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THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2000

Public sitting

held on Wednesday 21 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)*

VERBATIM RECORD

ANNEE 2000

Audience publique

tenue le mercredi 21 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)*

COMPTE RENDU

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

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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Mme Vanessa Harris, cabinet Freshfields,
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comme personnel administratif.

Le PRESIDENT: Veuillez vous asseoir. La séance est ouverte et je donne la parole à M. Bundy au nom de l'État de Qatar pour qu'il termine l'exposé qu'il avait commencé hier. Monsieur Bundy, vous avez la parole.

Mr. BUNDY: Merci, Monsieur le Président.

51. Mr. President, Members of the Court, when the Court rose yesterday I had just finished speaking about the relevance of the 1913 Anglo-Ottoman Convention and the 1914 Anglo-Turkish Convention and this brings me quite naturally to the 1916 Treaty between Qatar and Great Britain. Once again, this Treaty demonstrated the Al-Thani régime's capacity to enter into international agreements — in other words, to act as an independent political entity regardless of whether it was termed a "State" or not. The 1916 Treaty also demonstrated the territorial integrity of Qatar.

52. Counsel for Bahrain complained that when in our first round Qatar referred to the 1916 Treaty as covering the "whole peninsula" of Qatar that we had gratuitously added the word "whole" to the description which did not appear in the Treaty. If I may quote from Mr. Paulsson's remarks last week: "In other words, or so Qatar suggests, the 1916 Agreement with the Shaikh of Qatar must mean more than what it says." (CR 2000/12, p. 9.)

53. Mr. Paulsson then alleged that Sheikh Abdullah Al-Thani himself, in 1934, was said to have conceded that the 1916 Treaty only dealt with the interior of Qatar but not the coast. (*Ibid.*)

54. Once again, Mr. President, I regret to say that our distinguished opponents have neglected to place the documents in their proper historical context. This is particularly surprising because the document which my opponent cited from was a document furnished by Bahrain itself in its Counter-Memorial. [Place Counter-Memorial of Bahrain, Vol. 2, pp. 411 and 412 on screen.]

55. The relevant document is now being placed on the screen and Members of the Court will also find it in tab 15 of your folders. Here is the bit which Mr. Paulsson relied on as part of an exchange between the Qatari Ruler and the British Political Resident and there you will see that the Ruler is recorded as saying [enlarge relevant quote on screen]:

"At any rate I have not yet done anything contrary to the terms of the [1916] Treaty and would leave matters for discussion when such terms are being infringed. The Treaty does not include the interior but only the coast and I have some other arrangement with Bin Sa'ud according to which no one ventures to encroach upon my territory."

56. What Mr. Paulsson failed to disclose was that on the very next page the document went on to record the Political Resident's reaction to what the Ruler of Qatar had said. [Place relevant quote on screen.] And the Political Resident replied as follows:

"According to Bin Sa'ud's Treaty with the British Government he cannot interfere in your affairs and it is because of your Treaty with the Government that he cannot do anything and if he does, the Government will prevent him. *And you are the Ruler of all Qatar and the Treaty [the 1916 Treaty] extends to the whole of Qatar.*" (Counter-Memorial of Bahrain, Ann, 122, Vol. 2, p. 412.)

57. What could be clearer evidence of how the 1916 Treaty was viewed by the British? Bahrain's contention that Al-Thani rule was somehow circumscribed by the 1913 and 1914 Conventions or by the 1916 Treaty is flatly contradicted, I would suggest, by the record. Qatar was recognized as a long-standing and separate political entity under Al-Thani rule covering the entire peninsula. Necessarily, as an independent entity, that territory was entitled to a 3-mile belt of territorial waters running round its coast under international law as it stood at the time.

58. In these circumstances, was it necessary for the Al-Thani Rulers to exercise simultaneously over all of their dominions sovereignty absent any competing claim or presence in Qatar? The answer must be no. While our distinguished opponents have quoted extensively from Judge Huber's Award in the *Island of Palmas* case, there is one telling passage from that Award that they have passed over and, with the Court's indulgence, I am now putting that passage on the screen [place text on screen]. It reads:

"Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas." (*UNRIIAA*, Vol. II, p. 840.)

59. It is quite true that Qatar at the time, and indeed still today, is a relatively unpopulated country. But the situation in Bahrain was not materially different even though Bahrain was a compact group of islands. As a Military Report for the British War Office in 1904 noted: "All the large towns [that is of Bahrain] are at the north end of the island" (Reply of Qatar, Ann. II.37, Vol. 2, p. 211). The south and south-eastern coasts of Bahrain were relatively barren.

60. I trust that the Court will thus appreciate that there is a double standard in Bahrain's arguments. On the one hand, counsel for Bahrain harp on the fact that most of the population of Qatar was located on the east coast of Qatar. And on the other, counsel pass over in silence the fact that the south and south-east coasts of Bahrain — these are the coasts that lie across the sea from the Hawar Islands — were also sparsely populated. But these facts are not very important. What the evidence that I have reviewed does show, however, is that Al-Thani sovereignty repeatedly and consistently was recognized as encompassing all of the areas included as part of the Qatar peninsula.

4. The map evidence

61. At this juncture, Mr. President, it is appropriate to say a few words about the maps and, in doing so, I would like to respond to points that Sir Elihu Lauterpacht raised in his presentation on the subject. Before entering into details, permit me first very briefly to comment on what Mr. Paulsson had to say about the map evidence.

62. According to my distinguished confrère said, "The map game can be played in infinite permutations." Indeed, he acknowledged that, "Anyone can inundate the Court with inconclusive maps." (CR 2000/12, p. 12.) Counsel added that the Captain Izzet map, and I quote, is "a far more interesting map than ones drawn up by Italians or Australians, sitting at their desks far away" (*ibid.*, p. 11).

63. But with respect, Mr. President, the maps are not a game. The maps are serious evidence of what a distinguished Tribunal sitting in the *Eritrea/Yemen* case called "general opinion or repute" (Award in the First Phase, para. 381). The only reason why Bahrain denigrates the maps is because they simply do not support Bahrain's case. The Court can be assured that if Bahrain had been able to muster any map evidence supporting its contentions, it would have done so. Indeed, Bahrain did introduce four maps in its Supplemental Documents of last March, all of which I showed in my first round presentation to be without relevance; and I am happy to see that counsel for Bahrain, in their presentation, did not return to any of these maps to try to resurrect them. The one-way direction of the maps, consistently and overwhelmingly in Qatar's favour, is telling in and of itself.

64. Moreover, to attempt to downplay the significance of the maps by saying that they were prepared by foreigners sitting far away at their desks in chanceries is to ignore the fact that many of the States under whose auspices the maps were prepared had important strategic interests in the Gulf at the time. One need look no further than the decision in the *Sharjah/Dubai* Arbitration to see that the Arbitral Tribunal in that decision expressly took note of the fact that European Powers, such as France, Germany, Russia — not to mention Great Britain — all had important interests in the Gulf area in the late nineteenth century. (*Sharjah/Dubai Award*, 91 *ILR.*, at p. 560.) It was thus hardly surprising that official cartographers and expert map-makers from these countries took pains to depict the territorial situation in the Gulf with accuracy.

65. By the same token, Sir Elihu's complaint that many of the maps are of a small scale in no way diminishes the probative value that should be attached to them. As I have noted, the maps that Qatar has introduced were produced by official government agencies and cartographic institutes of the highest order. These were not impressionist painters spreading pigment across a canvas; these were professional map-makers whose reputations depended on the accuracy of the maps that they produced.

66. Remember, Mr. President and Members of the Court, if you will, that a significant number of the maps that Qatar has produced in its Map Atlas are actually of a much larger size than appear there: we had to reduce the maps for the Map Atlas in order to present them in a manageable size. The fact remains that the maps are of a sufficient size which permitted the map-makers clearly to distinguish Qatar, including the Hawar Islands and Zubarah, from the separate entity of Bahrain. Similar maps were presented during the course of the *Eritrea/Yemen* case in order to depict islands which were in fact even smaller than the Hawar Islands in this case. There, the Tribunal had no hesitation in observing that: "These islands are large enough to find a place quite often — though by no means always — on even relatively small-scale maps of the region." (*Award in the First Phase*, para. 490.)

67. Next, Sir Elihu took issue with the colouring that appears on the maps. Here, he rested his case on the fact that "the Tribunal in the *Eritrea/Yemen* case thought it necessary to enter a qualification as to the evaluation of the colour of maps" (CR 2000/14, p. 10). What my colleague neglected to point out, however, was that when the Tribunal, in *Eritrea/Yemen*, made that

observation, it did so only with respect to maps that were prepared *before 1872* when hand-colouring was still used in a second stage of the preparation of maps. (*Eritrea/Yemen*, Award in the First Phase, para. 370.) That method of map-making was outmoded by the end of the nineteenth century and certainly by the early twentieth century when the maps that Qatar has introduced were produced. As I noted in my first intervention, the Court need have no qualms about the technical accuracy of the maps that Qatar has introduced.

68. Sir Elihu then took issue with the fact that the maps depicted the political status of Qatar and the Hawar Islands. To make this point, he showed the map that is now being placed on the screen, a map that was published in 1884. [Place enlargement of map 11 of Qatar's Map Atlas on the screen.]

69. Counsel's argument centred on the fact that the word "OMAN" appears at the bottom of the map under Qatar and that there was no boundary drawn between Oman and Qatar (CR 2000/14, pp. 10-11). Counsel concluded from this that the map "manifestly does not support the idea that as a matter of general repute, Qatar was as a result of the 1868 Treaty a separate, recognized State" (*ibid.*, p. 11).

70. I would respectfully submit that there are two flaws with this line of argument. First, counsel overlooks the fact, which Lorimer in fact had expressly recognized in 1908, that the southern border of Qatar at this time was indeterminate. Hence, it is hardly surprising that the map refers to Oman in the far south: and secondly, the map still demonstrates with admirable clarity the fact that Qatar and Bahrain were distinct entities. The map also shows that the Hawar Islands and Zubarah were not deemed to appertain to Bahrain. They were Qatari.

71. Counsel advanced an even more untenable argument with respect to the map that now appears on the screen: this was a map prepared in 1910 by the cartographic company which actually acted as the cartographer to the British Crown. [Place enlargement of map 41 in Qatar's Map Atlas on the screen.] While counsel admitted that there is a difference in colouring between Bahrain and the Hawar Islands, he suggested that because the Hawars are there labelled "Warden Islands" on the map, that the drafter of the map in 1910 must have had, or been referring back, to Lieutenant Brucks's map of 1829 which used the same name. He then jumped to the quite

extraordinary conclusion that, "on a correct interpretation, this map, by implication shows the Hawars as being Bahrain's" (CR 2000/14, p. 12).

72. Suffice it to say that counsel did not introduce a shred of evidence to support this remarkable process of deduction. To say that this map supports the appurtenance of the Hawar Islands to Bahrain is plainly wrong. And to attach any significance to the Brucks's map, which was prepared 80 years before this map was prepared and, indeed, 40 years before the 1868 Agreements, is also misconceived.

73. Bahrain then shifted to another tack. Counsel for Bahrain claimed that distortions of colour can emerge in the process of enlarging the maps, and he took the map that appears on the screen — this same map — as an example; he then showed the same map as enlarged on a Bahraini computer which looked like this [place Bahrain's enlargement of the map on the screen].

74. It is not for me to say whether Bahrain needs new computers. The fact of the matter is that Qatar's cartographers used a far more technically accurate way of reproducing the maps and preparing the enlargements that have been furnished to the Court. Qatar did not simply enlarge the maps on a computer. It took close-range photographs of the maps in question which produced high-resolution reproductions and when this process is followed, there is minimal distortion in the depiction of the maps.

75. This brings me to the British map that was prepared in 1920 to illustrate Britain's views as to the territorial issues affecting islands attached to the Arabian peninsula. [Place map 58 from Qatar's Map Atlas on the screen.]

76. Clearly troubled by this map, Bahrain spent a considerable amount of time trying to downplay its significance.

77. As I mentioned in my first round presentation, the map was prepared to illustrate the Treaty that Britain proposed to enter into with concerned parties as part of a peace settlement with Turkey. The relevant part of that draft treaty was Article 2 and it has been reproduced, for convenience, at tab 16 of the judges' folders.

78. Sir Elihu questioned whether the map really was prepared to accompany the draft treaty (CR 2000/14, p. 13). I would suggest the matter is very clear. Article 2 of the Treaty described a line within which the Arabian Peninsula, including their appurtenant islands, was deemed to lie. If

we focus on the notation that appears on the map [enlarge red caption in the middle of the map], it can be seen that the map was described as "showing the sea line within which lies the Arabian Peninsula". Precisely what Article 2 said it was doing, and it is thus abundantly clear that this was the map which Britain used to illustrate their proposal of the Treaty.

79. Next, counsel observed that the chart number which appears on the map — No. 748 — does not correspond with the chart numbers that are referred to in Article 2 of the draft (CR 2000/14, p. 14). [Place Art. 2 on the screen.] This is quite true. But once again, the reason why this is so is very straightforward.

80. The Court will observe in looking at Article 2 that various Admiralty charts are referred to. [Underline in red the charts referred to in subparagraphs (a), (c), (d), (e) and (f).] These were large-scale charts used to identify the individual locations that are referred to in each of the subparagraphs of Article 2. When it came to depicting the entire line within which the Arabian Peninsula and its islands were deemed to lie, obviously a smaller-scale map had to be used. That explains the different chart numbers.

81. Counsel then turned to the red enclave which so clearly surrounds the Bahrain islands [place enlargement from map 58 of Qatar's Map Atlas on the screen], although he declined to speculate as to what this red enclave might signify (CR 2000/14, p. 14). Again, the answer is straightforward.

82. The Court will recall that, according to Article 2 of the Treaty, the straight red line depicted Britain's views of the territories which were included as part of the Arabian Peninsula. The Preamble to Article 2 clearly stated that the Arabian Peninsula included the islands, whether previously Turkish or not, lying within that red straight line.

