

THE INTERNATIONAL COURT OF JUSTICE AND THE DISPUTE OVER HOWAR ISLANDS: A TENTATIVE APPROACH TO ITS JUDGEMENT ON JURISDICTION AND ADMISSIBILITY

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INTRODUCTION

The historical background of the dispute between Qatar and Bahrain over the Howar islands is well-known to most citizens⁽¹⁾ of the Arabian Gulf states as well as to scholars⁽²⁾ of international law. It has created a great deal of successive tensions between the two states for more than two centuries. The passive and formidable impacts of these tensions have unfortunately been realized in all fields of cooperation, not only between the members of the Gulf Cooperation Council (G.C.C.), but also between the Arab states themselves. The blame lies not with the disputant states, but with the deficiencies of the system of settlement dispute in the Arab regional organizations. One of these failures, in fields of cooperation among Arab states is the continuation of this dispute, without prejudice to many ones of this kind, between two Arab states. It is somewhat painful for a citizen of the G.C.C. states to live with such a dispute between states which are members of the G.C.C. and of the Arab League, states whose constitutions declare that the territories and peoples of the two states constitute integral parts of the Arab world and of the Arab Nation⁽³⁾. To leave the settlement of any dispute for the initiation of individual efforts of mediation, as is the case in the Arab world, and more particularly in the dispute over the Howar islands, is not a practical one in the present international community, even though the mediator is so influential to the parties of the dispute.

(1) For more details on the historical background of these disputes, Al-Mansoor, Abdul Aziz Muhammed, *Al-Tatawir al-Siyasi Li Qatar fi al-Fatra ma bayn 1868-1916*, 2nd ed., 1980, p. 34.

(2) Day, Alan J. *Border and Territorial Disputes*, Longman Group Limited 1982, p. 212.

(3) Article 1 of the Bahrain's Constitution of 1972 states that: "(a) Bahrain is an Arab state..., her people are an integral part of the Arab Nation, and her territory is an integral part of the Arab world..."; Article 1 of the Qatar's Constitution of 1972 declares that: "Qatar is an Arab and an independent sovereign state... her people is an integral part of the Arab Nation".

Although it is true that the Arab regional system of dispute settlement affords the parties more opportunities of choice among many methods of settlement, it may also operate for the benefit of one party at the expense of the interest of the other. More particularly, this applies if the former wants to prolong the dispute. The only benefit for the latter is that through the process of settlement of the dispute, through mediation or any other methods, it may find an opportunity of submitting the dispute for international adjudication. Such an opportunity was grabbed by Qatar on 8 July 1990, when it unilaterally filed an application in the Registry of the Court constituting proceedings against Bahrain regarding the dispute between the two states over the Howar islands and over the delimitation of the maritime area between the two states⁽¹⁾. The legal grounds, as alleged by Qatar, are the 1987 Exchange of Letters and the 1990 Minutes, which were reached through the mediation of the Custodian of the two Holy Shrines King Fahed Ibn Abdul Aziz⁽²⁾.

By this application, the machinery of the I.C.J.'s jurisdiction was activated, at least accidentally, to comply with the requirement embodied in article 40 of the Court's Statute⁽³⁾. According to this statute, the Court's Registrar, as he did, should forward the application to the Government of Bahrain and to all interested states. Under such incidental jurisdiction, the Court began its interlocutory proceedings on monday 28th of February 1994⁽⁴⁾, during which Bahrain did not discuss the subject matters of the dispute, but questioned the legal ground of the I.C.J.'s jurisdiction as invoked by Qatar⁽⁵⁾. By such plea, Bahrain directly and emphatically invoked the Court's generally established rule that its jurisdiction is invariably based on the will of the parties, and raised the issue of jurisdiction; an issue which must firstly be decided by the Court without prejudice to the subject matter of the dispute. Subsequently, the President of the Court and the representatives of the disputant states agreed, in accordance with the general rule embodied in the Optional Clause, that the proceedings on the

(1) I.C.J. Reports, 1994, p. 114.

(2) Al-Watan, Sunday 13 March 1994, issue No. 946/6500.

(3) Article 40 of the I.C.J.'s Statute states that: "2. The Registrar shall forthwith communicate the application to all concerned. 3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court".

(4) Al-Watan Newspaper, 1st March 1994, issue No. 934/6488.

