a single vote was taken on the course of the delimitation line. There was no need for such a restriction, either legally or technically.

203. In terms of law, the Parties indicated, with arguments in support of their positions, that the area for delimitation consisted of two sectors: a northern sector and a southern sector. The similarity in their positions did not imply that they were in agreement on the co-ordinates of the point of separation of the two sectors. This lack of agreement should have led the Court to determine those co-ordinates in light of the circumstances of the case, and in particular of the technical data.

204. Technically, the point of separation of the delimitation line is simple to determine. *First*, the geometrical reference figure is the provisional equidistance line (Sketch-map No. 2). The Court's uncertainty as to whether Fasht al Azm was part of the Bahraini island of Sitrah resulted in the construction of two theoretical median lines, whose ends run northward from the point where Fasht al Azm ceases to have effect. In the southern sector, the junction point is located in the area of Qit'at el Erge. *Second*, this southern junction of the two theoretical lines is the most northerly point where Rabad al Gharbiyah has effects upon the equidistance line. Hence, technically, this latter point represents the point of separation between the two sectors of the delimitation lines.

205. In terms of the delimitation, if the northern sector had been defined in this way we would have voted in favour. Overall, the delimita-

tion line laid down in the Judgment mitigates the inequity of the final solution, in particular by the lack of effect accorded to Qit'at Jaradah. Some adjustments could, however, have slightly improved the solution.

In effect — and this is very much a subsidiary point — the geographical location of Qit'at Jaradah in relation to the Parties' respective mainlands is instructive. As we have just pointed out above, this feature is situated, according to the hydrographic calculations, 17.113 km from the Qatar peninsula and 21.698 km from the main island of Bahrain. If Fasht al Azm were attached to the island of Sitrah, the distance would have been 11.605 km, but on this point the Court refrained from making any judicial ruling that would have enabled this fact to be taken into account. Thus the maritime delimitation was affected by the excessive influence accorded to Qit'at Jaradah by the ruling on the maritime delimitation, which was thus distorted in an inequitable manner.

This anomaly is aggravated by the fact that Qit'at Jaradah is accorded an effect of 500 m, even though the Court had decided not to give it any effect at all and to draw the delimitation line at a strict tangent to Qit'at Jaradah. This has distorting consequences for the northern part of the line.

The position is further aggravated by the fact that the Court has established a single maritime boundary on the basis of two contradictory maps, an American one for the southern sector and a British one for the northern sector. This duality in the Court's approach is somewhat puzzling, since it would have been more normal for it to rely on a single map for the entire course of the line and to choose the most recent one, providing the most up-to-date data. This was the British map, prepared in 1994 by the Admiralty of the country that had for many years been the protecting power in the region and was thus quite well informed of the true situation. This British bathymetric chart clearly demonstrates the geographical continuity between the Hawars and Qatar, which form a single entity and together constitute the Qatari peninsula. But in choosing to rely rather on the American map for this southern sector of the single boundary, the Court was able to represent the low-water line in that southern sector in an arbitrary manner only, thus raising fears as to the legibility of the decision and above all creating *a real risk of amputation of the territory of Qatar proper*. Thus the choice of the less suitable map for the southern sector leaves serious doubts, not only as to the fairness, but also as to the simple accuracy, of the line obtained. Having failed to choose the British map, it would have been better if the Judgment had not assumed responsibility for errors in the course of the line and had instead invited the Parties to negotiate that course on the basis of indications from the Court.

For all of the reasons set out above, we regret that we cannot accept responsibility for any amputation of Qatar's territory.

* * *

X. A Suggested Solution

206. In this particularly sensitive case, where public opinion is easily roused, it would have been open to the Court to render its Judgment more readily acceptable if it had taken the initiative of more or less directly encouraging the two Parties to envisage the *possibility of mutual financial compensation*. The Court's judicial function is not basically incompatible with a certain capacity to make suggestions, or even indicate guidelines, to the parties. Juridical technique has more resources in this regard than might be imagined. On the opening day of the hearings, Professor Salmon made it clear that the return of the Hawars to Qatar would necessarily be accompanied by the compensation of any interests affected by such decision. We are thinking rather of an additional possibility, which would have been open to the Court thanks to a certain effort of the imagination from which it should not have debarred itself, particularly in a case so sensitive for both Parties.

207. We were prompted in this direction by two factors: the first was Bahrain's reference to its relative poverty; the second is the precedent constituted by a delimitation agreement between Saudi Arabia and, precisely, Bahrain. While the former is of no legal relevance whatever, as the entire body of international jurisprudence has consistently demonstrated, the latter, by contrast, may be taken as a good example to be recommended by the Court and followed by the Parties. If the precedent of the Saudi-Bahraini agreement, provided by two Gulf States, one of which is party to the present proceedings, had been so suggested, it would have allowed the Court to take account indirectly of the otherwise inadmissible arguments concerning the relative poverty of Bahrain.