83. Had Bahrain not been enclaved by a red circle, the map would have given the false impression that the Bahrain Islands formed part of the Arabian Peninsula. Obviously, the British considered Bahrain to be a separate entity which did not fall within the domains of the mainland rulers on the peninsula. The clearest way to depict this situation and to highlight the existence of Bahrain's separate status was to draw a line around the Bahrain Islands. Significantly, this enclave did *not* include the Hawar Islands. Nonetheless, the Hawar Islands were still seen as appertaining to the Arabian Peninsula by virtue of the fact that they fell within the straight red line. If the Hawar

Islands were thus considered to appertain to the Arabian Peninsula, who else could they belong to other than Qatar, for it was Qatar in the 1913 and 1914 Conventions and in the 1916 Treaty, which had been identified as a separate territorial shaikhdom covering the entire peninsula?

84. Moreover, counsel conspicuously failed to mention that, in 1933, Rendel of the Foreign Office prepared the map which now appears on the screen. [Place enlargement of map 77 from Qatar's Map Atlas on the screen.] This omission was particularly strange given that Mr. Volterra had referred in his presentation to Rendel's memorandum to which this map was attached. Bahrain included the Rendel memorandum as tab 53 to its judges' folders but it did not include in that tab this map, which was attached to that memorandum. If Bahrain wishes to rely on the memorandum, I assume also that they are prepared to rely on the map. Having seen the map again, perhaps one can appreciate Bahrain's reluctance to produce it.

85. I need only say that this map is entirely consistent with the red line map that I just discussed as well as the other maps that Qatar has introduced. Qatar and Bahrain are clearly identified as separate political entities. The Hawar Islands, Zubarah and Janan fall outside of the territory which was considered to be Bahraini. They were an integral part of Qatar.

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5. Conclusions

86. Mr. President, Members of the Court, this brings me to the end of my presentation. I would submit that the evidence that I have reviewed yesterday and this morning in response to Bahrain's contentions supports the following five conclusions [place conclusions one-by-one on the screen]:

1. The 1868 Agreements formally recognized the existence of Qatar and Bahrain as separate political entities.
2. Following those Agreements, Bahrain exercised no sovereign rights on the Qatar peninsula, including the Hawar Islands and Zubarah.

3. Ottoman and Qatari title over the entire peninsula was recognized in the historical documents of the time.
4. The 1913 and 1914 Conventions, and the 1916 Treaty between Qatar and Great Britain confirmed this pre-existing state of affairs. Qatar's title was never displaced.
5. The map evidence overwhelmingly confirms Qatar's title to the Hawar Islands, Janan and Zubarah.

I wish to thank the Court for their patience in hearing me and I would be grateful, Mr. President, if you could call on Mr. Shankardass to continue Qatar's presentation. Thank you.

The PRESIDENT: Thank you very much Mr. Bundy. I now give the floor to Mr. Shankardass.

Mr. SHANKARDASS:

TERRITORIAL EXTENT OF QATAR AND BAHRAIN AND THE OIL CONCESSION HISTORY

Oil concessions territory: 1933 British correspondence

1. Mr. President, distinguished Members of the Court, Mr. Bundy has taken you through developments in regard to the territorial integrity of Qatar to the Anglo-Qatar Treaty of 1916 and shown you that the position as it was at that time with regard to the extent of both Qatar and Bahrain continued to be generally recognized until the 1930s, that is up to the time when Rendel of the Foreign Office annotated an official map clearly showing that the Bahrain group of islands did not include the Hawar Islands. Mr. President, I have already addressed the Court at some length on the developments following the prospects for the discovery of oil in the 1920s and 1930s and the impact on the extent of the two Sheikhdoms to be covered by oil concessions. In this brief presentation, I propose to offer my comments on just a few of the issues raised by counsel for Bahrain in an effort to complete the rebuttal that Mr. Bundy has been making.

2. In my presentation to the Court on 30 May on the extent of Bahrain and Qatar as shown by the history of oil concession negotiations in the 1930s, I had cited four British documents (CR 2000/6, pp. 23-26) to support my submission that the British view in 1933 clearly was that the Hawar Islands were part of the territory of Qatar. My learned friend Mr. Paulsson sought to

discount the value of one of those documents. This was a telegram (Memorial of Qatar, Ann. III.88, Vol. 6, p. 449) from Loch, then the Acting Political Resident, stating that the British could accept the Sheikh of Bahrain's condition that the Bahrain Islands should not be named (in the concession in view of his alleged claim to Hawar and other places on the Qatar coasts), "as the Hawar Island is clearly not one of the Bahrain group". Mr. Paulsson contended in effect, that this was merely an accurate statement of a geographical fact and that Loch was not saying Hawar did not belong to Bahrain.

3. Mr. President, I believe it would be helpful to the Court if I were to describe the context in regard to the view expressed by Loch in his telegram and of some of the other views of the British officials concerned at the time.

4. Qatar has shown in its pleadings (Reply of Qatar, paras. 4.203-4.206) that after a meeting with Holmes, then acting for BAPCO, early in May 1933, the Ruler of Bahrain was greatly disturbed to discover that his unallotted land area was much less than what he had imagined. In fact in a letter to the Political Agent of 28 May 1933, he stated "it now appears that the additional area does not amount to more than 38,000 acres" (Reply of Qatar, Ann. III.44, Vol. 3, p. 277), that is, after deducting BAPCO's 100,000 acres.

5. As Qatar has shown (Memorial of Qatar, paras. 6.16-6.20), subsequent, more precise calculations were made by British authorities in London in 1933. These clearly showed that the remaining acreage, that is, Bahrain's unallotted area, was actually around 44,768 acres, which could not therefore possibly include the Hawar Islands. Clearly, not even the Ruler himself was including the Hawar Islands in his own estimate of the remaining 38,000 acres. Qatar has shown that the calculations in London were therefore obviously one of the important reasons why the British officials in London or the Gulf, and the oil company representatives concerned, considered, in 1933, that the Hawar Islands were not part of Bahrain's unallotted area or of Bahrain (Memorial of Qatar, para. 6.20).

6. The next piece of evidence of particular relevance, is the Political Agent's letter of 30 July 1933, (Memorial of Qatar, Ann. III.87, Vol. 6, p. 445), a part of which Mr. Paulsson also referred to (CR 2000/12, p. 33, para. 149). This records his discussion with the Sheikh of Bahrain

and his son on 29 July, when the Sheikhs objected to the Bahrain Islands being specifically named in the new concession. The letter states:

"They explained that the islands off Qatar were the cause of *this hesitancy* (here the Shaikh added — according to the Political Resident — that the Foreign Office knew that these islands are the dependencies of Bahrain and that there is a ninety-year old agreement somewhere to this effect) and, therefore, to avoid any misunderstanding by the omission of these islands, they would like the area to be called 'Bahrain Islands'."

7. So here, Mr. President, we have the Ruler of Bahrain, soon after oil was discovered in Bahrain in 1932, and he himself having just discovered, two months earlier, that he had only 38,000 acres or so left, obviously attempting to explore the possibility of adding to his territory, that is, some "islands off Qatar".

8. His own information about the so-called "ninety-year-old document somewhere" was obviously as much based on hearsay as was that of the Political Agent, Prideaux, from his conversation with a fisherman in Hawar in 1909, that I have referred to on a number of occasions. But the Court will recall that, contrary to what the Sheikh of Bahrain was saying, Prideaux's conclusion was, consistent with the entry in Lorimer, that Hawar was a dependency of the mainland, that is, part of Qatar.

9. It is Qatar's submission therefore that it is against this background that British authorities would not consider, in 1933, that the Sheikh of Bahrain could have any rights in the Hawar Islands. This was the common view of British officials in each of the 1933 documents I referred to on 5 June. The Court will recall that the fourth document that I listed, a letter of 9 August 1933 (Memorial of Qatar, Ann. III.91, Vol. 6, p. 461) from Laithwaite of the India Office, expressly excluded the Hawar Islands from the territories of the Ruler of Bahrain, on the ground, not only that the islands were geographically part of Qatar, but also because, he said, the Ruler of Bahrain exercised no control over them. My respectful submission therefore is, Mr. President, that the four British documents I listed in my earlier presentation, taken together, leave no doubt of the British view in 1933 of Qatar's ownership of Hawar.

The 1923 Holmes maps

10. My learned friend Mr. Paulsson also contended (CR 2000/14, pp. 22-23) that the map prepared and signed by Holmes and attached to the *draft* Bahrain Oil Concession Agreement of 1923, (which is at tab 19 in the judges' folders, in the first round, which is now on the screen), was unreliable, merely because, he said, it was attached to a *draft* concession. The Court will recall I referred to this map as evidence of what was understood at the time (and stated in the draft) as "all the islands forming part of the Shaikh's Dominions" to be regarded as "conceded territory", and marked in red on the map (Memorial of Qatar, Ann. III.66, Vol. 6, p. 327).

11. With great respect to Mr. Paulsson, and contrary to what he suggested, the conclusion must surely be that if Mr. Holmes was attempting to secure a concession over as much territory as possible, there would be no reason for him to exclude the Hawar Islands if anyone had thought, at the time, that they were part of the Sheikh of Bahrain's "dominions".

12. I am grateful for the correction pointed out as to the date of the second map which I showed (and is at tab 20 in the judges' folders, in the first round), and that is, that it was prepared in 1923 but only published by Rihani in 1928, and I should not therefore have referred to it as a 1928 map. However, I would like to draw the Court's attention to the fact that the maps prepared by Holmes in 1923, and showing Bahrain only as the group of islands painted in red, were obviously assumed to be correct, as one of them was published by Rihani in 1928 (which is at tab 68 of Bahrain's judges' folders) and again published by Professor Wilkinson in 1991 (at tab 69 of Bahrain's judges' folders). Now, even the map shown to us by Mr. Paulsson from the book by Thomas Ward — which map is now on the screen — (CR 2000/14, p. 24) (and at tab 70 in Bahrain's judges' folders), appears to have been based on the maps prepared by Holmes and used in various oil concession, or concession negotiations including those for the Bahrain concessions, for its unallotted area. The only difference is that this map, published in a book in 1965, and shown to the Court by Mr. Paulsson, shows the extent of the new Bahrain concession, it says so, signed after the British decision of July 1939, which included Hawar. In other words, in my respectful submission, these maps, taken together, reflect the position both before and after the British decision of July 1939, which wrongly decided that Hawar was part of Bahrain.

The geological and concession maps

13. May I now turn to the other two maps that I showed the Court during my presentation in the first round. These are at tabs 21 and 22 of the judges' folders in the first round and now together on the screen. As to the geological map of 1933 (at tab 21) and prepared by geologists in connection with Qatar's oil concession of 1935, Sir Elihu submitted to the Court in his presentation on 8 June (CR 2000/11, p. 18) there is no reason to believe that the geological unity suggested by Qatar between the peninsula and the Hawars, which of course is based on this map on the screen, does not also extend to the Bahrain main island as well as to Saudi Arabia and even to Iran. We then had Mr. Paulsson drawing the Court's attention (CR 2000/12, p. 37, para. 167) to what he calls "a rather withering comment" of Mr. Walton of the India Office in his letter of 14 May 1936 (Memorial of Bahrain, Ann. 248, Vol. 5, p. 1076) to the effect that the map attached to the concession was irrelevant, as its object was only to draw the southern boundary of the concession. Mr. Paulsson drew particular attention to the comment by Walton stating: "Incidentally it marks the Bahrein islands as well as Hawar." (*Ibid.*) Surely the answer to both Sir Elihu Lauterpacht and Mr. Paulsson is the same. Neither the geological map, nor the concession map, was prepared for a concession over Bahrain, Saudi or even Iranian territory. The object of the geological map was to assess the geological prospects for oil in Qatar including Hawar; and that of the concession map, was to define the area of the concession as constituting "the whole area" over which the Sheikh of Qatar ruled. The Court will recall this concession map was in fact based on the geological map showing Hawar as part of Qatar. Furthermore, it was also meant to show the area which the British undertook to protect under the guarantee of protection of 11 May 1935. These two maps, Mr. President, which are on the screen, therefore showed the territory of Qatar, as understood by all concerned, including the British Government, who expressly approved the concession to which the map was attached.

Qatar's exercise of authority; British recognition; Bahrain acquiescence

14. We have heard a great deal about Bahrain's *effectivités*, but may I say, Mr. President, that the unchallenged action of the Ruler of Qatar, before Bahrain's claim to Hawar was made in 1936, in granting exploration rights over Qatar in 1932, in authorizing, in 1933, a geological survey over Qatar specifically including the Hawar Islands, as the map on the screen clearly shows, and

eventually granting in 1935, a concession over the whole area over which he ruled, amounted to the most important and well-documented exercise of authority over Qatar including the Hawar Islands, and of course Zubara. All of these activities had express British recognition or sanction as well as, at least acquiescence on the part of Bahrain, who never protested against the Ruler of Qatar undertaking any of these activities with regard to Hawar or Zubara. All that even the British ever heard of was recorded in the British Political Agent Loch's letter of 29 May 1933 (Counter-Memorial of Bahrain, Ann. 59, Vol. 2, pp. 203-206) to a part of which Mr. Paulsson also referred (CR 2000/12, p. 18, para. 80), that with regard to what were considered "nebulous claims" of the Ruler of Bahrain to areas on the Qatar coast, Loch had "*heard mutterings* that the explorers of (APOC) in Qatar have examined places to which the Ruler of Qatar had no right to allow them to go" (Counter-Memorial of Bahrain, para. 215). This clearly shows, Mr. President, that the Ruler of Bahrain was fully aware of the geologists' activities authorized by the Ruler of Qatar, but simply chose not to protest and engaged only in what has been referred to as "mutterings".

15. There is that history of Bahrain making claims from time to time of certain rights in Zubarah, but none in the nineteenth century, and not in fact until 1936, to Hawar. The admitted record clearly shows that the Ruler of Bahrain expressly disclaimed any rights flowing from Qatar's oil concession of 1935 in Zubarah, not only under the Agreement of 1944 (the only agreement ever signed by the two Rulers) but also in terms of his letter to the British Foreign Secretary, Mr. Ernest Bevin, of 24 June 1948 (Memorial of Qatar, Ann. III.260, Vol. 8, p. 283, at p. 291). In this letter, the Court will recall, four years later, he specifically pointed out that he had "never at any time claimed such rights" in Zubarah.

16. Qatar's territorial and other rights to the Hawar Islands, which were also covered by the Qatar oil concession, were no different. The Ruler of Bahrain acquiesced, as he made no protest, in the Ruler of Qatar granting the exploration and survey rights, and the oil concession between 1932 and 1935. Mr. President, Members of the Court, all of these were of equal significance for both Zubarah and Hawar — and of course had British sanction.

