

A Revised Look at the Hanish-islands Arbitration The Dual Role of Diplomacy and Inter-state Arbitration to Force Lasting Resolution of Military Conflicts

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Abstract

Recent events in Yemen have highlighted the devastating impact military conflicts and conflicting claims to sovereignty have on the general population. In respect to its maritime border with Eritrea (itself a young and conflict-torn nation), Yemen appears to be relatively stable in part as the result of a sustainable solution from a series of diplomatic and legal efforts culminating in two notable arbitration awards. While conflict between Yemen and Eritrea broke out in 1995 over the control of the Hanish Islands, the prompt intervention of the then-UN Secretary General Boutros Boutros-Ghali brought the two warring nations to agree to submit the territorial dispute to inter-state arbitration. Four years later, a distinguished arbitral tribunal reached two unanimous decisions settling the conflicting territorial claims and establishing a right for Eritrean fisherman to have access to the territorial waters attributed to Yemen. By incorporating Islamic law in its decision, the arbitral tribunal forged a viable solution that was acceptable to both countries. This chapter reviews the implications of the Eritrea/Yemen arbitration to stability in the Southern part of the Red Sea, while revisiting the important steps leading up to the success of the arbitration proceedings to draw important lessons for existing military conflicts.

Keywords: inter-state arbitration, peaceful resolution, Eritrea, Yemen, Red Sea, UNCLOS, de-escalation, fishing rights and Islamic law

1 Introduction

The opening of the Suez Canal in 1869 has transformed the Red Sea into a critical navigable seafaring route; further attributing considerable importance to an uninhabited set of islands, islets and rocks, known as the *Hanish* islands.¹ The archipelago, which lies in the Southern part of the Red Sea, between the African and the Arabian costs, serves a highly strategic role for navigation, oil exploration and security in the region.

In December 1995, Eritrea and Yemen came into direct military conflict over the control of these islands, in part as a result of foreign interest in

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1 In the Matter of an Arbitration Pursuant to an Agreement to Arbitrate Dated 3 October 1996 Between the Government of the State of Eritrea v. the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Permanent Court of Arbitration, Oct. 9, 1998, para. 93; *available at* “www.pca-cpa.org/showpage.asp?pag_id=1160” (Last accessed: June 30, 2015) [hereinafter “Phase I Award”].

investing in the islands to develop recreational diving facilities.² Following the swift personal intervention by the then-UN Secretary General Boutros Boutros-Ghali, Eritrea and Yemen agreed to a ceasefire. The countries consented that the French mission would mediate the conflict.³ Together with the Secretary General, the French mission brokered the peaceful negotiation of the dispute by persuading the two states to agree to binding inter-state arbitration.⁴

Less than three months later, the French Mission produced a memorandum that would become the basis for an Agreement of Principles,⁵ which in turn would serve as the basis for an Arbitration Agreement between the two nations. Precisely four years after the breakout of the conflict,⁶ a five-member arbitral tribunal rendered two arbitral awards that settled the conflicting sovereignty over the islands⁷ and delineated the maritime border.⁸ The scope of the dispute concerned the full set of islands in the archipelago but focused primarily on three major islands: Jabal Zuqar in the North, Al Hanish Al Kabir in the South (Greater Hanish) and Al Hanish al-Saghir (Lesser Hanish).⁹

The arbitration was the first dispute settlement proceeding to apply the United Nations Convention on the Law of the Sea (UNCLOS).¹⁰ The outcome of the arbitral proceedings has been described as “[an] extremely thorough and

2 World News Brief; *Yemen and Eritrea Fight over Islands in the Red Sea*, NY Times, Dec. 18, 1995; available at www.nytimes.com/1995/12/18/world/world-news-briefs-yemen-and-eritrea-fight-over-islands-in-red-sea.html (Last accessed: June 30, 2015). See Phase I Award, paras. 43, 274 & 507.

3 Bertrand Ramcharan, *Preventive Diplomacy at the UN 96* (2008) [hereinafter Ramcharan 2008].

4 Ahmed Sadek El-Kosheri, *Keynote speech at the Sharm El Sheikh Conference*, Cairo, Nov. 11, 2014; available at sccinstitute.com/media/49765/english-version-dr-kosheri-sharm-key-note-speech.pdf (Last accessed: June 30, 2015).

5 UN Security Council, *Agreement on Principles, S/1996/447*, June 19, 1996 [hereinafter Agreement on Principles].

6 The Eritrean overtook the Yemeni control of the island and agree to ceasefire on December 17, 1995 (the Eritrean offensive commenced on December 15, 1995). The Tribunal rendered the Phase II award on December 17, 1999.