208. What happened was the following. In the course of negotiations with Saudi Arabia, Bahrain invoked its economic difficulties; whereupon the Saudis proposed that Bahrain should recognize their sovereignty over a disputed island, in return for which the two parties would share the area's resources.

209. The delimitation agreement of 22 February 1958 (which entered into force four days later following the exchange of instruments of ratification on 26 February 1958) includes an interesting Article 2, which reads as follows:

> "In view of the desire of His Highness the Ruler of Bahrain and the consent of His Majesty the King of Saoudi Arabia, the oil resources in the area mentioned and delimited above in the part belonging to the Kingdom of Saoudi Arabia shall be developed in the manner which His Majesty may choose, on condition that *he gives the Government of Bahrain half of that which pertains to the Saudi Arabian Government of the net income derived from this development*. It is understood that this *shall not impair the right of sov-*

ereignty and administration of the Saudi Arabia Government in the above mentioned area."[78]

210. We would point out in passing that this agreement was not negotiated by the United Kingdom, the protecting State, in the name of Bahrain, its protected State, but by Bahrain itself, which on this occasion exercised, *in 1958*, its own *jus tractatuum*.

It should be noted in the second place that the line drawn apparently refrained from taking any account of the attribution of the Hawars to Bahrain. It did not resolve the issue. Point No. 1 of the median line drawn is the equidistance point between a point A (corresponding to the southernmost point of the island of Bahrain at Ra's-al-Barr) and a point B on the Saudi coast at Ra's-abu-Maharrah. Thus Bahrain did not have the Hawars brought into the equation.

Thirdly and lastly, it should be noted that certain islands and low-tide elevations were not taken into account at all in the delimitation.

211. To return to our suggestion, we feel that this 61-year-old dispute would be finally given its quietus if the legal position were restored, with the Hawars being returned to Qatar, subject to an obligation to share not only "oil resources" (as in the 1958 agreement with Saudi Arabia), but also all other resources (natural gas, tourism and fisheries) which those territories might provide. For, if the latter do not contain oil, as would appear to be the case, the agreement embodying our suggestion would lose its entire point if it were restricted to "*oil* resources".

212. Finally, it should be emphasized that the Saudi-Bahraini example of 1958 does not represent an isolated case. Such arrangements are more frequent than one might think. We would point out in particular that, at the Summit of the Organization for African Unity (OAU) held in Rabat (Morocco) in June 1972, Algeria and Morocco signed two agreements, one drawing the frontier between the two countries, keeping the region known as Ghara-Djebilet under Algerian sovereignty, and the other granting to Morocco one half of the region's mineral resources (in particular, high-content iron ore). The African Heads of State present at this Rabat Summit were witnesses to that agreement.

* * *

XI. Final Conclusion

213. To conclude this opinion, a dissenting one to our regret, we believe that the Court was correct in refusing to apply the principle of *uti*

[78] Emphasis added. See United States of America, Department of State, Bureau of Intelligence and Research, *International Boundary Study, Series A, Limits in the Seas, Continental Shelf Boundary, Bahrain/Saudi Arabia*, No. 12, March 1970.

possidetis juris to the present case. We are in full agreement with the Court's analysis in this regard. And yet, as representatives of the various legal systems of the continent of Africa, we are committed to that principle and have never lost sight of its importance for the post-colonial phase of State development in Africa under conditions of stability and peace.