The 1935 concession map

17. Both Sir Elihu Lauterpacht (CR 2000/11, p. 19, para. 19 (9)) and Mr. Paulsson asked why the Ruler of Qatar did not refer to the map attached to the 1935 oil concession as evidence of his "claim" to Hawar in the so-called "arbitration". Apart from the fact that it would simply not have occurred to him to do so when he was complaining about aggression on his territory, the fact is that PCL did specifically refer to the map in their very first letter of 29 April 1936, when initially protesting the Sheikh of Bahrain's claim to the Hawar Islands. It was to this letter that Mr. Walton of the Indian Office replied on 14 May 1936, (Memorial of Bahrain, Ann. 248, Vol. 5, p. 1076) containing what Mr. Paulsson calls the "withering comment" (CR 2000/12, p. 37, para. 167) that I have just referred to, and simply dismissed the map as irrelevant. As I have already shown, by then, the 1933 British view that Hawar belonged to Qatar had been reversed — for the reasons which counsel for Qatar have already fully explained to the Court.

The nature of the Hawar Islands

18. Mr. President, Members of the Court, the fact simply is that the Hawar Islands were of no significance until it was thought that there was a good possibility that oil might be found there. As Mr. Paulsson himself said, "The fact is that no one much cared who controlled this empty scorched land — until, that is, it was thought there might be mineral riches below the sands." I trust I have shown that the Ruler of Bahrain *did begin to care* when he discovered in 1933 that only 38,000 acres or so were left for which he could grant his second concession. As Belgrave wrote soon after, upon the Ruler's direction, to the Political Agent, that the Ruler had suffered from a "grave misapprehension regarding the additional area" virtually blaming the British for misleading him into thinking that another half of his territory — in other words some additional 100,000 acres — was still available for the second concession (Reply of Qatar, paras. 4.203-4.206). The Court will recall that this was also the time, as Sir Ian Sinclair has shown, when the financial position of Bahrain was causing the Ruler grave concern. These are the events that led to the saga I have already referred to — leading eventually to the British decision of 11 July 1939.

19. But what of thereafter. The record now also shows that once prospects for oil from the Hawar Islands virtually disappeared, Bahrain simply abandoned the islands for all practical purposes. As Qatar has shown (Reply of Qatar, paras. 4.189-4.192), throughout the 1940s and

1950s, the islands were used only as a penal colony, to which the more junior members of the ruling family could be banished for misbehaviour, or for seasonal hunting as in the past. The Court will no doubt note that this was the position despite all the "improvements" carried out by Bahrain from 1937 onwards. In fact, the Hawar Islands were virtually forgotten until more recent times.

20. The Court will therefore see that the Hawar Islands were only detached, wrongly that is, from the territory of Qatar, pursuant to the complex political and corporate ambitions, to acquire as much as possible of the new wealth that oil was expected to bring. In all the circumstances that Qatar has explained to the Court, there is no reason why they should not now be finally returned to Qatar.

21. Mr. President, distinguished Members of the Court, it has, for me, been a great privilege to appear before this Court again, constituted as it is of members of high distinction, universally acknowledged and to have an opportunity to pay tribute to the great work this Court carries on in the peaceful settlement of international disputes. I thank you once again and respectfully ask that you might now call upon my distinguished colleague, Sir Ian Sinclair. Thank you.

Le PRESIDENT : Je vous remercie, M. Shankardass. Je donne maintenant la parole à Sir Ian Sinclair.

Sir Ian SINCLAIR: Mr. President, Members of the Court.

QATAR'S POSITIVE CASE ON HAWAR

1. This morning, I propose to respond to a series of points which counsel for Bahrain have advanced on my earlier remarks on Qatar's positive case for title over the Hawar Islands.

Summary statement of Qatar's positive case on Hawar

2. Before I do so, however, I propose initially to present a summary statement of Qatar's positive case on Hawar. This will take the form of a series of propositions which set out Qatar's position within the broader historical perspective, for Qatar believes that it is only within that broader historical perspective that the genesis of the dispute over Hawar may be discerned and fully understood. These propositions necessarily have to be expressed at a level of generality

which may exclude minor qualifications, and I now show them on the screen. The first proposition is as follows:

- (1) Britain recognized Qatar as an entity separate from Bahrain in 1868, that recognition necessarily encompassing acknowledgement that the Al-Thani Rulers of Qatar exercised or were entitled to exercise authority over the whole of the peninsula which, in the submission of Qatar, must have included, for reasons explained more fully in proposition (7) below, the Hawar Islands which lie wholly or partially within a 3-mile belt of territorial sea appertaining to the mainland.
- (2) After 1868, Bahrain ceased to have any right or title to exercise any form of authority in or over Qatar, including the Hawar Islands, their Ruler having been specifically forbidden by the British authorities from breaching the maritime peace by interfering in Qatar.
- (3) In the latter years of the nineteenth century and the early years of the twentieth century, some members of the Dowasir tribe were no doubt present in the Hawar Islands during the winter months to engage in fishing activities, but Qatar denies that this intermittent presence, in any event interrupted during the voluntary exile of the tribe in Saudi Arabia during the 1920s and early 1930s, amounted to possession of the territory on behalf of the Ruler of Bahrain.
- (4) The Anglo-Ottoman Treaties of 1913 and 1914, and the 1916 Treaty between Britain and Qatar acknowledge the authority of the Rulers of Qatar over the whole of the territory of the peninsula, including islands situated within the territorial sea appertaining to the peninsula.
- (5) Bahrain committed a series of wrongful acts in 1937 by occupying, and, as it now admits, establishing military defences on, the main island of Hawar. That *de facto* situation continues until today.
- (6) The British decision of 11 July 1939, deciding that the Hawar Islands belonged to Bahrain, was rendered invalid by reason of the fundamental procedural defects affecting the conduct of the enquiry by the then Political Agent in Bahrain in 1938 and 1939 to which reference has been made in Qatar's written pleadings. To this must, of course, be added the lack of consent by the Ruler of Qatar to the making of such a decision by the British Government. The decision was not an arbitral award and is not *res judicata*, and Qatar has never acquiesced in the continuing occupation of the main Hawar Island by Bahrain since the late 1930s.

(7) Proposition 7, and I am sure the Court will be glad to hear that this is the final one: Qatar's title to the Hawar Islands is based on their location wholly or partially within a 3-mile belt of territorial sea extending seawards from the low-water mark on the mainland of Qatar opposite the islands, this being the seaward limit of Qatar's territorial sea in the relevant period, and on the principle of proximity as properly understood, this principle entitling Qatar to assert sovereignty over the small number of uninhabited islands in the Hawar group which lie marginally outside the 3-mile limit of its territorial sea.

3. Mr. President, I do not propose at this late stage to enlarge on each and every one of these propositions of fact and/or law, copies of which have been put in the judges' folders for this morning as item No. 18, under tab 18. Some of my colleagues have already done so, or will be doing so in the course of responding to Bahrain's first round arguments.

Proposition (3)

4. I would however like to test the strength of at least one of these propositions — and that is proposition No. 3 — against the documentary evidence of the behaviour of the Dowasir tribe in the 1920s and the 1930s. Qatar has set out, in paragraphs 3.82 to 3.92 and 3.94 of the Qatar Counter-Memorial, the evidence of the contumacious behaviour of the Dowasir in Bahrain in the early 1920s leading to their voluntary exile to Dammam in Saudi Arabia. Bahrain, in its Reply, has not sought to challenge this documentary evidence but claims that in 1927 those discontented Bahraini Dowasir who had left Bahrain in 1923 returned from Dammam and expressly affirmed their allegiance to the authority of the Ruler of Bahrain¹. Bahrain cites no source for this proposition, which is in any event wholly inconsistent with the evidence contained in the Bahrain Government's Annual Report for 1932 to 1933 where it is stated [show on screen; copy in judges' folders]:

"The town of Budeya is gradually being re-inhabited by members of the Dawasir tribe who returned one by one from Dhammam. Ahmed bin Abdullah, the son of the late Shaikh of the Dawasirs makes every effort to prevent his followers from returning to Bahrain."²

¹Reply of Bahrain, p. 23, para. 33.

²Reply of Qatar, Ann. III.42, Vol. 3, p. 270.

5. The Court will recall that Sir Elihu asserted, in his statement on 8 June, that the Dowasir, having gone into voluntary exile from Budeya (*not* the Hawars) in 1923, "sought the permission of Bahrain to return to the Hawars in about 1928"³. This is, I am afraid, patently untrue on two counts, as the passage I have just cited fully proves:

- (1) Some of the Dowasir were still drifting back to Budeya in Bahrain in 1933;
- (2) They were drifting back to Budeya on the main island of Bahrain where they had their houses, *not* — and I repeat, *not* — to "the Hawars".

Qatar reaffirms the picture of the status and allegiance of the Dowasir in the early 1930s which it presented to the Court in paragraphs 3.82 to 3.92 and 3.94 of the Qatar Counter-Memorial, and would in addition point out that Bahrain has presented no credible evidence of the return of the Dowasir to their customary habit of visiting Hawar in the winter months after their period of voluntary exile in Dammam, which still persisted, at least for some of the tribe, until 1933 or later, as the evidence which I have just read out to you fully supports.

Comparison between Bahrain and Qatar: 1929

6. In this context, Mr. President, Qatar conceives it to be its duty, at this final stage of the oral hearings, to seek to find whatever common ground there may be between the Parties on disputed issues of fact and law. Now this is particularly difficult in a case such as the present where there are few uncontested facts, and where, even though there may be a measure of agreement on applicable legal principles, there is strong disagreement as to their application in the particular circumstances of the case.

7. But let us see how far we can get in narrowing the differences between the Parties at least on the factual aspects of the territorial issues — the Hawar Islands and Zubarah. In a sense, Mr. Paulsson was right, in his historical exegesis on 8 June, to concentrate on seeking to provide the Court with a picture of developments in this part of the Gulf in the 1930s. However and with all respect, Qatar believes that the picture which Mr. Paulsson presented to the Court was a false one — rather akin to the peculiar image of oneself which one may encounter when peering into a distorting mirror in a funfair. But this is by the way. Qatar would like to put to the Court a

³CR 2000/11, p. 24, para. 31.

photograph in words of the two Parties — Bahrain and Qatar — as they were in the three key years of 1929, 1934 and 1939. We already know from the video presentation and from some of the photographs presented in evidence in this case — particularly of reefs, shoals and low-tide elevations — that such materials can present highly misleading images. So let us turn to the year 1929, and present a picture in words. First, I take Bahrain.

8. Bahrain had acquired a foreign financial adviser in 1926 — Mr. Charles Belgrave. He had begun the difficult task of modernizing the administrative structure of the sheikhdom and putting in place certain financial controls. The Bahrain archipelago, as Belgrave had described it in his article in the *Journal of the Central Asian Society* in 1928, consisted of "a group of small islands about seventeen miles off the Arab coast half-way down the Persian Gulf" (Reply of Qatar, Ann. II.81, Vol. 2, p. 567). No mention here of the Hawar Islands or indeed of Zubarah. In case we are confronted yet again with the threadbare argument that this is a geographical and not a political description, let me remind the Court that, only a few years later — on 3 May 1933, Laithwaite of the India Office who later became Sir Gilbert Laithwaite, the Permanent Under-Secretary to the Commonwealth Relations Office, he states that the *dominions* of the Ruler of Bahrain (and I ask you to note the word "dominions") may be regarded as consisting of "the Island of Bahrein, and of the adjoining islands of Muharraq, Umm Na'assan, Sitrah and Nabi Salih . . ." (Memorial of Qatar, Ann. III.84, Vol. 6, p. 431). He later adds in the same letter that "in considering any grant of a concession in respect of his 'dominions' or 'Bahrain' it would seem necessary to have a clear understanding as to precisely what is covered". Nothing could be clearer. Neither the Hawar Islands nor Zubarah are to be considered part of the Ruler of Bahrain's "dominions".

9. In the 1920s, Bahrain was certainly richer than Qatar. It was the centre of commercial activity in the Gulf. Bahrain's economy was much more prosperous than that of Qatar until the 1950s when the balance was redressed by the development of oil in Qatar. This was attributable partly to the fact that Bahrain possessed more fertile land which meant that it could sustain a diversified system of agriculture; but, more significantly, it was due to the British interest in seeking to develop Bahrain as the trading and strategic centre of the Gulf (Memorial of Qatar, para. 3.63).

10. In the autumn of 1929, the great economic recession began to hit the Gulf region. Almost simultaneously, as indeed Mr. Paulsson admits, the revenues of Bahrain from pearling began to fall off dramatically as a result of the development of cultured pearls in Japan. He states (and here Qatar can agree with him entirely) that the pearling industry, which in fact was as important to Qatar as it was to Bahrain, "declined rapidly in the 1920s" and that "the pearl banks were depleted" as a result of the development of the cultured pearl (CR 2000/11, p. 45, para. 8).

11. Now you may ask, what about oil, that Pandora's box which was to transform the economies of Saudi Arabia, Iraq, Iran and the small sheikhdoms in the Gulf? Bahrain had already granted a concession to EGS in 1925, which was transferred to BAPCO in 1928. As is well known, Major Frank Holmes made an application for what was termed Bahrain's "unallotted area" in 1928. The extent of the unallotted area was unclear. You will have heard from Mr. Shankardass, the Ruler of Bahrain had been under the misapprehension that the unallotted area comprised half the land territory of the main island of Bahrain. This was clearly wrong, and the Ruler had to be informed, much to his annoyance, that he had misunderstood the position (Memorial of Qatar, paras. 6.15-6.19, with relevant Annexes). So, in 1929, the Ruler of Bahrain was looking around for new sources of additional oil revenues.

12. What about Qatar in 1929? By comparison with Bahrain, Qatar was, in 1929, a typical Gulf sheikhdom of the time, poor in natural resources, dependent in large measure upon pearling for its revenues, and with a small population which, outside Doha and other small settlements, was nomadic or semi-nomadic in its lifestyle. It lacked most of the attributes of what might be termed twentieth century "civilization"; and its peoples, poor though they might be in material terms, were proud of their heritage and determined to maintain their independence.