(5) See: Bahrain's contention in her letters of 14 July and of 18 August 1991 despatched to the Registrar of the I.C.J., Reports, 1994, p. 112.



merits should be delayed until the questions of jurisdiction and admissibility are determined⁽¹⁾. Relevant evidence and documents to the issues of jurisdiction and admissibility, to which written proceedings were to be addressed in accordance with Article 31 of rules of the Court and with the agreements of the parties and the procedures, were to be submitted to the Court⁽²⁾. Also, according to the agreements of the parties just mentioned, and to the rules of the Court, the Court defined 10 February and 11 June 1992 as time-limits for Memorial and Counter-Memorial of Qatar and Bahrain, respectively, on the issues of jurisdiction and admissibility; and subsequently the parties duly filed their pleadings within the time-limits as fixed⁽³⁾.

For the purpose of examination of the issues of jurisdiction and admissibility, the Court defined 28th February to 11 March 1994 for the public hearings, during which the oral arguments were addressed to the Court and written submissions were presented to the Court by the representatives of the disputant states⁽⁴⁾. In Qatar's Memorial and reply, it was stated that:

«The state of Qatar respectfully requests the Court to adjudge and declare, rejecting all contrary claims and submissions, that -

The Court has jurisdiction to entertain the dispute referred to in the application filed by Qatar on 8 July 1991 and that Qatar's application is admissible» ⁽⁵⁾.

Conversely, on Bahrain's Counter-Memorial and Rejoinder, it was stated that:

«The State of Bahrain respectfully requests the Court to adjudge and declare, rejecting all contrary claims and submissions, that the Court is without jurisdiction over the dispute brought before it by the Application filed by Qatar on 8 July 1991»⁽⁶⁾.

Consequently, based on all these substantial and procedural legal grounds, the Court reached its decision of the 1st of July 1994 on the issues of jurisdiction

(1) This agreement was reached in a meeting held between the president of the Court and the representatives of Qatar and Bahrain on 2 October 1991, I.C.J. Reports 1994, p. 114.

(2) *ibid.*

(3) *ibid.*

(4) *ibid.*, p. 115.

(5) I.C.J. Reports, 1994, p. 115.

(6) *ibid.*

and admissibility, in which the Court afforded the parties the opportunity to submit to it the whole of the dispute whether jointly or separately on 30th November 1994⁽¹⁾.

Therefore, the main aim of this study is to provide a tentative evaluation of the I.C.J.'s judgement of the 1st July 1994 on jurisdiction and admissibility against the prevailing principles of international law governing personal and objective jurisdiction of the International Court of Justice.

1. The Judgement and the Well-Established Conditions of the I.C.J.'s Personal Jurisdiction:

Generally speaking, the I.C.J.'s personal jurisdiction is intimately and closely connected with its objective one, whereas the existence of the latter inevitably presupposes the establishment of the former. Conversely, this fact cannot be reversed, since, as a general rule, the I.C.J. does not possess compulsory jurisdiction. In the present judgement, however, the I.C.J. did not pronounce any view on the availability of the conditions of its personal jurisdiction on the dispute, but instead, concentrated on examining those of its objective jurisdiction. This attitude of the I.C.J. may be taken as an indication of the Court's satisfaction concerning the pre-existence of these conditions with regard to the disputant states, and thus, the judgement implies these conditions. Accordingly, some theoretical observations may deem to be necessary for the purpose of revealing the underlying conditions of personal jurisdiction in the judgement.

The dispute between Qatar and Bahrain over the Howar islands is a contentious one, which is covered by Article 34/1 of the I.C.J.'s Statute. The article states that: "Only states may be parties in cases before the Court". However, these conditions, statehood and contentious cases, are not the only ones for assuming personal jurisdiction on a dispute by this Court. The other conditions are stipulated by the Statute of the I.C.J., the Charter of the United Nations, and the Resolutions of the General Assembly and of the Security Council, as will immediately be analyzed.

1.1. The Acceptance of the I.C.J.'s Jurisdiction by Non-Members of the U.N. and of the Statute:

The conditions of the I.C.J.'s assumption of personal jurisdiction over a

(1) I.C.J. Reports, 1994, p. 112.



dispute between states which are not members of the U.N., and of the I.C.J.'s Statute, are embodied in article 35/2 of the Statute⁽¹⁾ and were determined by the Security Council on 15 October 1946⁽²⁾. The conditions define the framework within which this category of states can express their acceptance of the I.C.J.'s jurisdiction.

In the present judgement, however, none of these conditions, in spite of the acceptance of the I.C.J.'s jurisdiction by Qatar and Bahrain, are applicable to the disputant states for obvious reasons, as will subsequently be mentioned. Thus the judgement does not imply any one of them.

1.2. Being Parties to the I.C.J.'s Statute:

The condition for the I.C.J.'s assumption of personal jurisdiction over a dispute between non-member states of the U.N. is only to be parties to the Statute, as required by Article 93/2 of the U.N. Charter⁽³⁾; a condition which is

(1) The Article declares that: "The conditions under which the court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court".