7 For Phase I Award, see *supra* note 1.

8 For the arbitral award in the second set of proceedings, see *In the Matter of an Arbitration Pursuant to an Agreement to Arbitrate Dated 3 October 1996 Between the Government of the State of Eritrea v. the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, Permanent Court of Arbitration, Dec. 17, 1999; available at www.pca-cpa.org/showpage.asp?pag_id=1160 (Last accessed: June 30, 2015) [hereinafter “Phase II Award”].

9 See Phase I Award, paras. 88-90 [hereinafter “the Islands”, “the Hanish Islands” or “the Zuqar-Hanish group”].

10 Interview with Professor Lea Brilmayer, Eritrean TV, 1999, 1:40-1:50 min. (published May 17, 2015); available at goo.gl/D2YyyK (Last accessed: June 30, 2015). Professor Lea Brilmayer is the Howard M. Holtzman Professor of International Law at Yale Law School and was the main counsel for Eritrea in the Arbitration. Professor Brilmayer’s co-counsel in the first phase was Gary Born and in the second phase Jan Paulsson.

important award”;¹¹ “a model case of conflict prevention”¹² and “a masterpiece of legal draftsmanship.”¹³ By further incorporating Islamic law and developing an easement on the basis of the Islamic law, the Arbitral Tribunal reached the impossible. It brought sustainable solutions to conflicting interests that are acceptable to both parties. This chapter reviews the innovative solutions adopted by the five-member tribunal by: (1) revisiting the evolution of the dispute from the military conflict to the tribunal’s awards; (2) discussing the issues and findings of the tribunal; (3) tracing the importance of the decision to regional stability, and (4) concluding with the lessons to be drawn from the outcome of these proceedings.

2 From Military Conflict to Inter-state Arbitration

2.1 *Two Distressed Nations Come into Direct Conflict*

The reasons for the conflicting claims over the Islands trace back to centuries of shifting interests in the region. Despite both countries having rich histories, both Yemen and Eritrea may be characterized as emergent states struggling to assert their national identity and independence after prolonged civil wars.¹⁴ Eritrea obtained its independence from Ethiopia in 1993, just two years before the outburst of the conflict with Yemen, after a prolonged war of independence. Eritrea and Ethiopia would later fight a full war between May 1998 and June 2000 whose aftermath led to the establishment of two commissions that reviewed the longstanding issues arising in the war.¹⁵ Yemen’s history was equally plagued by civil war and military conflict. In 1990, the communist state of the People’s Democratic Republic of Yemen

11 W. Michael Reisman, *The Government of the State of Eritrea and the Government of the Republic of Yemen Award of the Arbitral Tribunal in the First Stage of the Proceedings*, 93 AM. J. INT’L L. 668-82, 668 (1999) [hereinafter “Reisman on Phase I Award”]. See also W. Michael Reisman, *Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)*, 94 AM. J. INT’L L. 721-36 (2000) [hereinafter “Reisman on Phase II Award”].

12 Ramcharan 2008, *supra* note 3, at 96.

13 Barbara Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 32 Ocean Dev. & Int’l L. 1-25, 2001. Professor Kwiatkowska highlights the importance of both awards. See *id.* at 14. See also Barbara Kwiatkowska, *Current Legal Developments: Red Sea, Award of the Arbitral Tribunal in the First Stage of the Eritrea/Yemen Proceedings*, 14 Int’l J. Marine & Coastal L. 125-36, 1999.

14 Phase I Award, para. 92 (“...it is well to have in mind that both have experienced periods in which they were preoccupied by civil wars on either side of the Red Sea: Yemen from 1962-70, and Ethiopia with the severe and bloody conflict with Eritrean rebels which resulted in the independence of Eritrea in 1993.”).

15 Ethiopia and Eritrea signed the Algiers Agreement of 2000 effectively establishing the Boundary Commission and the Claims Commission. See UN Security Council, Identical letters dated 12 December 2000 from the Permanent Representative of Algeria to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2000/1183, Dec. 13, 2000, Arts. 4 & 5.

(“South Yemen”) joined the Yemen Arab Republic (“North Yemen”) to form the Republic of Yemen (“Yemen”). Even after the unification, the South and North troops would clash in the summer of 1994 sparking a civil war to undo the unification efforts. In July 1994, the pro-union forces secured control of Yemen.

