SEPARATE OPINION OF JUDGE AL-KHASAWNEH

Sovereignty over Zubarah and over the Hawars — Court declined to rule on: uti possidetis juris, *original title, and impact of* effectivités — *Preference for comprehensive treatment of the arguments presented — Confinement by the Court to the validity and binding force of the 1939 British decision — Too restrictive — Territorial claims open to judicial scrutiny — Absence of reference to substantive law in the part of the Judgment dealing with the Hawar Islands.*

No rigorous examination of the British decision in the Judgment — Qatari claim of bias and prejudgment is not answered — Qatari consent to entrust the British Government with resolving the dispute — Doubts as to the reality of the consent — Consent artificially held to be freely given — Dubai/Sharjah *arbitration fundamentally different.*

Uti possidetis juris *argument — Status of Qatar and Bahrain — "Protected States" or "States in special treaty relations with His Majesty's Government" — Control of the British Government over the Sheikhdoms — No right of the British Government to alienate parts of the Sheikhdoms' territories without the Rulers' consent — No British territorial title to the Sheikhdoms —* Uti possidetis juris *is inapplicable — Intertemporal law — Originally seen as a Latin American principle — Doubtful applicability of the principle in the Middle East.*

Ascertaining the historic title — Necessary given the uncertainty of the other grounds for determination of territorial title — Al-Khalifah Sheikhs exercised influence over the affairs of the Qatari peninsula mainland — In precario possessionis *— Claim of Qatari independence in 1868 — Not upheld — Ottoman sovereignty on Qatar in 1872 — Qatari independence in 1913 under the Anglo-Ottoman Convention — No indication of the spatial extent of the authority of the Ruler — No firm evidence permits to conclude that the Hawars belonged to Qatar — Relationship between geographic proximity,* effectivités *and title — Evidence of Bahrain* effectivités *before 1913 — Recognition by the Ottomans that the Ruler of Bahrain had ownership rights with respect to the islands — Other* effectivités *shown until 1936 — Absence of* effectivités *adduced by Qatar.*

1. I am in substantive agreement with the majority view on the attribution of sovereignty over Zubarah to Qatar and over the Hawars to Bahrain. With respect to the Hawars, the Court came to its conclusion on the basis that, whilst the British decision of 1939 was not an arbitration that had attained a *res judicata* character, it was nevertheless a valid political decision that binds the Parties.

2. Having reached this conclusion, the Court expressly declined (paragraph 148 of the Judgment) to rule on:

(a) The applicability of the principle *uti possidetis juris*;
(b) whether one or the other Party holds an original title; and

(c) the impact of the respective weight of *effectivités* which the Parties claim to have carried out on the Hawar Islands.

3. It is of course not unusual for the Court, when faced with what appears as alternative lines of reasoning to be satisfied, in finding its own jurisdiction or in reaching a substantive conclusion, with only one line of argumentation[1]. An analysis of the merits and demerits of such an approach is beyond the scope of this separate opinion. Suffice it to recall that I have had occasion in my dissenting opinion[2] in the *Aerial Incident of 10 August 1999 (Pakistan* v. *India)* case to express a preference for a more comprehensive treatment of the various arguments presented by the Parties and a reluctance to yield too readily to formalism. These are considerations that guide me also in dealing with the present case.

4. In confining itself to the issue of the validity and binding force of the British decision of 1939, the Court risks the not unreasonable criticism of having been excessively restrictive, all the more so since the Bahraini formula of 1988 opened all territorial claims to judicial scrutiny and did not confine itself to the legal status of the British decision. Moreover, that decision was based on an assessment, by the British officials at the time, of substantive law, regardless of whether one agrees with that assessment or not. The absence therefore of any reference to substantive law in the part of the Judgment dealing with the Hawars seems to me unwarranted.

