

CR 2000/12

**International Court  
of Justice**

**THE HAGUE**

**Cour internationale  
de Justice**

**LA HAYE**

**YEAR 2000**

*Public sitting*

*held on Friday 9 June 2000, at 10 a.m., at the Peace Palace,*

*President Guillaume presiding*

*in the case concerning Maritime Delimitation and Territorial Questions between  
Qatar and Bahrain (Qatar v. Bahrain)*

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**VERBATIM RECORD**

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**ANNEE 2000**

*Audience publique*

*tenue le vendredi 9 juin 2000, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Guillaume, président*

*en l'affaire de la Délimitation maritime et des questions territoriales entre Qatar et Bahreïn  
(Qatar c. Bahreïn)*

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**COMPTE RENDU**

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*Present:*      President    Guillaume  
                 Vice-President    Shi  
                 Judges        Oda  
                                Bedjaoui  
                                Ranjeva  
                                Herczegh  
                                Fleischhauer  
                                Koroma  
                                Vereshchetin  
                                Higgins  
                                Parra-Aranguren  
                                Kooijmans  
                                Rezek  
                                Al-Khasawneh  
                                Buerghenthal  
                 Judges *ad hoc*    Torres Bernárdez  
                                Fortier  
  
                 Registrar    Couvreur

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*Présents* : M. Guillaume, président  
M. Shi, vice-président  
MM. Oda  
Bedjaoui  
Ranjeva  
Herczegh  
Fleischhauer  
Koroma  
Vereshchetin  
Mme Higgins  
MM. Parra-Aranguren  
Kooijmans  
Rezek  
Al-Khasawneh  
Buergenthal, juges  
MM. Torres Bernárdez  
Fortier, juges *ad hoc*  
  
M. Couvreur, greffier

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Le PRESIDENT: Veuillez vous asseoir. La séance est ouverte et je donne la parole pour l'Etat de Bahreïn à M. Jan Paulsson.

Mr. PAULSSON: Thank you Mr. President.

#### THE EVENTS OF THE 1930S IN THEIR CONTEXT

33. Yesterday Bahrain pointed out to the Court that Qatar is the product of expansion and consolidation; that its expansion to Zubarah was illegal; and that its expansion to the Hawar Islands is purely imaginary. Qatar's problem is that it claims territorial sovereignty over contested areas, which Qatar acknowledges once belonged to Bahrain, without — it appears — being able to show how and when it allegedly displaced Bahrain as sovereign.

34. Qatar is surely acutely aware of this considerable difficulty in its case. Its advisers have doubtless searched high and low for events they could posit to be constitutive of sovereignty.

35. As we have discovered in these hearings, Qatar now pins its hopes on the 1913 Anglo-Ottoman Convention which was never ratified but which Qatar said "must nevertheless be regarded as an expression of the thinking of the British and the Ottomans at the time" (CR 2000/5, p. 58, para. 67). What Qatar likes about this text is that Article 11 recites that: "it is understood by the two Governments that the peninsula will be governed as in the past by the Shaykh Jasim-bin-Sami and his successors". Qatar included the text of this unratified Convention in its judges' folders. Bahrain has already demonstrated how this treaty was aborted very quickly (see, e.g., Counter-Memorial of Bahrain, paras. 123-127).

36. In an attempt to breathe some life into this unratified convention, Qatar stressed that a subsequent Anglo-Turkish Convention of 1914 (Memorial of Qatar, para. 11.45) — the year after — was in fact ratified, and alleged that Article III of that Convention incorporated an explicit reference to Article 11 of the unratified one. Given the presence of two treaties, one of which was stillborn while the other entered into force, one might have expected that Qatar would be even more pleased to provide the ratified 1914 Convention in the judges' folders. It did not. The Court will see that the 1914 text asserted only that the delimitation of Qatar's *southern border* would be «*en conformité de l'article 11 de la Convention anglo-ottomane*» of 1913. In other words, the 1913 text says two things — "peninsula" and "southern borders" — while the 1914 text says only that the



"southern border" will be in accordance with the 1913 text, and now Qatar wants us to believe that the 1914 document confirmed *both* things. There is nothing in the ratified Convention of 1914 that could be said to incorporate a recognition of Al-Thani rule over a unitary Qatar peninsula; that notion did not survive the non-ratification of the 1913 document, and was very plainly not resuscitated by the 1914 Convention. It seems we must be *very* careful when examining the alleged interrelationship of historical documents.

37. Nor is Qatar more convincing when it describes the 1916 Agreement between Britain and "the Shaikh of Qatar". Qatar argues that:

"The Treaty does not specifically define the territory of Qatar, but it was *implicit*: the treaty was signed [Qatar goes on to say] only three years after the 1913 Convention, which *expressly* referred to the *whole peninsula* being governed by the Al-Thani." (CR 2000/5, p. 59, para. 75.)

"Whole" is added by Qatar.

38. In other words, or so Qatar suggests, the 1916 Agreement with the Shaikh of Qatar must mean more than what it says because one of the parties to it had been involved in negotiations of another document, with a third party, and if it had been ratified, might have included the thing Qatar would have liked to see in *this* Agreement. Such an argument does not require refutation.

39. Incidentally, Sheikh Abdullah Al-Thani himself in 1934 stated that the 1916 Treaty "does not include the interior but only the coast". That, as well as massive other evidence which contradicts Qatar's claim that its peninsula-wide integrity was well established by 1930, appears in Bahrain's Counter-Memorial (paras. 128 *et seq.*; see also Reply of Bahrain, para. 263).

40. Qatar also sought to impress the Court by referring to Ottoman administrative records suggesting that all of the peninsula of Qatar was a single unit under Ottoman control. All that needs to be said is that Iraq, not long ago, declared Kuwait to be one of its provinces, as indeed Iran until 1970 referred to Bahrain as one of its provinces. But saying it does not make it so. Bahrain has cited no less than ten examples of Ottoman officials realizing and acknowledging that their authority was limited to the town of Doha, including a 1913 report from the Ottoman Council of Ministers recommending "an end to fruitless efforts to impose sovereignty in the Katar peninsula" (Reply of Bahrain, para. 244).

41. Qatar unceasingly takes the word "Qatar", whenever it appears in any historical document, to refer to the entirety of the peninsula without regard to the context of the document, which often makes clear that the author or authors did not intend to refer to anything beyond the vicinity of Doha, or alternatively beyond the east coast of Qatar, or yet again beyond the territories under Al-Thani control — whatever they might have been at the time. Qatar relies on the mere use of a word, defined as it wishes, to answer the very question being posed; it is a *petition de principe*, of no assistance in resolving a dispute. The fact is that no one much cared who controlled this empty scorched land — until, that is, it was thought that there might be mineral riches below the sands. As for Qatar's peculiar enthusiasm for the fact that the British once asked Sheikh Abdullah Al-Thani for permission to overfly his territory, this obviously does not in any way *define* his territory. The fact that permission was not asked of Bahrain is entirely *unremarkable*; the aeroplanes *came* from Bahrain.

42. A few words about the origins of the settlements around Doha.

43. In 1845, a British study of the "Arabian Shores of the Persian Gulf" noted only three localities on the eastern side of the peninsula. First, Biddah (Doha): a "town" containing "about three hundred houses . . . a most miserable place: not a blade of grass nor any kind of vegetation near it". Second, Wukra: a "town" of "about 250 houses". Third, Adeed: no estimate of dwellings but a brief description concluding as follows: "In point of appearance it would, perhaps, be difficult to select a more wretched, desolate, and barren-looking spot in the whole of the Gulf." (Memorial of Bahrain, Ann. 6, Vol. 2, pp. 0090-0091.)

44. Lorimer gave a figure of 27,000 inhabitants for Qatar in 1915 (R. S. Zahlan, *The Creation of Qatar*, p. 119). That was at the height of the pearling industry, however, and according to the report of a Political Agent in 1933, this was "overestimated" as the result of emigration to Bahrain (5 Records of Qatar 5.15). If we extrapolate from a report of the Political Resident who visited Qatar in 1941 (Memorial of Bahrain, Ann. 296, Vol. 5, p. 1205) 10,000 may be an accurate number. But even if it had been 20,000, Qatar would still have been practically empty: less than two inhabitants per square kilometre.

45. Even today, Qatar is one of the least populated countries in the world. And that is so even though it has the highest percentage of foreigners of any country anywhere — 70 per cent of

the people living in Qatar are aliens, according to The Economist Intelligence Unit (1999-2000 Country Profile, Ann. 10, p. 96 Bahrain Supplemental Documents submitted on 1 March 2000). Today, there are, according to the same source, no more than 160,000 Qatari nationals.

46. Allow me to remind you of the current population distribution, according to the Annual Statistical Abstract, of the Central Statistical Organization of Qatar, which you will also find in your judges' folder (15th Issue, 1995).

47. Sir Elihu Lauterpacht will address the general subject of maps next week, and I shall not anticipate his remarks. But there was one item in my learned friend Mr. Bundy's presentation last week which calls for comment here, namely the Ottoman map prepared by Captain Izzet. I am very pleased that Mr. Bundy spent so much time on that map, because it assists Bahrain's case.

48. Here is the map. You will recall that Mr. Bundy developed at length the proposition that it was illogical to draw conclusions from the fact that both Bahrain and the Hawar Islands are shaded in blue, because there are so many other areas also shaded in blue. Indeed, Mr. Bundy criticized us, referring almost ominously to "a much more serious problem" (CR 2000/7, p. 20, para. 56), on the grounds that Bahrain had not shown the northern parts of Captain Izzet's map that covered Kuwait and Iraq, and other territories, because there too the map showed blue spots which obviously could not represent Bahraini territory.

49. I am pleased to have the occasion to agree with our opponents. If we had claimed that Captain Izzet's map was evidence of a conscious attempt to define political borders, we would have been wrong indeed. But Mr. Bundy put words in Bahrain's mouth when he said that Bahrain "makes something of the fact that the main island of Bahrain and the Hawar Islands are shaded in the same blue, Captain Izzet must have considered that the Hawar Islands belonged to Bahrain". As far as I know, Bahrain never used the word "blue" for this purpose. Bahrain wanted instead to provide the best evidence of reality on the ground. Recall that the Ottomans took control of Doha in 1871. Captain Izzet prepared this map in 1878. This is, I submit, a more interesting map than ones drawn up by Italians or Australians, sitting at their desks faraway. In the area that interests us, only six names are given: Bahrain Island, Hawar Island, Zubarah, Ras Maroon (Ras Laffan area), the Hills of Biddah, and then, in the far south-east corner, Qatar. This is, may I say, entirely consistent with Bahrain's version of history. Although Bahrain would readily have provided Qatar

with the northern half of the Izzet map if Qatar had only asked, so much the better if Qatar sent someone to Istanbul to verify the map; here at least is a reliable Ottoman document.

50. The map game can be played in infinite permutations. Qatar has decreed that only the maps from 1870 to 1939 are relevant. But Bahrain could say that one should only consider maps from the 1850s because that was before the first Al-Khalifa/Al-Thani conflict. Bahrain could point out that Qatar has not provided a single map from the 1850s. And I could direct you to this Scottish map from 1850 where as you see the peninsula of Qatar does not exist, or this British one from 1852 — again, no Qatar at all, and finally another British map from 1853, and conclude that the "overwhelming" and "uncontradicted" so-called "map evidence" from the 1850s is that the Qatar peninsula did not even exist.

51. All of these three maps come from a single book, entitled *The Gulf in Historic Maps*, beautifully edited and published in 1996. I do not offer it as evidence; I would be amazed if anyone asked me to. The point is that there are scores of map collections and thousands of maps. Anyone can inundate the Court with inconclusive maps.

52. Now, although it would be preposterous to take these three maps as evidence of the non-existence of the Qatar peninsula, they do reflect something much simpler: the Qatar peninsula in those days was easily overlooked. Endless sand, hardly a soul in sight.

53. Qatar today is hardly overlooked; it is among the two or three wealthiest countries in the world in revenue *per capita*; it is in the enviable position of being able to afford practically any initiatives that money can buy.

54. But we are now trying to recall the early 1930s. At that time Qatar was a place of "extreme poverty", notably as a result of the virtual disappearance of the pearl market, which also affected Bahrain (see Memorial of Bahrain, paras. 377-379).

55. Poverty meant that the Al-Thani rule was fragile. In May 1937, the British Political Agent, Captain Hickenbotham, recorded as follows:

"My general impression is that the Shaikh of Qatar is being daily weakened by defections not only of outside notables but from his own family. He will very shortly not be in a sufficiently strong position to make any terms whatsoever and indeed rumours are circulating that he goes daily in fear of his life." (Memorial of Bahrain, para. 278.)

56. Captain Hickinbotham reported that one of Sheikh Abdullah's own nephews had recently escaped from Sheikh Abdullah's compound in Doha, at night, with a number of followers, to join the Naim. Four vehicles and 30 armed men were sent in pursuit. The Al-Thani nephew was able to escape only after having shot his own father — Sheikh Abdullah's brother Nasir — in the shoulder. The Ruler's nephew was not leaving the Qatar peninsula; he was leaving the jurisdiction of Sheikh Abdullah to join the Naim. The point is obvious: Sheikh Abdullah's jurisdiction was not the whole of the peninsula of Qatar.

57. As is clear from Hickinbotham's report, the reason why Sheikh Abdullah did not want people escaping into Bahraini jurisdiction was that he was very committed to the objective of collecting taxes from his adherents. That is why he not long thereafter attacked Zubarah — five weeks after the Hickinbotham's report — but I shall come back to that event in due course.