13. Qatar suffered as much as Bahrain from the decline in revenues from pearling during the recession years; but, unlike Bahrain, had no compensating revenues from oil concessions to relieve its poverty. Qatar can in no way accept that its then Ruler exercised no authority or control over the west coast of the peninsula at this time; indeed, as Ms Pilkington reminded the Court during the first round, Sheikh Abdullah maintained the frontier posts in the southern border area which had already existed in his father's time (CR 2000/5, p. 61, para. 82). It may indeed be the case that large areas of the interior and of the west coast of Qatar were empty of settled human habitation at

the time. This would indeed in part explain why, as Qatar has consistently maintained, the Hawar Islands were essentially uninhabited apart from winter visitors such as the Dowasir, anxious to engage in fishing activities. But, of course, the Dowasir were still in Dammam at this time, 1929, although some may have been in the course of returning to Budeya. Fractions of nomadic tribes, some of whom acknowledged allegiance to the Ruler of Qatar (and some of whom were more likely to have acknowledged allegiance to Ibn Saud), were accustomed to wander with their camels and goats through the unsettled regions of the peninsula at this time. The Court will recall the lengthy citation which my learned friend Professor Salmon made from a letter of 4 May 1934, from the Ruler of Qatar to the then Political Agent, explaining the position (CR 2000/5, p. 42, para. 27).

14. In 1929, oil was simply not a factor in Qatar. The oil companies had not yet even begun to assess the geological prospects of the presence of oil-bearing structures on the mainland of the peninsula.

Comparison between Bahrain and Qatar: 1934

15. So now, Mr. President, we turn to the year 1934. By this time, the effects of the economic recession were beginning to bite hard in Bahrain. Belgrave, in his letter to the Political Agent of 29 April 1933, covering the Bahrain budget for that year, admits that the financial position of Bahrain causes him very grave concern; both the new budget and the figures for 1932 "reveal a very disastrous condition of affairs" (Reply of Qatar, Ann. III.42, Vol. 3, p. 257). A copy of this letter is in the judges' folders as item 19. Belgrave goes into considerable detail about the economies which he has had to make. Small cuts had been made in the Civil List. Expenditure on education had been reduced by 25 per cent and other savings had been made in some of the departmental expenditure. Belgrave goes on to complain about the proportion of the budget which he has had to devote to the Civil List. He concludes by making what is almost a desperate appeal, and here I show on the screen an extract from his letter. He says:

"If this State [Bahrain] finds itself in serious financial difficulties it will depend upon the Government of India for monetary assistance. Excluding the possibility of increased revenue from oil it appears to me inevitable that within a year or two the State will be approaching a condition of bankruptcy."

I think it was Dr. Johnson, the noted English lexicographer, who is reported to have said that "the prospect of a hanging in a fortnight concentrates the mind wonderfully". Could it not be that the prospect of bankruptcy within a year or two may have concentrated the minds of Belgrave and others into seeking ways and means to secure increased revenues from oil for their master, the Ruler of Bahrain? For example, by mounting a claim to the Hawar Islands, thought at the time to be oil-rich?

16. I turn to Qatar in 1934. In Qatar 1934 was the year in which the negotiations for an oil concession to be granted by the Ruler of Qatar to APOC were in progress. It was also the year in which Fowle (the Political Resident) had an acrimonious exchange with the Ruler of Qatar. It was on this occasion — 12 March 1934 — that the Ruler of Qatar claimed that the 1916 Treaty did not include the interior but only the coast, to which, as Mr. Bundy has reminded you all this morning, the Political Resident's robust reply was: "And you are the Ruler of all Qatar and the Treaty extends to the whole of Qatar." No equivocal geographical qualification here. The Ruler grumbled about being compelled to give the concession to the Anglo-Persian Oil Company, even if he were not satisfied with the terms that they might offer; and he boldly asserted, and here I show on the screen a passage from the report: "if I am not allowed by the Government to give it to others I will leave the oil in its place and give it to no one. I lived all this time without oil." (Counter-Memorial of Bahrain, Ann. 122, Vol. 2, p. 410.) This is hardly the view of someone obsessed with the riches which a new oil concession might bring.

Comparison between Bahrain and Qatar: 1939

17. Finally, let us look at the year 1939. For Bahrain, it was a year of triumph, clouded only by a small speck on the horizon. The triumph was of course the British decision of 11 July 1939, stating that the Hawar Islands belonged to Bahrain. The Court, of course, will have noted that the Bahrain Government had already received advance notification in April 1939, that this was the solution which was being recommended by the person appointed to lead the so-called enquiry, that is to say Weightman, since Belgrave had been shown Weightman's report in draft. And here I refer to the extracts from Belgrave's diary entry for 22 April 1939 (Memorial of Qatar, Ann. III.143,

Vol. 7, p. 223). The small speck on the horizon was the discovery of oil on the mainland of Qatar in February 1939, ironically on the Dukhan peninsula opposite Hawar but a bit further to the south.

18. For Qatar, the picture in 1939 was, not unnaturally, somewhat different. Early in the year, there was the encouraging news of a show of oil in the Dukhan oilfield. Later in the year, however, Qatar was faced with the outbreak of war between Britain and Germany which was to lead to the closing down of oil operations in Qatar the following year. The result was that Qatar was denied the benefits of revenue from oil production on its territory until the late 1940s.

19. For the word-picture of Hawar in 1939, we have to turn to the Belgrave diaries and Bahrain Government Reports. As far as the Belgrave diaries are concerned, Qatar would direct the attention of the Members of the Court to paragraphs 4.178 and 4.188 of the Qatar Reply. Qatar's word-portrait of the Hawar Islands at this time is also confirmed by the evidence of Alban, Weightman's successor as Political Agent in Bahrain, which is reproduced at paragraph 4.176 of the Qatar Reply and which is based on a visit which Alban paid to the main island of Hawar in December 1940. Alban's report — an extract from which is now on the screen and a copy of which is in your folders as item No. 20 — as recorded in the Intelligence Summary of the Political Agent, Bahrain, for the period 1 to 15 December 1940 (Reply of Qatar, Ann. III.94, Vol. 3, p. 575) states *inter alia*: "A few Dawazir from Zellaq were in residence; they apparently like Hawar in winter and return to Zellaq in summer." The picture which Bahrain seeks to paint of conditions in Hawar at this time is blatantly contradicted even by Belgrave himself who, in his diary entry for 1 April 1938, records the headman of those present on the main island of Hawar (and these were presumably members of the Dowasir tribe) as resenting the Bahrainis for "having developed the place which in the past was never visited and which they seem to consider their own property" (Memorial of Qatar, Ann. III.143, Vol. 7, p. 213). The Court will have to determine whether this is not a more accurate description of the position on Hawar at this time than that presented by the self-serving statements of elderly former visitors to Hawar from the Dowasir tribe. In this context, the Court will also no doubt bear in mind the evidence of Prior, who succeeded Fowle as Political

Resident in September 1939, and who was convinced that the British decision of 11 July 1939 was "a grave miscarriage of justice"⁴.

Mr. President, this might be a convenient moment at which we could take our coffee break, if you agree.

Le PRESIDENT : Je vous remercie, sir Ian. La Cour suspend pour un quart d'heure.

L'audience est suspendue de 11 h 20 à 11 h 45.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise. Sir Ian, you have the floor.

Sir Ian SINCLAIR: Merci, M. le président. Mr. President, Members of the Court, before the coffee break I had completed a comparative word-picture of Bahrain and Qatar in the three key years of 1929, 1934 and 1939. If I can just now summarize what the position was.

Comparison between Bahrain and Qatar in the 1930s: summary

20. So, in the 1930s we have a sheikhdom — Qatar — still deeply rooted in and deriving sustenance from the traditional Arab societies by which it was partly surrounded. This no doubt serves to explain, at least in some measure, the close relations which the then Ruler of Qatar maintained with Ibn Saud when compared with his distrust of the British Government — a distrust which was unfortunately to be justified by events in 1938 and 1939. Oil was hardly a factor in Qatar at this time. By way of comparison, we have Bahrain, which was, already in 1932, to become the first oil-producing State on the southern side of the Gulf. Bahrain's administration was in process of becoming modernized following the arrival of Belgrave as Adviser to the Ruler of Bahrain in 1926. But the fat years of the late 1920s and early 1930s were about to be followed by the lean years of 1933 and 1934. The Ruler of Bahrain was desperate to increase his oil revenues, and was bitterly disappointed to hear that the extent of the "unallotted area" available to him to be offered for a new concession was considerably less than what he had thought it to be. His eyes began to turn to the Hawar Islands. He (or Belgrave) had already no doubt heard reports that the

⁴Memorial of Qatar, para. 6.101, p. 126.

IPC geologists had uncovered evidence of a potential oil-bearing structure on the Dukhan peninsula which could extend into the Hawar Islands.

Omissions in Bahraini presentation on principle of proximity

21. Mr. President, against this background, I can turn to Sir Elihu's criticisms of my first round presentation on the geography of the Hawar Islands and the principle of proximity. There are certainly some (no doubt inadvertent) omissions in Sir Elihu's analysis of the legal position as regards title to islands located within the territorial sea of a State. For example, at paragraph 29 of his presentation on 8 June⁵, Sir Elihu cites a passage from paragraph 239 of the first Award in the *Eritrea/Yemen* arbitration. I show that passage on the screen, but I also add to it the immediately following two sentences, some elements in which I have caused to be underlined:

"The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any. The facts alleged by Eritrea and Yemen in the present case must be measured against these tests, with the following qualification. Not only were these islands for long uninhabited and ungoverned or, if at all, governed in the most attenuated sense, but the facts on which Eritrea relies were acts by its predecessor, Ethiopia, which were not 'peaceful' . . ."

Now, that part of the qualification which I have caused to be underlined in the passage shown on the screen is precisely what Qatar says was the position in the Hawar Islands prior to 1936. Mr. Shankardass has gone over the evidence again and I think you will agree that, prior to that year, the Hawar Islands were essentially uninhabited and certainly "ungoverned" by Bahrain, in the sense of the application to Hawar of the administrative rules and structures applied in the main island of Bahrain.

22. Again, in the same paragraph 29 of his statement, Sir Elihu cites a passage from paragraph 241 of the first Award in the *Eritrea/Yemen* case about the requirement of evidence of intention to claim the islands *à titre de souverain*. The Court will certainly wish to take into account the fact that despite its claim to have exercised *effectivités* on or in relation to the Hawar Islands for a period of more than 200 years, Bahrain never displayed any intention to claim the islands *à titre de souverain* until 1936, when the claim was advanced for the first time

⁵CR 2000/11, p. 23, para. 29.

specifically in connection with the ongoing negotiations for an oil concession over the territory of Bahrain which is not included in the 1925 oil concession. This must inevitably cast doubt on the good faith of Bahrain in advancing this claim for the first time in 1936. For ease of reference, copies of the full texts of paragraphs 239 and 241 of the first Award in the *Eritrea/Yemen* case are in the judges' folders under tab No. 21.

23. Then, at paragraph 31 of his address to the Court on 8 June, Sir Elihu, in criticizing the points made by Professor Salmon and Mr. Shankardass on the *Kasikili/Sedudu Island* case, sought to distinguish the facts in that case from the facts in the present case⁶. I will not seek to respond to Sir Elihu on this point, as Mr. Shankardass has already done so, in some detail⁷. I would only add that, as I have already pointed out earlier in this statement, Sir Elihu is clearly in error in arguing, as he did in paragraph 31 of his statement of 8 June, that the Dowasir "sought the permission of Bahrain to return to the Hawars in about 1928". To return to Budeya on the main island of Bahrain — yes. But to the Hawars — no.

24. It is noteworthy that Sir Elihu cites in support of his argument the passage from Judge Huber's Award in the *Island of Palmas* case which is cited with approval in paragraph 104 of the *Eritrea/Yemen* first Award, yet he fails to draw attention to what is said in paragraph 105 of the Award, where, after recalling that Yemen had relied primarily on a "historic title", the Tribunal reflects on the meaning of "title" and states [show on screen]: "It is a matter of law, not of possession, though it would normally indicate a right in law to have possession even if the factual possession is elsewhere." This is of course somewhat reminiscent of a view already expressed in the 1960s by a noted professor of international law at the time [show first citation from Jennings on screen]:

"Yet if the legal right to territorial sovereignty is to have any real significance it must on occasion at least be capable of subsisting even when divorced from possession; it must mean that the State in which is vested the right can vindicate it before a Court and be enabled to recover a possession of which it has been deprived."

You will find a copy of that Mr. President, Members of the Court, in your judges' folders as item No. 22.

⁶CR 2000/11, p. 24, para. 31.

⁷CR 2000/17, pp. 25 *et seq.*

25. This is of course a citation from a book (*Acquisition of Territory in International Law* (1963) p. 5), published in 1963 by a former President of this distinguished Court, Sir Robert Jennings when he was still professor of international law at Cambridge. Professor Jennings (as he then was) indeed goes on to say in the same work: "when occasion demands, the law does recognize an abstract title presently divorced from a material display". He gives the example of the long-established rule that a belligerent occupant does not acquire sovereignty until after *debellatio*.

Rebuttal of Sir Elihu Lauterpacht's arguments on Qatar's positive case

26. Mr. President, I turn now to Sir Elihu's critique of my presentation on Qatar's positive case for sovereignty over the Hawar Islands. He begins by questioning my statement that 11 out of the 17 islands identified by Belgrave as comprising the Hawar Islands in the "preliminary statement" which he submitted to Weightman on 29 May 1938 lie "wholly or partially" within a 3-mile limit drawn from the low-water line on the mainland of Qatar opposite the Hawar Islands. I must admit to being frankly puzzled by this criticism. There is of course a clear difference of view between the Parties about Janan Island, Bahrain regarding it as forming part of the Hawar Islands and Qatar denying this. It is clear in any event that the British authorities in 1947 did *not* regard Janan Island as falling within the scope of the British decision of 1939 which purported to attribute the Hawar Islands to Bahrain. Sir Elihu's argument appears rather to be that the glass should be described as half-empty rather than half-full. He seems to want to concentrate on those islands which fall outside or partially outside the 3-mile limit rather than the great majority which lie inside the limit. And the Court will remember that I quite deliberately chose Belgrave's 1938 list of the Hawar Islands as my point of departure. In this context, Qatar would certainly take the view that any island which falls partially within a 3-mile limit drawn from the low-water line along the mainland enjoys the benefit of the régime applicable to islands located wholly within that 3-mile limit.