Besides both countries seeking to assert control over these strategic islands, the immediate source of this dispute arose as the result of a potential *foreign investment* interest.¹⁶ The Yemeni government had previously granted exclusive rights to a French company for purposes of flying in scuba divers to a local marina complex.¹⁷ In the mid-nineties, the German company Konzeptbau Bautraeger und Internationale Immobilien engaged the Yemeni authorities to build a resort hotel and diving facilities on Al-Hanish al-Kabir island (“the Greater Hanish”).¹⁸ In order to secure the island, the Yemeni government deployed military personnel who together with other civilians were discovered by an Eritrean naval patrol in the fall of 1995.¹⁹

On November 11, 1995, the Eritrean Foreign Minister delivered an ultimatum to his Yemeni counterpart by which Eritrea demanded Yemen to withdraw its forces from the island within a month. During this ultimatum period, the Eritrean and Yemeni diplomats met in Eritrea and agreed to amicably resolve this dispute in February the next year. The discussions came to a standstill when the Yemeni government did not withdraw the military contingent and claims of continued work on the project persisted. The Eritrean troops launched an offensive on December 15, 1995 and swiftly overran the Yemeni defenses.²⁰ After the conflict received international attention, the parties entered into a ceasefire agreement on December 17, 1995.

The military conflict risked turning into a regional calamity after the League of Arab States condemned the Eritrean military aggression, while also calling the League’s members to come in support of Yemen (the call to arms was later retracted). Speculation of Israeli and Saudi intervention was also rife.²¹ Ethiopia, Egypt, Algiers and Qatar have all called for the peaceful resolution of a dispute.²² In an offer of good faith and subject to a plan drafted by Ethiopia, the Eritrean forces released the Yemeni military prisoners on December 22,

16 Jeffrey Lefebvre, *Red Sea Security and the Geopolitical-Economy of the Hanish Islands Dispute*, Middle East J. 52(3):367-85. Lefebvre discusses in detail the nature of the foreign investment, *see id.* at 374.

17 Lefebvre, *supra* note 16, at 373.

18 *Id.* at 373. *See also* Phase I Award, paras. 41 & 274 (the award does not specify the exact name of the German contractor).

19 *See generally* Phase I Award, para. 29.

20 Yemen and Eritrea Step Up Dispute over Island, New York Times, Dec. 19, 1995; available at “www.nytimes.com/1995/12/19/world/yemen-and-eritrea-step-up-dispute-over-island.html” (Last accessed: June 30, 2015).

21 Lefebvre, *supra* note 16, at 376-80.

22 *See* UN General Assembly, 14th Plenary Meeting, A/51/PV.4, Sept. 30, 1996 at 21. The Yemeni Foreign Minister specifically commands the work completed by the Secretary General in mitigating the tensions. *Id.* at 20-21.

1995.²³ The release of prisoners meant that meaningful discussions to resolve the issues peacefully could take place.²⁴

2.2 *Swift Intervention by the United Nations and the Containment of the Threat to Resume Conflict*

The peaceful negotiations between Eritrea and Yemen succeeded in large part due to the UN Secretary General Butros Boutros-Ghali's personal intervention. In December 1995, he flew to Yemen and met with the Yemeni president.²⁵ The Secretary General aimed to have the involvement of a "major power" to mediate the conflict, to which the Yemeni president agreed to the presence of the French diplomatic mission. The Secretary General then made the same trip to Eritrea and again met personally with the Eritrean president. Without revealing the preference of the Yemeni president, he steered the Eritrean president towards the French mediation solution.

Securing the agreement of the parties was only part of the challenge. The French Foreign Ministry was reluctant to become involved in the conflict. The Secretary General then approached the French president François Mitterrand *personally* and Mitterrand consented to the French involvement.²⁶ President Mitterrand appointed Francis Gutmann, the former French ambassador to Spain,²⁷ as the head of the French mediation mission.²⁸ The French team completed three separate missions to the region in the beginning of 1996 shuttling between Eritrea and Yemen.²⁹

The team produced a detailed memorandum on February 29, 1996, which served as the framework for the Agreement on Principles³⁰ that Eritrea and Yemen signed on May 21, 1996.³¹ The Agreement on Principles mandated that

23 UN Security Council, Letter Dated 22 December 1995 from the Permanent Representative of Eritrea to the United Nations Addressed to the President of the Security Council, S/1995/1054, Dec. 22, 1995 at para. 2.