58. Hickinbotham's replacement as Political Agent, Mr. Weightman (or Sir Hugh Weightman as he later became), confirmed the troubles of the Al-Thani Chief. In his annual report for 1939, which you will find in Volume 5 of Bahrain's Memorial at page 1190, (looking always, if you do, at the bottom, the big number which appears — sometimes there are several numbers because the original number is there and the serial number — the relevant ones are always the big numbers at the bottom of the pages). Weightman referred to dissatisfaction within the Qatari population caused both by poverty, and, as he put it, "the Ruler [Sheikh Abdullah] and his son Hamed's greed . . . Neither can see that . . . the rising generation . . . can no longer be deceived and repressed." The Report added that tribesmen were tempted to emigrate to Bahrain and Saudi Arabia as a result of the Ruler's refusal to share oil money. Indeed, it notes that one of Sheikh Abdullah's brothers, Sheikh Nassir bin Jasim,

"took it upon himself to speak plainly to the Ruler and warn him that his niggardliness in money matters and handling of employment in the oil company was losing him the support of the tribesmen he needed to control Qatar" (Memorial of Bahrain, Vol. 5, p. 1190).

59. But rather than sharing revenues, the Ruler's son put in place a scheme for preventing emigration to Bahrain by force (*ibid*).

60. The problem though was worse than losing population to emigration. The dissatisfaction, according to this Report, was also felt by Al-Thani adherents "in Doha itself

including some of [Sheikh Abdullah's] bodyguards and in many of the purely Qatari tribal sections . . . to the point of open threats to withdraw support from the Qatar Shaikhs and join Bahrain or Ibn Saud". You can see this passage in the very first paragraph of the Report, still at page 1190.

61. The threat could not have been more serious. This was a region and a culture, as Qatar has often reminded this Court, where allegiances tended to attach to Rulers rather than to territory. So we find in 1939 that the people of Doha were considering whether it might not be better to attach themselves to the Al-Khalifa of Bahrain or to Saudi Arabia. If they had done so, the Al-Thani rule would have been over, and Qatar as such might not have existed today.

62. May I repeat that I have just been talking about the situation in the period 1937-1939. Qatar's Counter-Memorial was indeed right in admitting that Qatar did not become a State controlling its entire peninsula until sometime after 1945.

63. As we look back today, the people of Qatar should, in Bahrain's opinion, be congratulated for their astonishing progress. It is all the more impressive for having been achieved so quickly. But in recent years the Government of Qatar has acted as though it wants to rewrite history, as if it did not wish to admit how far and how fast the country has developed. This creates difficulties for any objective person seeking to understand past events. The topic seems sensitive, so I will content myself without further comment to quote a passage from a book by Dr. J. B. Kelly. I wish to emphasize that I would not have quoted from this book if it were not for the fact that Dr. Kelly is a scholar on whom Qatar itself relies (Memorial of Qatar, para. 5.20) with respect to the region's history. This is what Dr. Kelly, perhaps rather harshly, writes in a book published in 1980:

"the Qataris have of late been equipping themselves with a history and an indigenous culture, both of noble proportions. The showpiece of this particular enterprise is a 'national museum', housed in the former (c. 1920) palace of the ruler in Dauhah [Doha]. Largely an inspiration of a public relations firm in London, the museum has been equipped and adorned at a cost of several millions, despite — or perhaps because of — the fundamental limitation of having very little to put into it . . . What is objectionable about these public relations exercises on behalf of the Qatari régime is that they involve the falsification of the historical record over the past two centuries, notably concerning the nature and length of Bahrain's connection with Qatar . . ." (J. B. Kelly, *Arabia, the Gulf and the West*, (1980) at p. 191. Counter-Memorial of Bahrain, Vol. 2, pp. 267-370.)

64. Whenever historical accuracy, or even demographic accuracy, is sacrificed to some objective of governmental policy upon which Bahrain will not speculate, the details of the past of course become difficult to reconstitute. But at least we can confidently summarize the answers to the first series questions as follows:

*What was Bahrain?* (And these you will also find in your folders.)

- It was a strategically located archipelago which had been inhabited for several thousand years with rich agriculture and commerce;
- Zubarah was still a part of Bahrain;
- it was a State with a ruling dynasty going back to the late 1700s;
- it was the place where oil was first discovered on the Arab side of the Gulf (1932), after which Bahrain enjoyed a short period of unique prosperity ("streets of gold") which was the envy of its neighbours.

*What was Qatar?*

- Scarcely populated (maybe 10,000 inhabitants — perhaps up to double that number) in 1930;
- the overwhelming majority of this population living in and around Doha (not counting the Bahraini adherents in Zubarah, perhaps a few thousand, before their eviction);
- fishermen and pearlers, not desert people accustomed or able to cross the wasteland;
- desperately poor;
- an emigration problem;
- insecure Al-Thani rule;
- Qatar itself has admitted that until some time after 1945, it was not a modern State; the Al-Thani rule expanded and diminished continuously depending on the volatile allegiances of other tribes;
- the 1913 Anglo-Ottoman Treaty was never ratified; the 1914 Anglo-Turkish Treaty did not confirm Al-Thani rule throughout the peninsula; this was a State *in statu nascendi*.

My second, much briefer series of questions.

## II. ZUBARAH

### What were Bahrain's connections to the Zubarah region?

65. In the 1760s, as you know, the Al-Khalifa came from present-day Kuwait and established Zubarah, which quickly flourished, rich in trade and pearl fishing. Some decades later, the Al-Khalifa moved their seat of government to the islands of Bahrain, but continued to rule Zubarah (Memorial of Bahrain, 104-112).

66. Throughout the nineteenth and early twentieth centuries, the north-west of the Qatar peninsula, and Zubarah in particular, was populated by members of a Naim-led tribal confederation, adherents of the Al-Khalifa of Bahrain.

67. What evidence does the Court have?

68. Captain George Brucks conducted a survey during eight years, in the very early period, from 1821-1829 — that is to say a century before the events of the 1930s.

69. You have an extract of the Brucks report at tab 6 of your judges' folders.

70. What Captain Brucks had to say about Zubarah is at page 100. He found the inhabitants to be subject to Bahrain; indeed, he writes that all the villages from Ras Rakkan to Zubarah are subject to Bahrain.

71. The Naim, who inhabited the Zubarah Region, and the Al-Khalifa had a mutually beneficial relationship. On the one hand, this relationship permitted the Al-Khalifa to maintain control over their territories in the peninsula. On the other hand, it enabled the Naim to consolidate their leadership of the confederation of tribes in the north of the peninsula. The Naim paid taxes and provided services to the Ruler of Bahrain, who honoured and supported them. The public record provides extensive evidence of this relationship. For example, in 1880 Shaikh Jasim of Doha wrote to the Political Resident and complained that Sheikh Isa, the Ruler of Bahrain "has kept his friends in Fueyrat [northern Qatar], and is sending the Naeem to the . . . and if *he* [the Ruler of Bahrain] allowed the Naeem to remain at Fueyrat and create disorders at El Katr, there will be no end to disturbances." (Counter-Memorial of Bahrain, para. 53.) The Court will find over 20 other examples of this relationship between Bahrain and the Naim in Bahrain's Reply (para. 234).



72. From 1874 to 1903, there were six attempts at expansion into the Zubarah Region by the Ottomans and/or the Chiefs of Doha. These attacks have been fully described and documented (Memorial of Bahrain, Sect. 2.7); none of them were successful; neither the Ottoman Empire nor the Chiefs of Doha extended their authority to the Zubarah region until the attack in 1937 to which I shall revert in a few moments.

73. Throughout this time the close relationship between the Al-Khalifa and the Naim continued. The Naim customarily travelled between the Zubarah region and the islands of Bahrain. Many Naim families had houses both in Zubarah and in the islands of Bahrain. One historian has described the Naim's seasonal migration as being by boat: "from Zubarah to Jau and Askar on the west coast of Bahrain, and it took place with families, small animals, and even camels, and to a lesser degree horses." (Klaus Ferdinand, *Bedouins of Qatar*, p. 41 (1993). Memorial of Bahrain, Ann. 232, Vol. 4, p. 1013. See also Memorial of Bahrain, Section 2.1.)

74. Likewise people from the main islands of Bahrain travelled to Zubarah, as described in the written pleadings (Memorial of Bahrain, Ann. 228).

75. Belgrave recorded in 1948:

"some of the Khalifah lived permanently at or around Zubarah coming over to Bahrain for visits and about a year before I came [1926] one Shaikh Ibrahim bin Khalid Al-Khalifah was banished to Zubarah by order of Shaikh Hamed . . . He lived there till about 1926 when he was permitted to return to Bahrain . . . [As] far as I can ascertain, from 1914 till 1937 there was no interference with Bahrain people living in the Zubarah area." (Memorial of Bahrain, Ann. 228.)

#### **What were Qatar's connections to the Zubarah region?**

76. What about Qatar's connections to the Zubarah region? What evidence does Qatar present? The events referred to by Qatar as alleged proof of Al-Thani authority over Zubarah are revealed, on close inspection, to be nothing more than isolated incidents in which tribes were sent by the Ottomans and the Al-Thani to Zubarah during one or other of their unsuccessful attempts to impose authority there.

77. *Faute de mieux*, Qatar continues to refer to these incidents as exercises of its authority in Zubarah. For example, Professor David recalled that in 1895 the British destroyed a flotilla of Al-Thani boats at Zubarah. He went on to argue that Qatar had found no documents that support

Bahrain's claim that this action was taken to protect the Ruler of Bahrain's title to Zubarah (CR 2000/9, p. 14, para. 26). Rather, Professor David suggested, the action was taken to ensure the security of the main island of Bahrain.

78. This comment does not reflect close familiarity with the historical documents. After the British destroyed the Al-Thani dhows, the terms of the surrender included the dispersal of the Al-Thani tribes used to attack Zubarah and the return of nine boats *belonging* to the people of Bahrain. In 1895, Captain Pelly wrote to an Ottoman official that:

"hearing that you are detaining nine boats belonging to the Shaikh of Bahrain, who is on friendly terms with the British Government, and Zubarah being one of the towns belonging to him, also the Albin-Ali being his subjects . . ." (Memorial of Bahrain, Vol. 2, Ann. 59, p. 0265).

79. An Ottoman report on Zubarah from 1897 states: "Britain claims Zubarah is under the control of Bahrain which it claims is under British protection" (Memorial of Bahrain, Ann. 63 (a), Vol. 2, p. 269).

80. In 1933 the British Political Agent reported that:

"the explorers of the Anglo-Persian Oil Company Limited in Qatar have examined places to which the Ruler of Qatar had no right to allow them to go, and which people of Bahrain frequent to this day as a summer resort; indeed it is said that as late as last year (1932) the Ruler of Qatar admitted in public that certain areas on the Qatar coast pertain to Bahrain." (Counter-Memorial of Bahrain, 215.)

81. In 1932, British officials concluded that if they were unable to obtain emergency landing rights from the Al-Thani Sheikh in his territory around Doha, then Britain, which had already such permission within Bahrain's territory, could establish emergency landing facilities in Zubarah or Dohat Faisakh, some 30 miles to the south of Zubarah. (Reply of Bahrain, 265-266). The Political Resident noted that both "are near Bahrain" (decipher of telegram from Political Resident to Secretary of State of India, 18 August 1932, Reply of Bahrain, Ann. 1), and suggested two places as "alternative sites". The British thus acknowledged that the permission of the Al-Thani of Doha was not required for landing on the north-west coast of Qatar — this was the territory of Bahrain.

82. Now Professor David illustrated the difficulties for outsiders not only to identify the subdivisions of various tribal units and sub-units, but also the difficulty of following the ephemeral and shifting allegiances of these tribes over time — especially with respect to populations which had no archives. His illustrations seemed quite convincing.

83. What the Court must consider, however, is that Professor David only told one side of the story. He set himself the task of challenging Bahrain's title, and apparently hid behind Qatar's thesis of instant coast-to-coast sovereignty as of 1868. But what of Qatar's alleged title to Zubarah?

84. Let me put it this way: Bahrain's case may have its *difficulties*, but Qatar's case is *impossible* unless one accepts the notion of instant inherent natural borders. There is no proof of any allegiance to Qatar in the Zubarah region before the Al-Thani attack of 1937.

85. There must be a starting point somewhere. Fortunately, there is one, and the Court is in a position to note that both Parties agree. As Sir Elihu Lauterpacht reminded the Court yesterday in paragraph 5 of its Application to this Court in July 1995, Qatar admitted as follows: "Until 1868, the Qatar peninsula was considered by the British as a dependency of Bahrain." So without arguing about what happened afterward, one may begin with a confident proposition that at least until 1868 all agree that the entirety of the Qatar peninsula was subject to Bahrain's sovereignty — and this obviously included Zubarah.

86. The big hole at the heart of Qatar's case, both as to Zubarah and as to the Hawar Islands, is that it owes the Court an explanation of how and when the State of Qatar, emerging geographically from the original comprehensive Bahrain domination, extended its sovereignty to Zubarah. It must do the same with respect to the Hawar Islands. Qatar has not, and cannot, provide any proof in either case.

87. All of the evidence, such as it is, and with all the difficulties so well described by Professor David, points to the conclusion that as of 1937 the Al-Thani régime had never — never — established itself at Zubarah. Since the Ottomans admitted that *they* had not, and since Qatar claims under the Ottomans, Qatar must show how and when it obtained Zubarah sometime after 1915, on the departure of the Ottomans. Instant inherent sovereignty at least stopped at Zubarah.

88. Therefore if one disregards the mystical theory of the predestined geographical unit, Qatar's case fundamentally rests on an expression which Qatar was fortunate to find in the unratified 1913 Anglo-Ottoman Treaty: "the peninsula" — not the whole peninsula — "the peninsula" will be governed by Jasim bin Thani and his successors. But Professor David was very discrete on this score. What he said was *une glissade*; he quickly slipped in as a significant

example of British recognition "Article 11 of the Anglo-Turkish Treaty of 1913 confirmed by that of 1914" (CR 2000/9, p. 16, para. 29).

89. But as we have seen, the unratified 1913 Treaty cannot create a title, and the proposition regarding the peninsular borders of Qatar was absolutely not "confirmed" by the 1914 Treaty.