(2) The conditions may be summarised as follows:

- the necessity of notifying the Registrar of the Court about any country's acceptance of the Court's jurisdiction.
- the acceptance must be in conformity with the provisions of the U.N. Charter and of the Court's Statute and of its internal procedural rules;
- the state must implement the Court's judgement with good faith and must accept the obligations stipulated in Article 94 of the U.N. Charter.

Security Council Resolution. 9/1946, October 15, 1946.

(3) Article 93/2 of the U.N. Charter denotes that: "A state which is not a member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assmebly upon the recommendation of the Security Council."

Consequently, the General Assembly has determined the conditions required in such a case by a resolution passed on 11 December 1946. According to the Resolution, the Non-member states to the U.N. Charter are entrusted to agree to all provisions of the Statute of the I.C.J. and Article 94 of the U.N. charter, regarding the authority of the Security Council in implementing the I.C.J.'s judgement, and to participate in the expenses of the Court pursuant to what determined by the General assembly. By this provision each of Switzerland, San Marino, Lichinsctayen and Japan, before the latter joined the U.N., had acceded to the I.C.J.'s Statute, General Assmebly Resolution, 91 (i), December 11, 1946.

indirectly applicable to Qatar and Bahrain as can be seen in the analysis of the following implications of the judgement.

1.3. Membership of the U.N.

One of the implications of the judgement is this condition, since, the I.C.J. is a principal organ of the United Nation, and its Statute is an integral part of the U.N. Charter. Thus, when Qatar and Bahrain were admitted to the membership of the U.N. on 21 September 1971⁽¹⁾, they automatically became parties to the I.C.J.'s Statute, as, generally, declared in Article 93/1 of the U.N. Charter in the following words: "All Members of the United Nations are *ipso Facto* parties to the Statute of the International Court of Justice"⁽²⁾.

The availability of this condition for Qatar and Bahrain enabled the former to file the 1991 unilateral application in the Registry of the Court, instituting legal proceedings against the latter. Bahrain, however, was not able to question the legal grounds of the I.C.J.'s personal jurisdiction but instead contested those of the Court's objective jurisdiction.

2. The Judgement and Conditions of the I.C.J.'s Objective Jurisdiction:

The judgement dealt with Qatar's unilateral application in accordance with the conditions required for the I.C.J.'s assumption of jurisdiction over the dispute and within the framework defined by the general rule governing the Court's jurisdiction as embodied in the Statute and established in the practice of this Court.

2.1. Optional Jurisdiction of the I.C.J. as Framework for the Judgement:

Although Qatar and Bahrain possessed the requisite condition of the I.C.J.'s personal jurisdiction as implied in the judgement; at that time, before the 1987 Exchange of Letters, the Court lacked the competence to assume an objective jurisdiction on the dispute. Since the jurisdiction is an optional one; it is assumed by the Court in accordance with certain conditions embodied in Article 36/1 of its Statute. The Article states that: "The jurisdiction of the Court comprises all cases which the parties refer to it...". This general rule, which

(1) U.N. General Assembly, Provisional Verbatim Record of 1934th Meeting (Admission of Bahrain and Qatar in the U.N.), A/PV 1934, 21 September 1971.

(2) Cf. the relationship between the members of the League of Nations and the Permanent Court of International Justice, see: generally, Lauterpacht, Sir. Hersch. The Development of International Law by the International Court, London 1982.



governs the I.C.J.'s jurisdiction, is usually regarded by the Court as the framework for the operation of the conditions, declarations and agreements of the Court's assumption of objective jurisdiction on any dispute, as in the present one.

However, one may argue that Article 36/1 of the Statute implies, at its end, that the Court possesses a compulsory objective jurisdiction with regard to: "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force", and thus, all required conditions for the assumption of jurisdiction by the Court over these matters, which the dispute over the Howar islands may be one of them, fall to the ground. The argument is not a theoretical one, but can be supported by the very essence of the U.N. Charter, more specifically Article 36/3, which declares that:

«In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court».

Any one of the disputant states can rely on this Article and submit the dispute unilaterally to the Court without any pre-existing conditions, but several judges of the Court, itself ⁽¹⁾, have rejected such an argument in the sense that it is necessary for the disputant states to reach an agreement, tacit or expressed, or only a declaration, as condition for submitting the dispute to the I.C.J. in accordance with Article 36/2 of the Statute. That is to say, that the I.C.J., as a general rule, does not possess compulsory jurisdiction, but optional one.

