DECLARATION OF JUDGE VERESHCHETIN

Exclusive reliance of the Court on the 1939 decision by Great Britain relating to the Hawar Islands — Presumed consent by the Rulers of Qatar and Bahrain as the basis of this reliance — Historical and legal context of the 1939 British decision — Failure of the Court to assess the substantive legality of the 1939 decision — Disagreement with the Court's finding on the status of Qit'at Jaradah.

1. The core issue of the dispute before the Court is the appurtenance of the Hawar Islands. Of all the possible grounds for the resolution of this principal disagreement between the Parties (original title, the principle of proximity and territorial unity, *effectivités*, the principle of *uti possidetis*, and the 1939 decision by Great Britain), the Court has chosen exclusive reliance on the latter. In my view, in the particular circumstances of the case, reliance on the decision of the former protecting Power could be possible and legally correct only in combination with recourse by the Court to the principle of *uti possidetis*, the essence of which, according to the Court's jurisprudence, lies "in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved" (*Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 566).

2. However, the Court has opted to found its Judgment purely on the presumed consent by the Rulers of Qatar and Bahrain to refer their dispute, which originated in the mid-1930s, to the British Government. Thus the Judgment of the Court on sovereignty over the Hawar Islands rests plainly and simply on the decision taken by the British Government in 1939. The Judgment states that the decision was binding at the time it was taken and "continued to be binding on [Bahrain and Qatar] after 1971, when they ceased to be British protected States" (paragraph 139 of the Judgment).

3. This characterization by the Court of the 1939 British decision implies that it was and remains a sort of legally binding third-party settlement of a territorial dispute between two sovereign States. Of necessity, this assumption must also imply that the two States under British protection at the relevant time could freely express their sovereign will to be legally bound by the British decision. They must actually, in one form or another, have made their commitments to be legally bound by this decision. In turn, the British authorities which rendered the decision must be presumed to be a neutral and impartial "third party", acting at the request of the Parties in dispute.

4. To assess the real nature of the presumed "agreement" between Qatar and Bahrain to the effect "that the issue [of sovereignty over the Hawar Islands] would be decided by 'His Majesty's Government'" (paragraph 114 of the Judgment) and accordingly to assess the nature and validity of the British decision, it would be pertinent to look at the criteria developed in the Institut de droit international, which for a number of years studied the topic of the distinction between international texts with or without legal import. The Institute could not come to any definitive conclusions. Nevertheless, it is interesting to note that its Rapporteur, Professor M. Virally, in the light of the debates there, in 1982 concluded, *inter alia*, that:

> "The legal or purely political character of a commitment set forth in an international text of uncertain character depends upon the intention of the parties as may be established by the usual rules of interpretation, including an *examination of the terms used to express such intention, the circumstances in which the text was adopted and the subsequent behaviour of the parties.*" (*Annuaire de l'Institut de droit international, 1992, Tableau des résolutions adoptées (1957-1991)*, p. 159; emphasis added.)

5. With reference to the above standards of interpretation, one inevitably sees that the circumstances in which the undertakings by the Rulers of Qatar and Bahrain were assumed were to say the very least not conducive to the genuinely free expression of will and the free choice of a third party: the recourse to any other State but Britain, or to any international organ, being practically precluded by the terms of the "special relationship" existing between Britain and the "protected States".

6. The Court cannot ignore the historical context in which the "consent" was given. In the past, the British Government repeatedly characterized Bahrain and Qatar as "independent States under the protection of His Majesty's Government" (see, for instance, the statement of the Secretary of State for Foreign Affairs in the House of Commons in 1947, 445 H.C. Deb. (5th Ser.), cols. 1681-1682). However, this characterization did not accord with the terms of the "Exclusive Agreements" of 1880 and 1892 between Bahrain and Great Britain and of the 1916 "General Treaty" between Qatar and Great Britain, as well as with less formal engagements later accepted by the two "protected States" combined with the practices of the British political residents and agents. Not only all the foreign relations of the two States were conducted by the United Kingdom, but also many vital areas of the internal life of Bahrain and Qatar were placed under British control. It was only in the process of decolonization, in 1971, that Bahrain and Qatar attained a full measure of sovereignty, both internal and external.