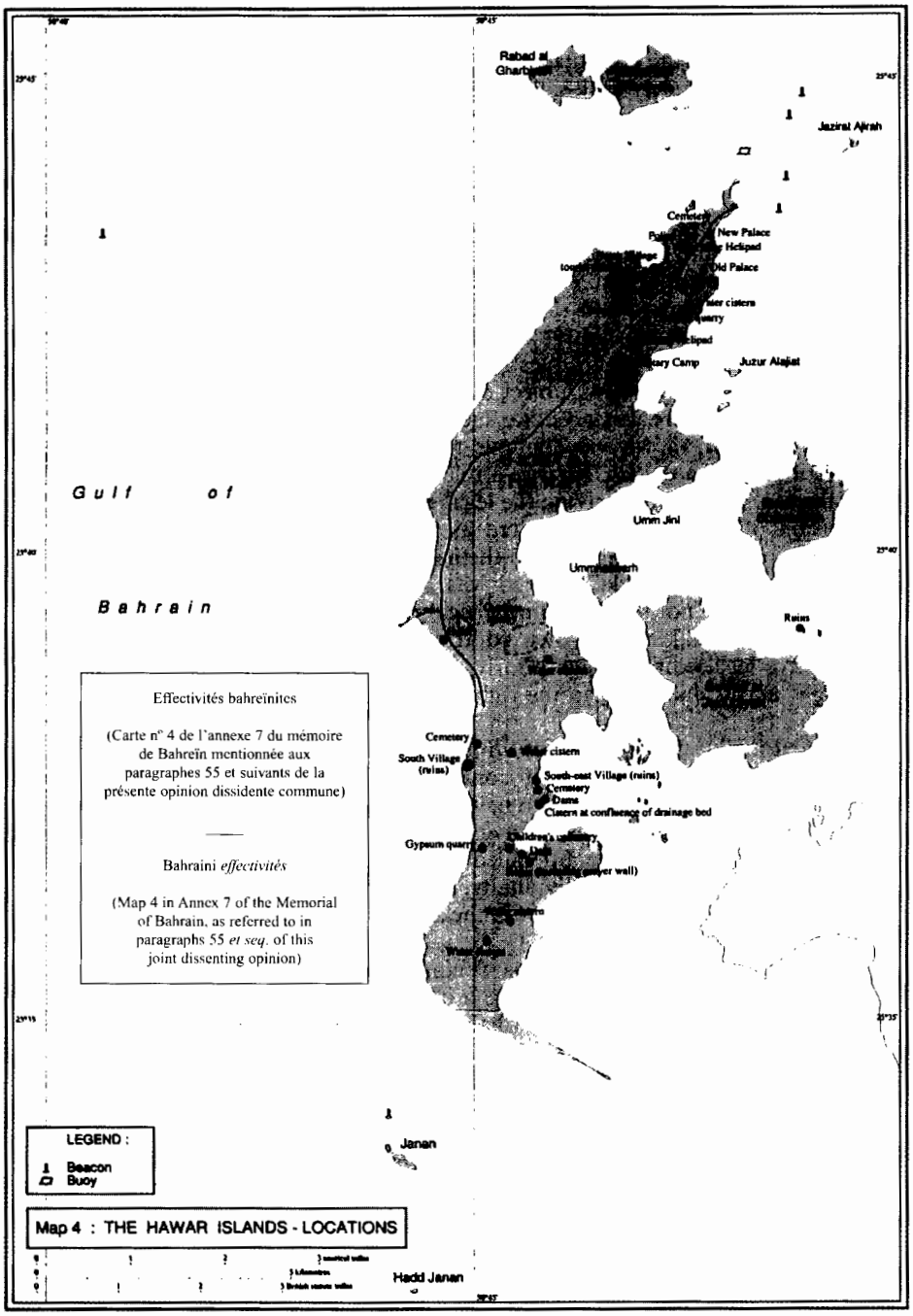
214. However, our agreement with the Court's analysis ruling against the application of the principle to the present case is inspired by a variety of reasons. *First*, the "special relationship of protection" between the United Kingdom and the two States parties to the present dispute gave rise to a flexible division, evolving over time, of responsibilities between the protecting Power and the protected State, as a result of which the State retained its personality; this was not the case for most countries in Africa. There could be no question of applying the principle of *uti possidetis juris*, since no new subject of international law had been created; that is to say, there was no State succession in the present case.

