

**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

**REPLY OF THE STATE OF QATAR**

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## PART I

### INTRODUCTION

This Reply of the State of Qatar is filed pursuant to the Order of the Court dated 17 February 1999 which extended until 30 May 1999 the time-limit for the filing by each of the Parties of a Reply.

### CHAPTER I - GENERAL

#### Section 1. Qatar's Case and Structure of Qatar's Reply

1.1 This Reply is divided into four Parts. Following this introductory Part I, Part II addresses "The Geographical and Historical Background", dealing in particular with the territorial integrity of Qatar (Chapter II) and the extent of the territory of Bahrain (Chapter III). Part III then addresses "The Hawar Islands and Other Territorial Questions". The Hawar islands are considered in Chapter IV, and in Chapters V and VI, Qatar addresses the questions of Janan island and Zubarah, respectively. The issue of maritime delimitation is dealt with in Part IV, and the Reply ends with Qatar's Submissions. Included at the end of this Volume are Appendices 1 and 2. Attached to this Reply there are three further Appendices in two separate volumes, together with a Map Atlas, and three volumes of Documentary Annexes. A list of these Appendices, Maps and Annexes may be found at the end of this Volume. In general, the Annexes are organised according to the Part of the Reply in which they are referred to. In other words Annexes to Part II of the Reply are numbered Annex II.1, II.2, etc. A list of certain documents which are being deposited separately with the Registry pursuant to Article 50, paragraph 2, of the Rules of Court is contained in the Agent of Qatar's letter to the Registrar dated 28 May 1999.

1.2 The Order of the Court dated 17 February 1999 placed on record the decision of Qatar to disregard, for the purposes of the present case, the 82 documents that had been challenged by Bahrain, and decided that the Replies would not rely on those documents. Qatar's decision had been announced by Qatar in its Interim Report of 30 September 1998, and was confirmed in Qatar's letter to the Court dated 1 February 1999. Qatar must once again reiterate here that its case on none of the issues before the Court is dependent on the documents that were challenged by Bahrain.

1.3 Consequently, there is no foundation for Bahrain's contention - which has been voiced by several Bahraini governmental authorities and widely reported in the press - that Qatar's decision

no longer to rely on the 82 challenged documents has effectively put an end to Qatar's case on the Hawar islands and Janan, and that the only territorial issue still facing the Court is Bahrain's claim to Zubarah<sup>1</sup>. On the contrary, there is a wealth of both documentary and cartographic evidence from numerous sources to support Qatar's claims in respect of all the issues, including not only the maritime issues and Zubarah but also the Hawar islands and Janan. A great deal of that evidence has already been submitted by Qatar with its Memorial and Counter-Memorial, and further supporting evidence is provided with this Reply.

1.4 On the basis of that evidence, Qatar will show in Chapter II of this Reply that from the date of the 1868 Agreements, shortly followed by the Ottoman arrival in Qatar in 1871, the separate identities of Qatar and Bahrain were continuously recognised by Britain, Turkey, Persia and other countries. It will further demonstrate that historical, geographical and cartographical sources have consistently shown that the waterless Hawar islands and the island of Janan (both inhabited only seasonally, if at all), as well as Zubarah, were viewed as appertaining to Qatar not only as a geographical entity but also as a political entity, exercising authority over the whole peninsula and the immediately adjoining islands, under successive independent Rulers long before Qatar's emergence as a fully-fledged State.

1.5 Conversely, Qatar will show in Chapter III that there is no evidence of any historical dominance of Bahrain over Qatar. It will further be seen that at least after the 1868 Agreements, the political entity of Bahrain was considered as consisting of only the main Bahrain island and four other islands in its immediate vicinity, which did not include the Hawar islands, Janan or any territory on the mainland of Qatar. This again is confirmed by consistent and overwhelming documentary and cartographical evidence and was also, tellingly, the view expressed in 1928 by Belgrave himself, the Ruler of Bahrain's Adviser, at a time when he had become "so far as internal administration was concerned... to all intents and purposes the ruler of the State"<sup>2</sup>. Qatar will also demonstrate that since at least 1868, Bahrain has had no territorial rights in any part of the peninsula of Qatar, its territorial waters or the islands wholly or partly situated therein.