*Bahrain's ties to Zubarah*

- Zubarah was the ancestral home of the Al-Khalifa;
- the inhabitants continued to show allegiance to the Al-Khalifa;
- there was repeated and always successful resistance, led by Bahrain, to a series of attempts (notably by the Ottomans) to conquer Zubarah from Doha;
- and there were regular visits by the Amir of Bahrain.

These overheads you will find consistently in your folders.

*Qatar's ties to Zubarah*

- Prior to 1937, the Al-Thani had never controlled Zubarah — not even momentarily.

### III. THE INVASION OF ZUBARAH

7 July 1937

90. Zubarah in the 1930s was already mostly in ruins. But the region was still inhabited by the Naim, and visited by the Rulers of Bahrain. In 1937 Sheikh Abdullah of Doha tried to establish a customs port to collect taxes at Zubarah. The Naim complained to Sheikh Hamed of Bahrain. This led to a series of unsuccessful negotiations between Bahrain and Qatar in Manama, Bahrain, over the course of a month.

91. The British Political Resident, Hickinbotham, wrote as follows in late May 1937 (I cannot answer for his syntax):

"The Adviser [Belgrave] informed me that the Bahrain Government had a counter proposal ready if necessary, the basis of which was that they were prepared to concede all the area directly extraneous to Zubarah itself provided the Bahrain Government were permitted to retain Zubarah itself to do with exactly as they wished. We were agreed that provided any vestige of power remained with Shaikh Abdullah [of Qatar], there was no reason why a compromise should not be satisfactorily arrived at in this form — whilst the Na'im should be given the right to decide by plebiscite as to which ruler they desire to serve, and of course should they move into any portion of Qatar belonging to the Shaikh of Qatar, after having admitted, for example, Bahrain

nationality, they would then *ipso facto* be liable for payment of all taxation that at the time had been imposed upon other adherents to Qatar." (Memorial of Bahrain, Vol. 3, Ann. 128, p. 0674.)

92. The formulation "any portion of Qatar belonging to the Sheikh of Qatar" is obviously uncomfortable to the ears of our opponents, especially as these words were written in 1937 — i.e., precisely 69 years after Qatar would have us believe that it acquired coast-to-coast sovereignty.

93. At any rate, the concession to the effect that the Naim who moved into Qatar territory would have to pay taxes to the Sheikh of Qatar did not seem enough; there is no indication that Sheikh Abdullah had the slightest inclination to accept the plebiscite which the Political Agent and Bahrain favoured. Bahrain submitted several petitions containing 536 signatures of residents of Zubarah professing their allegiance to Bahrain and defining the territory they considered to appertain to the Al-Khalifa (Memorial of Bahrain, Vol. 3, Ann. 130 (6), p. 0681). This evidence underlies the territorial limits of Bahrain's claims there.

94. Subsequently, Sheikh Hamed of Bahrain sent out a high-level delegation, including his Heir Apparent, Belgrave, and some 30 others travelling in two vessels. They went to the little fishing village of Ghariyeh on the north coast of Qatar. The Qatari delegation was led by Sheikh Abdullah himself. After several days of inconclusive meetings, the Bahraini delegation embarked in their vessels and set course for home.

95. For what happened next, we have a number of eyewitness reports. Allow me to read the following passage in Belgrave's memoirs (p. 156; tab 10 of your judges' folders):

"Quite a number of our people [Belgrave writes] had binoculars and one or two of them were idly scanning the shore. I heard startled exclamations . . . Some unusual activity had been sighted on the coast. Motor lorries, loaded with men, were moving in the direction of Zabara and bodies of men were deploying. Then, as we watched, the fighting started. The Naim tribesmen who lived at Zabara were being attacked by Shaikh Adbulla bin Jasim's Bedouin, those surly looking Bedouin who had been so much in evidence at the village in Ghariyeh. There was frantic excitement on board the launches. Some of our men belonged to the Naim tribe and had families at Zabara, they wanted to go and help their kinsmen. With difficulty we restrained them from jumping overboard. Between us and the shore there were dangerous shoals, and, even if we had been able to land, our small party could have done little good . . .

Several of the men who were killed [Belgrave continued] were personal retainers of Shaikh Hamed's; one of them was an old man whom I knew very well and was fond of. As soon as the Qatar force had withdrawn the whole of the Naim tribe with their families, their flocks and their camels left Zabara and came to Bahrain, in a flotilla of boats which we sent for them . . . This incident exacerbated the feeling between Bahrain and Qatar and put an end to any hope of negotiating a settlement for many years to come. All intercourse with Qatar was terminated and nobody from

Qatar was allowed to land in Bahrain. When Shaikh Hamed died, in 1942, I remembered the words which were attributed to Queen Mary Tudor: 'When I am dead . . . you shall find "Calais" lying on my heart,' but in this case the word would have been 'Zabara'."

96. Of course Belgrave himself is now also dead, but at least two old men are still alive who were actually on land during that fateful day and saw their relatives killed by the Al-Thani forces. Their first-hand recollections of the dramatic event have been provided as statements to the Court (Memorial of Bahrain, paras. 283-284).

97. Bahrain pleaded with Britain to "restrain Sheikh Abdullah from making war against our subjects who live within our boundaries at Zubarah" (Memorial of Bahrain, para. 285).

98. Britain did not make a move. Interestingly, British government memoranda said this: "there is no course now open to us except to let hostilities take their course", and "The oil company [PCL] . . . will not resume operations until autumn and before that the dispute . . . should have been settled." (Memorial of Bahrain, para. 286.)

#### **Bahrain's non-acquiescence**

99. After the 1937 attack, Qatar did little to consolidate its occupation. Zubarah was a long way from Doha and 97 per cent of Qatar's population. Little by little, some Bahraini Naimi began to drift back to their empty lands. As Belgrave put it, still in his memoirs at page 157:

"Soon the Bahrain Arabs at Zabara began again to complain about the aggression of the Qatar Arabs and the Shaikh used to discuss with me, every time I saw him, for hours at a time, the question of his rights in Zabara and the unhelpful attitude of the British authorities from whom he could never get a definite statement."

100. The long record of Bahrain's frustrated attempts to obtain redress for the wrong the Al-Thani did in Zubarah is summarized in some 40 paragraphs of Bahrain's Memorial (Memorial of Bahrain, paras. 295-336). While Bahrain can understand that Britain found it expedient to ignore the issue in order to avoid conflict, and while Bahrain was not in a position to oblige Britain to adjudicate the matter, a fair reading of the record does not allow the conclusion that Bahrain acquiesced.

101. In all but one instance, the alleged conversations involved proposals — e.g., "let us have another port on the Qatari mainland, and we will forget about Zubarah" (see Memorial of

Bahrain, Vol. 3, Ann. 87, p. 0524). But Bahrain did not relinquish the *quid* because it never got the *quo*.

102. In fact only one agreement was signed by Bahrain with respect to Zubarah. It dates from June 1944, and its text, which Mr. Shankardass showed you (CR 2000/9, p. 28, para. 8), is as follows:

"The Ruler of Bahrain and the Ruler of Qatar agree to the restoration of friendly relations between them as they were in the past. The Ruler of Qatar undertakes that Zubarah will remain without anything being done in it which did not exist in the past. This is from consideration and reverence to Al Khalifah. The Ruler of Bahrain, also, on his part undertakes not to do anything that might harm the interest of the Ruler of Qatar. This agreement does not affect the agreement with the Oil Company operating in Qatar whose rights are protected." (Memorial of Qatar, Vol. 8, Ann. III.240, p. 183.)

103. This text is sufficiently ambiguous that one has the strong sense that it was the result of arm-twisting by the British, who wanted peace and whose real interest was in the last sentence. This was a standstill agreement to help the oil men.

104. When he left Bahrain in 1957, after 31 years, Belgrave, who of course had been present at all stages, noted simply that Zubarah "was still the subject of long and acrimonious discussions between the Shaikh [Hamad of Bahrain] and the British authorities, and any signs of a settlement seemed to be as far distant as they ever had before" (p.159).

In summary, the events of 1937:

*1 July 1937*

- It was an armed invasion by the Al-Thani.
- There was resistance to it by local Naimi population loyal to Bahrain.
- The Naimi were expelled to Bahrain unless they wanted to join the Al-Thani.

With regard to acquiescence the summary can be as follows:

**Bahrain's non-acquiescence in Zubarah *fait accompli***

- There was no consolidation of Qatari rule.
- No significant *effectivités* until today.
- Some Naimi returned to the empty land, creating an ambiguous situation.
- Britain never made a decision, instead temporizing to avoid conflict.

— Concessions offered by Bahrain never became part of any agreement and so cannot be deemed a waiver.

— To the contrary, Bahrain's claims were reiterated until today.

My fourth series of questions concern the Hawar Islands:

#### IV. THE HAWAR ISLANDS

##### What were Bahrain's connections with the Islands?

105. Bahrain's dominion over the Hawar Islands dates back to the time when, as Qatar admitted in its Application, *all* of the Qatar peninsula was a Bahraini dependency.

106. Even if one were to take the most generous view of the consolidation of the Qatari State in the absence of a single unambiguous factual element of proof, it cannot be said to have acted to extend its sovereignty to any part of the western shores of the peninsula before 1937, and the events at Zubarah. As counsel to Qatar noted last week, the first recorded visit of the Sheikh of Qatar to the west coast of the peninsula was in 1938 when he visited the new oilfield of Dukhan.

107. By that time, the Hawar Islands had been populated by Bahraini subjects for 1½ centuries — ever since the Al-Khalifa permitted the Dowasir to settle on the Hawars.

108. Captain Brucks's survey, which you have already seen in your judges' folders, contains Mr. President, Members of the Court, the first mention of the Hawar Islands contained in any authentic document presented to the Court.

109. At the top of the peninsula, at the point of Ras Rakkan, Brucks makes the following general conclusion, at page 99: "From the point to Al Bidder southward, and to Warden's Island westward, the authority of the Sheikh of Bahrain is acknowledged."

110. Now to find what he said specifically about the Hawar Islands, you need to look at page 101. He used the name Warden's Islands and describes the Hawars as: "a group of eight or nine islands and rocks . . . The principal is called Al Howahk [obviously what we know as Hawar], and is about four miles long. It has two fishing villages on it, and belongs to Bahrain."

111. Today, 170 years later, you can still see the two villages on Hawar.

112. Abundant evidence of Bahrain's ownership and control of the Hawar Islands was available already *before* the British adjudication in 1939. Bahrain refers the Court to the summary



of the evidence, over four single-spaced pages, which appears in paragraph 28 of Bahrain's Reply. It is a subject on which Mr. Robert Volterra will address you next Tuesday, if you so please.

### **What were Qatar's connections with the Hawar Islands?**

113. Now, the Hawars are not close to Qatar in any sense that involves human exchanges. The life of Qatar was in Doha and in its surroundings on the eastern coast. There was no road from the east coast of Qatar to the west; indeed, why build a road to nowhere?

114. It is therefore hardly surprising that the Ruler of Qatar, when making his claim to the Hawar Islands, did not know where they were, did not know their size, and was ignorant of the Dowasir settlements there.

115. The people of Doha never had any interest in these Islands, where the life was even harsher than on the eastern Qatari coast. The people of Doha were pearl divers and fishermen. The Hawar Islanders also dove for pearls and fished. There was no reason to undertake an arduous journey across a wild and dangerous desert to trade fish for fish, or to trade pearls for pearls. The Hawar Islanders traded with the markets of Manama and Muharraq in Bahrain, easily accessible across the water.

116. Another reason why the Ruler of Qatar's ignorance of the Hawars is not surprising is to be found in one single word: oil. Recall that Bahrain and its American concessionaire, BAPCO, had struck oil in 1932. The word spread that "the streets of Manama were paved with gold". Qatar, and its British-led concessionaire, PCL, had no results: only poverty for Qatar, and mounting expenses for PCL. It is impossible not to imagine that PCL — which had a concession covering all territories belonging to Sheikh Abdullah of Qatar — would have explained to him that it would be advantageous to operate as close as possible to Bahrain, given geological probabilities, where oil had already been found, and asking whether Sheikh Abdullah considered himself to be the master of the Hawar Islands. It would not have been difficult for Sheikh Abdullah to figure out the "good" answer; nor was it difficult to assert a claim. This is a familiar story; many territorial disputes have been conceived — and I might say even financed — by the concessionaire who wants maximum rights.

117. The lack of connection between Doha and the Hawars is evident in a long letter which Sheikh Abdullah of Qatar submitted to Britain in 1939 in support of his claim to the Hawar Islands. I am now to some extent anticipating my last series of questions, but with the Court's indulgence, I propose to mention this document now and I will not repeat myself later. Sheikh Abdullah's long letter appears at page 1146 of Volume 5. You will see that the Political Agent added his comments in the left-hand margin.

118. The first remarkable thing about the document is that it does not offer any evidence of Qatari connections with the Hawars. For example, at the bottom of the first page, Sheikh Abdullah argued that Bahrain's position is not credible because the Bahraini military detachment in the islands had not been there for very long. But he did not claim — because he could not do so — that there had ever been *Qatari* detachments or representatives on the Islands. Again, at page 1157, he asserted that a Bahraini Dowasir was attacked on Hawar and came to his father, Sheikh Jasim — who had died 26 years earlier — for protection. Sheikh Abdullah affirmed that there were "reliable witnesses", but named none.

119. The second remarkable thing about this document is the astoundingly confident way in which its author asserts things which can so easily be determined as wrong — and fundamentally wrong. May I respectfully direct the Court to the passage near the bottom of page 1148:

"they are islands whose extent is from 4 to 5 square miles approximately at high tide. Moreover, they are barren, without water and unfit as a pasturage for herds, and were in the past completely without inhabited villages or anything that approaches the meaning of this word . . ."