Within this framework, the optional jurisdiction, Qatar, in her application of 8 July 1991, invoked certain bases (conditions) for the assumption of the objective jurisdiction by the I.C.J. on the dispute; conditions which were rejected by Bahrain without hesitation. Since then, the Court must determine, firstly, the issue of jurisdiction and more specifically, the bases (conditions) upon which it was based, as raised by Bahrain.

In examining Qatar's unilateral application, the Court found that Qatar instituted the proceedings against Bahrain on two legal grounds. The first one comprises proposals of the King Saudi Arabia sent to the Heads of Qatar and Bahrain in identical letters and accepted by them in 1987. The Saudi proposals

(1) Akehurst, M.A. Modern Introduction to International Law, 5th ed., p. 206 ff; Starke, J. Introduction to International Law, 9th ed., p. 478 ff.

composed of four points as follows:

- The dispute between Qatar and Bahrain over the Howar islands should be submitted to the I.C.J. for reaching a final and binding decision on both parties.
- The maintenance of the status quo of the disputed areas.
- The establishment of a committee composed of the representatives of Qatar, Bahrain and Saudi Arabia:

«for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued».

- Saudi Arabia should "continue its good offices to guarantee the implementation of these terms"⁽¹⁾.

In the same manner the 1990 Minutes was signed by the Foreign Ministers of Bahrain, Qatar and Saudi Arabia as follows:

«The following was signed:

- (1) to reaffirm what was agreed previously between the two parties;
- (2) to continue the good offices of the Custodian of the two Holly Mosques, King Fahd Ben Abdul Aziz, between the two countries till the month of Shawwal, 1411 H, corresponding to May of the next year 1991. After the end of this period, the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar, and the proceedings arising therefrom. Saudi Arabia's good offices will continue during the submission of the matter to arbitration;
- (3) should a brotherly solution acceptable to the two parties be reached, the case will withdrawn from arbitration»⁽²⁾.

After extensive efforts of mediation by Saudi Arabia the parties did not reach the desired solution, as proposed in the 1987 Exchange of Letters and in the 1990 Minutes. From one hand and from another Qatar grabbed this opportunity and made use of the Exchange of Letters and of the Minutes. In this regard, Qatar registered the 1987 Exchange of Letters and the 1990 Minutes in

(1) I.C.J. Reports, 1994, p. 117 ff.

(2) Translation from Arabic as supplied by Qatar, I.C.J. Reports, 1994, p. 119.



the Secretariat of the United Nations in accordance with article 102 of the U.N. Charter ⁽¹⁾ and invoked them as bases for her unilateral application of 8 July 1991.

The two texts refer plainly to the jurisdiction of the I.C.J. In the 1987 Exchange of Letters it was agreed that: "the dispute between Qatar and Bahrain over the Howar islands should be submitted to the I.C.J. for reaching a final and binding decision on both parties...."; while in the 1990 Minutes the parties precisely agreed that: "(1) to reaffirm what was agreed previously between the two parties [the 1987 Exchange of Letters]..." moreover, after the end of the period of the Saudi Mediation, as defined in the 1990 Minutes,"... the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar, and the proceedings arising therefrom....".

In Qatar's view, therefore, the 1987 Exchange of Letters and the 1990 Minutes concerning the reference of the dispute to the I.C.J. constitute expressed agreements, with full meaning of this term, and thus, the Court is able "to exercise jurisdiction to adjudicate upon those disputes", as requested by the 1991 application⁽²⁾. Conversely, Bahrain questioned the legally binding force of the 1987 Exchange of Letters and of the 1990 Minutes on the grounds that they do not constitute international agreements which enable Qatar to unilaterally seize the Court, as she did⁽³⁾.

It should be noted, however, that Bahrain in her contention did not realize that the I.C.J. may assume objective jurisdiction on bases other than mere agreements.

2.2. Examination of the Bases of the I.C.J.'s Jurisdiction as Invoked by Qatar:

2.2.1 The 1987 Exchange of Letters and the 1990 Minutes as Declarations on Accepting the I.C.J.'s Jurisdiction:

Taking into account the practice of the I.C.J. in which it favours a restrictive interpretation of texts conferring on it the jurisdiction, a decisive importance may be attached to the interpretation of a meaning given to the 1987 Exchange of Letters and the 1990 Minutes as unilateral declarations of accepting the Court's jurisdiction. In the Anglo-Iranian Oil Company Case⁽¹⁾, the Court

(1) I.C.J. Reports, 1994, p. 122.

(2) I.C.J. Reports, 1994, p. 120.