1.6 With regard to the actual issues that have been submitted to the Court, it will be seen in Part III that Qatar's case on each one of the territorial questions is further strengthened by additional documentary evidence from Turkish and other sources filed with this Reply.

1.7 Qatar will show in Chapter IV that the principle of proximity as it applies to islands lying wholly or partly within the territorial waters of a State or other territorial entity supports and sustains Qatar's claim of sovereignty over the Hawar islands. Qatar will also demonstrate that the very strong presumption of Qatar's sovereignty over these islands by virtue of their proximity to Qatar's coast has not been, and cannot be, displaced by Bahrain, and that cartographic evidence from a wide variety of sources, both official and unofficial, further confirms that the Hawar islands were regarded as appertaining to Qatar. Moreover, it will be seen in Chapter V that there is no basis for any claim by Bahrain to sovereignty over Janan island, where the principle of proximity also supports Qatar's claim of sovereignty.

1.8 As far as Zubarah is concerned, it will be seen that Bahrain has raised this issue merely as a diversionary tactic. Chapter VI will confirm Qatar's case as already set out in its Memorial and Counter-Memorial. It will demonstrate that ever since the separation of the geographical and political entities of Qatar and Bahrain in the 19<sup>th</sup> century, Zubarah has been consistently recognised as forming part of Qatar, and that Bahrain's claim has no basis. On this issue too, this Reply contains further evidence, both documentary and cartographic, which confirms and strengthens the evidence already produced with Qatar's Memorial and Counter-Memorial.

1.9 Turning to maritime delimitation, Qatar will show in Part IV that Bahrain's case is fundamentally flawed by a series of gross exaggerations and distortions. Chapter VII, which discusses Bahrain's imaginary views of itself, will demonstrate the unfounded nature of Bahrain's claim to be a maritime State whose power and influence extends right up to the shores of the

Qatar peninsula. It will also be seen in that Chapter that both Dibal and Qit'at Jaradah, by application of the law of the sea, fall under Qatar's sovereignty.

1.10 Chapter VIII then deals with Bahrain's false allegations, in particular with regard to Qatar's alleged misrepresentation of what is meant by the Bahraini coast, and the so-called "undue weight" given by Qatar to the 1947 line. In this regard it will show that the most appropriate way of making the maritime delimitation between Qatar and Bahrain is to take as a starting point the respective main coasts of the Parties, and that the 1947 line is a highly relevant historical circumstance which has to be taken into account in determining the course of the single maritime boundary.

1.11 Finally, Chapter IX deals with the single maritime boundary claimed by Qatar. Qatar maintains the line for the single maritime boundary that it has previously put forward in both its Memorial and its Counter-Memorial and which, as is further shown in Chapter IX, leads to an equitable result.

1.12 Qatar cannot end this Section without emphasising once again that it does not accept the accuracy of the texts of its Memorial and Counter-Memorial as highlighted by Bahrain<sup>3</sup>. If Bahrain's highlighting were to be taken at its face value, included among the challenged documents and thus eliminated from the evidence would be, for example, Lorimer's *Gazetteer of the Persian Gulf, Oman and Central Arabia*, the 1913 Anglo-Ottoman Convention, and British Government records from the period up to 1933<sup>4</sup>. It is obvious that the highlighting exercise performed by Bahrain cannot be considered accurate, and Qatar must request the Court to disregard it. In its letter to the Court of 1 February 1999, Qatar announced that it would provide with this Reply a document to illustrate the consequences of its decision no longer to rely on the challenged documents in this case. As it is Qatar's Memorial and Counter-Memorial that the Court has to consider (and not Bahrain's version of these pleadings), Qatar submits herewith, for the convenience of the Court, copies of its own highlighted versions of its Memorial and Counter-Memorial. These are designed to assist the Court in determining which passages of those pleadings are no longer being relied upon by Qatar because they depend solely upon documentary annexes which Qatar has pledged itself to disregard. In this Reply, all references to Qatar's Memorial and Counter-Memorial are to the versions of those written pleadings as highlighted by Qatar, the highlighted passages being those which should be disregarded.