And again, near the bottom of page 1153:

"The Hawar Islands are considered, from a geographical point of view, as a part which completes Qatar from the North. Any one who has the least primary knowledge of geography will agree with this."

120. Mr. President, Members of the Court, the Hawar Islands are not four to five square miles, but five times larger: 20 square miles, or about 51 km<sup>2</sup>. They most certainly do not "complete Qatar from the north". They are not barren. There are many remnants of old systems for the collection and preservation of water. Livestock grazed there for generations. And to say that they were "completely without inhabited villages", to say that is — how shall I put it? — a decisive error. The two villages, as we have seen, were observed by Captain Brucks 100 years

before Sheikh Abdullah wrote his comment. Moreover, there are many old people still alive who had lived on the Hawar Islands in the 1920s, the immediately preceding decade — and know the same two villages like the back of their hands (see witness statements in the Memorial of Bahrain, Anns. 313-316, and Reply of Bahrain, Anns. 20-23).

121. While putting forth these gross inaccuracies, Sheikh Abdullah expressed complete confidence that he was right, and much scorn for Bahrain's "concoctions", as he called them, and "bold denials of firmly set facts". How can one explain that someone is so confident, and so wrong?

122. The simplest answer is that Sheikh Abdullah who, as the Political Agent determined, had never been to the Hawar Islands, simply assumed that he was claiming the little islands near the point of Ras Rakkan, not so far from Zubarah, with which he was undoubtedly familiar.

123. The two islands there are indeed much smaller, probably barren, very likely were never inhabited, and could be said to "complete Qatar from the North". And this could explain why Sheikh Abdullah was so dismissive of Bahrain's description — which certainly does not fit Ras Rakkan. As for Sheikh Abdullah's assertion that "during low tide" the distance between the Hawar Islands and the mainland is "about traversable by foot", it is preposterous to anyone who has been to the Hawar Islands.

124. We have a reliable account of distances and communications from the highest official in the Gulf, the Resident Agent, Lieutenant-Colonel Hay, who later became Sir Rupert Hay. It is particularly useful because it dates from November 1941, when he paid a visit to Qatar, and wrote a report to his Government (Memorial of Bahrain, Ann. 296; Vol. 5, p. 1205).

125. Hay explained that he went from Bahrain to Zikrit where he visited the British-led oil activities (PCL), and at Dukhan immediate south.

126. From the west coast, Hay recounts that: "We set off . . . to visit the Shaikh [of Qatar] at his residence in Raiyan about 60 miles away."

127. He describes the scene of the voyage as follows:

"The road lay across stony and uninhabited desert and the going was fairly rough; not a living thing was seen for some 50 miles . . . it was strange to travel about these wild parts . . . without any kind of armed escort."

128. Hay also noted that although the Sheikh's prosperity had already been "greatly increased" as a result of the Oil Company's operations, there still had not been found a suitable port on the *eastern coast* of Qatar from which to export the oil. So even this new industry had not created an infrastructural link from east to west.

129. What Sir Rupert Hay saw on the way east from Dukhan remains to be seen today, as in these images recorded earlier this year and submitted with Bahrain's Supplemental Documents.

130. I direct your attention, once again to the screen, where you will see an extract from the 23rd edition (1975) of *Al-Munjid*, an Arabic reference book published in Lebanon and, I might venture, is inspired by *Le Petit Larousse*. (Bahrain's Supplemental Documents submitted on 1 March 2000, Ann. 21, p. 179.) You also have this in your judges' folders at tab 14. What you see now is the dictionary's definition of "Hawar Islands", which in English reads: "a group of 16 islands subject to the State of Bahrain". Next you have a map upon which I do not need to comment — the international border is as clear as it could be. I do not wish to mislead the Court so I will note that after this case was started, subsequent editions of *Al-Munjid* recognized that Qatar was claiming the Hawars and therefore did not repeat in this unequivocal way that the Hawars are "subject to Bahrain". This is what was shown in 1975. But I focus on the map for another reason, and it is this. There is no road from Doha that comes even close to the empty peninsula next to the Hawars.

131. A member of the Qatar Historical Commission, in a book cited by Qatar, has written that in 1908 the population of the entire western coast was "roughly 3 per cent" of the total for Qatar. Moreover, this tiny population — of 3 per cent — can be precisely located, for the author writes, and speaking about 3 per cent of the total population means depending on what estimate you except from a high of 300 to 800 people, that would be 3 per cent of the population, the entire population of the western coast of Qatar. The author writes that there were only three towns on the west coast, Zubarah, according to her, being "practically deserted". (R.S. Zahlan, *The Creation of Qatar*, p. 15, 1979.) The Court may well wonder where these three towns on the "west coast" were located. Please observe the map. The only three towns on the west coast of Qatar according to this member of the Qatar Historical Commission in 1908, were: Abu Dhaluf, Hidayah, and Khuwayr (or Kwar Hassan, as it is more frequently known today). As you can see, all three are on the

northern part of the western coast. This is where the 300 or 800 people were. However long you consider the matter, the conclusion remains: the south-west coast of Qatar was simply unpopulated.

132. The closest Qatari area to the Hawars is a peninsula which is devoid of life, with no building except for a few remote military posts. I do not think that its name is the Zikrit peninsula, that appellation is used simply for purposes of identification. The only important human presence in the area is the oil town of Dukhan and its adjoining port of Zikrit. Of course, oil was not discovered in Qatar until 1939. Dukhan was created to provide accommodation for some 300 men working in the desert (Geoffrey Bibby, *Looking for Dilmun*, p. 4, 1970).

133. Bahrain can cite a witness who is perhaps unexpected in this connection, namely Professor Geoffrey Bibby, the English archaeologist, who wrote the most famous book on Bahrain by a Western author, namely *Looking for Dilmun* (published in 1970, 1st edition 1970), which has been cited by both sides in this case.

134. The reason I now cite Professor Bibby has nothing to do with archaeology. It has to do with what he did as a young man, years before he became a professor. This takes us back to 1947-1950, when young Geoffrey Bibby, as he writes in the first chapter of *Looking for Dilmun*, was deputy to the head of the PCL's operations in Qatar. The operations were in Dukhan, where, as I said, there were some 300 men in the field. Now here is the point:

135. Even though young Mr. Bibby and his company were working the concession in Qatar, the place they found convenient as a base from which to operate, to supervise the operation in Dukhan, was not in Doha, nor anywhere else in Qatar, but in Manama, on the main island of Bahrain. This is where the PCL had its office, with a staff of around 20 clerks and purchasing agents.

136. In other words, even Dukhan was, for all *practical* purposes, closer to Bahrain than to Qatar. How much truer would that be for the Hawar Islands, populated by the Dowasir from Budaiya and Sellac.

137. And what exactly was the PCL head office in Manama doing? Among other things, Professor Bibby remembers, at page 4 of his book, PLC ran "a fleet of dhows, that sailed continuously with water from an undersea spring off Bahrain to waterless Qatar". In other words,

Dukhan's supply of water — indispensable for any life — was brought by Bahrainis, bringing it there from the Bahraini sea.

What do we conclude?

*Bahrain's ties to the Hawar Islands*

- were exclusive;
- constant;
- and existed many generations before the British decision of 1939;
- and ever since.

*Qatar's ties to the Hawar Islands*

- It is a discredited thesis, that there were any such ties;
- for once it is possible to prove a negative, in two ways: first, the compelling inference from the 82 documents. What else can one conclude about a party which is reduced to filing such alleged evidence? Second aspect of proving this negative, the positive proof — Qatar's geographical and demographic isolation from the Hawar Islands, and its utter ignorance of them.

Mr. President, only one series of questions remain, about the British decision of 1939, and this, for me at least, would be a suitable moment for a break. But, I am at your disposal.

Le PRESIDENT: Je vous remercie. La cour suspend pour dix minutes.

*L'audience est suspendue de 11 h 10 à 11 h 30.*

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne à nouveau la parole à M. Jan Paulsson.

Mr. PAULSSON: Thank you very much, Mr. President.

## V. THE BRITISH DECISION OF 1939

### The Context

138. On Tuesday of last week, our opponents told the Court that if only the British had known how close the Hawars were to Qatar, "they would surely not have decided that the islands belonged to Bahrain" in 1939 (CR 2000/6, p. 45, para. 22). This sounded like a complaint about an error made in a decision reached more than 60 years ago and as all lawyers know this is not a very impressive grounds of challenge.

139. But the following day we heard that the 1939 decision was the conclusion of a "sordid and shameful story". The British decision, Sir Ian Sinclair told us, was "hypocritical". The meaning of that word is plain: the British decided, or so Qatar would have you believe, that the Hawars belonged to Bahrain even though the British did not believe it was true: that is hypocrisy.

140. Now, Qatar cannot have it both ways. If Britain's decision was based on Britain not knowing the alleged true facts, then Britain was not hypocritical. If Britain was hypocritical, then the true facts did not matter.

141. But let us stay with the "sordid and shameful" scenario. Sir Ian Sinclair found indications in the record that the British expected that Sheikh Abdullah's claim would fail. Sir Ian may well say that this is because the British were "sordid and shameful", but a more plausible interpretation is that no one expected Sheikh Abdullah to succeed because his claim was preposterous. He and his tribe lived all the way over on the Doha side, isolated by an empty quarter and no one had ever heard of any Qatari presence in the Hawars. The sudden claim in 1938 had a very strong odour of oil.

142. It is when it gets to speculations about motive that the Qatari presentation is mired in confusion. At one point it adopts the thesis that the British favoured Qatar because they favoured the British oil company. Moments later, they say that Bahrain favoured Britain for, if I have understood it correctly, perfidious Albion now had an altruistic motive — to help Bahrain's finances. It is not clear how this would work; no one had found any oil on the Hawar Islands, as indeed no one still has.

143. Once our learned friends have squeezed every drop of suspicion out of every yellowing page, they end up with a conclusion which, among all the propositions ever put to this Court, must surely rank as one of the least surprising: colonial Powers acted in their own interest.

144. Well, yes they did. Tens of thousands of miles of grotesque international borders in the developing world were drawn up by powerful intrusive foreigners whose entire attention was on their own political and commercial interests, with very little regard to indigenous populations. Yet these borders survive, not because they appeal to our sense of fair play, but because continued respect for such borders has avoided war. You will hear my confrère Fathi Kemicha on this topic next week, I hope.

145. So, Qatar's demonstration comes to this: a tale of sound and fury, signifying nothing. Strictly speaking, Bahrain could stop here. But, as a matter of historical accuracy and coming before this high Court, Bahrain wants this Court to be satisfied that it was not the beneficiary of "sordid and shameful" machinations.

146. Once oil was struck in Bahrain in 1932, Qatar — or rather the British-owned Anglo-Persian Oil Company — wasted no more time. Within months of the Bahraini discovery, the British Political Agent wrote "the explorers of Anglo-Persian in Qatar have examined places where the Ruler of Qatar has no right to allow them to go", even though, as he noted, "it is said that as late as last year [1932] the Ruler of Qatar admitted in public that certain areas on the Qatar coast pertain to Bahrain" (Counter-Memorial of Bahrain, 215).

147. At the same time, Sheikh Hamad of Bahrain was negotiating with the American-owned BAPCO for additional concession acreage. It was in Britain's interest that the extension of BAPCO's rights be as limited as possible — BAPCO is American. Sheikh Hamad of Bahrain was apparently willing to exclude the Hawars from the extension, but he left no doubt about his position when he declared to the Acting Political Agent in a meeting on 29 July 1933, that "these islands are the dependencies of Bahrain" (despatch dated 30 July 1933, Memorial of Qatar, Ann. III.86, Vol. 6, p.445).

148. The very next day, the Political Agent — Loch — telegraphs his Government as follows:



"Shaikh [Hamed of Bahrain] gives his authority [for the defined extension] subject to following observations. Firstly. He desires that area be called Bahrain Islands without specifically naming any so that question of Hawar Island and Qatar will not be prominent by their omission. I think that we may accept this as Hawar Island is clearly not one of the Bahrain group." (Memorial of Qatar, Ann. III.88, Vol. 6, p. 449.)

149. Qatar's advocates are very insistent on this phrase, "Hawar Island is clearly not one of the Bahrain group". My learned opponent, Mr Shankardass, asked the Court "carefully [to] note Loch's view, in 1933, that Hawar Island did not appertain to Bahrain". He then went on to say that this was in "stark contrast" with Loch's own subsequent acknowledgement of Bahrain's right to the Hawars (CR 2000/6, p. 24, para. 37 (2)). This argument, of course, contributes by insinuation to Sir Ian's "sordid and shameful story". But Loch did not say "not part of Bahrain"; he said "not part of the Bahrain *group*". The political versus geographical distinction is key. In my respectful submission, when the Court "carefully" considers this letter, as Mr. Shankardass invites it to do, what it will find is that Loch could not possibly be interpreted as expressing a "view" about ownership of the Hawars. As just noted, this telegram was sent the day after Sheikh Hamed "immediately" insisted to Loch that the islands were Bahrain's "dependencies". The fact that the Hawars are not part of the group of islands clustered around the main island of Bahrain obviously does not mean that they do not belong to Bahrain. The island of Pitcairn in the South Pacific, St. Helena in the South Atlantic, and the Caymans in the Caribbean are certainly not geographically part of the British islands, but they just as certainly fall under British sovereignty.

150. The concession negotiated by Anglo-Persian was quickly assigned to a newly created company, PCL, in which the British Government had an indirect shareholding. We have included, under tab 19 of your folders, a brief explanation of the various companies whose names appear in the records, which may facilitate its reading.

151. PCL had a General Manager named John Skliros, who was another dynamic figure of the history of oil. He knew nothing about the Hawar Islands — except that he wanted them. So on 29 April 1936 he wrote this short letter (Counter-Memorial of Bahrain, 233) to the British Government, where he argues that Hawar:

"is shown on the official map of Qatar which was signed by the Shaikh of Qatar and by Mr. Mylles and which forms part of the Qatar concession. This map, I believe, was seen and approved by the Political Resident and perhaps, the India Office. All this points to its forming part of Qatar and not of Bahrain."