27. To return to Sir Elihu's critique of Qatar's positive case, he offers what he sees as three reasons why the legal arguments developed in paragraphs 4.35 to 4.71 of the Qatar Reply should be rejected. First, he says that there is no absolute rule that islands located within the territorial sea

belong to the coastal State. And then he cites a passage from the first Award in the *Eritrea/Yemen* case which suggests that the rule applies only in the absence of any clear title being shown to them by another State⁸. But he fails to cite another passage from the first Award in the *Eritrea/Yemen* case which expresses in even stronger terms the burden of proof which has to be discharged by a State which seeks to challenge the presumptive title of the coastal State to islands located wholly or partially within its territorial sea. This occurs in paragraph 474 of the first Award (show on screen, copy in judges' folders, item No. 23) where the Tribunal states:

"There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal state unless there is a fully-established case to the contrary (as, for example, in the case of the Channel Islands)."

28. So, "a strong presumption": and there has to be a "fully-established case to the contrary" to displace it. Qatar does not put forward the rule upon which it relies as an absolute rule. Obviously, there will be minor exceptions to it as where, for example, there is an island located wholly or partially within the limits of the territorial sea of a State, title to which has been vested in another State by virtue of a treaty to which the coastal State is a party or has succeeded. Indeed this is the position with respect to a number of the examples which Sir Elihu gave in his address of 8 June⁹. This is certainly the case of the Greek islands off the Anatolian coast of Turkey, title to which was transferred to Greece by virtue of the Treaty of Lausanne of 1923 or, in the specific case of the Dodecanese Islands, by virtue of the Treaty of Peace with Italy of 1947. It is also the case with St. Pierre and Miquelon, title to which is vested in France by virtue of an early eighteenth century treaty. It seems likely to be the case with other of Sir Elihu's examples, for example, the Penguin Islands. But that is not of course the case here. Bahrain relies on no conventional title. It simply occupied the Hawar Islands in 1937. At that time, as Mr. Shankardass has demonstrated, there was no long-standing Bahraini presence on any of the Hawar Islands. They were essentially unoccupied, and, as the Court will be aware, Qatar strongly denies that Bahrain had exercised any activities *à titre de souverain* on any of the Hawar Islands prior to 1936 and 1937, either directly or as a result of the winter presence of some members of the Dowasir tribe on the main island of Hawar. It will of course be a matter for the Court to determine whether Bahrain has been able to

⁸CR 2000/11, p. 29, para. 54.

⁹CR 2000/11, p. 35, para. 75.

persuade them that it has a "fully-established case to the contrary" on the basis of the pre-1936 *effectivités* which it has invoked, sufficient to displace the "strong presumption" that the Hawar Islands belong to the coastal State, that is to say, Qatar.

29. Sir Elihu took me to task for having put an interpretation on Judge Huber's Award in the *Island of Palmas* case which he found not very much to his taste. The question is whether Judge Huber was expressing a negative proposition or a positive proposition. Frankly, I do not think it much matters. Judge Huber had expressed his thought in negative terms: "it is impossible to show the existence of a rule of positive international law . . .". So I naturally referred to it as a negative proposition. The important point is the *scope* of this proposition, whether negative or positive. It applies to "islands situated outside territorial waters", the clear implication being that it does not, or does not necessarily, apply to islands situated within territorial waters. Of course, Qatar is aware that the island of Palmas was, certainly at the time of the Award in the case, in the high seas and nowhere near the territorial sea of either party. If, as Sir Elihu contends, all that Judge Huber meant to convey was the non-existence of a rule of positive international law to the effect that islands situated in the high seas should belong to the nearest State, he would surely have confined his dictum to that very simple proposition. But he did not do so. He obviously wished to preserve the application, or potential application of the principle of strong presumption that islands located within the territorial waters of a State should belong to that State: and that, Qatar would submit, is precisely what he did. I am sure that even Sir Gerald Fitzmaurice, whose memory I revere, would have accepted that a meaning must be given to every phrase in a judicial pronouncement, just as it must be given, as he himself counselled, to every phrase in a treaty; and one cannot simply read a phrase out of a sentence without distorting the meaning of that sentence. In other words, the phrase to which Sir Elihu takes exception is an integral and essential part of the rule which Judge Huber is putting forward.

30. Sir Elihu also cited a few passages from an article written by Sir Humphrey Waldock in the *British Year Book of International Law* for 1948. I would only venture to remind the Court that the article in which this passage occurred was concerned with "Disputed Sovereignty in the Falkland Island Dependencies", and that the article was directed primarily towards criticizing

sector claims in the Antarctic, as the following extract from the article will indicate. It comes from near the end of the article (show on screen):

"If the above appreciation of the place of continuity and contiguity in international law is correct, sector claims in the Antarctic, being merely forms of continuity or contiguity, can have no legal significance independently of an exercise or display of state activity in regard to the sector."¹⁰

31. I must say that I found rather surprising Sir Elihu's denial that a coastal State might have security concerns about the presence of foreign States on islands located within its territorial sea. Many States are today concerned about the potentially dangerous activities of what have been stigmatized, at least in the tabloid press, perhaps somewhat simplistically, as "rogue States". But I am sure that they would prefer to contract or treat with the representatives of such "rogue States" on their own far-distant territory rather than if they were installed on an island located within the territorial sea of the potential target State.

Distinction between rules governing attribution of land territory and those governing maritime delimitation

32. There is one additional observation I must make on Bahrain's systematic attempt to undermine Qatar's reliance on the significance, as regards title, of the location of islands within the territorial sea of a State or other territorial entity. This indeed gives me the opportunity to reiterate, if further explanation is necessary, that Qatar invokes primarily the principle that islands so located fall under the sovereignty of the coastal State, and, only subsidiarily, the principle of proximity, the latter justifying the attribution to Qatar of the remaining islands in the Hawar group located marginally outside the 3-mile territorial sea limit applied by both Bahrain and Qatar in the 1930s. However, my learned confrère, Professor Weil, professed puzzlement as to why Qatar had opted for the notion of location within a 3-mile limit rather than location within a 12-mile limit¹¹. The reason is of course that Qatar sees a clear distinction between the rules governing the attribution of land territory and those governing the delimitation of maritime boundaries. In the case of the former, the application of the principles of the inter-temporal law requires that title to territory be established in accordance with the law contemporary with the acquisition of such title. In the

¹⁰25 *BYIL* (1948), p. 345.

¹¹CR 2000/15, p. 21, para. 9.

present case, that would have been a period in which the 3-mile territorial sea limit was widely, if not universally, applied and in which it was certainly being applied by both Bahrain and Qatar. Lest it should be argued by Bahrain that, even if Qatar had acquired title to the islands in this manner, she had subsequently abandoned it by failing to perform any acts *à titre de souverain* on the contested islands at the relevant time, Qatar would submit that Qatar's title could not have been replaced by a Bahraini title based upon the effective occupation of the islands by Bahrain in 1937, since that occupation resulted from a violation (indeed a continuing violation) of Qatar territory. Professor Weil appears to think that my theory involves the application of concepts and rules which belong completely to the past. But, Mr. President, Members of the Court, application of the principles of the inter-temporal law to the acquisition of *territorial* sovereignty necessarily involves an appreciation of what the law was at the time when such sovereignty was said to have been acquired. Professor Weil will, I hope, be relieved to hear, however, that Qatar fully accepts that the *maritime* delimitation between the two States in the present case should be effected in accordance with the rules of international law applicable in the matter as between the two Parties in the year 2000.

Fringe of islands concept

33. Finally, Mr. President, Members of the Court, Qatar would suggest that there may be an alternative way of looking at the Hawar Islands. It will be recalled that, when I addressed the Court for the first time on 30 May on the geography of the Hawar Islands and the principle of proximity, I devoted part of my statement to the macrogeography of the islands¹² — a word whose origin we all, as international lawyers, owe I may say to Judge Oda. In that part of my statement, I referred to the Hawar Islands as the pieces required to complete the curve of the western coast of Qatar. I put up on the screen on 30 May an illustration of this notion, and I do so again today [show map No. 2 in the Memorial of Qatar and draw closing line around the outer area of the Hawar Islands]. The Court may, on reflection, note something rather familiar about the closing line which is now being put on the screen, and indeed about the Hawar Islands themselves. Can they not be considered as a fringe of islands so closely associated with the mainland coast as to be considered part of it? In

¹²CR 2000/6, pp. 33-34, para. 2.

other words, Qatar would invite the Court to consider carefully the alternative theory that the Hawar Islands may constitute "a fringe of islands along the coast in its immediate vicinity" within the meaning of Article 7, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, with all the consequences which would flow from that concept.

34. In short, Qatar remains unimpressed by the criticisms made by our opponents of the application in the present case of the basic principle (or, if one prefers, strong presumption) that an island located within the territorial sea of a State appertains to the coastal State. Any necessary qualifications which have been made to the application of that principle to accommodate cases where another State may already have acquired title to such an island by virtue of a valid treaty or by virtue of having otherwise made out a "fully-established case to the contrary" (in the words of the first Award in the *Eritrea/Yemen* case) can be met in the formulation of the principle. Qatar is satisfied that Bahrain has not been able to develop, to the satisfaction of the Court, a fully-established case for its own claim of title based upon the alleged pre-1936 *effectivités* on which it relies.

Bahrain base points on spit of Hawar Island

35. Mr. President, Members of the Court, before I yield to the next speaker, there is one matter of cartographic detail to which I must refer. In his commentary accompanying the video presentation made by Bahrain on 13 June, Mr. Volterra took up again Qatar's depiction of the tail of Hawar on its map No. 5 submitted with the Qatar Memorial, and showed us various images purporting to show that, at low tide, the end of the tail of Hawar remains "a significant distance" from the Qatari shore¹³. Mr. President, there is a saying, at any rate in the English language, that "the camera never lies": but, as I have already observed, it can seriously mislead. I do not propose to subject the Members of the Court to further visual distortions, but I would ask them to look carefully at the following maps and charts, some of which indeed I showed to the Court on 30 May. Qatar prepared its map No. 5 using edition No. 2 of the Bahrain map in the 1:50,000 series, that is to say, the edition published in 1986. I now put up the relevant portion of that map on the screen. Beside it, I put up the relevant portion of Bahrain nautical chart No. 5005, published in 1987. As

¹³CR 2000/13, p. 32, para. XXVI.

you will see, the depiction of the tail of Hawar on the chart on the right, is well-nigh identical to the depiction of the same feature on edition No. 2 of the Bahrain map in the 1:50,000 series. I now show on the screen the relevant portion of the revised 4th edition of the Bahrain map of the Hawar Islands in the 1:50,000 series. This was published only in 1997 and was not accordingly available to Qatar at the time when it prepared map No. 5 submitted with the Qatar Memorial. The differences between the two maps are very apparent. In the more recent 4th edition map, the representation of the spit has been modified to show that it may not be above water at all states of the tide, particularly at high tide; but it does show the apparent low-water mark extending out to a point about 250 m from the mainland of Qatar.

36. The question still is: what is the distance between the low-water line on the mainland of Qatar and the nearest low-water line on the so-called tail of Hawar? Qatar insists that that distance is no more than 250 m, and no amount of video misrepresentation or photographic manipulation can change that. This distance, I may say, is not much more, as the crow flies, than the distance between the Court's new building and the entrance to its grounds. The Court may in any event wish to note some of the base points which Bahrain is claiming around the Hawar Islands for its territorial sea boundary [show map No. 110 in Bahrain judges' folders for 15 June]. I now show on the screen a copy of the map which Professor Reisman put up on 15 June to illustrate the base points which it is claiming for the delimitation of its territorial sea boundary with Qatar in the southern sector. As the Court will see, Bahrain is still claiming three base points — now illustrated by arrows — on the spit of Hawar pointing towards the mainland, including one right at the end of the tail. Bahrain is presumably not claiming a submarine base point.

37. Qatar maintains that its own positive case for sovereignty over the Hawar Islands is well founded in fact and in law, resting, as it does, on the seven general propositions which I advanced at the beginning of my statement, combined with the other arguments, presented by my colleagues, Professor Salmon, Mr. Shankardass, Ms Pilkington and Mr. Bundy over the past three or four weeks. Qatar's case on the Hawar Islands rests on a combination of historical, geographical and legal arguments which my colleagues and I have sought to present to you in our oral pleadings as well as in our written pleadings. Given that the outcome of this case, at least so far as the question of title to the Hawar Islands is concerned, may depend upon an assessment by the Court of

disputed questions of fact, Qatar would ask the Members of the Court to study carefully, the documentary and other evidence which has been presented to them, trusting that they will be able to distinguish — as I am sure they will — between proof and mere assertion.

Mr. President, that concludes my presentation this morning. With your permission, I suggest that you might now call Professor David to the rostrum. Thank you.

Le PRESIDENT : Je vous remercie, sir Ian, et je donne maintenant la parole au professeur Eric David.

Monsieur DAVID : Je vous remercie, Monsieur le président, de me donner à nouveau la parole.

ZUBARAH

1. Monsieur le président, Madame et Messieurs de la Cour, j'avais commencé mon exposé, le 5 juin dernier, en disant que, dans le présent différend, la revendication de Bahreïn sur la région de Zubarah n'était pas la partie la plus compliquée du dossier à présenter. Mon opinion n'a pas changé après avoir entendu les plaidoiries de nos adversaires sur ce sujet, même si nous avons tous appris avec grand intérêt que Gilgamesh avait trouvé à Bahreïn le secret de la jeunesse éternelle¹, et on comprend que quelques siècles plus tard, les Al-Khalifah l'aient suivi dans cette île merveilleuse.

2. Plus sérieusement, je vais reprendre le plan que M. Shankardass et moi-même avons suivi initialement en examinant, aussi succinctement que possible, conformément au Règlement de la Cour et aux pressantes recommandations de son président, les réponses — du moins les plus pertinentes — ou les absences de réponse de Bahreïn aux arguments de Qatar.

3. Je ne reviendrai pas sur le caractère artificiel et tactique de la demande de Bahreïn sur Zubarah², sinon pour observer qu'assez curieusement, Bahreïn n'hésite pas à présent à adresser le même reproche à Qatar à propos de sa revendication sur les îles Hawar. Pour M. Volterra, cette revendication ne servirait que de contrepoids à la revendication, supposée réelle celle-là, de

¹M. J. Paulsson, CR 2000/11, 8 juin 2000, p. 44, par. 5.