1.13 Finally, Qatar has sought to present its Reply in such a way as to eradicate any confusion which may have been created by Bahrain. Notably, in the course of this pleading and in Appendix 1, it has identified various serious mis-citations and distortions by Bahrain of the documentary evidence and of the content of Qatar's written pleadings. However, any failure by Qatar to answer specific allegations by Bahrain should not be construed as an implicit admission of such allegations. Nor should any failure by Qatar to indicate errors in the translations produced by Bahrain be construed as an acceptance by Qatar of such translations.

## **Section 2. Deficiencies in Bahrain's Written Pleadings**

1.14 Having set forth the main points of Qatar's case which will be expounded upon in this Reply, it is appropriate now to mention various deficiencies in Bahrain's written pleadings. As will be seen, these deficiencies include, but are not limited to, a failure to join issue with Qatar, the making of exaggerated claims and assertions, and the mis-citation and selective quotation of documentary evidence.

### **A. Bahrain's failure to join issue with Qatar**

1.15 Bahrain's failure to join issue with Qatar takes two forms in its Counter-Memorial. On certain points, Bahrain simply fails to respond to Qatar's arguments; on others, it makes an unfounded and arbitrary presentation of Qatar's position, apparently with the aim of then appearing to be able easily to rebut Qatar's supposed position.

## **1. Bahrain's failure to respond to Qatar's arguments**

1.16 As has already been noted above, Qatar's case remains unaffected by the decision to disregard certain documents. However, rather than responding to Qatar's position on various issues involved in the case as supported by unchallenged evidence, Bahrain has in many instances ignored Qatar's arguments, often on the spurious basis that they depend solely upon the challenged documents.

1.17 For example, one of the tactics that Bahrain has employed as part of its litigation strategy is conveniently to avoid responding to Qatar's arguments on certain points related to the Hawar islands. For instance, Bahrain contends that "in its efforts to challenge the historical record" Qatar's sole response was the production of the challenged documents<sup>5</sup>. This is patently not true, and Qatar has produced a wealth of documentation in its previous written pleadings which remains in evidence, supplemented by further documentary evidence furnished with this Reply, which demonstrates the falsity of Bahrain's version of events.

1.18 The bulk of Qatar's arguments regarding Zubarah have also gone unanswered by Bahrain, doubtless because Bahrain has no credible arguments to advance on this issue.

1.19 Bahrain's failure to respond to Qatar's arguments is not confined to the territorial questions, but applies also with regard to the maritime questions. Qatar will take just one example here, concerning Dibal and Qit'at Jaradah. As will be recalled, Qatar argued in its Memorial that these two shoals are not subject to appropriation by either of the Parties under the rules applicable to the acquisition of land territory<sup>6</sup>. Yet rather than joining issue with Qatar on this point, Bahrain purports to believe that the Parties "agree that the low-tide elevations in the disputed area are susceptible to appropriation"<sup>7</sup>. Qatar's Memorial quite clearly provided no basis for this statement, which is no more than an attempt by Bahrain to divert attention from the real questions.

## **2. Bahrain's arbitrary presentation of Qatar's position**

1.20 Qatar does not propose to make here an exhaustive survey of Bahrain's distortions of its position. Rather, it will simply draw attention to a few of the most glaring examples of such distortions.

### **(a) Qatar's supposed "claim that it became a sovereign State in 1868"**

1.21 Qatar showed in its Memorial that the 1868 Agreements between the British and, respectively, Mohamed bin Thani as Chief of Qatar and Ali bin Khalifah as Chief of Bahrain treated those Chiefs on an equal footing; that Mohamed bin Thani's position as Chief of Qatar thereby gained formal recognition by the British, as did the fact that the authority of the Chief of Bahrain did not extend to Qatar; and that Qatar and Bahrain were treated as separate entities<sup>8</sup>.