152. As arguments go, surely this is about as feeble as one can get. Indeed, it rather falls into the category of wishful thinking. Here is the map, being discussed, which was shown to you last week. What Mr. Skliros was perhaps *implicitly* hoping was that the British Government would believe, and what Sir Ian Sinclair *explicitly* invited the Court to believe last week, was that Mr. Mylles and Sheikh Abdullah showed their intention to separate the Hawar Islands from Bahrain by placing their signatures between the two sets of islands. Apparently this argument was offered in all seriousness. Well, may Bahrain answer in four ways:

- first, if this page were blank, and you were to imagine that you were going to sign it, where would you put your signature? The answer seems obvious: just where the signatures did appear;
- secondly, if you wanted to demonstrate a separation between the Hawars and Bahrain, isn't there a clearer more straightforward way of doing it? How about . . . a line?
- thirdly, Sheikh Abdullah and his concessionaire have at any rate no right to draw Bahrain's borders; and
- fourthly — and rather decisively — when Sheikh Abdullah was repeatedly asked in 1938 and 1939 whether he had any evidence that the Hawar Islands belonged to him, it did not occur to him to offer this map as evidence of his authorization of oil exploration in the Hawars. Either Sheikh Abdullah was surprisingly forgetful, though he had only once ever signed a concession agreement, or he did not place the same interpretation on this map as Sir Ian does now.

153. Sheikh Hamad of Bahrain must have had a suspicion as to what Skliros was up to. If I may ask you to look at page 1071 of Volume 5, in April 1936, Sheikh Hamad took the precaution of instructing his adviser, Belgrave, to write to the Political Agent to confirm that the Hawars were "indisputably part of the State of Bahrain".

154. This is the letter in which Belgrave makes a list of the Hawar Islands — on page 1072 — which as Qatar correctly points out is incorrect. But consider the circumstances. Our opponents say they have checked Belgrave's diaries and conclude that Belgrave had never previously been to the Hawars. I believe them. So Belgrave was given the task of writing this urgent letter. He must have sought information, through a translator, from someone at hand who knew something about the Hawars, and that person — however he understood Belgrave's

question — listed the islands exactly in the order that you encounter them when you travel to Hawar: Nun, Mashtan, Al Mutarid, Rabad, and then Hawar.

155. It is important to remember that Belgrave was in no sense providing evidence or argument to a tribunal. He was simply providing information as best he could in the circumstances as he did not want the British to give out wrong and adverse information to Skliros. And, Belgrave was certainly right to be in a hurry, for as we just saw Mr. Skliros was writing his own letter, in fact dated the very next day.

156. Mr. Shankardass told the Court:

"We now also have Belgrave's entry in his diaries on 23 April 1936 . . . that the Al-Khalifa Shaikhs, five days before the formal claim was made on 28 April 1936, did not in fact themselves believe that they had a sustainable claim to the Hawar Islands." (CR 2000/8, p. 27, para. 27.)

157. The Court must have thought, as I did, that this was rather dramatic stuff. Here we have Qatar putting it to the Court that Shaikh Hamed of Bahrain himself did not believe that he owned the Hawar Islands when he asserted his rights.

158. When one advances such an electrifying idea, one had better well be able to back it up. Please look at Belgrave's entry for 23 April 1936, and judge for yourselves. In the morning Belgrave goes to the office, in the evening he goes to the cinema. But in between there is this:

"Discussed oil & the new agreement & especially the question of our right of the Hawar Group of Islands which the Shaikhs fear the Agency will not allow. I think myself it is quite incontestable."

159. How can anyone seriously read this entry to mean that the Shaikhs did not believe in their title to the Hawars?

160. Sir Ian Sinclair also put forward a creative interpretation of this entry. Here is what Sir Ian argued to the Court:

"That the Bahrain Sheikhs should fear the British Political Agency would turn down a claim by the Ruler of Bahrain to the Hawar Islands is understandable. But why is Belgrave so confident that such a claim (to be made only five days later) will be backed by the Agency? Could it be that he had advance knowledge or at least a hint of what the reaction of the Agency to such a claim was likely to be? What other explanation is there, given, as Belgrave must have known, the very shaky grounds for a Bahraini claim to the Hawar Islands if those grounds were to be subjected to serious scrutiny?" (CR 2000/7, p. 50, para. 10.)

161. No element of these comments carries conviction. The Sheikhs were not concerned about a "claim" being turned down; the reference is to their "right". As for the basis of their fear, we know from the evidence that there was a British interest to disfavour Bahrain's American concessionaire, or at least to promote the interest of the British oil company.

162. In the second sentence, Belgrave does not express confidence that the claim will be "backed by the Agency"; he says it is "incontestable".

163. As for the "advance knowledge or at least a hint", this is a figment of Qatar's imagination. What Belgrave *writes* is that he holds Bahrain's right to be unassailable.

164. And now to the last: Belgrave "must have known" that Bahrain's claim was "very shaky". Such a self-serving assertion would be merely humorous if it were not for the seriousness of the stakes in this case. It verges on the outrageous.

165. Incidentally, why would Belgrave be writing lies to himself in his diary — "I think Bahrain's right is incontestable — if in fact he thought it was "very shaky?"

166. Continuing in this vein, Sir Ian speculated about the fact that Belgrave, in assisting Sheikh Hamad of Bahrain in formulating Bahrain's basis for the title to the Hawars "had totally forgotten to mention them as part of the principality of Bahrain in an article published by him only eight years previously" (CR 2000/7, p. 51, para. 13). In Belgrave's description, Bahrain cannot anywhere find the expression "principality of Bahrain", which Sir Ian used (Qatar judges' folders, tab 18). Like so many people, Belgrave describes what he calls the "Bahrain archipelago" — others speak of the "Bahrain group". It neither offends nor worries Bahrain that people define the Bahrain archipelago geographically as the islands immediately surrounding the main island. The Hawars may be said to form their own archipelago. That does not imply a political judgment as to who owns them.

167. Now, let us see what the British officials do about the two letters from Skliros and Belgrave, separated by one day. First, at page 1074 of Volume 5, you have the Political Agent's report to his superior (p. 1075), in which the important points are paragraphs 5 and 6, which I shall not read to you. Sir Ian seems to suggest that this is the reflection of a "sordid and shameful" machination. Bahrain just does not see it. As for the response to Mr. Skliros, on page 1076, two pages on of the same volume, you see that Mr. Walton of the India office answers him, that is to

say Mr. Skiros, by saying that the matter will go back to the Political Resident in the Gulf, but not without Mr. Walton making a rather withering comment about Mr. Skiros's hopeless argument about the map that Sheikh Abdullah and Mr. Mylles signed. You see it in the last paragraph, here is what Mr. Walton says:

"I doubt whether the map attached to the Qatar concession is relevant in this connection — its object was to define the southern boundary of the concession. Incidentally it marks the Bahrain Islands as well as Hawar. Yours sincerely."

168. This answer is about what Mr. Skiros's argument deserves, and it remains the answer which Qatar deserves today.

169. May I only add that although Mr. Walton's letter contemplates the issue of whether the Hawar Islands belong to Bahrain, the "Bahrain Islands" are referred to as something distinct from "Hawar". Considering Mr. Walton's answer on the merits, it is obvious beyond peradventure that the distinction is a matter of geography, not of sovereignty.

170. Following advice from the Political Agent and the Political Resident, including the conclusion that successive Rulers of Bahrain had "exercised active jurisdiction in Hawar down to the present day" (Counter-Memorial of Bahrain, 236), the British Government in July expressed the view that Bahrain was entitled to sovereignty over the Hawar Islands (Counter-Memorial of Bahrain, 253).

171. The British posture seems entirely appropriate; it answered a query from PCL, but gave notice that its opinion was subject to whatever ruling might be given, if and when Qatar sought to have its views heard.

172. In 1937, of course, Sheikh Abdullah's men invaded Zubarah. One of Bahrain's responses was to take a series of defensive actions in the Hawar Islands. Qatar has sought to characterize this as an opportunistic illegal occupation by Bahrain. This is not an argument that deserves much attention, particularly with the disappearance of the 82 documents. Suffice it to say that, contrary to what Qatar argues, these actions by Bahrain are precisely those of a sovereign reacting to a perceived external threat.

173. And so we come to 1938, when the Ruler of Qatar finally shows his very first sign of any interest in the Hawar Islands. Whether one is prepared to believe that he was not encouraged

by PCL, the indisputable fact remains that the joint interest of PCL and Sheikh Abdullah was the aggrandizement of Qatar.

### **The arbitration**

174. In February 1938, on the occasion of a visit by the Political Agent to Doha, Sheikh Abdullah stated that Bahrain had no right to be in the Hawar Islands. In his report on the meeting, which you will find in Volume 5 at page 1096, the Political Agent Weightman — or Sir Hugh Weightman as he was to become — notes however that Sheikh Abdullah "changed the conversation immediately and it was evident that at that time he was by no means prepared to lay a formal claim to the Hawar group of islands".

175. Apparently, Weightman did not report on this February meeting to his superior, the Political Resident, until this letter, which as you see is dated 15 May. Sir Ian finds this delay to be part of the "sordid and shameful story". It is hard to see why. Weightman's conclusion was that Sheikh Abdullah was "by no means" prepared to make a claim. Weightman writes that he was trying "to draw" Sheikh Abdullah on the subject, but he "immediately changed the conversation". We do not know why, but we may note that Mr. Skliros was not there to whisper in his ear. At any rate why would it be urgent for Weightman to report a claim *not* being made?

176. It was not until three months later that Sheikh Abdullah actually put a claim in writing: a short letter dated 10 May and a slightly longer one on 27 May. They are reproduced at pages 1094 and 1102 of this volume (Memorial of Bahrain, Vol. 5). You can study them yourselves. They contained strong rhetoric, but not the slightest proof of acts of administration or any other Qatari presence in the Hawars.

177. On 30 May, Weightman went to Doha and met with Sheikh Abdullah and his advisers. The British Political Agent "questioned [Sheikh Abdullah] closely" in regard to Qatar's claim and the latter stated that "he had no further proof to offer beyond the statements made in his petitions of claim" (Counter-Memorial of Bahrain, Ann. 88). In response to "repeated enquiries" (*sic*) as to whether the two letters put forward by Sheikh Abdullah presented his claim "in all the detail he wished", or whether the Ruler had "any other evidence, documentary or otherwise, which he would wish to submit", Sheikh Abdullah stated that he had set out all he wished to say in these two letters.

178. Nevertheless, two weeks later, on 15 June, Sheikh Abdullah asked by letter, to be informed of Bahrain's claim, stating that he might have more evidence to produce depending on the nature of Bahrain's claim.

179. The Foreign Office advised that "when one is assuming an arbitral rule of this nature", each party's statements should be communicated to the other for answers, so that a decision would be less likely to be based on "some erroneous statement" (Memorial of Qatar, Ann. III.165).

180. And so, once Bahrain's counter-claim was filed in December 1938, Qatar was given a chance to answer it, which it did by the Rejoinder filed at the end of March 1939.

181. Now we come to what may be the single most important document in the case, namely Weightman's report of 22 April 1939 in which he summarizes the proceedings and reviews the evidence. If there is one document which Bahrain is certain that every Member of this Court will study with particular care, it is this: and you find it at page 1165 of Volume 5. I do not presume to help you read it, but allow me to make one comment, in light of Qatar's repeated complaints that Britain unfairly placed the burden of proof on Qatar. My comment is this, Weightman's report makes no presumptions whatsoever. There is no mention of Qatar having the burden of proof. There is a straightforward balancing of evidence, which is not difficult, given Qatar's absence of evidence.

182. Qatar seems to take the position that Weightman was a liar, and that everyone who agreed with him was a hypocrite. That kind of argument will surely not satisfy this Court or any other court. Although Bahrain can hardly be required to prove that Weightman was *not* a liar, we suggest that the objective reader of Weightman's report will be convinced that it was unlikely to have been written by someone who had a "sordid and shameful" bias. I respectfully ask the Members of Court, in due course, if not today, to read paragraph 11 and ask themselves: is this the language of a man who is "going through the motions" for iniquitous purposes?

183. There is no historical document in the entire file of this case that contains more specific analysis of the issue of title to the Hawars. Qatar's apparent unwillingness to discuss Weightman's analysis might just be explained by the fact that it is a thorough exposition of the merits of the dispute, and, the moment one talks about the merits, Qatar's case for the Hawars is exposed as nothing but empty assertion.

184. In a time-honored tradition, Qatar evidently decided that since it does not like the message, it will blame the messenger. And so, Qatar attacks Weightman *ad hominem*.

185. Qatar calls Weightman's analysis "slanted" without ever explaining in what conceivable way — given that in over 60 years until today, Qatar has not found a single authentic document to show a single instance of Qatari presence on the Hawar Islands — in what conceivable way — Weightman's assessment was wrong on the merits?

186. Qatar's attack on Weightman is certainly robust. He must have had a "deep-seated prejudice . . . against the Al-Thani ruling family". Those are Sir Ian's words (CR 2000/8, p. 15, para. 15). Weightman had "an almost paranoid attitude towards the ruling family of Qatar" — again, Sir Ian's words (CR 2000/8, p. 14, para. 13).

187. Sir Ian said almost as though he were complaining, that Weightman "gives no real explanation for his rooted dislike of the then Ruler of Qatar" (CR 2000/8, p. 15, para. 13). By using this approach, Qatar could refer to anyone who does not agree with it, and complain that Mr. X has never explained why he was "paranoid" or held "deep-seated prejudices". The Court is asked to presume bad faith. That would turn a universal rule upside down.