5. More importantly, to base the disposition of territorial title to the Hawars solely on the validity of the British decision necessitates subjecting that decision to the most rigorous examination, which was not adequately attempted in the Judgment. Thus for example the Qatari claim that there was bias and prejudgment in violation of the rule which prohibits bias in a decision-maker on the international plane goes unanswered in the Judgment, although there is prima facie some evidence to support that allegation. To cite only one example, what is one to make of the undeniable fact that Weightman, then British Political Agent, was at one and the same time laying the ground for an enquiry on title to the Hawar Islands, and also participating in the description of the concession area to be offered by Bahrain which included the Hawars (Reply of Qatar, Vol. 3, p. 389), and indeed in advising the Ruler of Bahrain against offering a concession that would grant the entire unallotted area

[1] *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 25; *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 16-17; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Judgment, I.C.J. Reports 2000*, pp. 23-24, para. 26.

[2] *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Judgment, I.C.J. Reports 2000*, dissenting opinion of Judge Al-Khasawneh, p. 49, para. 6.

except the Hawars and three miles of sea around them? (Reply of Qatar, Vol. 3, p. 437.)

6. As far as Qatari consent to entrusting resolution of the dispute to the British Government on the basis of "truth and equity" is concerned, doubts also linger regarding the reality of that consent when set within the context of overwhelming British control over the two sheikhdoms and the realization on the part of the Ruler of Qatar that, faced with what he must have seen as a fait accompli, he had no one else to turn to. Under these circumstances, to construe his agreement to entrusting the British Government with resolving the dispute as a freely-given consent is possible only through a most nominal and highly artificial and disconnected interpretation of a series of events that started with the 1936 British provisional decision and ended in 1939 when the final decision was made. It should be added here that while the conclusion of the Arbitral Court in the *Dubai/Sharjah Border* case on the validity of the British decisions of 1956 and 1957, as administrative decisions, might recommend that conclusion as a model for the present case, that decision is fundamentally different from the present one in that, consent, thought necessary by the Court of Arbitration, had been freely given by the six Trucial States, together with an express undertaking by the Rulers of Dubai and Sharjah not to "dispute or object to any decision that may be decided by the Political Agent regarding the question of the boundaries" between the sheikhdoms.

7. For these reasons the Judgment would have been based on firmer ground had the Court laid the British decision of 1939 to rest and instead embarked on an exploration of the, admittedly, much more arduous path of ascertaining original title to the Hawars, which is what I shall endeavour to do in this separate opinion. But before that, I should comment briefly on another argument advanced on Bahrain's behalf in support of its claim to the Hawar Islands, namely the applicability of the principle *uti possidetis juris*.

8. Some remarks on the *uti possidetis juris* principle are appropriate for two reasons: firstly, to those who doubt the reality of Qatari consent to the British decision or find that consent vitiated, the decision becomes nothing more than the *uti possidetis juris* principle in disguise. Hence an enquiry into the impact of the principle assumes practical relevance. Secondly, the implications of this principle, which seem to be passing through a new phase of mutation, are profound. Generally speaking, to yield too readily to its applicability would be inimical to other legally protected rights, for example, the right of self-determination (although there is no danger of this in the present case) as well as to the very function of international courts which is not to declare, in the interests of preventing conflicts, pre-existing *de facto* territorial situations legal without regard to title and other relevant criterion, but to uphold justice by correcting illegalities where they occur.

9. Both Bahrain and Qatar were classified under British law not as colonies but as "protected States" or sometimes as "States in special treaty relations with His Majesty's Government". Such a formal classification notwithstanding, the British Government in fact exercised overwhelming control over the two sheikhdoms, not only in the sphere of international relations but also in domestic affairs. This control was derived from the various treaties with the two sheikhdoms and in addition from "custom, suffrage and acquiescence". However, regarding the pertinent question of territorial title, the British Government did not claim for themselves a right to alienate parts of the sheikhdoms' territories without the rulers' consent. This is clear from the *Dubai/Sharjah* arbitration[3]. Moreover, the British Government never acquired title in the various sheikhdoms of the Gulf including Bahrain and Qatar, unlike for example the Spanish Crown in Latin America, which had acquired sovereignty and title to territory. This, in itself, should lead us to conclude that the principle *uti possidetis juris* is inapplicable in this case.