(3) *ibid.*

did not make it clear whether the Iranian unilateral declaration of accepting the Court's jurisdiction is not a treaty or it "is not a treaty text resulting from negotiations between two or more states", even though one may say that the last interpretation is the only valid one. This interpretation is supported by the so-called Optional Clause as embodied in Article 36/2 of the I.C.J.'s Statute, which considers as a treaty any text, such as the text of this Article, to which the declaring state gives its adherence; that is to say, in certain texts it is not always easy to make distinction between a declaration and a treaty. Moreover, in the case concerning the Austro-German Customs Union⁽²⁾. The Court decided that:

«from the point of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes».

Turning now to Qatar's unilateral application, she might have relied, in that application, on mere declarations of the two states throughout the process of mediation which lasted from 1976 to 1990⁽³⁾. This hypothesis is not without support from the Statute and practice of the Court, since in many occasions the Court regarded that declarations expressed under Article 36/2 of the Statute in different times and by different states are not precisely and exactly like a treaty, even though they are essentially treaties. They contain reciprocal rights and obligations, the content of which are determined by each state in accordance with the statute⁽⁴⁾; exactly as Qatar and Bahrain did in the 1987 Exchange of Letters and in the 1990 Minutes. To meet the Registration requirement of the declarations under Article 36/4 of the Statute and under Article 102 of the U.N. Charter, Qatar unilaterally despatched the texts containing the declarations to the Secretary-General of the United Nations, who forwarded copies of the declarations to the members of the Statute and to the Court's Registrar⁽⁵⁾.

It may be asked, however, whether a state not party to the present dispute could rely on these declarations with regards to other disputes with one of the declaring states? As a general rule, a state accepting the jurisdiction of the I.C.J. in conformity with a previous declaration does so relying on the principle of reciprocity, as embodied in Article 36/2 of the Statute, which denotes that: "... in

(1) I.C.J. Reports, 1952, p.. 105.

(2) P.C.I.J. 1931, Ser. A/B. No. 41, p. 47.

(3) I.C.J. Reports 1994, p. 116 ff.

(4) P.C.I.J., 1931, Ser. A/B, No. 41, p. 47 ff.

(5) I.C.J. Reports, 1994, p. 122.

relation to any other state accepting the same obligation". Therefore, any state, other than Bahrain, which has disputes with Qatar cannot rely on the declaration, if it did exist⁽¹⁾. The declarations contained in the 1987 Exchange of Letters and in the 1990 Minutes are not regarded as general ones⁽²⁾ under Article 36 of the I.C.J.'s Statute, but restricted declarations between certain states - Qatar and Bahrain - and within a certain period of time. The declarations on the acceptance of the Court's jurisdiction are only confined to the dispute between these two states over the Howar islands; and they do not cover other disputes⁽³⁾. A state not party to the 1987 Exchange of Letters and the 1990 Minutes cannot enjoy the benefit of the Optional Clause embodied in Article 36 of the Statute, unless she is willing to accept the obligations of the Clause by acceding to the 1987 and 1990 texts. Moreover a state acceding to these texts with reservation will reciprocally be treated by the other accepting states⁽⁴⁾.

At any rate, the oral and written statements of Qatar and Bahrain during the Court's proceedings drew the attention of the Court to another direction, in which Qatar argued that the 1987 Exchange of Letters and the 1990 Minutes do not constitute anything else other than agreements conferring objective jurisdiction on the Court with regard to the dispute; while Bahrain denied such argument. Accordingly, the Court inquired into the nature of the 1987 Exchange of Letters and the 1990 Minutes, after then the Court analyzed the contents of these texts in order to ascertain affirmatively or negatively its jurisdiction over the dispute.

2.2.2. The 1987 Exchange of Letters and the 1990 Minutes as Constituting International Agreements on Accepting the I.C.J.'s Objective Jurisdiction:

In its judgement of the 1st July 1994, the I.C.J. waived the first hypothesis, i.e. that the 1987 Exchange of Letters and the 1990 Minutes constituted declarations of Qatar and Bahrain, and examined a more concrete one by

(1) Qatar has boundary disputes with Saudi Arabia, which have not been solved neither by agreement nor by international tribunal, Amin, S.H. International and Legal Problems of the Gulf, Middle East and North African Studies Press Ltd, London, 1981, p. 131; El-Hakim, Ali A. The Middle Eastern States and the Law of the Sea, Syracuse University Press, New York 1979, p. 121.

(2) Nottebohm Case, I.C.J. Reports, 1953, p. 111.

(3) See: n. 2. above, p.3.