1.22 What Qatar does not purport to show is that it became a sovereign State at that time. It is therefore puzzling, to say the least, that in its Counter-Memorial Bahrain refers on several occasions to "Qatar's claim that it became a sovereign State in the 1860s"<sup>9</sup> and that it criticises Qatar for its presentation of "the 'State of Qatar' as possessed of full-fledged statehood commencing in 1868"<sup>10</sup>. In this connection Bahrain cites various sections of Qatar's Memorial<sup>11</sup>. Yet reference to those sections, or indeed to the other sections of Qatar's Memorial and, now, to its Counter-Memorial, shows that Qatar has made no such claim. On the contrary, Qatar has stated clearly that in the 19<sup>th</sup> century the tribal societies of neither Qatar nor, by the same token, Bahrain, could be considered as States in the modern sense of the word<sup>12</sup>. Qatar has also shown that various powers competed for control over both Qatar and Bahrain during the first half of the 19<sup>th</sup> century<sup>13</sup>.

1.23 Notwithstanding these facts, which are supported by contemporary documentary evidence and are freely admitted by Qatar, and on the basis of a "claim" by Qatar to sovereign statehood as of 1868 that has in fact been wholly invented by Bahrain, Bahrain sees fit to accuse Qatar of

"anachronism, revisionism and nominalism"<sup>14</sup>. In Qatar's view, if either Party may be said to be guilty of such sins it is Bahrain itself. Bahrain does not hesitate to make a claim of sovereign statehood stretching back to the early 19<sup>th</sup> century<sup>15</sup>; nor does it hesitate to refer to "internal Al-Khalifa dynastic [*sic*] struggles"<sup>16</sup> and to a challenger to the Bahraini "throne" in 1848<sup>17</sup>, at a time when such notions were clearly incompatible with the inter- and intra-tribal struggles that were then taking place, not to mention the competition among various powers for control of the region, and indeed the frequent submission by Bahrain to one or other of those powers<sup>18</sup>.

**(b) Qatar's supposed claim that the Al-Thani were "masters of a unified Qatar peninsula by the mid-19<sup>th</sup> century"**

1.24 Contrary to Bahrain's assertion, Qatar has not made any claim that the Al-Thani were masters of a unified Qatar peninsula by the mid-19<sup>th</sup> century<sup>19</sup>. However, the mere fact that by the mid-19<sup>th</sup> century Al-Thani authority did not extend over the whole peninsula does not, as Bahrain contends, confirm "Bahrain's sovereignty over the Qatar peninsula"<sup>20</sup>. Rather, as will be fully explained in Chapter II, and as Qatar has also shown in its Memorial and Counter-Memorial, the Al-Thani gradually established and consolidated their authority throughout the peninsula from around the middle of the 19<sup>th</sup> century. For example, Qatar has provided evidence from a contemporary traveller that Mohamed bin Thani was governor of Bida and was acknowledged as head of the entire province of Qatar by at least 1862-63<sup>21</sup>. It has also shown that when, a decade later, and following the 1868 Agreements, the Ottomans arrived in Qatar, the Al-Thani remained, in Lorimer's words, "the principal factor in politics"<sup>22</sup>. Further, Qatar has demonstrated that the process of consolidation continued thereafter<sup>23</sup>, with continuity of Al-Thani rule over the whole peninsula being expressly recognised by the British and the Ottomans in the 1913 Anglo-Ottoman Convention<sup>24</sup>.

**(c) Qatar's alleged misuse of the name "Qatar"**

1.25 Bahrain accuses Qatar of "nominalism" in its use of the name "Qatar", asserting that "Qatar unceasingly treats the word 'Qatar'... as referring to the entirety of the peninsula as a political entity without regard to the context"<sup>25</sup>. This is precisely what Qatar has not done. On the contrary, in its Counter-Memorial Qatar has made a contextual analysis of use of the word "Qatar" in response to Bahrain's earlier arguments on this point<sup>26</sup>. As is more fully explained below in the context of the discussion of the significance of the 1913 and 1914 Conventions, Qatar does not deny that the Ottomans sometimes used the word "Qatar" to designate the town of Doha<sup>27</sup>. However, Qatar's contextual analysis as well as the cartographical evidence submitted with this Reply shows, *inter alia*, that the Ottoman *kaza* of Qatar covered the whole peninsula, that the Al-Thani consolidated their authority over the whole peninsula during the Ottoman presence and that both the British and the Ottomans recognised these facts. Here again it is Bahrain, not Qatar, who is guilty of a form of reverse "nominalism", by insisting against all the evidence that the word "Qatar" when used in the political sense invariably referred only to the town of Doha and its immediate environs<sup>28</sup>.