24 See Lefebvre, *supra* note 16, at 380.

25 See Lefebvre, *supra* note 16, at 380. Ramcharan 2008, *supra* note 3, at 96.

26 Ramcharan 2008, *supra* note 3, at 96-98.

27 Lefebvre, *supra* note 16, at 380. See also Francis Gutmann-Biografi, *La Revue Géopolitique*; at "www.diploweb.com/_Francis-GUTMANN,466_.html" (Last accessed: June 30, 2015). Guttmann served as the French Ambassador to Spain immediately after Spain joined the European Economic Community (EEC) in 1986.

28 See Phase I Award, para. 55.

29 Bernard Ramcharan, *Preventing War between Eritrea and Yemen over the Hanish Islands, in Conflict Prevention in Practice: Essays in Honor of Jim Sutterlein 157-68* (ed. B.G. Ramcharan, 2005)[hereinafter Ramcharan 2005]. Dr. Ramcharan writes an account of the diplomatic discussions, to which he was present as a Director in the Department of Political Affairs. *Id.* at 159.

30 UN Security Council, Agreement on Principles, S/1996/447, June 19, 1996 [hereinafter Agreement on Principles].

31 Phase I Award, para. 77.

the parties “renounce to resort to force against each other”³² and submit the territorial dispute to binding arbitration before a five-member tribunal.³³

Despite the active mediation efforts by the French diplomatic mission, the situation nearly escalated into a full war when Eritrean troops were observed on the Island of Lesser Hanish on August 10, 1996.³⁴ The Yemeni officials informed the Secretary General in stern tones of the situation and that they had every intention to use force to expel the Eritrean troops in the event that these did not withdraw within 24 hours.³⁵ The Eritrean Chargé d’Affaires denied any violations. In one of the meetings with the UN Officer in Charge of the Political Affairs, the Eritrean official even went as far as to state that “the stand of my Government firmly is that there is no reinforcement... if there are any claims of violations, we want them in writing”.³⁶

On August 14, 1996, French aerial surveillance revealed an estimated 50 individuals on the Island and several Eritrean vessels *en route* to it.³⁷ Even a radio antenna was observed on an adjacent island. The same day, the Secretary General addressed both countries urging them “to exercise maximum restraint”.³⁸ The next day, the Secretary General telephoned the Yemeni president personally and appealed again “for maximum restraint”.³⁹ The Security Council conducted informal consultations on this issue, which did not assuage Yemeni concerns. The Yemeni officials highlighted “the significance and the gravity” of the actions undertaken by the Eritrean government.⁴⁰ The Yemeni government reiterated its intent of using force if the troops were not withdrawn within 24 hours.

The Eritrean government took the stand that the troops were on the island before the signing of the Agreement on Principles. It nonetheless withdrew the troops in what it described as “gesture of goodwill and in the interest of the smooth progress of the arbitration process and to preserve and promote the peace [in] the region.”⁴¹ The French Mission continued shuttling between the countries.⁴² After the final withdrawal of the Eritrean troops from the Lesser Hanish, the parties entered into the Arbitration Agreement, based on the French

32 Agreement on Principles, Art. 1.

33 *Id.* Arts. 1(2)(b), 2 and 3.

34 *See* UN General Assembly, 14th Plenary Meeting, A/51/PV.4, Sept. 30, 1996, at 21.

35 Ramcharan 2005, *supra* note 29, at 159.

36 *Id.* at 159.

37 *Id.*

38 *Id.* at 164.

39 *Id.*

40 UN Security Council, Letter dated 17 August 1996 from the Charge d’Affaire A.I. of the Permanent Mission of Yemen to the United Nations Addressed to the President of the Security Council, S/1996/671, Aug. 19, 1996.

41 UN General Assembly, 25th Plenary Session, A/51/PV.25, Oct. 7, 1996, at 2-3.

42 Ramcharan 2005, *supra* note 29, at 159.

Memorandum and the Agreement on Principles, governing the scope and the conduct of the forthcoming arbitral proceedings.⁴³

2.3 *The Framework for the Arbitration*

The Arbitration Agreement set out a detailed mechanism for selecting the arbitrators for the five-member tribunal, as well as detailed the procedural framework for how the dispute will be reviewed. The parties agreed on a tribunal consisting of Judge Stephen M. Schwebel and Rosalyn Higgins, appointed by Eritrea, Dr. Ahmed S. Al-Koshieri and Mr. Keith Highet, appointed by Yemen, and Sir Robert Jennings, as the president. The arbitrators appointed the Permanent Court of Arbitration (PCA) as the Registrar for the proceedings.⁴⁴