188. Weightman's bias, according to Qatar, is reflected in various notes and communications which — I would respectfully submit — are equally susceptible of an innocent interpretation. Qatar places considerable emphasis on a letter which Weightman wrote in December 1939, which I am sure you remember. According to Sir Ian, this was the letter in which Weightman "almost seems to relish an eventual murder attempt on the heir-apparent of Qatar" (CR 2000/8, p. 14, para. 12 (8)).

189. We have put this document at tab 20 of your folder (Counter-Memorial of Qatar, Ann. III.48, Vol. 3, p. 275).

190. We see that Weightman is no admirer of Sheikh Abdullah or of his son Hamad: "Bahrain [he writes] is besieged by all kinds of people from Qatar — who are sick to death of the avarice of Sheikh Abdullah and of the impositions of his eldest son Sheikh Hamad."

191. He evaluates the situation as follows:

"My personal belief is that as long as the old Shaikh is alive, Qatar will muddle along somehow, since he is personally quite popular both with the townfolk (if one can use the words 'town' for places like Doha or Wakrah) and with the Bedu. The only people who really hate him are some of his own relatives. But when he dies and Sheikh Hamad comes into power, I should anticipate a rapid acceleration of the tempo



of agitation. I doubt very much if there will be any armed rising for the Ruling Family have the best arms by a long way. But I should certainly anticipate a murder and quite candidly I think it would be to Qatar's advantage in the long run if Sheikh Hamad bin Abdulla passed out. We have of course recognized him as heir-apparent but that does not involve us in protecting him from assassins fortunately, and since I should not anticipate fighting we have nothing much to worry about so far as the oil camp at Zakrit is concerned."

192. In other words, Sheikh Hamad may be killed, but it will be a family feud and will not involve civil war. Weightman characterizes it as an internal matter. His preoccupation is that there be no civil war. Weightman thought that Sheikh Abdullah was bad for his own people. As Political Agent he was *supposed to* assess the merits and prospects of persons in positions of power.

193. Weightman's letter shows concern with "Qatar's advantage in the long run". Nothing involves the "long run" as much as issues of territory. Title to the Hawars had not been asserted for the benefit of individuals, but for the benefit of two competing countries. Whatever his opinion of individuals, there is no evidence that Weightman favoured the people of Bahrain over the people of Qatar. The only "slant" he had, as far as I can see, is that he did not believe that mere proximity creates title.

194. The insults are not limited to Weightman. Loch, Qatar told the Court, hurt Qatar's interest because of the "spineless" way he handled himself.

195. Nor does Fowle escape; "bias" and "deliberate failure to investigate" (CR 2000/7, p. 50, para. 10).

196. In fact Qatar concludes that the "British Government" was "going through the motions of an enquiry", and that "the scenario for the enquiry" was accepted in principle by "both the India Office and the Foreign Office in London" (CR 2000/8, p. 11, paras. 7-8). So now the entire British Government is indicted. The only way to avoid being called "sordid and shameful", it seems, is to embrace Sheikh Abdullah's claims.

197. We now come to the end of the story. The analysis and the record of the competing claim to the Hawar Islands were reviewed by the British Government in London, in particular by the Marquess of Zetland and Lord Halifax, and the Award in favour of Bahrain was made on 13 June, assented to on 1 July by the Government of India, and communicated to both Rulers on 11 July.

198. In summary, the Ruler of Qatar was unable to produce any proof, or even *allege* any particulars, of his rule in the Hawar Islands. The British officials who evaluated his claim concluded that despite their repeated invitations that he show them evidence, his claim had no other basis than the unsustainable one of proximity.

#### **The aftermath of the decision**

199. Three weeks after receiving the unfavourable British decision, Sheikh Abdullah wrote to the Political Resident to express his "great disappointment" with the decision. His letter appears at page 1184 of the Memorial of Bahrain, Volume 5. It is important to note that this letter argues only about the merits. But as always, Sheikh Abdullah offers no evidence, mere affirmation. There is no complaint about the procedure.

200. After 1940, Qatar did not say a word about the Hawar decision until British enquiries in 1947 regarding the maritime boundary triggered a reiteration of the expressions of discontent with the 1939 decision. For the ensuing 17 years, not a word was heard from Qatar on this subject.

#### **Britain's 1939 decision re Hawar**

- Following its invasion of Zubarah in July 1936, Qatar's claim to the Hawar Islands was a logical progression of Al-Thani expansionism;
- the immediate timing obviously connected with Qatar's new appetite for oil;
- Britain's commercial interests on this issue lay with Qatar;
- there was no conspiracy against Qatar;
- there were instead fair proceedings in which Qatar fully participated, accepting — and I am quoting Sheikh Abdullah — "the right of His Majesty's Government to look into such matters";
- the substantive reasons for the decisions are compelling, and did not assign either party the burden of proof
- finally, Britain has always stood behind its decision.

## CONCLUSION

201. Mr. President, Members of the Court, Bahrain naturally relies on the powerful legal position it enjoys by virtue of the 1939 decision. Professor Reisman will in a few moments analyse the legal situation created by that British decision.

202. What I wish to point out, as my final thought this morning, is that Bahrain's right over the Hawar Islands would be just as clear if there had been no decision in 1939.

203. For that Award did no more than record the obvious: 60 years ago, there was already overwhelming proof of Bahraini sovereignty, both in terms of the allegiance of the population to Bahrain, and in terms of Bahrain's control over the islands and the activities there.

204. Children grew up on Hawar to become leading figures in Bahraini life. Thus for example, Abdullah bin Jabor Al Dosari was the influential secretary to the Emir of Bahrain in the 1930s. He spent much of his childhood on Hawar. As their written testimony attests (Memorial of Bahrain, Anns. 313 and 314), Hawar Islanders were there as children many years before oil was discovered, many years before there was any mention of a Qatari claim — in the 1920s, before Belgrave even heard of the Hawars. These Hawar islanders can point out today the location of fish traps which Abdullah bin Jabor's father owned on Hawar. And his grandson has been the Minister for Foreign Affairs of Bahrain, since independence in 1971, and of course is present with us in this Great Hall today.

205. These are not phantoms conjured up by ghosts, or gratuitous assertions based on shadowy documents. These are people you can number and name, whom you can see and touch even today — and who can show you where they and their families lived, and how their destinies have become indistinguishable from that of their nation: Bahrain.

206. Thank you for your patience. May I now, Mr. President, ask you to call on Professor Reisman.

Le PRESIDENT: Je vous remercie, Maître Paulsson. I now give the floor to Professor Michael Reisman.

Mr. REISMAN:

**RES JUDICATA**

**Introduction**

1. Mr. President, Members of the Court. It is an honour to address this distinguished Court on behalf of the State of Bahrain on the legal consequences of the 1939 arbitration, just described to you by Mr. Paulsson.

2. Sir Elihu introduced our case by explaining that, despite the enormously complex picture painted by our learned adversaries, much of the case is actually quite simple. And I can add that one of the simplest of the issues is that of the sovereignty over the Hawars, for that matter was resolved 61 years ago, by a valid and binding arbitration, in favour of Bahrain, which is *res judicata*.

3. The Court may have been surprised today to learn from my colleague, Mr. Paulsson, that there was an arbitration, with a procedure designed in consultation with lawyers in the British Foreign Office and with a written award, based upon a detailed memorandum of fact and law. Surprised because Qatar's counsel filled your folders and the screen behind me with memoranda and documents from people who did not conduct the procedure, from which they developed increasingly implausible conjectures about possible conspiracies. People whose views are agreeable to Qatar were given breathtaking promotions, like the British bureaucrat who Sir Ian told us wrote a memorandum in 1964 criticizing the 1939 Award and who in the very next paragraph emerged as no less than the Foreign Office<sup>1</sup>. But Qatar scarcely referred to the procedures and seemed particularly allergic to mentioning the two central documents: the award and the memorandum of fact and law on which it was based.

4. Imagine a losing party attacking a judgment of this great Court, by referring only to notes or e-mails exchanged between judges during the proceedings and deliberations, second and third-hand accounts of conversations at lunches and teas during the oral argument, internal memoranda of officials of governments about their potential interests in the case, further

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<sup>1</sup>Speech of Sir Ian, CR 2000/7 p. 48, paras. 8-9.

speculations about what those interests might have been, even a memorandum by a subsequent staff member of the Court, who had not been involved in the case, confiding to his files that he personally thought the case had been wrongly decided; and imagine this memorandum being presented as the true contemporary view of the Court as a whole. All this without mention or discussion of the judgment or the internal memoranda of fact and law on which it was based.

5. This is hardly a juridical method. It is the method of the journalist in search of an "exposé" who ignores the official record, the documents of the case, the legal memoranda, the evidence, but looks at anything else for what Sir Ian calls "the true record"<sup>2</sup>, or "the unpleasant reality" as Qatar said in surely unintended irony when it submitted the 82 forged documents.

6. There was an arbitration. A simple arbitration to be sure, given that neither ruler was greatly familiar with international procedure. But an arbitration nonetheless, with all the requisites. With an award, which is now in your folders. With a detailed memorandum of fact and law on which it was based, which you will see shows an admirably sound grasp of the international law principles of territorial sovereignty, it gives a complete overview of the procedure and shows a scrupulous concern for the facts and the evidence submitted — including, even then, the problem of doubtful evidence submitted by Qatar. The memorandum is also now in your folders. International arbitration requires, as we all know, the consent of the parties: and indeed there was *written* consent to this specific procedure by the Ruler of Qatar; also now in your folders.

7. Yet Qatar contends that the 1939 decision "cannot be equated to an arbitral award and that, whether or not it is to be so treated, it would in any event be invalidated by reason of the serious procedural defects to which Qatar has drawn attention"<sup>3</sup>. In argument last week, counsel went even further, calling the award "a miscarriage of justice"<sup>4</sup> and asking, not for a review, but an appeal on the merits. So let us be clear: Qatar is not merely asking for review, for even if the arbitration is, as I think I can show, entirely valid, Qatar wants an *appeal*. And no ordinary appeal, for an appeal would confine itself to questions of law. Qatar wants a complete rehearing of all the

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<sup>2</sup>*Ibid.*, para.1.

<sup>3</sup>Memorial of Qatar, para. 6.144.

<sup>4</sup>CR 2000/6, p. 39, para. 10.

factual evidence — in so far as it is available — of the *res judicata* of an arbitral award rendered 61 years ago.

8. If the essential claim is extravagantly simple, the legal and factual issues on which it depends are not: and one of them is a threshold issue which may preclude consideration of this entire matter.

#### **Is there jurisdiction to review the Award of another tribunal?**

9. In three consecutive cases, this Court and its predecessor have established, as a virtual *jurisprudence constante*, not to review, invalidate or even confirm awards taken by other international tribunals, unless there is *specific, express, additional* consent to reopen the award. In the *Socobelge*<sup>5</sup> case, an international tribunal had found that the Greek Government had not performed a contract with a Belgian company. When Greece did not comply with the award, Belgium espoused the claim before the Permanent Court on the basis of a bilateral judicial settlement treaty, whose jurisdictional clause incorporated Article 36 of the Court's Statute. What could be more encompassing than "any question of international law" in Article 36, paragraph 2? And yet the Permanent Court said "since the Court has received no mandate from the Parties in regard [to the awards], it can neither confirm nor annul them either wholly or in part"<sup>6</sup>. Consent to "any question of international law" did not include consent to review an arbitral award that was *res judicata*.

10. In 1960, the Court faced the same question in the *King of Spain*<sup>7</sup> case, which arose from a territorial dispute between Honduras and Nicaragua that had been submitted to the sole arbitration of the King of Spain in 1902. The King decided in favour of Honduras in 1906, but the process was marked by procedural problems, not the least of which was the very appointment of the sole arbitrator. Nicaragua protested and unsuccessfully sought review by the King. In 1957, rumours of petroleum deposits in part of the disputed area set off clashes with significant military casualties. The Organization of American States mediated the so-called Washington Agreement, by which the matter was submitted to the International Court.

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<sup>5</sup>*Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series. A/B, No. 78, p. 160.*

<sup>6</sup>*Ibid.*, p. 174..

<sup>7</sup>*Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960.*

11. The Washington Agreement could not resolve the parties' fundamental disagreement about whether the 1906 Award should be reopened, so it simply stated that each party would argue the issue "as it deems pertinent"<sup>8</sup>. And each Government then appended its own declaration as to what it thought pertinent. Nicaragua obviously contended that it was now entitled to impugn the Award, while Honduras demurred on that point. The Court said that "even if the complaints had been put forward in proper time, the Award would, in the judgment of the Court, still have to be recognized as valid"<sup>9</sup>.

12. In 1991, the Court revisited this issue once again in the case of the *Arbitral Award of 31 July 1989*<sup>10</sup>. Senegal, as the Court well knows, had prevailed by majority in a maritime boundary dispute with Guinea-Bissau. Senegal had accepted the jurisdiction of the Court in an earlier declaration. Guinea-Bissau made a broad jurisdictional declaration after the Award and applied to the Court to annul the Award, contending that such a question easily fit into the categories of Article 36, paragraph 2, of the Statute and certainly into "any question of international law". The Court responded in the most careful terms, confirming that it would not review the substantive decision by the arbitration tribunal. I would, with your indulgence, read the Court's statement here:

"the Parties were agreed," the Court said, "that there was a distinction between the substantive dispute relating to maritime delimitation, and the dispute relating to the Award rendered by the Arbitration Tribunal, and that only the latter dispute, which arose after the Senegalese declaration, is the subject of the present proceedings before the Court. Guinea-Bissau also took the position, which Senegal accepted, that these proceedings were not intended by way of appeal from the Award or as an application for revision of it. Thus, both Parties recognize that no aspect of the substantive delimitation dispute is involved."<sup>11</sup>

13. Judge Mbaye, who joined the majority, thought that the Court's assuming jurisdiction, as a *cour de cassation*, over awards of "another means of settlement of disputes . . . would be to embark on an adventure which would have disastrous consequences not confined to arbitral decisions"<sup>12</sup>.