² CR 2000/8, 5 juin 2000, p. 51-52, par. 1-4.

Bahreïn sur Zubarah³. La Cour appréciera qui, de Qatar ou de Bahreïn, utilise le règlement judiciaire des différends à des fins essentiellement tactiques, mais en gardant à l'esprit que les tentatives répétées par Qatar de soumettre la question des îles Hawar au règlement arbitral ou judiciaire remontent à 1964⁴, alors que la volonté par Bahreïn de soumettre la question de Zubarah à un tel règlement n'a été introduite qu'en 1988⁵.

D'ailleurs, Bahreïn lui-même ne semble guère croire en sa revendication sur Zubarah puisqu'il n'a pas hésité à qualifier l'action judiciaire de Qatar d'«aventure *sans risque*» où Qatar «n'avait rien à perdre en déposant unilatéralement sa requête»⁶ (les italiques sont de moi). Je me garderai bien de tirer des conclusions hâtives de ce bel accès de lucidité, sauf pour constater que si Bahreïn estime que Qatar ne court aucun risque en soumettant ce contentieux au règlement judiciaire, c'est que Bahreïn accorde bien peu de crédit à ses propres demandes, et notamment à celle sur Zubarah...

4. Je ne reviendrai pas non plus sur la question des origines de Zubarah : le point n'est pas essentiel pour démontrer la souveraineté de l'une ou l'autre des Parties, mais il demeure que les éléments produits par les Parties tendent à montrer que Zubarah existait avant l'arrivée des Al Khalifah⁷ même si Bahreïn présente certains de ces éléments comme «spéculatifs»⁸.

5. Je peux à présent aborder le fond de ce qui continue à diviser Bahreïn et Qatar à propos de Zubarah, et comme au premier tour, j'examinerai successivement la manière dont Bahreïn considère [1.1] le fondement du titre de Qatar sur Zubarah (I), [1.2] la confirmation de ce titre (II) et [1.3] l'absence de rôle joué par l'allégeance des Naïm envers l'émir de Bahreïn (III). Je commence donc avec le fondement du titre de Qatar sur Zubarah.

I. LE FONDEMENT DU TITRE DE QATAR SUR ZUBARAH [2.1]

6. En ce qui concerne l'acquisition par Qatar de son titre sur Zubarah à travers l'établissement de l'autorité des Al-Thani sur l'ensemble de la péninsule, Bahreïn a insisté sur le

³M. R. Volterra, CR 2000/13, 13 juin 2000, p. 10, par. 10.

⁴CR 2000/8, 5 juin 2000, p. 51-52, par. 1-4.

⁵*Ibid.*

⁶CR 2000/11, 8 juin 2000, p. 10 par. 16.

⁷CR 2000/8, 5 juin 2000, p. 53, par. 7.

⁸M. J. Paulsson, CR 2000/11, 8 juin 2000, p. 46, par. 21.

fait que la péninsule de Qatar était une dépendance de Bahreïn jusqu'en 1868⁹, et qu'ensuite, il ne voyait pas comment Qatar, en émergeant géographiquement en 1868 — je reprends les termes de M. Paulsson —, aurait pu étendre sa souveraineté à Zubarah ou aux îles Hawar¹⁰. A moins de recourir à une quelconque théorie des «frontières naturelles» ou d'une «unité géographique prédestinée»¹¹, M. Paulsson a dit qu'il était «impossible» pour Qatar de prouver que sa souveraineté s'était étendue à Zubarah et aux îles Hawar¹².

La réplique est pourtant simple.

7. En ce qui concerne la souveraineté — disons plus correctement, l'autorité — de l'émir de Bahreïn sur la péninsule avant 1868, Qatar a montré dans ses écritures, et M^c Pilkington l'a répété en cette enceinte, [2.2] à quel point cette autorité restait éminemment théorique. Je ne reprendrai pas tout ce qui a été écrit¹³ et dit à ce sujet¹⁴.

8. En ce qui concerne l'extension de l'autorité de Qatar à Zubarah en 1868, là aussi, on ne peut que se référer à ce qui a déjà été largement exposé. Si l'autorité du cheikh de Bahreïn sur la péninsule de Qatar est symbolique, [2.3] celle des Al-Thani sur ce même territoire est constatée dès 1862 par un visiteur étranger¹⁵, elle est reconnue par les Britanniques, comme l'a rappelé hier M. Bundy, [2.4] à travers le traité du 12 septembre 1868¹⁶, et elle est encore confirmée dans le témoignage de Lorimer qui voit en Muhammad-bin-Thani qui signe ce traité au nom des tribus de Qatar [2.5] «l'homme le plus influent de *tout* le promontoire»¹⁷ (les italiques sont de moi). Ces faits, que Bahreïn n'a d'ailleurs pas contestés, permettent de constater l'évidence, à savoir que la révolte des tribus de Qatar contre le cheikh de Bahreïn et la signature des traités de 1868

⁹ *Ibid.*, CR 2000/12, 9 juin 2000, p. 19, par. 85; aussi sir E. Lauterpacht, CR 2000/11, 8 juin 2000, p. 16, par. 19.1.

¹⁰ M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 19, par. 86.

¹¹ *Ibid.*, par. 84, 88.

¹² *Ibid.*, par. 84.

¹³ Contre-mémoire de Qatar, vol. 1, par. 2.2-2.7; réplique de Qatar, vol. 1, par. 2.5; voir aussi ce qu'écrivent les Britanniques : Lorimer pour la période 1823-1840, dans mémoire de Qatar, annexe II.5, vol. 3, p. 201 suiv.; ou le résident politique en 1868, dans mémoire de Qatar, annexe II.7, vol. 4, p. 53.

¹⁴ M^c N. Pilkington; CIJ, CR 2000/5, p. 49, par. 17 suiv.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 52, par. 32 ss.

¹⁷ Mémoire de Qatar, annexe II.5, vol. 3, p. 208.

transforment l'autorité *de facto* des Al-Thani sur la péninsule [2.6] en une autorité *de jure* qui comprend *ipso facto* et *ipso jure* Zubarah et les îles Hawar.

Je disais, il y a deux semaines, que l'accessoire suit le principal¹⁸; presque en écho, le professeur Reisman rappelait la semaine passée que, pour l'arbitre de l'affaire de l'*Ile de Palmas*, si un groupe d'îles est considéré en droit comme une unité — et c'est à fortiori le cas d'une péninsule —, «le destin du principal entraîne le destin du reste»¹⁹.

Qatar a donc fait la démonstration que la péninsule se détache complètement de Bahreïn en 1868, et contrairement à ce que soutient sir Elihu Lauterpacht²⁰, c'est à Bahreïn de prouver que Zubarah serait pourtant resté sous son autorité. A supposer que Bahreïn réussisse à faire une démonstration que l'on n'a trouvée jusqu'à présent ni dans ses écritures, ni dans ses plaidoiries, on a vu que les événements postérieurs à 1868 confirmaient que le destin de Zubarah suivait le destin de la péninsule.

9. Il est donc vain aussi de s'interroger, comme le fait M. Paulsson, sur l'allégeance des tribus locales aux Al-Thani, avant ce que M. Paulsson appelle «l'attaque de 1937»²¹.

Le pouvoir des Al-Thani sur l'ensemble de la péninsule est, pour reprendre un vocable cher à Bahreïn, *une effectivité*, qui vaut toutes les allégeances du monde.

La suite des événements le confirme.

10. Lors du premier tour des plaidoiries, Qatar avait montré que, même si l'on prétendait isoler le cas de Zubarah du reste de la péninsule, l'histoire montrait que le titre de Qatar sur Zubarah avait trouvé une large confirmation [2.7] entre 1873 et 1878. Sur ces événements pourtant capitaux, Bahreïn n'a rien répondu lors du premier tour de plaidoiries; tout au plus trouve-t-on une vague allusion à ces événements chez M. Paulsson lorsqu'il les qualifie d'«incidents isolés au cours desquels des tribus étaient envoyées à Zubarah par les Ottomans et par les Al-Thani lors de l'une ou l'autre de leurs tentatives infructueuses d'y imposer leur autorité»²².

¹⁸ CR 2000/8, 5 juin 2000, p. 55, par. 12.

¹⁹ CR 2000/15, 14 juin 2000, p. 11, par. 44.

²⁰ CR 2000/11, 8 juin 2000, p. 16, par. 19.2.

²¹ CR 2000/12, 9 juin 2000, p. 18, par. 84.

²² *Ibid.*, p. 17, par. 76.

Monsieur le président, voilà un moment où il est dur de se plier à votre désir, pourtant sage, de ne pas répéter ce qui a été dit car il est tentant pour le plaideur de confronter encore une fois la réalité avec la version qu'en donnent nos adversaires. Mais *dura lex sed lex*, je respecterai le Règlement de la Cour et votre souhait.

*

11. En conclusion, Bahreïn n'a pas apporté l'ombre d'une contestation à ces éléments de faits que constitue l'absence de pouvoir réel des Al-Khalifah sur la péninsule de Qatar avant 1868, avant le développement du pouvoir des Al-Thani sur cette péninsule à partir des années 1850, sur la révolte de toutes les tribus de la péninsule contre les Al-Khalifah en 1867-1868, sur la conclusion en septembre 1868 de traités séparés par la Grande-Bretagne d'un côté avec Ali-bin-Khalifah, présenté comme «le cheikh de Bahreïn», de l'autre avec Mahomed bin Saneé, présenté comme «le chef d'El-Kutr». Ces faits sont historiques et ils conduisent à une conséquence juridique simple, à savoir que c'est *toute* la péninsule de Qatar, y compris Zubarah et les îles Hawar, qui forme désormais, en fait et en droit, un ensemble géopolitique distinct et indépendant de Bahreïn.

II. LA CONFIRMATION DU TITRE DE SOUVERAINETÉ DE QATAR SUR ZUBARAH [3.1]

12. Lors du premier tour de plaidoiries, Qatar avait montré que son titre sur Zubarah avait trouvé confirmation, d'une part [3.2] dans l'exercice par Qatar de son autorité à Zubarah (A), d'autre part [3.3] dans la reconnaissance générale de ce titre par les autres Etats, ainsi que par Bahreïn lui-même (B). Examinons à nouveau, si vous le voulez bien, ces deux aspects de la confirmation du titre.

A. L'exercice par Qatar de son autorité à Zubarah après 1878 [4.1]

13. Comme je l'ai dit, je ne reviens pas sur les années 1873-1878 puisque Bahreïn n'a pas répondu à ce que nous avons dit à ce sujet lors du premier tour des plaidoiries.

Pour la période postérieure à 1878, je distinguerai les faits d'autorité de Qatar contestés par Bahreïn (1) et ceux que Bahreïn invoque en sa faveur (2).

1. Les faits d'autorité de Qatar contestés par Bahreïn [4.2]

14. Qatar avait choisi, comme exemples particulièrement significatifs d'exercice de son autorité à Zubarah après 1878, des événements survenus en 1889, 1892, 1895, 1911, 1935 et 1937²³. Bahreïn n'a discuté que des événements de 1895 et 1937. Je ne parlerai donc que de ces derniers et ne reviendrai pas sur les autres dont la valeur probante n'a pas été contestée par Bahreïn.

15. En ce qui concerne l'accueil à Zubarah en 1895, par Jasim-al-Thani, de la tribu des Al-bin-Ali [4.3], et la décision des Britanniques d'envoyer un navire de guerre sur les lieux afin de prévenir une éventuelle invasion de Bahreïn par les forces de Jasim, j'avais critiqué l'analyse de Bahreïn consistant à dire que l'action des Britanniques était motivée par un titre de l'émir de Bahreïn sur la région de Zubarah²⁴. M. Paulsson m'a répondu en citant une lettre datée du 23 juillet 1895 où le commandant du navire britannique écrit à un fonctionnaire turc que Zubarah est une des villes appartenant au cheikh de Bahreïn²⁵; en outre, M. Paulsson invoque un rapport turc de 1897 disant que, selon les Britanniques, Zubarah serait sous le contrôle de Bahreïn²⁶.

16. Monsieur le président, Madame et Messieurs de la Cour, j'avais dit, lors du premier tour de plaidoiries, qu'en slalomant adroitement à travers les innombrables documents britanniques consacrés à Zubarah, il était possible de trouver, çà et là, l'une ou l'autre déclaration favorable aux thèses de Bahreïn²⁷. Les deux documents cités en sont des exemples. Nos adversaires auraient même pu citer, à propos de cet épisode, un autre document britannique affirmant que l'émir de Bahreïn voyait dans l'installation des Al-bin-Ali à Zubarah «un empiètement injuste sur ses territoires ancestraux»²⁸.

Il reste que quand on prend la peine d'examiner tous les documents relatifs à cette affaire, la lettre de l'officier de marine britannique citée par nos adversaires est un exemple atypique qui ne trouve aucun appui dans le reste de la correspondance relative à cet événement. Cette correspondance confirme au contraire que le seul et unique souci des Britanniques était non de préserver une prétendue souveraineté de Bahreïn à Zubarah, mais simplement d'assurer la sécurité

²³CR 2000/9, 5 juin 2000, p. 13-15, par. 25- 26.

²⁴*Ibid.*, p. 13-14, par. 26.

²⁵CR 2000/12, 9 juin 2000, p. 18, par. 78.

²⁶*Ibid.*, par. 79.

²⁷CR 2000/9, 5 juin 2000, p. 17, par. 35.

²⁸24 mai 1895, mémoire de Qatar, annexe II.41, vol. 5, p. 139.

de l'île contre une éventuelle agression des tribus de Qatar. Zubarah apparaissait alors, pour paraphraser ce que Napoléon disait à propos du port d'Anvers vis-à-vis de l'Angleterre, comme «un pistolet braqué sur le cœur de Bahreïn». La Cour trouvera en référence [4.4] plus d'une demi-douzaine d'exemples — j'en montre certains ici à l'écran — montrant que l'action militaire des Britanniques en 1895 contre le cheikh Jasim Al-Thani n'avait d'autre motif que la seule crainte d'une attaque contre Bahreïn des tribus rassemblées à Zubarah; il ne s'agissait nullement — et pardonnez-moi de le répéter — de protéger un quelconque titre de souveraineté de Bahreïn sur la région²⁹.