10. In addition, in the *Eritrea/Yemen* Arbitral Award of 1998 the Tribunal had occasion to consider the argument that the *uti possidetis juris* principle applied and rejected that argument by one of the parties, noting that:

> "Added to these difficulties is the question of the intertemporal law and the question whether this doctrine of *uti possidetis juris*, at that time thought of as being essentially one applicable to Latin America, could properly be applied to interpret a juridical question arising in the Middle East shortly after the close of the First World War."[4]

I find that line of reasoning both persuasive, and by analogy, applicable, to the present situation, where the crystallization of the territorial claims took place before the principle had started to lose its essentially Latin American character and to assume a more international applicability, although it is still very doubtful whether even now it has any applicability in the Middle East.

11. I alluded earlier to the inherent difficulty of ascertaining historic or even original title (para. 7 above) and I would recall in this context Jorge Santayana's famous words "[t]he future is relatively easy to predict. It is the past that is well-nigh impossible to ascertain." A measure of this difficulty may be gleaned from Sir Robert Jennings's classic work on the acquisition of territory in international law. Commenting on the

[3] *Dubai/Sharjah Border* Arbitration, Award 1981, *International Law Reports*, Vol. 91, p. 567.

[4] *Eritrea/Yemen* Arbitral Tribunal, Phase One, para. 99.

Minquiers and Ecrehos case[5] he drew attention to the fact that

> "There is something a little ironic in the frequent citation of the *Minquiers and Ecrehos* case as an illustration of the importance of historical consolidation; for this was the case where *pleadings of unparalleled learning demonstrating the effect of titles established in feudal times were almost brushed aside* with the observation 'what is of decisive importance . . . is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups'."[6] (Emphasis added.)

In the present case, while the events surrounding the ascertainment of title did not take place in the Middle Ages, they go back to the eighteenth century and indeed, if the Ottoman dimension of the two Sheikhdoms' diplomatic history is to be fully taken into account as it should have been, to 1517 when Ottoman sovereignty was extended to the whole of Arabia regardless of the fact that, for the most part, particularly in the Gulf region, it was a loose or nominal one.

12. Those difficulties were compounded in the present case by the fact that, though the Court was inundated with a mass of information, some of doubtful probative value and some of questionable relevance, on the crucial question of Qatar's territorial extent the indigenous sources are more notable for their paucity of information than for their content. Similarly the evidence on Bahraini *effectivités* is relatively modest. There is no doubt that this is a reflection of the underdevelopment of the political and economic situation in the two Sheikhdoms at the time. These difficulties notwithstanding, the only way to dispose of the question of sovereignty over the Hawars is to embark on an enquiry into the two Sheikhdoms' diplomatic history; especially in view of the fact that what appeared at first glance as alternative lines of reasoning, i.e., the validity of the British decision and the applicability of the *uti possidetis juris* principle, have proved on closer examination to be uncertain grounds for the determination of territorial title.

13. What emerges with relative clarity from the historical record is that the Al-Khalifah Sheikhs exercised considerable influence over the affairs of the Qatari peninsular mainland from some time in the second part of the eighteenth century and up to 1868. Evidence also suggests that this influence was not absolute and was exercised more strongly over the settled segments of the population on the coastal areas than over the nomadic tribes. Even with regard to the former, this influence was intermittent and occasioned violent opposition. Thus it is safe to say that while the Al-

[5] *Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 47.

[6] R. Y. Jennings, *The Acquisition of Territory in International Law*, p. 27.

Khalifah *animus possidendi* was strong, the actual *corpus possessionis* was weak, resulting in a situation where their hold on the peninsula could be interpreted, at best, as having been one of *in precario possessionis*.

14. In 1861 Mohammed bin Khalifah entered into a treaty of protection with the British in which he was styled "The Independent Ruler of Bahrain". In return for British protection, he agreed not to disturb maritime peace. It is obvious that at that time the British authorities considered the Qatari peninsula to be a dependency of the Ruler of Bahrain.