(4) Nottebohm Case, I.C.J. Reports, 1953, pp. 122.

approaching these texts from two angles. The first was to examine the nature of the 1987 Exchange of Letters and the 1990 Minutes against the well-established rules of international law, in particular those established by the Court itself and by the Vienna convention on the Law of Treaties of 1969. By applying these rules, the Court found out that taking into account the actual terms and the surrounding circumstances in which these texts were concluded, the 1990 Minutes re-affirmed the obligations previously entered into in the 1987 Exchange of Letters. concomitantly, The 1990 Minutes provide that the mediation of Saudi Arabia should continue during which time the dispute is before the Court, but whenever the party reaches an agreement in submitting the dispute to arbitration, within the time-limit as fixed, the case must be withdrawn.

The Court properly concluded that the failure of the Saudi mediation and the expiration of the time-limit, as fixed, without reaching any agreement, the 1987 Exchange of Letters and the 1990 Minutes are not mere registrations of meetings, but they contain and moreover, create rights and obligations in international law - for Qatar and Bahrain - and thus constitute international agreements. The Court also pointed out that in her objection to the bases of Qatar's unilateral application, Bahrain improperly relied on unconvincing grounds, such as the intention of the signatories, the constitutional requirements, and the treaty registration. She contested that her signature of the 1990 Minutes had never been intended to enter into agreements and according to the constitution of Bahrain such agreements, if they had been concluded, could have only come into force, as a law, through certain constitutional procedures; and argument which carries in its face its weakness. Bahrain also arguably added that the subsequent conduct of the two states - Qatar and Bahrain - emphasizes that the two states have never regarded the 1990 Minutes as constituting a binding agreement. She relied, as support for the above arguments, on the late registration of the 1990 Minutes in the United Nations Secretariat and the non-registration of this text in the General Secretariat of the Arab League in accordance with Article 17 of the Pact of this organization⁽¹⁾.

The Court, however, rejected the grounds upon which Bahrain based her contentions without hesitation; it declared that the Foreign Ministers of the two states had signed written agreements which were accepted by their respective governments, and that it was consequently unnecessary to consider what might have been the intentions of the Ministers at that time. The Court added, non-

(1) I.C.J. Reports, 1994, p. 121 ff.

registration or late registration has nothing to do with the legal nature of the agreements, but non-registration prevents any party from invoking the agreements before any organ of the United Nations⁽¹⁾. The Court did not respond to Bahrain's contention regarding the constitutional requirements; a contention which is contrary to the generally accepted rule of international law that a Foreign Minister of a state is considered as possessing full power to conclude treaties⁽²⁾. Furthermore, constitutional requirements cannot be taken as grounds for invalidating a treaty⁽³⁾.

It may be added, that the 1987 Exchange of Letters and the 1990 Minutes cannot be regarded as constituting special agreements (compromises), whereby two or more states agree to submit a particular and defined dispute to the I.C.J. for a settlement⁽⁴⁾. The main feature of this type of agreement is that the jurisdiction conferred and the Court is seized of the particular dispute by the mere notification of the agreement to the Registry of the Court. The 1987 Exchange of Letters and the 1990 Minutes do not reach this stage of clarity as compromises, but they are covered, as the Court decided, by Article 2/1 (a) of the Vienna Convention on the Law of Treaties 1969⁽⁵⁾.

It should be noted that in its judgement of 1st of July 1994, the Court did not adopt any innovation in its pre-existing practice, in which it always insists on the restrictive interpretation of jurisdiction clauses. The Court, however, does not allow this fact to obscure the Court's insistence, in accordance with international law, on the principle that consent of a state is an essential for the Court to exercise jurisdiction over any dispute. In the case of Monetary Gold Removed From Rome, it was decided that:

«The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-

(1) *ibid*, p. 122.

(2) Sinclair, Sir Ian. *The Vienna Convention on the Law of Treaties*, Manchester University Press 1984, p. 31.

(3) *ibid*, p. 169 ff.

(4) See: U.S. Diplomatic and Consular Staff in Tahrán Case, U.S. v. Iran, I.C.J. Reports, 1980, p. 3ff; Corfu Channel Case (Merits), I.C.J. Reports, 1949, p. 4.

(5) Article 2, U.N.T.S., vol. 1155, p. 331.

established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a state with its consent»⁽¹⁾.

Similarly, in the Corfu Channel Case of 1949 between the UK. and Albania⁽²⁾, the Court considered that the letter, not exchange of letters or minutes, forwarded from the Foreign Minister of Albania to the General Registrar of the I.C.J. as constituting good evidence of Albanian's consent to submit the disputes to the I.C.J. That is to say, the jurisprudence of the Court emphasizes that the principle that jurisdiction is to be found on state's consent ought not to be interpreted in an exacting manner. In the Corfu Channel Case the Court exercised jurisdiction by virtue of Albanian's implied consent, which is more or less in clarity than that of expressed consent embodied in the 1987 Exchange of Letters and in the 1990 Minutes.