The Arbitration Agreement also contained strict timelines for the commencement of the proceedings and the submissions of the memorials.⁴⁵ It also set out that the proceedings would be conducted in two phases and according to a fixed set of principles. The first phase would settle two matters: (1) the territorial sovereignty based on “the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of *historic* titles”, and (2) the scope of the dispute based on the submissions of the parties.⁴⁶ In the second phase, the Tribunal would resolve the maritime delimitations on the basis of its prior findings on territorial sovereignty.⁴⁷ The parties also expressly provided the Tribunal with the competency to apply UNCLOS, as well as “any other pertinent factor.”⁴⁸

In such manner, the Arbitration Agreement set out critical requirements which empowered the tribunal with authority and a certain degree of flexibility. For once, the parties submitted the dispute to the Arbitral Tribunal subject to the UNCLOS, which only came into force in 1994. Even at the time of the dispute, Eritrea was not a member of the Convention.⁴⁹ The choice of UNCLOS alone defines these proceedings as being monumental. The

43 Eritrea-Yemen Arbitration Agreement, May 21, 1996; available as Annex I to the Phase II Award, at 53-62 [hereinafter Arbitration Agreement].

44 See Arbitration Agreement, art. 7(2). Phase I Award, para. 5.

45 See Arbitration Agreement, art. 1(6) and Art. 8(3). The Agreement specified that the Tribunal may extend the time periods set out in the Agreement for “good cause. *Id.* at Art. 8(5).

46 Arbitration Agreement, Art. 2(2) (emphasis added).

47 *Id.*, Art. 2(3).

48 *Id.*, Art. 2(4).

49 See generally UN Division on Oceans and Law of the Sea, Status of the UN Convention on the Law of the Sea, Oct. 10, 2014; available at www.un.org/depts/los/reference_files/status2010.pdf (Last access: June 30, 2015). Eritrea retains the status of a non-signatory and appears as an observer to the Convention. See *id.* at 4. See also Nuno Sérgio Marques Antunes, The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law, *Int'l & Comp. L. Q.* 50(2): 299-344 at 300 (2001).

Agreement called the tribunal to delve deeply into the “historic titles” to the islands for purposes of determining territorial sovereignty, while offering a degree of flexibility to apply “other pertinent factor” in its judicial review. This dichotomy of express authority and flexibility in the Arbitration Agreement has led to the Tribunal notably applying Islamic law, as discussed below, for purposes of finally delimitating the territorial claims to the disputed islands.

3 The Tribunal’s Important Findings

3.1 Fundamental Differences over the Scope of the Dispute (Phase I)

Unanimity is a rare phenomenon in international law⁵⁰ but it is precisely what the five-member arbitral tribunal achieved in *both* phases of the Eritrea-Yemen arbitration.⁵¹ Perhaps the most impressive aspect of the Phase I decision is the achievement of a unanimous decision despite initial divergent opinions.⁵² It may be noted that “one or two [members of the tribunal] were inclined to dismiss the claims of the countries” for lack of substantial evidence to support their claim.⁵³

The first phase of the arbitral proceedings saw the parties disagree on even the most basic issues, such as which islands were subject to the competency of the arbitral tribunal. In the heated period leading to the drafting of the Agreement on Principles, Eritrea sought to include the Northern islands in the archipelago (namely Jabal Al-Tayr and Zubayr group, which lie closely to the Yemeni border) as part of the dispute.⁵⁴ Yemen disagreed. Yemen’s position was that the Northern islands in the archipelago came under its sovereignty and the dispute concerned only the Greater Hanish, where the Eritrean stationed their troops.⁵⁵ The parties could not agree on even the basic geographic coordinates, as suggested by the French arbitrator.⁵⁶

In the Arbitration Agreement, the parties agreed for the Arbitral Tribunal to determine the scope of the dispute with the reservation that the Arbitration Agreement would not jeopardize the standing of the parties at the commencement of the arbitration proceedings.⁵⁷ The Tribunal noted this inconsistency and held that the scope of the dispute covered all of the islands in

50 Martti Koskenniemi points out that “only one in 51 judgments of the ICJ and one of the 18 opinions [of the International Court of Justice] have been unanimous.” Martti Koskenniemi, *From Apology to Utopia* 33 (2nd ed., 2006).

51 Phase I Award, para. 527. *See also* Phase II Award, para. 169.

52 *See generally* El Kosheri, *supra* note 4, at 9.

53 *Id.*

54 *See generally* Phase I Award, para. 77-78. *See also* the brief discussion of the issue in Reisman on Phase I Award, *supra* note 11, at 669.