15. All this was to change in 1868 when Mohammed bin Khalifah, together with the Sheikh of Abu Dhabi, led a punitive expedition against the eastern coast of the peninsula in the course of which the towns of Bida'a, Wakra and Doha were destroyed. Having breached his obligations not to disturb maritime peace, Mohammed Al-Khalifah was heavily punished by the British, who deposed him and installed his brother Ali Al-Khalifah. At the same time the British authorities entered into a separate treaty with the sheikhs of Qatar, paramount among whom was Mohammed Al-Thani, in accordance with which Mohammed bin Thani was to retire to his abode in Doha and to continue certain payments to Ali Al-Khalifah which were to be forwarded to the Wahabis as part of the *zakat* (a religious tax) that was collected from the people and tribes of Qatar.

16. It has been argued for Qatar that the events of 1868 marked the independence of Qatar and the consolidation of Al-Thani rule over the peninsula. This claim cannot in my view withstand the test of critical examination. In the first place, the treaties were primarily concerned with the maintenance of maritime peace and not with territorial title; secondly, because Mohammed Al-Thani was required to retire to Doha and its environs; and thirdly because the continued payment of sums to Ali Al-Khalifah, stipulated in the treaty, confirms vestiges of Bahraini authority over the peninsula.

17. But beyond these questions lies a more fundamental one. The events of 1868 clearly confirm that the British authorities in the Gulf thought it more expedient to deal with the sheikhs of Qatar directly. Can this in itself create title? The answer must be in the negative, for the British position in the Gulf itself depended on *de facto* ascendancy and not on any recognized title. Moreover the views of regional powers who had or claimed sovereignty were completely opposed to the British position. Thus Persia, which had a long-running claim to Bahrain, abandoned only on the eve of the termination of Bahrain's treaty relations with the United Kingdom in 1971, never extended her territorial claim to Qatar. Similarly, the Ottoman Empire, which undoubtedly had sovereignty over Qatar and Bahrain — though, with regard to the latter such claims remained nominal and were never pressed — could not have entertained notions of Qatari dependence on Bahrain.

18. Be that as it may, any theory of Qatari independence *erga omnes* as of 1868 is gravely weakened by the fact that the Ottomans asserted their sovereignty to the peninsula in 1872 and remained there until just before the outbreak of the First World War. The fact that for most of their stay in Qatar, Jasim bin Thani was kaimakam, i.e., district governor, does not alter this fact. The reasons for Ottoman resurgence in the nineteenth century are beyond the scope of this opinion. Suffice it to say that the Ottoman State's fear for its Arab possessions from encroaching European expansion was a primary motive[7]. To an over-burdened empire the co-option of influential local leaders or families as middle-ranking officials of the Imperial Ottoman Administration was a practical way of dealing with the need to expand its control. This was a process that was being repeated all over those parts of the Ottoman Empire where, hitherto, the central administration was not directly felt.

19. The real date for Qatari independence is 1913, the date on which the Anglo-Ottoman Convention was concluded (but not ratified). Although the treaty was primarily concerned with the delimitation of Qatar from Najd, i.e., central Arabia, it refers to the Qatari peninsula continuing to be ruled by Al-Thani "as in the past". However there is no clear indication of the spatial extent of that authority, nor can the spatial extent of that authority be ascertained from the 1914 Treaty of Aden between the Ottoman Empire and Great Britain, which was ratified and in fact made a renvoi to the relevant provisions of the 1913 Anglo-Ottoman Convention. Were the Hawars intended to lie within the nascent authority of the Al-Thanis? The provisions of the Convention are silent and the words "as in the past" are not conducive to such an interpretation, for that authority, independently of Ottoman power, was restricted to the environs of Doha and to the north of the peninsula around Zubarah. Moreover, there is no express reference to the Hawars in the Convention nor do we find any expression such as "the Qatari peninsula and the islands immediately off its coast" from which a reasonably firm inference may be drawn. There is however a map which forms Annex V to the Anglo-Ottoman Convention of 1913 which may lend support to the inclusion of the Hawars within the Qatari peninsula (this map is reproduced as map 46 in the Map Atlas of the Reply of Qatar), but even here it is difficult to come to any firm conclusions. That map was primarily concerned with delimiting the territories that were to remain under Ottoman sovereignty after the conclusion of the Treaty of Aden. As far as other territories are concerned the map seems to follow a geographic rather than a political criterion.