**(d) Qatar's supposed claim that "Bahrain" is a single island**

1.26 Finally, a point which concerns both territorial and maritime questions needs to be mentioned. This is Qatar's alleged treatment of Bahrain as a single island. Bahrain states in this regard, "As if by magic, 'Bahrain' no longer refers to the multi-island State of Bahrain. Now it refers only to its main island", describing this as a "play on words" by Qatar<sup>29</sup>. Bahrain's rebuttal of Qatar's so-called position with regard to what comprises Bahrain is so extravagant that it bears repeating:

"By excluding the territories other than the main island of the archipelagic group of which the State of Bahrain is comprised, Qatar misrepresents geographical and, even more important, political and economic reality. The State of Bahrain does not consist of a continental or quasi-continental 'mainland' - the main island - with offlying islets, rocks and

low-tide elevations. The State of Bahrain consists of a system of inter-related maritime features, which includes, in addition to the main island of Bahrain and the islands of Muharraq and Sitrah, the Hawar archipelago and *all the islands and other features scattered throughout the sea between the main island of Bahrain and the Qatar peninsula, together with the Zubarah Region*. The islands and other maritime features are not accessories to or dependencies of the main island; they, together with the main island, form ('all together', to quote Lorimer) the State of Bahrain. They are the State of Bahrain; together they represent the State of Bahrain"<sup>30</sup>.

1.27 Qatar must make a few comments in this regard. *First*, it has never contended that Bahrain consists only of the main island; on the contrary, it has consistently relied upon Lorimer's and others' recurring description of Bahrain as an archipelago limited to the five islands of Bahrain, Muharraq, Umm Na'asan, Sitrah and Nabi Salih and a number of lesser islets and rocks. As is explained more fully in Chapter III below, it is these islands which, taken "all together", to use Lorimer's words as quoted out of context by Bahrain in the above-cited passage, form a compact group almost in the middle of the gulf dividing Qatar from the Qatif coast. What Qatar does contest, of course, is that Bahrain also comprises the Hawar islands, Janan, Zubarah and any low-tide elevations or shoals which, by virtue of the law of the sea, do not appertain to Bahrain.

1.28 *Second*, it is true that Qatar contends that, for purposes of drawing a provisional equidistance line for the maritime delimitation, the mainland-to-mainland method should be used, on the basis of the high-water line, and thus that low-tide elevations and minor islands and islets should be disregarded in order to arrive at an equitable result<sup>31</sup>. On the other hand, it does not contend that only the main island of Bahrain is to be taken into account in such an exercise. This is quite clear from *Map No. 14*, facing page 342, where it can be seen that basepoints have been plotted not only on the main Bahrain island but also on the islands of Sitrah and Muharraq<sup>32</sup>. Moreover, a point on Muharraq - point MQ - has been chosen by Qatar as the end point on the Bahraini side of the closing line between the northern and southern sectors<sup>33</sup>. There is thus no basis for Bahrain's assertion that Qatar reduces Bahrain to a single island, either with respect to territorial questions or in the context of the maritime delimitation. This assertion is just one more illustration of Bahrain's inability to provide a reasoned rebuttal to Qatar's real arguments.

1.29 Qatar will not burden this Section with any further examples of the distortions of Qatar's position that are to be found in the Bahrain Counter-Memorial, nor of the fact that the criticisms that Bahrain levels against Qatar would be much more appropriately directed against Bahrain itself. In sum, Qatar would simply say that Bahrain's constant failure to join issue with Qatar, either by ignoring Qatar's arguments or by purporting to respond to claims which Qatar in fact has not made, means that the issues that still divide the Parties are to all intents and purposes the same as those that divided them at the outset of this case.

### **B. Bahrain's exaggerated claims and assertions**

1.30 Alongside Bahrain's failure to join issue with Qatar, another aspect of Bahrain's litigation strategy is to make highly exaggerated claims and assertions on both territorial and maritime questions. Again, just a few examples will be given here.