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<sup>8</sup>Application Instituting Proceedings (Ann. 3), 1960, *I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, pp. 28-29.

<sup>9</sup>*Arbitral Award made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960* p. 214.

<sup>10</sup>*Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 53.

<sup>11</sup>*I.C.J. Reports 1991*, p. 62.

<sup>12</sup>*Ibid* at p. 80.

14. In our case, the Court has found a general jurisdiction: "by the terms of those [Doha] agreements, the Parties have undertaken to submit to the Court the whole of the dispute between them . . ." <sup>13</sup>. Does this include consent to reopening an arbitral award? In *Socobelge*, an equally broad submission was deemed *not* to authorize the Court to reopen an award. In the subsequent cases, the Court looked for a special and express consent to the reopening. There is none in the Doha Minutes. In seeking to annul and appeal from the 1939 Award, Qatar is asking the Court, for the first time, to assume an appellate jurisdiction over the award of another tribunal without the express consent of the party that won the award. That is a step with implications that have, until now, led the Court to refuse to take it. Consistent with its jurisprudence, Bahrain submits that the Court should confine itself to declaring the finality of the 1939 Award. This Award confirmed, on the basis of *effectivités* that Bahrain then adduced and the complete absence of any *effectivités* of Qatar, that all the Hawars are the territory of Bahrain.

#### **Are there grounds for challenging the validity of the Award?**

15. But even if the Court were to review the 1939 Award, the Court would, Bahrain submits, find neither legal nor factual basis to any of Qatar's claims. Qatar alleges:

- the absence of consent on the part of Qatar to the arbitration;
- bias on the part of the officials of the United Kingdom, who acted as arbitrator;
- procedural violations in an alleged "pre-decision" taken in 1936;
- procedural violations in the conduct of the 1939 arbitration;
- the absence of a reasoned award; and
- Qatar's continuous protest of the decision which is, hence, not binding.

16. Let me take up each of these allegations.

#### **The alleged absence of consent**

17. The first is the issue of consent. I do not intend to go deeply into the matter of the treaty bases for the British decision at this time, other than to note that the United Kingdom certainly read its treaties with the regional States as authorizing it to arbitrate all disputes. In proposals of the

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<sup>13</sup>*Maritime Delimitation and Territorial Questions between Qatar and Bahrain Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1994*, p. 112 at 125.



British Delegation in 1919 for a draft treaty, it was stated that the various treaties already concluded with Rulers of the Arabian peninsula "contain, generally, dispositions that His Britannic Majesty's Government should arbitrate in all disputes between the said chiefs"<sup>14</sup>. And indeed, in later years, British officials referred to the 1939 decision as a *res judicata*, with all the legal consequences of that term<sup>15</sup>. But we need not pursue this line of enquiry because, quite simply, the Ruler of Qatar, by *written* communication, explicitly authorized the British Government to decide the issue of sovereignty over the Hawars. In a letter of 10 May 1938, the Ruler stated his claim to the Hawars, protested Bahrain's activity there and asked for a decision. At its conclusion, he said

"I deem it necessary to report the matter to you at the first instance and protest against the interferences and actions taken by the Bahrain Government at Hawar, which is a dependency of Qatar. I trust that you will give this your full attention and do what is necessary in the matter so as to avoid any trouble which may cause the breach of peace. I preferred to inform, as it is necessary for me to do, and hope that you will let me know of your decision as it is necessary to take prompt action and prevent the aggressors who ventured to take these actions without my knowledge. I am quite confident that you will, in order to keep the peace and tranquillity, do what is necessary in the matter."<sup>16</sup>

18. Mr. President, Members of the Court, that was not all. On 27 May 1938, the Ruler of Qatar, when informed of the claims and evidence submitted by Bahrain, responded with his own purported evidence, which I will examine briefly later. He prefaced the presentation by saying "I am also thankful to His Majesty's Government who will, as you said, decide the matter in the light of truth and justice"<sup>17</sup>. After presenting his version of the events, the Ruler concluded the letter by saying "I trust that His Majesty['s] Government will administer justice and equity and that will do so in the present circumstances . . ." All these letters are in your folders.

19. In oral argument, Sir Ian said that "at most" this was an agreement to "investigate"<sup>18</sup>. But the Ruler said "His Majesty's Government will *decide* the matter in the light of truth and justice". That, says Sir Ian, is still not good enough, because the Ruler never used the word arbitration. If the Ruler only consented to a political decision — and he certainly consented to something — then

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<sup>14</sup>Foreign Office Memorandum dated 1920, Reply of Qatar, Ann. 111.38, at p. 223.

<sup>15</sup>See Letter from the Political Agent, Bahrain to the Political Resident, Bahrain, 31 December 1946, Memorial of Qatar, Ann. III.249.

<sup>16</sup>Memorial of Bahrain, Ann. 256, at p. 1095.

<sup>17</sup>Memorial of Bahrain, Ann. 260, at p. 1102.

<sup>18</sup>CR 2000/7, p. 47, para. 6.

none of the arbitral standards apply, as I will show later. I submit that the consent to a decision by "truth and justice", with the procedure that followed and in which the Ruler fully participated, was arbitration. In the *King of Spain*, this Court said

"No question was at any time raised at any time in the arbitral proceeding before the King with regard either to the validity of his designation or his jurisdiction as such. Before him, the Parties followed the procedure that had been agreed upon for submitting their respective cases."<sup>19</sup>

Substitute the name of Qatar for Nicaragua and Qatar's claim that it did not consent evaporates.

20. Professor Salmon and Sir Ian implied an innovative theory of consent: consent, not to arbitration, but to the *award* that was rendered. In other words, that Qatar consented to the arbitration is irrelevant. As Qatar has not consented to the *award*, it is not bound by it. Qatar's allegation that it did not consent to this arbitration in 1938 nor participate in the procedure is simply without foundation.

#### **The alleged bias of the United Kingdom**

21. I turn now to the allegations of bias. With the withdrawal of the forged documents, many of which purported to show a British plot, one would have expected this issue to disappear from the case. To fill the vacuum, Qatar has spun new, even more convoluted conspiracy theories which Sir Elihu and Mr. Paulsson have shown to be groundless. The problem here is not only that the conspiracy theories are so implausible, but that they raise a fundamental jurisdictional question.

22. Qatar's Memorial tries to implicate Britain directly in this complex conspiracy no less than 12 times. Five British officials, acting in the line of duty, were explicitly named as members of the conspiracy. "[T]here were clear instances of bias," states Qatar, "both by Britain generally and by Weightman [the Political Agent] in particular, in favour of Bahrain," from which Qatar concludes that "the procedure followed by the British was so defective that the resulting decision can only be considered a nullity"<sup>20</sup>.

23. After Bahrain, in its Counter-Memorial, drew to the Court's attention the jurisdictional implications of Qatar's insinuations against Britain, Qatar changed its tune. In its Reply, Qatar's refrain went like this. There are just a few examples: "These are allegations directed against

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<sup>19</sup>*Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960, p. 207.*

<sup>20</sup>Memorial of Qatar, para. 6.251.

named individuals" . . ."21 "These allegations are not and never have been allegations directed against the British Government as such."22

24. In oral argument, however, Mr. Shankardass and Sir Ian returned, with seeming relish, to the theory of "perfidious Albion". As they must. A government can operate only through its human agents. If those agents act in the line of duty, within their authority, under the confirmation of higher levels of government, as in the present case, their acts are the acts of the government. So Qatar's allegation of bias means the bias of the British Government.

25. Entertaining allegations of bias against the United Kingdom will involve the Court in making judgments about British conduct and its consequent responsibility. But the United Kingdom has not accepted the Court's jurisdiction for this case; indeed, its declaration under Article 36 explicitly excludes events prior to 1946. In written pleadings, Bahrain invoked *East Timor* as dispositive of this issue. Qatar answered that the legal situation was infinitely more complex and launched itself into a discussion of cases which this Court knows better than anyone: *Monetary Gold*<sup>23</sup>, *Nicaragua*<sup>24</sup> and *Nauru*<sup>25</sup>.

26. Bahrain fully endorses the Court's jurisprudence in these cases. They show a broad consistency, though there are, as in the application of every rule, adaptations to deal with special features in particular cases. In general, the Court seems prepared to exercise jurisdiction over a dispute or a particular claim in a dispute when the interests of a third State are marginally or peripherally involved, as long as that third State is not the actual or unavoidable target of the suit or the issue *or the lawfulness of its behaviour is not central to the subject-matter of a particular issue at bar*. If one of these conditions is fulfilled, the Court may selectively reject jurisdiction for a particular claim and not for the entire case, unless the other claims depend upon and are determined by the claim which is precluded.

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<sup>21</sup>Reply of Qatar, para. 4.295.

<sup>22</sup>Reply of Qatar, para. 4.296.

<sup>23</sup>*Monetary Gold Removed from Rome in 1943*, I.C.J. Reports 1954, p. 19.

<sup>24</sup>*Military Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1984, p. 392.

<sup>25</sup>*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, I.C.J. Reports 1992, p. 240.

27. Qatar's argument with respect to the invalidity of the arbitral award for bias must, by its nature, put into issue the lawfulness of the United Kingdom's conduct without that State's consent. In *East Timor*<sup>26</sup>, the Court stressed that, were it to take jurisdiction, "Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent"<sup>27</sup>. As that concern would certainly apply to Qatar's allegation of bias, *East Timor* controls, for the allegation necessarily implicates a State not subject to the Court's jurisdiction in this case. The reasoning in *Nauru* reinforces this, for Qatar's claims make judgment about the lawfulness of British action a "prerequisite for decision". So there may be an insurmountable jurisdictional obstacle to hearing the allegation of bias.

28. I do not intend to take up the substance of the fanciful allegations of bias, but I would comment briefly on the implications of the many British memoranda that Qatar's counsel have tried to weave into a web of conspiracy. When a government was selected as an arbitrator in the nineteenth and early part of the twentieth centuries, and, even more, when that government had treaty responsibilities with respect to the litigants who selected it, the dynamics of deliberation were usually quite distinct from the deliberations of modern tribunals as the pleadings and documents in *King of Spain* case show. Officials of the government, at different levels, depending upon the internal rules of that government, participated in various ways in the aggregate deliberative process. They corresponded by memorandum, as is the custom of government officials. Precisely because they had a treaty authority over the subject of arbitration, there were earlier communications between them and their predecessors over different aspects of the issue. Some of those communications perhaps indicated a measure of judgment. Anyone who selects a government to serve as arbitrator appreciates the circumstances under which a government carries out collective functions, and must be deemed to have accepted this factor in return for the not inconsiderable advantages of having a knowledgeable and authoritative arbitrator to resolve the dispute, especially when the selected government commands enough power and respect to increase the likelihood of compliance with its award and, thus, ensure the finality of the resolution of the dispute.

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<sup>26</sup>*East Timor (Portugal v. Australia) Judgment, I.C.J. Reports 1995, p. 90.*

<sup>27</sup>*Ibid.*, at p. 34.

29. But there is more. No one who performs a judicial or arbitral function is a *tabula rasa*. We all have opinions. The question is whether, as professionals, we suspend them in the performance of an arbitral assignment. We submit that the documents of the procedure, the memorandum and the award are the authoritative picture of this arbitration. Do they show a bias warranting setting aside this award?

**Was there a procedural violation in the United Kingdom's exercise  
of responsibility in 1936?**

30. I turn to Qatar's allegation that the "provisional decision" of 1936 was taken without its participation, without reasons, and so on, and hence should be annulled, because, as an alleged arbitration — in 1936 — it failed to meet certain rules of natural justice, one of which was Qatar's entitlement to participate in that decision. There was no arbitration in 1936. There were no parties. Consider the actual scenario, stripped of the ever-more feverish speculations about conspiracy. Given its treaty responsibilities for the foreign affairs of Bahrain, the United Kingdom was obliged to respond to requests for clarification from oil companies engaged in commercial negotiations with Bahrain as to whether Bahrain had sovereignty over the Hawars. So it looked at and confirmed the obvious: no one but Bahrain was involved in the Hawars and it could demonstrate sufficient *effectivités*. Nothing new in this, and Mr. Volterra will explain next week, on numerous occasions in the preceding decades, Britain had affirmed Bahrain's title to the awards, even to foreign governments. Two years later, when Qatar set its mind on claiming the Hawars and approached His Majesty's Government, His Majesty's Government did not say that the matter had been decided by an arbitration in 1936 and was accordingly *res judicata*. Quite the contrary. Faced now with a claim for the Hawars from another Ruler, His Majesty's Government acted consistently with previous correspondence to the effect that the 1936 decision had only been provisional and established an arbitral procedure. This was the only arbitration. Qatar requested it, consented to it, participated fully in it and lost it. It was only this decision in 1939, that the United Kingdom later said was *res judicata*.

31. Qatar tries to transform the routine and, indeed, inescapable responsibility of any protecting Power in 1936 into a violation of *arbitral* procedure because, as Qatar alleges, Britain did not consult Qatar in this matter. There *was* no arbitration in 1936. When the position taken

was challenged in 1938, Britain *then* established an arbitral procedure. Consider the absurd implications of Qatar's contention about the events in 1936. Is every international actor, be it a State or the United Nations in a peace-keeping operation, functioning under a conventional or customary authority, obliged to arrange adversarial procedures for every routine, not to speak of provisional administrative decision, even when it is not clear that the matter is adversarial? There is no such thing as the 1936 "provisional" arbitration.

**Were there procedural violations in the conduct of the 1939 proceedings?**

32. At various places in its written and oral submissions, Qatar has taken the earlier documents, the necessary communications of the protecting Power with respect to the discharge of its responsibilities under the treaties that established its role, and suggested that they show that the United Kingdom, as arbitrator, had imposed the burden of proof on Qatar. Mr. Paulsson has just reviewed this aspect of the 1939 award and it is quite clear that there is absolutely no substance to it. Each side operated under the principle of *actori incumbit probatio*, each party is obliged to prove its case, and this is, as the record shows, the way of the arbitration procedure.