7. Also, less than clear for determining the nature of the undertakings are the terms used by the Rulers of Bahrain and Qatar in response to the initiative taken by Great Britain. Thus, as reflected in the Judgment (para. 118), on 10 May 1938 the Ruler of Qatar wrote to the British political Agent to complain that "the Bahrain Government [were] making interferences at Hawar" and to ask the British to "do what is necessary in the matter". One can hardly read into these words a specific commitment by the Ruler of Qatar to be legally bound by the British actions relating to the attribution of the disputed Islands. In the later stages of the process the Ruler of Qatar repeatedly expressed his expectations that the British Government would approach the matter "in the light of truth and justice" or "in the light of justice and equity".

8. Certainly, legal characterization of the British involvement in the settlement of the dispute was not a matter of special consideration by the States concerned. For the British authorities it was a matter of course that they could act on their own authority. For Bahrain and Qatar the appeal to the British Government was not a choice, it was the only option, the single avenue open to them. It is regrettable that the Court, having placed complete reliance on the presumed consent by the Rulers of Qatar and Bahrain to be legally bound by the British decision, has not paid due attention to a very revealing document prepared by an official of the British Foreign Office, who in 1964 arrived at the following conclusion based on a thorough study of the history of the British decision:

> "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." (Reply of Bahrain, Vol. 2, Ann. 2, p. 4.)

9. As to another criterion for the assessment of international texts of uncertain character mentioned by the Rapporteur of the Institut de droit international — the subsequent behaviour of the Parties — the constant protests of the Ruler of Qatar against the British decision speak for themselves. When the British decision was taken it was immediately protested against by Qatar as "unjust and inequitable". It was termed by Qatar the *"opinion"* of the British Government on the matter and the request was made that "the question may be considered again and that enquiries may again be made into it". The Ruler of Qatar stated that he "reserve[d] for [himself his] rights to the Hawar Islands until the true position ha[d] become clear" (paragraph 134 of the Judgment).

10. The foregoing does not lead me to conclude that the 1939 British decision is "null and void" or that it has no impact at all on the present legal situation, as contended by Qatar in its pleadings before the Court. I merely wish to say that this decision cannot be viewed as a fully-fledged third-party legal settlement of the dispute; much less can it be mechanically treated by the Court as if it had the character of *res judicata*. The legal effect of this administrative decision of the former protecting Power (the principle of *uti possidetis* set aside) cannot be the same in the assessment of the International Court of Justice in 2001 as it could have been for the two "protected States" at the time of its adoption in 1939, in an absolutely different legal and political setting. Even with the assumptions and presumptions of the consent by the Rulers of Bahrain and Qatar, the Court did not necessarily have to lend its imprimatur to the British decision without looking into its substantive grounding in law. The so-called "Bahraini formula", although not specifically required to do so, did not exclude a review by the Court of the British decision.

11. The Court should have analysed more deeply not only the formal procedural aspects of the British decision but also, and especially, whether it was well founded in law, in other words, the substance of the decision, and should have rectified it if appropriate. By resorting to the traditional grounds of territorial attribution, some of which were also the grounds allegedly relied on by the British authorities, as evidenced by the Weightman Report, the Court could have verified and if necessary modified the 1939 British decision before lending its authority to it.

12. The subtle interplay of the principle of proximity, *effectivités* and original title (in the absence of one single clearly prevailing ground) might have led the Court either to confirm or reverse the British decision, or else to modify it in the manner proposed by a group of judges (see the joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma). In spite of all the pitfalls and uncertainty involved, such an approach would have been much less subject to criticism than mere reliance on the administrative decision of the former "protecting Power".

13. I regret also being unable to concur with another finding of the Court relating to the characterization of the maritime feature Qit'at Jaradah as "an island" (paragraphs 195 and 252 (4) of the Judgment). The opposing views of the experts, the absence of any evidence whatsoever to the effect that Qit'at Jaradah has ever been shown on nautical charts as an island, the alleged attempts of both States to artificially change the upper part of its surface, do not allow me to conclude that Qit'at Jaradah has the legal status of an island as provided for in the 1982 Convention on the Law of the Sea. In my assessment, this tiny maritime feature (see paragraph 197 of the Judgment), constantly changing its physical condition, cannot be considered an island having its territorial sea. Rather, it is

a low-tide elevation, whose appurtenance depends on its location in the territorial sea of one State or the other. Therefore the attribution of Qit'at Jaradah should have been effected after the delimitation of the territorial seas of the Parties and not vice versa.

(Signed) Vladlen S. VERESHCHETIN.