For the sake of argument, one may tentatively suppose the opposite situation of the present judgement in order to examine the accuracy of Bahrain's argument. In that situation, one can say that even if the Court accepted Bahrain's contention and decided that it has no jurisdiction on the dispute, the I.C.J.'s Statute does not prohibit any one of the disputant states to submit the dispute to the Court before the conclusion of an agreement or even requires such an agreement to be reached before filing the application to the Court. This means that the Court may assume prorogated jurisdiction over any dispute by unilateral application of one of the disputant states, as did Qatar. In this case, the Court is seized with the unilateral application to which the other party plead on the merits, without questioning the jurisdiction itself. This act on the part of the other party is treated as an acceptance of the jurisdiction, or regarded as an estoppel by conduct⁽³⁾. Ofcourse, Bahrain was mindful of this fact and objected directly to the Court's jurisdiction, but this objection does not restrict Qatar's freedom in accordance with the Statute.

Thus, as a general rule, the agreement of the disputant states can be expressed or tacit, and may be concluded from one party's act or a series of acts⁽⁴⁾.

(1) I.C.J. Reports, 1954, p. 32.

(2) Corfu Channel Case (Preliminary Objection), U.K. v. Albania, I.C.J. Reports 1948, p. 28.

(3) The Minorities Schools Case, P.C.I.J., Ser. A. No. 15.

(4) Monetary Gold Case, I.C.J. Reports, 1954, p. 19.

After deciding that the 1987 Exchange of Letters and the 1990 Minutes constitute international agreements, the Court turned to the second angle of the issue in which it analyzed the consent of the parties as embodied in the 1987 Exchange of Letters and in the 1990 Minutes. In its analysis, the Court was of the opinion that Qatar and Bahrain, after the complete failure of the mediation of Saudi Arabia, undertook to refer the dispute to the I.C.J. for final settlement. The Court observed that the agreements permit the parties to present their claims jointly or separately within the framework as fixed by the agreements. Thus, it admitted Qatar's application⁽¹⁾ and assumed jurisdiction⁽²⁾ over the dispute on these grounds pending the decision on the merits.

From what has been said above, one may conclude that, in her unilateral application of the dispute to the I.C.J., Qatar might have intended to examine two possibilities. The first was the existence of the I.C.J.'s prorogated jurisdiction over the dispute, but such legal maneuver was to no avail. The representative of Bahrain did not plea on the merits, but directly and precisely objected to the Court's Jurisdiction itself. The second possibility was to establish The court's objective jurisdiction on the 1987 Exchange of Letters and the 1990 Minutes, as bases (conditions), in accordance with Article 36/1 of the Court's Statute; a possibility which became reality in the Court's judgement of the first July 1994. These bases (conditions) deserve the final judgement, a tentative evaluation against the overruling principles of international law, including those established by the Court itself.

In principle, no jurisdiction can be assumed by the I.C.J. unless one of the bases (conditions) are available for each type of personal or objective jurisdiction. The two types of jurisdiction, though theoretically connected, do not inevitably co-exist in every case. For this reason, our investigation has empirically examined the existence of the conditions of the I.C.J.'s personal jurisdiction over the dispute, according to which one may presume that the judgement implicitly, not explicitly, takes into account the availability of the condition of the Court's personal jurisdiction over the present dispute, i.e. the membership of Qatar and Bahrain to the U.N. The existence of the personal jurisdiction, however, does not mean that the Court automatically assumes an objective jurisdiction over the dispute, since there are certain conditions required

(1) I.C.J. Reports, 1994, p. 124.

(2) On 14 February 1995, the International Court of Justice decided that it has jurisdiction on the dispute between Qatar and Bahrain over Howar islands, Al-Watan, Thu/. 16 February 1995 No.: 6833/1279.

for the assumption of this type of jurisdiction by the I.C.J. Conversely, the assumption of the objective jurisdiction over the dispute by the Court presupposes the existence of the personal jurisdiction.

All the conditions of the I.C.J.'s jurisdiction over the dispute have been provisionally investigated within the framework as defined by the general rule that the I.C.J. possess only optional jurisdiction. This is the only framework within which the Court usually conducts its business with regard to the matters of jurisdiction; that is to say, no provision in the Statute or in the U.N. Charter implicitly or explicitly subscribes automatic compulsory jurisdiction of the Court, as further supported by the jurisprudence and practice of the Court.