Lors des événements de 1937, dont je parlerai dans un instant, le résident politique écrira :

«l'action prise en 1895 par les bateaux de Sa Majesté de détruire les boutres hostiles à Zubarah visaient à prévenir l'invasion de Bahreïn depuis Qatar et n'appuyait en aucune manière la revendication de Bahreïn sur Zubarah»³⁰. [4.4a]

17. Quant au document turc disant que, pour les Britanniques, Zubarah relève de Bahreïn, nous venons de voir que cela ne correspond nullement à la position officielle des Britanniques sur Zubarah. Ce document n'implique en outre aucune reconnaissance par la Turquie de ce qui est affirmé par le capitaine britannique. Outre les très nombreux documents turcs montrant que Zubarah est considéré comme un *nahiye*, un sous-district du *kaza* de Qatar, donc comme un territoire sous juridiction ottomane³¹, la phrase qui suit celle citée par nos adversaires affirme : «Cependant le Gouvernement ottoman n'a encore nullement reconnu la prétention de la Grande-Bretagne qu'elle a le droit de protéger Oman et les îles de Bahreïn.»³²

Ce document est donc sans pertinence pour la thèse de Bahreïn.

Bahreïn ajoute toutefois que ce n'est pas parce que les Ottomans présentaient Qatar comme une entité entièrement contrôlée par eux que c'était réellement le cas : toujours selon la Partie adverse, l'Iraq a dit la même chose du Koweït et l'Iran de Bahreïn³³. Il y a toutefois une grande différence entre ces exemples caricaturaux et la présente espèce : les Turcs étaient à Qatar, ce qui

²⁹Mémoire de Qatar, annexe II.39 (par. 3), 40 (par. 3 et 6), 42 (par. 2 et 4), vol. 5, p. 131-143; annexe III.42 et 44, vol. 6, p. 195 et 203.

³⁰Mémoire de Qatar, annexe III.135, vol. 7, p. 180.

³¹Réplique de Qatar, vol. 1, p. 243-244; voir. aussi Dr. A. Al-Meri, CR 2000/6, 30 mai 2000, p. 9-12, par. 5, 19 et 21.

³²Mémoire de Bahreïn, annexe 63 a), vol. 2, p. 269.

³³M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 9, par. 40.

n'est pas le cas aujourd'hui de l'Iraq au Koweït ou de l'Iran à Bahreïn. Certes, il n'y avait pas un soldat turc sur chaque mètre carré de sol qatarien, mais faut-il encore rappeler cette jurisprudence désormais classique qu'évoquait la semaine passée le professeur Weil³⁴, évoquée encore tout à l'heure par M. Bundy, et qui admet que, selon les circonstances, surtout pour des territoires faiblement habités, un exercice intermittent de la souveraineté n'affecte pas la validité du titre³⁵ ? Or, qui douterait encore que les Al-Thani ont exercé leur autorité à Zubarah chaque fois qu'ils l'ont voulu³⁶ ?

18. J'en viens aux événements de 1937 [4.5] et à la soumission forcée d'une fraction des Naïm, les Al-Jabr, par l'émir de Qatar, soumission que nos adversaires s'évertuent à présenter comme une manifestation de l'expansionnisme de Qatar — en quelque sorte un *remake* de *La conquête de l'Ouest* — et en outre comme une violation de l'interdiction du recours à la force dans les relations internationales³⁷. Je voudrais cependant préciser que l'action de Qatar, malgré la gravité de sa qualification par Bahreïn, n'a pas fait à l'époque, dans la pire des estimations, plus d'une douzaine de victimes de part et d'autre³⁸, même si, bien sûr, c'est douze victimes de trop et si l'existence d'une «agression» internationale³⁹ ne se mesure pas au nombre de victimes.

Quoi qu'il en soit, sir Elihu Lauterpacht a paru surpris de ma discrétion sur les événements de 1937⁴⁰. Monsieur le président, Madame et Messieurs de la Cour, si je suis resté discret sur ce point, c'est parce que je dois avouer que jamais je n'aurais imaginé que la qualification d'«agression» internationale qui figurait dans la réplique de Bahreïn⁴¹, à l'endroit que j'avais précisément qualifié, il y a quinze jours, de «chef-d'œuvre absolu de refus de la réalité»⁴², jamais je

³⁴ CR 2000/15, 14 juin 2000, p. 47, par. 63.

³⁵ *Ile de Palmas*, 4 avril 1928, RSA, II, p. 840 et 867; *Groenland Oriental*, 5 avril 1933, C.P.J.I. série A/B n° 53, p. 46, 50 et 51; *Temple de Préah Vihéar*, C.I.J. Recueil 1962, p. 29-30; *Rann de Kutch*, 19 février 1968, RSA, XVII, p. 564 et 569; *Dubai/Sharjah*, 19 octobre 1981, ILR, 91, p. 624; *Kasikili/Sedudu*, C.I.J. Recueil 1999, opinion dissidente de M. Rezek, par. 15.

³⁶ CR 2000/9, 5 juin 2000, p. 13-15, par. 25-26.

³⁷ M. Al-Arayed, CR 2000/11, 8 juin 2000, p. 8-9, par. 8, 10 et 21; sir Elihu Lauterpacht, *ibid.*, p. 22, 38-41, par. 23, 89-99.

³⁸ Réplique de Qatar, vol. I, p. 245, note 38.

³⁹ Réplique de Bahreïn, vol. I, par. 272.

⁴⁰ CR 2000/11, 8 juin 2000, p. 38, par. 89.

⁴¹ Réplique de Bahreïn, vol. I, par. 272.

⁴² CR 2000/9, 5 juin 2000, p. 25, par. 55.

n'aurais cru que cette qualification allait revenir dans ce prétoire et donner lieu à trois pages de développement et dix minutes de plaidoirie devant la Cour internationale de Justice⁴³. Lorsque l'exagération devient boursoufflure, je pense alors à Cyrano de Bergerac se moquant de son nez qui devient dans la célèbre tirade que je cite de mémoire : «C'est un pic, c'est un cap, que dis-je un cap, c'est une péninsule...»

19. Monsieur le président, nul ne songe à contester qu'en 1937, le Pacte de la Société des Nations de 1919 et le pacte Briand-Kellog de 1928 avaient définitivement mis la guerre hors-la-loi comme mode de règlement des différends internationaux. Nous sommes plusieurs dans cette salle à l'enseigner ou à l'avoir enseigné chaque année à des cohortes d'étudiants, et je ne vais donc pas contredire mon savant contradicteur sur ce point. Il n'en reste pas moins extraordinaire — et c'est un euphémisme — de soutenir que l'action de l'émir de Qatar à Zubarah, en 1937, violait l'interdiction du recours à la force : d'une part, cette conclusion tient pour acquis ce qui n'a pas été démontré, à savoir que Zubarah serait restée une possession de Bahreïn alors que ce n'était plus le cas depuis quelque 70 ans — ce que les Britanniques reconnaissent à l'époque⁴⁴ [4.5a]; d'autre part, cette action n'était pas différente de celle qui avait déjà été menée à Zubarah en 1878 sans la moindre opposition des Britanniques⁴⁵, enfin, cette conclusion implique alors que la Grande-Bretagne aurait violé l'article 3 [4.6] de la convention du 31 mai 1861 qui l'obligeait «à prendre les mesures nécessaires pour obtenir réparation de tout dommage ... infligé ... à Bahreïn ou à ses dépendances dans le Golfe»⁴⁶, nous sommes en 1861; si la Grande-Bretagne avait violé de manière aussi flagrante ses obligations internationales, on l'aurait su; or cela semble avoir totalement échappé aux juristes éminents du Foreign Office et de l'India Office !... Et pour cause, le résident politique écrit le 5 mai 1937 : "*juridically the Bahrain claim to Zubarah must fail*"⁴⁷.

20. On ne manquera pas d'observer, en passant, que la thèse de la violation, en 1937, de l'interdiction du recours à la force soutenue par nos adversaires, thèse qui d'ailleurs aurait été correcte, si d'aventure, les Al-Thani avaient débarqué à Manama en 1937, cette thèse, disais-je,

⁴³Sir E. Lauterpacht, CR 2000/11, 8 juin 2000, p. 38-41, par. 89-99.

⁴⁴Mémoire de Qatar, annexe III.126, vol. 7, p. 131.

⁴⁵Mémoire de Qatar, annexe II.5, vol. 3, p. 224-225.

⁴⁶Mémoire de Qatar, annexe II.20, vol. 5, p. 45.

⁴⁷Mémoire de Qatar, annexe III.126, vol. 7, p. 132; aussi, *ibid.* annexe III.135, vol. 7, p. 179.

confirme que Qatar et Bahreïn étaient à l'époque deux Etats indépendants puisque l'interdiction du recours à la force ne s'applique que dans les relations internationales des Etats; sur ce point, sir Elihu Lauterpacht rejoint le professeur Salmon et donne tort à son collègue M^e Kemicha qui, pour les besoins de l'*uti possidetis*, s'est efforcé en vain de démontrer le contraire.

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21. En conclusion, l'interprétation par nos adversaires des événements de 1895 et de 1937 n'infirme et n'affaiblit en aucune manière la portée des actes d'autorité de Qatar sur Zubarah.

Voyons à présent si, de son côté, Bahreïn peut invoquer un quelconque acte d'autorité ou de souveraineté à Zubarah.

2. Les faits d'autorité revendiqués par Bahreïn [5.1]

22. Bahreïn se prévaut des relations d'allégeance des Naïm avec les Al-Khalifah⁴⁸ [5.2]. Il invoque même des pétitions de personnes présentées comme des résidents de Zubarah et attestant de leur allégeance à l'émir de Bahreïn⁴⁹. J'ai montré lors du premier tour de plaidoiries que ces relations d'allégeance étaient impuissantes à fonder un titre de souveraineté en la présente espèce [5.3] eu égard à la variabilité des allégeances des Naïm, à l'absence d'autorité réelle des émirs de Bahreïn sur cette région, et à la présence parmi les Naïm de fractions qui faisaient allégeance à l'émir de Qatar⁵⁰.

Sans beaucoup se soucier des arguments développés par Qatar sur ce point, M. Paulsson se réfère à une source que Bahreïn chérit tout particulièrement, le *Mémoire* du capitaine Brucks [5.4] qui, pour la période 1821-1829 constate que les habitants des villages de la côte entre Ras Rakkan et Zubarah relèvent de l'autorité de Bahreïn⁵¹. Ce qu'on ne nous dit cependant pas, c'est qu'à l'époque, *l'ensemble* de la péninsule était supposé soumis à l'autorité de Bahreïn, même si cette

⁴⁸Sir E. Lauterpacht, CR 2000/11, 8 juin 2000, p. 16, par. 19.1; M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 16, par. 66.

⁴⁹M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 21, par. 93.

⁵⁰CR 2000/9, 5 juin 2000, p. 19 et suiv., par. 39 et suiv.

⁵¹M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 16, par. 70.

autorité, comme on l'a vu, était très théorique (*supra* par. 7)⁵². De fait, le mémoire du capitaine Brucks cite une douzaine d'endroits dont les habitants sont tous présentés comme des sujets de Bahreïn [5.5] et ces endroits comprennent non seulement Zubarah et les deux villages de pêcheurs de la principale île Hawar, mais aussi Doha, Wakrah, Fuwairat, Khor Hassan, Zakhnuniyah, etc⁵³. Si le mémoire du capitaine Brucks est pertinent pour la période antérieure à 1829, il n'a pas de signification plus particulière pour Zubarah ou pour les îles Hawar que pour n'importe quel autre endroit de la péninsule puisque c'est l'ensemble de celle-ci qui était soumise à l'époque à l'autorité nominale du cheikh de Bahreïn. En outre, ce mémoire n'est guère significatif pour la période postérieure à 1829, et *a fortiori* pour celle qui suit les événements de 1868.

23. M. Paulsson nous dit encore que les Naïm payent des taxes à l'émir de Bahreïn et lui rendent divers services⁵⁴ [5.6]. Cet argument qui figurait déjà dans le contre-mémoire de Bahreïn a été largement rencontré dans la réplique de Qatar⁵⁵. On ajoutera que M. Paulsson ne précise pas de quels Naïm il s'agit, mais de toute façon, Qatar a également montré, documents à l'appui [5.7], que l'émir de Bahreïn, contrairement à celui de Qatar, ne levait pas d'impôts à Zubarah⁵⁶. Ce sont les exemples que la Cour peut voir à l'écran.

24. M. Paulsson invoque la présence des Naïm à Zubarah ou leurs déplacements saisonniers de Bahreïn à Zubarah⁵⁷ [5.8]. Indépendamment de ce qui a déjà été dit sur l'allégeance et l'identification desdits Naïm⁵⁸, des déplacements de personnes privées n'ont évidemment aucune signification pour l'établissement de la souveraineté⁵⁹. Permettez-moi, Monsieur le président, de rappeler sur ce point des extraits de la jurisprudence internationale récente qui sont sans doute familiers à la Cour. Dans l'affaire *Botswana/Namibie* [5.9], la Cour a dit :

«Il n'est d'ailleurs *pas inhabituel* que les habitants de régions frontalières en Afrique traversent les frontières en question, pour des raisons liées à l'agriculture ou

⁵²Contre-mémoire de Qatar, vol. 1, par. 3.122.

⁵³Mémoire de Bahreïn, annexe 7, vol. 2, p. 97-101.

⁵⁴CR 2000/12, 9 juin 2000, p. 16, par. 71.

⁵⁵Réplique de Qatar, vol. 1, par. 6.49 et suiv.

⁵⁶CR 2000/9, 5 juin 2000, p. 21, par. 43.

⁵⁷CR 2000/12, 9 juin 2000, p. 16-17, par. 66 et 73.

⁵⁸CR 2000/9, 5 juin 2000, p. 23 et suiv., par. 49 et suiv.

⁵⁹Réplique de Qatar, vol. 1, par. 6.44.

au pacage, *sans que les autorités* d'un côté ou de l'autre de ces frontières *s'en alarment.*»⁶⁰ (Les italiques sont de nous.)

A fortiori en va-t-il ainsi dans la région du Golfe⁶¹ où comme le rappelaient, en 1981, les arbitres de l'affaire *Dubai/Sharjah*, [5.10] «le concept de frontière au sens occidental du terme était jadis totalement inconnu des peuples nomades de cette région»⁶². [Ma traduction.]