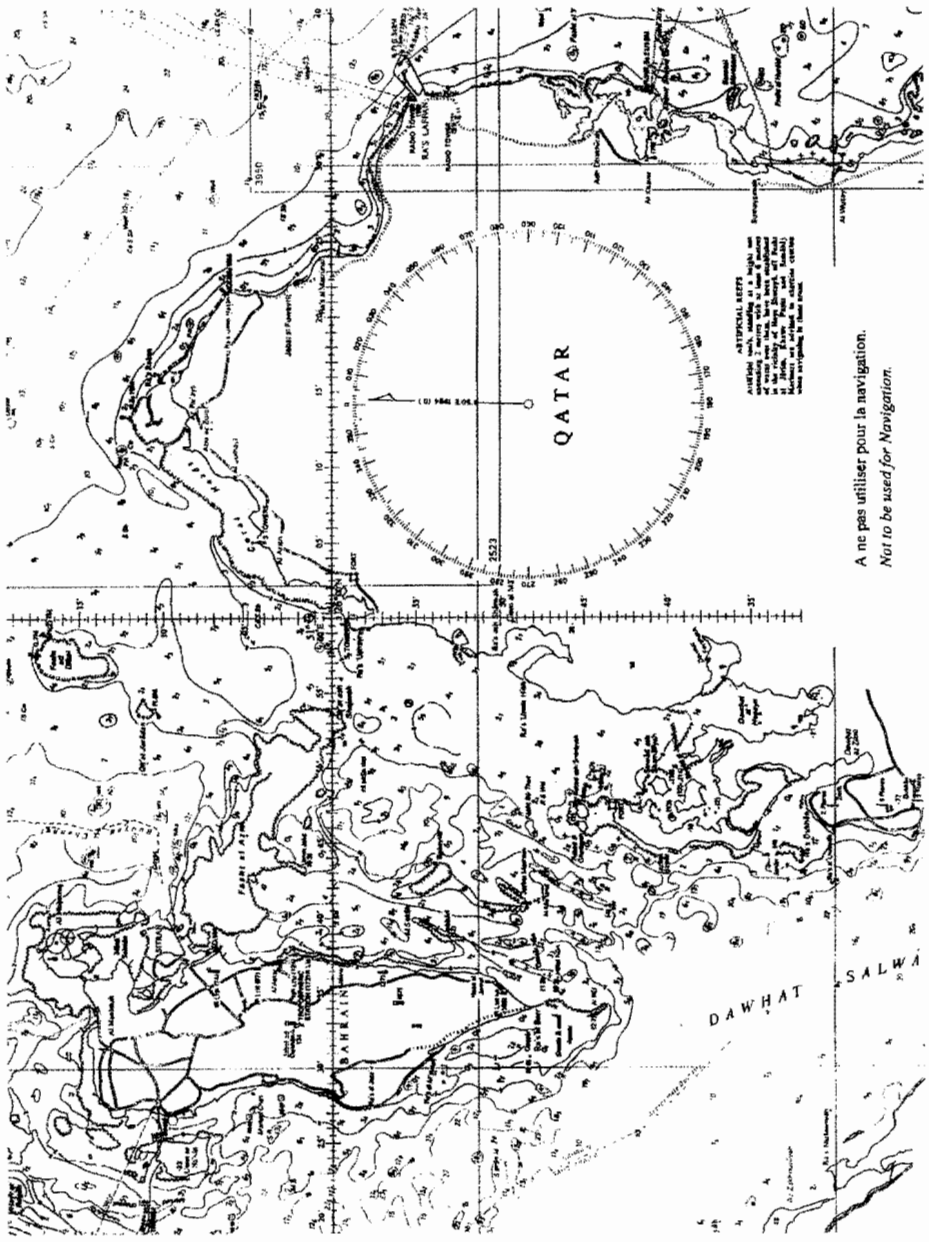
215. *Second*, in our view, simple reasons of legal ethics required the rejection of *uti possidetis juris* as a relevant title. No one can be unaware of the real motives underlying the legal contrivance which was the British decision of 1939, directly inspired as it was by rival oil interests. The authors of that decision troubled themselves so little with legal coherence that the only "principle" applied was: *"oil dominates the land and the sea"*. We could not therefore find a legal pretext for ratifying such a decision without making our own contribution to this kind of contrived, deceptive legal edifice which poorly conceals the interests clearly underlying it and is damaging to the rights of the peoples concerned.

216. Finally, the principle of *uti possidetis juris* is generally applied in a "global" manner, in that it confines itself to "photographing" the boundary situation between two newly independent States and conferring on that situation the status of inviolability. There is not necessarily any requirement to undertake a detailed examination of the various colonial texts which contributed, individually, to the creation of that boundary. In the present case, by contrast, it is the detail of a single text that we are directly invited to examine.

217. It follows that, in the particular case of a decision like that of 1939, we were bound to undertake a critical examination of the validity of that text, measured by the yardstick of modern methods of interpretation and on the basis of the rules and principles of contemporary international law, in which colonial or protectorate law have no place.

(Signed) Mohammed BEDJAOUI.
(Signed) Raymond RANJEVA.
(Signed) Abdul G. KOROMA.


Rabad al Gharbiyah
Jazirat Ajirah
New Palace
Old Palace
Juzur Alajjat
Umm Jini
Ruins
Gulf of Bahrain
Effectivités bahreïnites
(Carte n° 4 de l'annexe 7 du mémoire de Bahreïn mentionnée aux paragraphes 55 et suivants de la présente opinion dissidente commune)
Bahraini effectivités
(Map 4 in Annex 7 of the Memorial of Bahrain, as referred to in paragraphs 55 et seq. of this joint dissenting opinion)
Cemetery
South Village (ruins)
South-east Village (ruins)
Cemetery
Dams
Cistern at confluence of drainage bed
Gypsum quarry
Janan
LEGEND :
Beacon
Buoy
Map 4 : THE HAWAR ISLANDS - LOCATIONS
Hadd Janan



Reproduit à partir de la carte 2886 de l'Amirauté © *British Crown Copyright 1994*. Reproduit avec l'autorisation du *Controller of Her Majesty's Stationery Office et du bureau hydrographique du Royaume-Uni*. (Carte mentionnée au paragraphe 87 de l'opinion dissidente commune.)

Reproduced from Admiralty chart 2886 © British Crown Copyright 1994. Reproduced by permission of the Controller of Her Majesty's Stationery Office and the UK Hydrographic Office. (Map referred to in paragraph 87 of the joint dissenting opinion.)