Qatar in her application invoked, within the framework and according to the general rule, two text as conditions for the assumption of an objective jurisdiction by the I.C.J. over the dispute: the 1987 Exchange of Letters and the 1990 Minutes. Both of these texts include the consent of Qatar and Bahrain to submit the dispute to the International Court of Justice if no settlement has been reached through the mediation of Saudi Arabia. Upon the failure of the mediation and the expiration of the time-limit as fixed by these texts, the parties, namely, Qatar and Bahrain, disagreed on the interpretation of these texts. Each one provided an interpretation which supported her claim, without much due regard to its conformity with the generally accepted principles of international law. In Qatar's view, the texts constitute agreements conferring jurisdiction on the I.C.J. with regard to the dispute; while Bahrain, conversely, rejected this view on the grounds that the texts are no more than records of meetings.

The examination of the 1987 Exchange of Letters and of the 1990 Minutes, as bases (conditions) of the I.C.J.'s jurisdiction, reveals two correlated conclusions both of which balance Qatar's view on the matter of jurisdiction. The first conclusion, although it takes into account the practice of the I.C.J. in which it favours a restrictive interpretation of texts conferring on it the jurisdiction, gives a decisive importance to the interpretation of the meaning given to the exchange of letters and to the 1990 Minutes as unilateral declarations of accepting the Court's jurisdiction. This conclusion is the outcome of careful interpretation of article 36/2 of the Statute and of thorough investigation of the pre-existing practice of the Court, as in the Iranian declaration and in the Albanian letter previously mentioned. The nucleus of the conclusion, which may not be overemphasized, is that it is not always easy to make a clear distinction between a declaration and an agreement conferring jurisdiction on the Court.

In its judgement, the Court did not make it clear whether or not Qatar, in her unilateral application, might have relied on these texts as constituting mere declarations on accepting the jurisdiction of the Court, since she has registered them in accordance with article 36/4 of the statute and Article 102 of the U.N. Charter. The consent of the parties contained in the declarations is not general but restricted between the two states - Qatar and Bahrain - and in respect of the same dispute, as generally stated in Article 36/2 of the Statute.

In the oral and written statements of the disputant states, the parties drew the attention of the Court to another direction in which Qatar strongly affirmed that the 1987 Exchange of Letters and the 1990 Minutes constitute no more than international agreements conferring an objective jurisdiction of the Court over the dispute; an argument strongly opposed by Bahrain. Thus, the Court adopted, in her judgement, our second conclusion, although it did not make even tentatively any comment on the first one, in which the Court approached the arguments of the disputant states from two angles. The first one concerns the nature of these texts in which the Court rejected Bahrain's contention that was based on the intentions of the parties as well as treaty registrations, and' hence concluded that these texts constitute no more than international agreements creating rights and obligations for the parties. The Court did not pronounce any view on the constitutional requirements, as imposed by Bahrain; a contention which runs contrary to generally recognized rules of international law, that a foreign minister of a state possesses full power to conclude a treaty. Moreover, constitutional requirements cannot be taken as grounds for invalidating a treaty. The texts, even though they are covered by the Vienna Convention on the law of treaties, do not reach, in clarity, the stage of compromises whereby two or more states agree to submit a particular dispute to the I.C.J. for a settlement.

In adopting the second conclusion, the court reaffirmed its preexisting practice in which it insists on the restrictive interpretation of jurisdiction clauses. This fact did not obscure the Court's insistence on the principle that consent of a state is an essential for the exercise of jurisdiction over any dispute, as supported by many cases, such as Monetary Gold Case and the Corfu Channel Case.

In balancing the views of the parties, we have put forward an hypothesis for examining Bahrain's objection to the Court's jurisdiction, even though it was clearly unfounded. Accordingly, it was supposed that the Court admitted Bahrain's arguments, that the texts did not constitute agreements, and therefore decided that it had no jurisdiction on the dispute. The Statute does not prohibit any one of the disputant states to submit the dispute to the Court before the conclusion of an agreement. Thus, the Court may assume prorogated



jurisdiction over any dispute by unilateral application of one of the disputant states. Ofcourse, Bahrain was aware of this fact and did not discuss the subject matter of the dispute, but directly objected to the Court's jurisdiction. The objection did not restrict Qatar's freedom in accordance with the general rule, as embodied in the statute and in the preexisting practice of the Court, that the agreement of the disputant states can be expressed or tacit and may be concluded from one party's act or a series of acts.

The Court approached the agreements from the second angle, in which it analyzed the consent of the parties to refer the dispute to the I.C.J. for final settlement whether jointly or separately within the framework as fixed by the agreements. Thus, the Court admitted Qatar's application in her judgement of 1st July 1994. The judgement, according to our tentative estimation, adopted the more concrete, though not inevitable, conclusion of an objective analysis of the dispute.