55 Phase I Award, para. 77 (citing to the French Memorandum).

56 *Id.*

57 *See* Arbitration Agreement, para. 2(2).

the Hanish-Zubayr archipelago, including those under the control of Yemeni and Eritrean governments.⁵⁸ This very division in the parties' positions underlines the fundamental differences between the parties and the benefits of empowering a tribunal with the flexibility to decide the scope of the dispute.

3.2 *Resolving Conflicting Historical Claims to Territorial Sovereignty and Avoiding Non-Liquet (Phase I)*

Even though the scope of the dispute covered the full Hanish-Zubayr archipelago, the essence of the dispute narrowly focused on the Hanish islands. The claims may be summarized as follows.

Both countries traced their claims to historic times, but the Tribunal succeeded to narrow the inquiry to the period until the First World War. Eritrea and Yemen accepted that the Ottoman Empire had sovereignty over the region up until the First World War.⁵⁹ Yemen claimed an ancient title over the Islands, including a reversal right after the demise of the Ottoman Empire.⁶⁰ The Tribunal rejected both the existence of an ancient title concomitantly with the Ottoman control over the Islands.⁶¹ The Tribunal similarly rejected the argument that after the fall of the Ottoman Empire the title reverted back to Yemen.⁶²

Eritrea argued for a succession title over the Islands from Italy, through Ethiopia, after the 1929 Treaty of Lausanne.⁶³ The Tribunal held that the Italian presence did not amount to control. Despite that Italy may have had expansionist plans over the Islands, it never succeeded in establishing such control and, in fact, it communicated to the British Foreign Office "the indeterminate legal position of the islands."⁶⁴ Any discussion of a succession title from Italy to Ethiopia and then to Eritrea was therefore excluded. The Tribunal then held that neither country succeeded in establishing a historic title to the Islands.

The Arbitration Agreement Art. 2(2) required the Tribunal to determine the sovereign title on the basis of *inter alia* historic titles. The absence of a historic title placed the Tribunal in the dangerous position of not being able to decide

58 Phase I Award, paras. 83 & 90.

59 Phase I Award, paras. 125, 130-32. *See also* Reisman on Phase I Award, *supra* note 11, at 669.

60 Phase I Award, paras. 31-54; 503. Reisman on Phase I Award, *supra* note 11, at 670-72.

61 Phase I Award, para. 444.

62 Phase I Award, paras. 443 & 489.

63 Phase I Award, paras. 13-30 & 503. *See also* Reisman on Phase I Award, *supra* note 11, at 671-72.

64 Phase I Award, para. 448.

the matter on the basis of lack of applicable law (*non liquet*).⁶⁵ The risk of *non liquet* was further amplified by the fact that both Eritrea and Ethiopia structured the additional grounds supporting their claims for territorial sovereignty by tying these additional grounds to their arguments for the respective historic titles.⁶⁶

Eritrea and Yemen submitted additional evidence on various activities that would establish control over the Islands. Both parties submitted evidence of offshore concessions to the Tribunal⁶⁷ but neither was conclusive. Fishing and patrol of the islands were also inconclusive to establish title, as these activities did not conclusively involve state control.⁶⁸ Operation of lighthouses was also determined to be at times neutral. Eritrea retained the islands and the elevations most near its coast, including some beyond the 12 nautical mile limit (Mohabbakah, Haycock and South West Rocks).⁶⁹ The Tribunal reviewed the conflicting concession agreements, the operation of the lighthouses to weigh in favor of Yemen retaining sovereignty over the Northern islands in the archipelago (Jabal Al-Tayr and Zubayr group).⁷⁰

The final outcome of the Phase I granted Yemen control over the Zuqar-Hanish group, which were subject to military confrontation.⁷¹ Here, the Tribunal again balanced the evidence submitted by the parties and found that Yemeni exercised state authority over the Zuqar-Hanish group of islands.⁷² The Tribunal found comfort in the historical documents, which although were important were not convincing by themselves, that the British Foreign Office hoped that the Islands would revert to Arab rule.⁷³ Even after deciding the territorial delimitations of the islands, the Tribunal found one innovative solution to appease the conflicting claims to the Islands.

65 “The Tribunal apparently avoided an award of non liquet by reaching for criteria that the Arbitration Agreement had not authorized.” Reisman on Phase I Award, *supra* note 11, at 673. *See also id.* at 678-79.

66 Phase I Award, para. 450.

67 Phase I Award, para. 55.

68 *See generally* Phase I Award, paras. 275-311 & 451-59. *See also id.* paras. 493-95.