33. Qatar has also argued that there was no oral hearing and no opportunity to examine or cross-examine witnesses as to matters of fact. But there is no requirement that an arbitration, in order to be valid and fair, have oral hearings, nor that live witnesses be produced. Some tribunals, like the OECD Administrative Tribunal and the NATO Appeals Board, conduct hearings. Many tribunals, some of which were formerly subject to the review of the International Court, allow for oral argument or the production of witnesses only in very rare circumstances. The World Bank Administrative Tribunal, which has decided 225 cases, and its members have included distinguished former Judges of this Court, has held hearings in only two cases. Are 223 to be annulled for that reason? The ILO Administrative Tribunal holds oral hearings only "very exceptionally" — the last time at the initiative of the Tribunal itself. The IMF Administrative Tribunal holds oral hearings only if the Tribunal considers that they "are necessary for the disposition of the case". (Rule XIII (1) of that Tribunal's Rules of Procedure.) What is important is equality of opportunity, informing the tribunal and basic fairness.

34. The general notion of arbitration by a third authority selected by the parties was part of the pre-Islamic regional political culture and has deep roots in Islam itself. But the idiosyncratic procedures of public international arbitration were not yet part of the regional legal culture nor familiar to the Rulers of Qatar or Bahrain. It might well have been unfair to have imposed them. The critical question is whether the procedure that the United Kingdom developed in the course of the 1939 arbitration was fair to both parties, providing "a level playing field". And, indeed, the procedure was fair, simple to be sure, but entirely appropriate to the cultural context. From the documents that remain from the 1939 procedure, it is clear that if either Qatar or Bahrain had wanted to produce witnesses or to adduce other evidence, each had the opportunity. The Ruler of Qatar was certainly satisfied with the procedure. He wrote to the Political Agent on 30 March 1939 "that I have explained my comments and remarks to Your Excellency as fully as is required by the circumstances of this case"<sup>28</sup>.

#### **Was the Award supported by reasons?**

35. Let me turn to Qatar's attempt to impeach the 1939 award on the grounds that it was, as Qatar says, "unsupported by reasons". This assertion is simply factually incorrect. In retrospect, it is clear that the process of reaching the award is comprised of two documents, both in *Qatar's* annexes. The first was the eight-page, detailed review of the evidence by Sir Hugh Weightman to the Political Resident, of 22 April 1939, which, in the nature of bureaucracies, had to be approved at higher levels; the second is the shorter communication to the respective Rulers from the Political Resident on 11 July 1939, which is plainly based upon and implements Weightman's memorandum of law and fact, in no way departing from it. The second simply informs the recipients of the award and is, as I will show, quite consistent with awards of the time rendered by governments. If you wish to understand the 1939 Award, and that it is based on reasons, you must look at both documents.

36. We know from the memorandum of 22 April 1939 that the process involved a most detailed assessment of the positions of the parties along with an appraisal of their relative strengths and weaknesses. Those eight single-space pages demonstrate beyond peradventure that the process

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<sup>28</sup>Memorial of Bahrain, Ann. 279, Vol. 5, p. 1160.

involved a very careful examination of the evidence and of reasons and amply fulfilled the requirement for a reasoned decision in arbitration of the time and, indeed, in modern international arbitration. The Court will surely study this document, so I will simply direct its attention to the final long section in which Sir Hugh Weightman summarizes his conclusions, relates them to the evidence and makes his recommendation<sup>29, 30</sup>.

37. Now these reasons were not transmitted to the Rulers at the time, which was not unusual in government-conducted arbitrations of the period, but one can simply not say that there were no reasons supporting this decision.

38. The elaboration and transmittal of reasons must be put in the context of a special genre of international arbitration that flourished in the nineteenth and the beginning of the twentieth centuries, when it was not uncommon to select heads of State and government to serve as sole arbitrators. When two governments selected as their arbitrator a foreign government or its head, they generally did not expect that elaborate juridical reasons would be delivered with the award. The boundary case between *Bolivia and Peru* in 1909 produced an Award, rendered by the President of the Argentine Republic, of one-half a page<sup>31</sup>. The Award of Victor-Emmanuel III, the King of Italy, in the *Guiana boundary* case was two and one-half pages long<sup>32</sup>. The Award in the *Barotselend* boundary case was also two and one-half pages long<sup>33</sup>. The *Cordillera* case between Argentina and Chile which was decided by Edward VII, was one and one-half pages long;<sup>34</sup> the report of the tribunal he appointed was all of five pages long. When examined together, is it not clear that heads of State or government were selected, as arbitrators, not to provide elaborate statements with reasons for the award, but for their authority to finally resolve an issue and to raise the costs of challenging the award? It appears that it was simply not expected that the elaborate juridical reasons found in arbitrations conducted manifestly by jurists would be issued by a head of State or a government when he or she or it sat as sole arbitrator. By that standard, the 1939 Award

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<sup>29</sup>Memorial of Bahrain, Ann. 281, 1166-1167.

<sup>30</sup>*Ibid.*, at pp. 1171-1172.

<sup>31</sup>*Boundary Case Between Bolivia and Peru* (Bolivia v. Peru) 11 *UNRIAA* 133 (1909).

<sup>32</sup>*The Guiana Boundary Case* (Brazil v. Great Britain) 11 *UNRIAA* 11 (1904).

<sup>33</sup>*The Barotselend Boundary Case* (Great Britain v. Portugal) 11 *UNRIAA* 59 (1905).

<sup>34</sup>*The Cordillera of the Andes Boundary Case* (Argentina v. Chile) 9 *UNRIAA* 29 (1902).



far exceeded what one might have expected and would have fulfilled the reasons requirement, by any contemporary standard.

**Does protest affect a *res judicata*?**

39. I turn to the matter of Qatar's so-called protests of the 1939 Award — by my count, three times between 1939 and 1965, including a period of 17 years of silence — and the corollary claim of non-acquiescence. In its pleadings, Qatar uses the word protest like a mantra, as if the word has some magical power such that merely intoning it again and again can undo the binding legal effect of otherwise lawful judgments and awards. Is there something incongruous in the notion of protesting a *res judicata*? Ordinarily we speak of a protest of events like another State's unilateral military seizure of territory. Through the unique legal institution of protest, international law enables a weaker State to resist the transformation of *delictum* into *jus*, of delict into law. But what does it mean to protest an international *res judicata* of a procedure to which the protesting party had consented? Can "protest" undermine the *res judicata* effect of a judgment or award in international law or, for that matter, in any system of law? No one likes to lose and many losers protest. Convicted criminals protest their innocence. Does that affect the judgment against them? Parties that lose in civil suits protest the judgment. Does that affect the binding effect of the judgment? States that have not liked decisions of this great Court protest them. Does that protest affect the validity of these judgments?

40. And wholly aside from the question of protest of an international judgment or award, what is the effect, as a matter of international law, of a protest that was not based on valid legal objections of lack of consent or procedural violation? When we hear that the Ruler of Qatar protested the award, it means he said he did not like it, it was unjust, unfair and he would not recognize it. Then again, what else could he say? He was not and is not protesting the award as such, but international law itself, which says that title derives from effective occupation consistent with the ecological possibilities and not proximity alone. The Ruler of Qatar's protest was really "but it's so close".

41. I respectfully submit that the contention that Qatar protested the 1939 Award is simply devoid of legal consequence.

**Was the 1939 Award actually a political, administrative decision?**

42. Qatar has presented the 1939 decision alternatively as an arbitral award that was procedurally defective or an administrative decision that was *ultra vires*. The decision must be something so if it is not an arbitral award, it has to be a British political decision. If it is a British political decision, the question of whether it met the procedural standards of international arbitration is irrelevant, for political decisions are not reviewable by such a standard. The critical question as to whether the lawfulness of a political decision is that whether it was taken *intra vires*, which, in this instance, would mean whether it was based on authority that Bahrain and Qatar, respectively, had assigned to the United Kingdom to make the decision is what counts. In Qatar's written pleadings, Qatar often shifts between these two characterizations, because it would like to escape the finality of a *res judicata*, while still applying the high procedural standards of modern international arbitration to a political decision taken more than 60 years ago. This permits it to recycle its allegations about the validity of the award against the validity of the political decision. It also permits it to evade the relatively simple and dispositive question of whether the political administrative decision was taken *intra vires*. We believe that the 1939 decision was an arbitral award, but even if one were to assume the alternative hypothesis, it is clear that we still encounter a valid and binding decision.

43. First, it is clear that the letters from the Ruler of Qatar to the British Political Agent of 10 and 27 May 1938 that I reviewed earlier are an unequivocal assignment of authority to decide the territorial sovereignty of the Hawars. How can the question of authority even be raised with these letters in the record? Even if those letters did not exist, the aggregate of formalized and more informal bilateral instruments and unilateral declarations, which were concluded or enacted over the period following 1820, constituted, together, the rights and obligations of the United Kingdom, on the one hand, and of Bahrain and Qatar, respectively, on the other. On 12 September 1868, the Al-Thani Chief signed a unilateral guarantee regarding his behaviour and explicitly undertook the following obligation.

"In the event of a difference of opinion [with Bahrain] arising as to *any question, whether money payment or other matter*, the same is to be referred to the Resident."<sup>35</sup> (Emphasis added.)

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<sup>35</sup>Memorial of Bahrain, Ann. 12, Vol. 2, p. 157.

44. In addition to such explicit commitments, the United Kingdom acquired implied powers.

Consider Article X of the Treaty of 1916, in which the Sheikh of Qatar stated:

"the High British Government, in consideration of these Treaties and Engagements that I have entered into with them, undertake to protect me and my subjects and territory from all aggression by sea and to do their utmost to exact reparation for all injuries that I, or my subjects, may suffer when proceeding to sea upon our lawful occasions"<sup>36</sup>.

45. Even if one were to accept Sir Ian's contention that these treaties did not amount to a consent to arbitration, they certainly were a consent to make a decision. Moreover, given that the United Kingdom owed similar obligations of territorial protection to Bahrain and Qatar, and that Qatar claimed territory pertaining to Bahrain, the United Kingdom had no alternative but to determine the frontiers it was obliged to protect, as an inherent part of its obligation of protection.

46. When interpreting treaties with clear obligations but non-specific powers for performing those obligations, the International Court of Justice has found implied powers in so far as they were indispensable for the performance of the major purposes of the agreement in question. I will mention only *Certain Expenses*, where the Court stated that

"when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization"<sup>37</sup>.

47. The Court reached a comparable conclusion in the *Namibia* decision<sup>38</sup>, and there are other precedents.

48. The protective responsibilities that the aggregate agreements between the United Kingdom, on the one hand, and, respectively, Bahrain and Qatar, on the other, assigned to the British Government could not be discharged if the United Kingdom did not know where the boundaries were. Without the competence to determine, as a matter of law, to whom territory claimed by Bahrain and Qatar pertained, the United Kingdom would not have been able to fulfil its obligation to protect the territorial domains of the respective Rulers. Hence, on an analogy with

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<sup>36</sup>Memorial of Bahrain, Ann. 84, Vol. 3, p. 515.

<sup>37</sup>*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 151 p. 168.

<sup>38</sup>*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, p. 47.

*Certain Expenses*, the actions of the United Kingdom in deciding where its responsibilities lay must be deemed to have been *intra vires*.

### Conclusion

49. Mr. President, distinguished Members of the Court: A review of the allegations against the validity of that Award that Qatar has raised has demonstrated that none of them is well founded. Moreover, the Court must address the serious question of whether the Doha agreements that established general jurisdiction for this case also made the special expression of consent that the Permanent Court and this Court have required before the Court would undertake to review the validity of an international arbitral award rendered by another tribunal. As for Qatar's allegations of British bias, there is, Bahrain submits, most serious doubt as to whether they are even admissible, as they would require the Court to decide on the lawfulness of the acts of a State which had not consented to the present jurisdiction. Finally, if, as Qatar has intermittently argued, the 1939 decision is not an award but merely a political and administrative decision, we have demonstrated that it may not be tested by the standards of arbitration. Under the standards of valid international political decisions, the 1939 decision was *intra vires* and was lawful and binding on the parties.

50. Mr. President, Members of the Court, arbitration is a human creation and no human creation is perfect. Even if we were to assume that there *were* some defects in the 1939 procedure, *quod non*, and that none of the jurisdictional obstacles I have mentioned obtained, there are compelling prudential reasons against reopening an award made more than 60 years ago, on the basis of which governments and third parties have relied and invested themselves. One does not forget, as a judge of this great Court, that part of the burden of decision is that one side will always be disappointed. No government likes to lose a territorial dispute. They and national scholars often research obsessively and publish exposés of suspected or imagined improprieties in various arbitrations: Venezuela/British Guiana; Mexico/France in *Clipperton Island*, indeed, even intensely contested judgments of this Court. The list goes on and on. If the possibility of reopening long settled awards is affirmed by the International Court, how many States will seek to revive ancient claims? And why not? What would they have to lose? And what effect will this

have on international territorial stability? The Romans, from whose juridical well international law and many national systems have drawn long and deep, established the principle of *res judicata* because, they said, *interesse rei publicae ut sit finis litium*. "There is a public interest that a litigation be brought to an end." *Grisbadarna* has established that a "settled state of affairs" is not to be disturbed. Jellinek long ago commented on the normative force of the factual. The issue of the sovereignty of the Hawars was decided by a lawful decision more than 60 years ago. The parties consented to the process. Its validity is unassailable. It is a *res judicata*.

I thank you, Mr. President, Members of the Court, for your attention.

Le PRESIDENT : Je vous remercie, Professeur Reisman. Ceci marque le terme de notre séance de ce matin. La cour se réunira à nouveau pour écouter la suite de l'argumentation de l'Etat de Bahreïn le mardi 13 juin à dix heures. La séance est levée.

*L'audience est levée à 12 h 55.*

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