[7] Interestingly as it had been in 1517 when the Ottoman Sultan Selim (Yildrim) interrupted his successful European campaigns and moved southwards to meet Portuguese threats to the Gulf, the Red Sea and the Indian Ocean.

20. In the absence of clear guidance from the Anglo-Ottoman Convention, Qatar's claim to the Hawars would rest on the strong presumption that islands proximate to the mainland appertain to that mainland. This presumption is however rebuttable. Geographic proximity cannot displace a clearly established title. It would be crucial therefore to examine the subtle interplay between the concept of geographic proximity on the one hand and that of established title on the other; taking into account the weight of *effectivités* which cannot in themselves displace title, but come to the forefront when that title or its territorial expanse are not clear. As the Court cogently put it:

> "Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice."[8]

21. Bahrain has claimed to have demonstrated *effectivités* on the Hawars for a period of almost a century and a half, including the claim that the original Dawasir settlement on Hawars was effected through grant by a Qadi of Zubarah (circa 1800) when that town was still under Al-Khalifah rule. The evidence surrounding this particular *effectivité* is however so clouded in uncertainty and hearsay that not much probative value can be attached to it. What is more pertinent are the Bahraini *effectivités* carried out in the period 1872-1913, i.e., during the Ottoman presence in Qatar, for it is most unlikely that the Ottomans who were the title-holders in Qatar would have acquiesced to such *effectivités* had they not been carried out on territory to which their claims of sovereignty were nominal. One may cite in this regard the 1909 Bahraini court decisions relating to land rights and fishing traps in the Hawars, as well as the arrest and compelled attendance in Bahraini courts of Hawar Island residents. As to external supporting evidence, one may also cite the use of the same colour for the Hawars and Bahrain in a survey carried out in 1878 by Captain Izzet Bey, an officer of the Ottoman Army. Unlike the map annexed to the Anglo-Ottoman Convention of 1913, the Izzet Bey map leaves no room for different interpretations.

22. These facts carry an important evidentiary value, for they confirm that the Ottomans, the sovereigns of Qatar at that time, recognized that the Ruler of Bahrain, although he had no title to the peninsular mainland, nevertheless continued to have ownership rights over the islands on the western coast of Qatar, a view not at all unreasonable in view of the fact that for a seafaring people the links of these islands were perceived as

[8] *Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, p. 587, para. 63.

being greater with the main islands of Bahrain than with Doha, which is separated from the Hawars by a daunting desert.

23. Additionally, until 1936, the date of the provisional British decision, Bahrain continued to show a number of other *effectivités* on the Hawars. For example, the licensing of gypsum quarrying, which, in addition to being normally a governmental activity, also suggests the settled nature of the presence on the Hawars of persons closely linked with Bahrain. To be sure such *effectivités* are not numerous and in some cases are not free of controversy. However, by contrast Qatar could not demonstrate any comparable *effectivités*, indeed any *effectivités* at all, over the islands. In the period 1936-1939 there was a flurry of *effectivités* by Bahrain, but these should be discounted as no more than attempts to introduce new evidence after the commencement of the dispute.

24. In conclusion, lack of clarity regarding Qatar's original title to the Hawar Islands gives to the *effectivités*, adduced by Bahrain in support of its contention that it continued to have original title over the Hawars, a crucial role notwithstanding their small number and modest status; for under similar circumstances international law has been satisfied with little evidence, undoubtedly as a reflection of the varying standards of time and place. Following this line of reasoning, I concur with the majority view.

(Signed) Awn Shawkat AL-KHASAWNEH.