69 Phase I Award, para. 527(i-iii).

70 Phase I Award, para. 527(v).

71 Phase I Award, para. 527(iv).

72 Phase I Award, para. 508.

73 Phase I Award, para. 508. *See also id.* para. 491 (discussing the weight of the historic documents). The Tribunal cites to the relevant historic documents, *see id.* paras. 135-41.

3.3 *Phase I and II: Rights that Reflect the Parties' Concerns From Islamic Law to Artisanal Fishing*

In Phase I, the Tribunal determined that the Yemen's sovereignty over the islands "entails the perpetuation of traditional fishing regime in the region."⁷⁴ The Tribunal noted the *complementary* position of the parties on the fishing regime, in which the parties argued the maritime delimitation to be consistent with the other party's fishing rights. These arguments stood in stark contrast to existent case law where the parties argued the effects of the opposing side's continuous activity in the context of "catastrophic" and "long usage" tests.⁷⁵ The right to artisanal fishing effectively contradicted previous PCA case law where a similarly-situated tribunal rejected the right to easements in maritime law.⁷⁶

The Tribunal found support for its findings in the application of Islamic law, which received additional attention in the Phase II Award. After the reopening of the case, additional information and documents, which were identified only at the oral hearing, revealed the possibility of a solution that built on historical rights, in place for centuries, for open access to fishing in the Red Sea.⁷⁷ Even though the Arbitration Agreement did not expressly mention Islamic law,⁷⁸ the Tribunal innovatively relied on basic Islamic principles to recognize the rights of local fisherman to the contested waters. The Tribunal referred to individuals serving as "stewards of God" for purposes of using, maintaining and trading with each other the common fishing resources.⁷⁹ By applying Islamic law and giving due regard to uncontested local practices, the Tribunal adduced legitimacy to the final decision.⁸⁰ In this case, the application of Islamic law appears to have been necessary for closing the uncertainty around the tribunal not issuing a decision (*non liquet*) as neither country was in a position to conclusively establish historic ties to the area. The two awards and the Tribunal's innovative application of Islamic law underscore the degree of flexibility inherent in the arbitration process which allows for identifying the needs of the parties and providing specific solutions cognizant of local practices.

74 Phase I Award, para. 527(vi).

75 Phase II Award, para. 50 (discussing the Anglo-Norwegian Fisheries Case, Judgment of Dec. 18, 1951: I.C.J. Reports 1951, p. 116 et al).

76 See Reisman on Phase II Award, *supra* note 11, at 729 (discussing the *North Atlantic Coast Fisheries Case: Great Britain v. the United States of America*, Permanent Court of Arbitration, Sept. 7, 1910).

77 *Id.*

78 Arbitration Agreement, Art. 2.

79 Phase II Award, paras. 92-94.

80 El Kosheri, *supra* note 4, at 10.

3.4 Phase II: Delimiting Territories

In its final award, the *unanimous* Tribunal determined “a single all-purpose boundary which is a median line.”⁸¹ The Tribunal first set out to determine the base point from which a median line followed consistent with its findings on territorial sovereignty.⁸² Such rationale required the determination of the treatment of several extremities, including the islands in the North (Jabal Al-Tayr and Zubayr group), which were placed “out at sea” and thus were determined to be excluded from the base computation.⁸³ The Tribunal followed the determination from the North to South extremities; further reviewing the arguments concerning the Eritrean coast as these reflect the principle of proportionality. The Tribunal then traced the territorial delimitation across 29 points, reviewing the length of the coast; thus finally settling the maritime delimitation between the two states.

4 Eritrea/Yemen Proceedings in the Current Age

A full and deadly civil conflict is currently underway in Yemen.⁸⁴ Yemeni activist Farea Al Muslimi posits that the current crisis in Yemen is “a direct result of regional inaction over the last few years, if not decades.”⁸⁵ Since the rendering of the award, Yemen has been engulfed in conflict after conflict. From the suicide attack on USS Cole, the rise of Al Qaeda, the 2011 Revolution, the subsequent coup d'état and the current civil war, Yemen has been plagued by conflict. The situation in Eritrea also remains economically dire.⁸⁶

The Eritrea/Yemen arbitration resolved the territorial claims, but it remains up to the countries to accept the binding solutions offered by the Tribunal. In 2002, amidst rising tensions with Ethiopia, Eritrea condemned a perceived axis between Ethiopia, Sudan and Yemen aimed at “perpetrat[ing] acts of subversion and aggression.”⁸⁷ Eritrea perceived Yemen to have engaged in

81 Phase II Award, para. 132. The Tribunal clarified its boundary determination “not merely for the purposes of petroleum concessions and agreements, but a single international boundary for all purposes.” *Id.*

82 *Id.* para. 165.