«A l'exception de la frange côtière, la population était nomade ou semi-nomade, et pour ces gens, le concept moderne de «frontière» n'avait pas de signification. Ils n'étaient concernés que par les secteurs ou les localités dans lesquels ils se déplaçaient.»⁶³ [Ma traduction.]

De manière proche, dans l'affaire *Erythrée/Yemen* en 1998, le tribunal arbitral observe [5.11]

«que les idées occidentales de souveraineté territoriale sont étrangères à des populations élevées dans la tradition islamique et habituées à des notions de territoire très différentes de celles reconnues dans le droit international contemporain»⁶⁴. [Ma traduction.]

Le tribunal ajoute que, dans ce contexte, toute sentence doit tenir compte des «traditions juridiques régionales»⁶⁵. Autrement dit *jacus predict actum*. Tout ceci s'applique, bien sûr aussi, aux îles Hawar.

Pour ces raisons, les déplacements occasionnels à des fins privées et récréatives des émirats de Bahreïn à Zubarah⁶⁶ ne pouvaient non plus apparaître comme un empiètement à l'autorité territoriale de Qatar sur la région de Zubarah telle qu'elle résultait des événements, notamment de 1868 à 1878. Comme le rappellent encore les arbitres de l'affaire *Dubai/Sharjah*, c'est l'exploitation du pétrole qui a rendu nécessaire l'établissement de frontières claires et précises entre les émirats⁶⁷. Auparavant, les gens se déplaçaient librement d'un territoire à l'autre. Cela ne voulait cependant pas dire qu'il n'existait pas, pour autant, une notion et une conscience de souveraineté territoriale, ainsi que le rappelait M. Salmon il y a 15 jours⁶⁸. D'où l'importance des éléments permettant de définir l'étendue de cette souveraineté comme par exemple, dans le cas des

⁶⁰*Ile de Kasikili/Sedudu, C.I.J. Recueil 1999*, Arrêt du 13 décembre 1999, par. 74.

⁶¹Documents supplémentaires de Qatar, doc. n° 16.

⁶²19 octobre 1981, *ILR*, 91, p. 562.

⁶³*Ibid.*, p. 587.

⁶⁴Sentence du 9 octobre 1998, par. 525.

⁶⁵*Ibid.*

⁶⁶M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 17-18, par. 75 et 80.

⁶⁷19 octobre 1981, *ILR*, 91, p. 562.

⁶⁸CR 2000/5, 29 mai 2000, p. 42, par. 27.

îles Hawar, le désintérêt total de Bahreïn pour ces îles avant les années trente ou les témoignages d'Alban ou de Prior⁶⁹.

25. M. Paulsson signale encore que beaucoup de familles Naïm avaient des maisons à la fois à Zubarah et à Bahreïn⁷⁰, que des membres un peu turbulents de la famille des Al-Khalifah étaient parfois exilés à Zubarah tandis que d'autres y vivaient en permanence⁷¹[5.12].

Monsieur le président, Madame et Messieurs de la Cour, si des faits de ce genre devaient constituer des actes de souveraineté, la moitié de la Côte d'Azur appartiendrait à la plupart des Etats d'Europe, d'Amérique ou du Moyen-Orient dont les ressortissants ont cédé au charme du climat et des paysages méditerranéens [5.13]... Le roi Albert de Belgique a une maison à Grasse : la Belgique serait bien reçue par la France si elle revendiquait cette propriété comme territoire belge ! Il eût été sans doute plus intéressant que Bahreïn produise des extraits de son cadastre commencé dans les années vingt et terminé au début des années trente⁷², mais de ce côté-là, le seul document que Bahreïn a réussi à fournir concerne une seule demande d'inscription au cadastre le 23 avril 1937⁷³, plusieurs semaines après le début des tensions à Zubarah. Et Bahreïn ne dit rien de la suite réservée à cette demande. Pour Hawar non plus, Bahreïn n'a produit aucun document cadastral.

26. Nos adversaires disent aussi que les émirs de Bahreïn ont continué à gouverner Zubarah tout au long du XIX^e siècle après avoir quitté la ville [5.14]⁷⁴. Les seules preuves qu'ils apportent à cet effet consistent en une référence aux paragraphes 104 à 112 de leur mémoire. On ne voit pas très bien ce qu'ils veulent prouver car ces paragraphes ne concernent que le XVIII^e siècle [5.15].

27. M. Paulsson évoque encore plus de vingt exemples de relations privilégiées entre l'émir de Bahreïn et les Naïm, exemples cités dans la réplique de Bahreïn⁷⁵. Rassurez-vous, Monsieur le président, je ne vais pas répondre à chacun de ces exemples, mais je voudrais ici attirer l'attention

⁶⁹Mémoire de Qatar, annexe III.228 et 229, vol. 8, p. 125 et p. 127.

⁷⁰CR 2000/12, 9 juin 2000, p. 17, par. 73.

⁷¹*Ibid.*, par. 75.

⁷²Mémoire de Bahreïn, annexe 227, vol. 4, p. 968.

⁷³Mémoire de Bahreïn, annexe 118, vol. 3, p. 638.

⁷⁴Sir. E. Lauterpacht, CR 2000/11, 8 juin 2000, p. 16, par. 19.1; M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 16, par. 65.

⁷⁵CR 2000/12, 9 juin 2000, p. 16, par. 71.

de la Cour sur un mode d'argumentation assez habile auquel Bahreïn a eu fréquemment recours dans sa réplique : c'est ce que nous avons appelé la technique de la répétition et du «point-boulet». Bahreïn reprend une liste de faits déjà développés dans ses écritures antérieures, et il les additionne afin d'impressionner le lecteur par leur nombre (la quantité primant la qualité) et il leur donne une apparence de vérité scientifique en référençant chacun d'eux [5.16]. En réalité, ces références sont de simples renvois à des affirmations ou des arguments du mémoire ou du contre-mémoire de Bahreïn et il n'est nullement tenu compte, ou très peu, des réponses fournies par l'adversaire. Or, si les humoristes pratiquent ce qu'on appelle le comique de répétition, les juristes savent que répéter, énumérer et additionner, ce n'est pas argumenter. Il n'est donc guère utile, et d'ailleurs impossible dans le laps de temps imparti aux plaidoiries, de répondre aux vingt-quatre «points-boulets» auxquels M. Paulsson renvoie. Je dois malheureusement laisser à la Cour la tâche difficile et fastidieuse, j'ai presque envie de dire le traitement inhumain, de séparer le bon grain de l'ivraie en retournant aux écritures et documents des Parties.

28. Un autre exemple frappant de cette méthode d'argumentation apparaît ainsi au paragraphe 72 de la présentation faite par M. Paulsson le 9 juin dernier⁷⁶. M. Paulsson ne craint pas d'évoquer ce qu'il appelle six échecs de tentatives d'expansion de Qatar à Zubarah entre 1874 et 1903, et il se réfère à la section 2.7 du mémoire de Bahreïn sans autre développement. Or, bien que ces soi-disant échecs de tentatives d'expansion aient fait l'objet d'une réponse appropriée aux paragraphes 5.17 et 5.18 du contre-mémoire de Bahreïn, cela n'a pas empêché Bahreïn d'y revenir, d'abord dans sa réplique⁷⁷ puis dans ses plaidoiries orales, et chaque fois, comme si, entre-temps, rien n'avait été dit à ce sujet par Qatar ! Je ne vais donc pas reprendre l'argument et je ne peux, ici aussi, que renvoyer la Cour aux écritures des Parties et lui demander de juger sur pièce la valeur des arguments présentés de part et d'autre. J'aborde à présent la reconnaissance du titre de Qatar sur Zubarah.

⁷⁶ CR 2000/12, p. 17, par. 72.

⁷⁷Réplique de Bahreïn, vol. 1, par. 239 et 247.

B. La reconnaissance du titre de Qatar sur Zubarah [6.1]

29. Je distinguerai les reconnaissances faites par des Etats tiers au différend de celles qui ont été faites par Bahreïn lui-même.

1. Les reconnaissances émanant d'Etats tiers [6.2]

30. Les exemples de reconnaissance par les Britanniques, les Turcs et d'autres Etats, que j'ai cités à l'appui du titre de Qatar sur Zubarah⁷⁸, n'ont guère suscité de contestation de la part des conseils de Bahreïn. Qatar en prend acte.

Seule l'invocation par Qatar des traités anglo-turcs de 1913 et 1914 a fait réagir Bahreïn⁷⁹. M. Bundy a expliqué, hier, pourquoi ces traités étaient pertinents et confirmaient l'appartenance à Qatar de toute la péninsule. Je n'y reviens donc pas.

31. M. Paulsson a toutefois mentionné certains textes qui, selon lui, tendraient à prouver que les Britanniques auraient reconnu les droits de Bahreïn sur Zubarah⁸⁰. Ces textes font partie du slalom, du gymkhana juridique auquel Bahreïn doit se livrer pour trouver l'un ou l'autre document apparemment défavorable aux thèses de Qatar. En relisant ces documents et en les situant dans leur véritable perspective, on constate cependant qu'ils n'ont nullement l'effet que nos adversaires prétendent leur attribuer.

Examinons-les ensemble si vous le voulez bien dans l'ordre chronologique.

32. M. Paulsson se réfère à un télégramme du résident politique daté du 18 août 1932 et concernant la recherche d'un terrain d'atterrissage possible à Qatar⁸¹ [6.3]. Selon M. Paulsson, ce télégramme indique que si les Britanniques n'obtenaient pas de l'émir de Qatar une autorisation d'atterrir, les Britanniques établiraient une piste d'urgence à Zubarah ou à Dohat Faisakh, deux endroits «proches de Bahreïn»⁸². Etant donné, toujours selon M. Paulsson, que l'autorisation des Al-Thani n'était pas requise pour atterrir à ces endroits — Zubarah et Dohat Faisakh —, cela signifie qu'ils faisaient partie du territoire de Bahreïn puisque les Britanniques disposaient déjà de droits d'atterrissage à Bahreïn. Deux observations :

⁷⁸ CR 2000/9, 5 juin 2000, p. 16-19, par. 29-38.

⁷⁹M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 19-20, par. 88-89.

⁸⁰*Ibid.*, p. 18, 20-21, par. 80-81, 91-92.

⁸¹*Ibid.*, p. 18, par. 81.

⁸²Réplique de Bahreïn, annexe 1, vol. 2, p. 1.

Primo, en disant que ces sites d'atterrissage sont «proches de Bahreïn» [6.4], on a quelque peine à voir dans ce texte une reconnaissance par les Britanniques de l'appartenance de Zubarah et de ses environs à Bahreïn;

Secundo, Dohat Faisakh est en outre mentionné — avec l'île Hawar d'ailleurs — dans le rapport de reconnaissance aérienne de la péninsule de Qatar fait par les Britanniques en 1934⁸³. Ce rapport ne mentionne pas Zubarah, mais rien dans le texte ne suggère qu'une partie de la péninsule ne relèverait pas de Qatar, mais relèverait de Bahreïn.

33. La Partie adverse invoque une lettre de l'agent politique Loch, du 29 mai 1933, disant que les prospecteurs de l'Anglo-Persian Oil Company se sont rendus en des lieux où l'émir de Qatar ne pouvait pas les laisser aller [6.6] et que les gens de Bahreïn utilisent comme villégiature estivale⁸⁴. Le texte perd toute portée lorsqu'on le confronte à des documents postérieurs⁸⁵ que M. Shankardass a évoqués au début de nos plaidoiries⁸⁶ et encore ce matin, documents qui démontrent que, pour les Britanniques, les territoires du cheikh de Bahreïn visés dans la concession pétrolière qu'il avait accordée en 1925 se limitaient aux territoires sous son contrôle, donc sous le contrôle du cheikh de Bahreïn, ce qui, comme l'écrit Laithwaite de l'India Office le 9 août 1933 [6.7], «semble clairement exclure les zones de Qatar et sans doute aussi Hawar qui, de toute façon appartient géographiquement à Qatar...»⁸⁷ [*Traduction du Greffe.*]

34. L'extrait de la lettre de l'agent politique du 29 mai 1933 citée par Bahreïn ajoute encore [6.8] : «de fait, il a été dit que l'année dernière encore (1932) le souverain de Qatar admettait en public que certains secteurs de la côte qatarienne relevaient de Bahreïn.»⁸⁸ [*Traduction du Greffe.*]

«Il a été dit», Monsieur le président, "*it is said*" : ce ne sont pas sur des «Il a été dit» qu'on fonde un titre, notamment quand l'histoire réelle de Zubarah montre à quel point ce lieu relève de l'autorité de l'émir de Qatar. Monsieur le président, je constate que le gong vient de sonner à ma

⁸³Mémoire de Qatar, annexe III.94, vol. 6, p. 486.

⁸⁴ CR 2000/12, 9 juin 2000, p. 18, par. 80.

⁸⁵Mémoire de Qatar, annexe III.85 à 88, vol. 6, p. 440-451.

⁸⁶ CR 2000/6, 30 mai 2000, p. 23-25, par. 37.

⁸⁷Mémoire de Qatar, ann. III.91, vol. 6, p. 467.

⁸⁸M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 18, par. 80.

montre, qu'il est treize heures et je ne voudrais pas vous infliger un traitement inhumain et dégradant selon les termes de la Convention européenne des droits de l'homme ou la Déclaration universelle des droits de l'homme, en vous demandant de prolonger encore cet exposé. Peut-être que vous préférerez que je m'interrompe à cet endroit-ci de ma plaidoirie.

Le PRESIDENT : Je vous remercie. Nous ne pouvons que nous en remettre au gong de votre montre et par conséquent vous terminerez cet exposé demain matin. Je vous remercie, Monsieur le professeur. Ceci met un terme aux plaidoiries de Qatar pour ce matin. La Cour se réunira à nouveau cet après-midi à quinze heures pour rendre son jugement sur la compétence dans l'affaire de l'*Incident aérien du 10 août 1999 (Pakistan c. Inde)*. Dans la présente affaire, elle se réunira demain matin à dix heures pour entendre la suite et la fin de la présentation de l'Etat de Qatar pour le deuxième tour de plaidoiries. Je vous remercie. La séance est levée.

L'audience est levée à 13 heures.