83 *Id.* para. 147.

84 See generally Yemen Conflict: UN launches \$2.1 bn aid appeal amid famine threat, BBC, Feb. 8, 2017.

85 Farea al-Muslimi, The Gulf's Failure in Yemen, Foreign Affairs, May 6, 2015; available at: “www.foreignaffairs.com/articles/2015-05-06/gulfs-failure-yemen” (Last Accessed Feb. 22, 2017).

86 See generally Andebrham Giorgios, Eritrea at a Crossroads: A Narrative of Triumph, Betrayal and Hope (2014).

87 UN Security Council, Letter dated 31 October 2002 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council, S/2002/1218 Oct. 31, 2002.

conduct that violated the decisions of the 1998/1999 Arbitral Tribunal. It claimed that “the mere formation” of the axis represents “a flagrant violation of international law.”⁸⁸

Putting aside the monumental importance that the Eritrea/Yemen proceedings carries on the UNCLOS jurisprudence, the proceedings serve as a prime example of a swift containment of an impending crisis. Sir Hersch Lauterpacht once observed that “all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognized, they are capable of an answer by the application of legal rules.”⁸⁹ Under the purview and insistence of the French mediator, the conflict which initially was rife with military tensions was transformed into an arbitrable dispute. Amidst such negotiations and before the Arbitration Agreement was signed, military conflict was due to erupt. A simple reference to the current military conflict in Yemen highlights the fragility of peace in the region.

Besides being seized by special agreement reached by the parties, the International Court of Justice may be competent to hear a case between two or several states pursuant to a jurisdictional clause or reciprocal effects of declarations under the ICJ Statute.⁹⁰ To date, many treaties are currently in place to assist in peaceful resolution of disputes. The Eritrea-Yemen proceedings serve as a powerful reminder of the usefulness to combine diplomatic intervention with binding arbitration proceedings in order to pave the way for a binding resolution of a potential conflict. With tensions in the South Sea amassing,⁹¹ the Eritrea-Yemen proceedings underscore the multifaceted efforts required for achieving a sustainable solution to a peaceful conflict. What started as a military confrontation, arising from a foreign investment in an area with historically conflicting interests, turned into a viable and sustainable process embraced by both countries.

The background to the dispute should not underestimate the brilliance of the two awards that resulted from these proceedings. The Tribunal relied on Islamic law to deduce an easement for artisanal fishing to these contested waters. It has also parsed through historical claims often too sparsely or vaguely documented to derive sustainable demarcations for a geopolitically strategic area. The Tribunal has conducted this analysis, by applying for the first time, a Convention of increasing importance, while also adhering to the governing rule of equidistance between opposing states. In incorporating legal principles that are embraced by both parties, the Tribunal’s *unanimous* awards reflect conclusive efforts for the sustainable resolution of conflicts and building trust.

88 *Id.*

89 See Martti Koskenniemi, *Introduction* to H. Lauterpacht, *The Function of Law in the International Community* xxxvii (2011)(citing to *id.* at 172).

90 See generally International Court of Justice, *Statute of the Court*, 33 USTS 993, Art. 36.

91 Manuel Mogato, *ASEAN unsettled by China weapon systems, tension in South China Sea*, Reuters, Feb. 21, 2017.

5 Conclusion

The virtue of the Eritrea-Yemen arbitration is its success to bring together concerted efforts, from the diplomatic and arbitration communities, to deescalate the military tensions, compel the parties to mediation, set out the framework for inter-state arbitration and finally complete the arbitration with two sets of arbitration awards resolving the conflicting views of the states. The success of the arbitration may not be attributed to the arbitrator or the parties alone. Diplomacy was the first step in the resolution of the conflict. In the case of the Eritrea-Yemen arbitration, the swift ability of the UN Secretary General to intervene was decisive for the success of a peaceful outcome. The peaceful outcome of the dispute was achieved after the two states, both of which carried long-seated grievances, opted to trust an external tribunal. In the context of the arbitration regime that yields a solution in months, if not in years, after the start of a conflict, the element of *trust* may not be underestimated. Trust leads states to put down their arms. Trust leads states to abide by a tribunal's final decision. This is an important lesson during the increase in military tensions in Yemen and around the world.