1.31 With regard to the general historical background, Bahrain continues to pervert the history of the two sheikhdoms by asserting that Al-Thani authority in Qatar did not extend beyond Doha and its immediate surroundings until the 1930s and that, conversely, the Al-Khalifah continued to hold sway over the remainder of the peninsula, with the possible exception of some southern border areas which were under Saudi influence. But what the evidence actually shows, when it is not mis-cited or distorted by Bahrain, is that from the middle of the 19<sup>th</sup> century Al-Thani authority gradually came to be exercised throughout the peninsula. Moreover, Bahrain has produced no evidence whatsoever that until the 1930s Bahrain was sovereign over, or exercised

any authority over, any part of the peninsula or its adjoining islands. What the evidence does in fact show is that after 1868 any remaining Al-Khalifah influence in Qatar had disappeared<sup>34</sup>.

1.32 With regard to its claims of territorial sovereignty, Bahrain makes exaggerated claims and assertions both as to the acts of sovereignty that it allegedly performed and as to the territorial scope of its alleged authority. For the Hawar islands, Bahrain refers to what it describes as "the uninterrupted sovereignty exercised by Bahrain over the Hawar Islands from the 18<sup>th</sup> Century until the present day"<sup>35</sup>. Reference to the evidence relied upon by Bahrain in this regard shows however that there was no such exercise of sovereignty whatsoever.

1.33 As far as Zubarah is concerned, the story is much the same. Bahrain asserts that "the Zubarah Region was Bahraini until the Al-Thani attack of 1937"<sup>36</sup>. It appears that Bahrain bases this assertion upon the alleged "presence in the Zubarah Region of the Naim tribe, loyal to the Al-Khalifa, from the Al-Khalifa's founding of Zubarah in the 1760s until the Al-Thani attack of 1937"<sup>37</sup>, coupled with "the consistent recognition by Britain of the reality and authority of Bahrain's rights over the Zubarah Region"<sup>38</sup>. The fallacy of these statements will be dealt with in further detail in Chapter VI below. In the present context, Qatar would simply point out that Bahrain has produced no evidence that would allow it to make such assertions, with respect to either the loyalty of the Naim tribe to the Al-Khalifah, the extent of the area dwelt in by that tribe (or, rather, the small section of the tribe on which Bahrain's claim is in fact based), or the supposedly consistent recognition by the British of any rights of Bahrain, either in Zubarah itself or in the surrounding areas, which constitute the extravagant "Zubarah region" claimed by Bahrain. As will be further seen in Chapter VI below, there is substantial evidence that not only flatly contradicts Bahrain's assertions but also shows that from time to time the Rulers of Bahrain have disclaimed sovereignty over Zubarah.

1.34 Finally, Bahrain's claims and assertions are no less exaggerated when it comes to the maritime aspects of the case. It is hardly necessary to comment on Bahrain's assertion that it has "sovereignty over the entirety of the insular and other maritime features situated between the east coast of the main island of Bahrain and the west coast of Qatar"<sup>39</sup>. As for Bahrain's actual maritime claim, the Court needs only to glance at the map produced by Bahrain to illustrate its proposed single maritime boundary in order to appreciate just how grossly exaggerated and unreasonable that claim is<sup>40</sup>.

1.35 Qatar will of course deal with all these points in detail in the relevant Chapters below. It considers it proper to raise them here, however, since it has good reason to believe that Bahrain has advanced grossly extravagant claims for purely tactical purposes. Bahrain must realise that it has no valid claim to Zubarah, yet it inflates this claim in an attempt to make it appear to be on an equal footing with Qatar's well-founded claim of sovereignty over the Hawar islands. Similarly, the extravagance of the maritime boundary claimed by Bahrain is readily apparent, when it is compared with Qatar's reasonable and justified maritime claim.

### **C. Mis-citations and selective quotations in Bahrain's written pleadings**

1.36 Bahrain's attempt, in the pursuit of its litigation strategy, to re-invent and distort the history of Qatar has already been exposed in sub-section B above. If that were not alarming enough, it is equalled, if not exceeded, by Bahrain's use in its Memorial and Counter-Memorial of mis-citations and selective quotations. Qatar has selected a few mis-citations and selective quotations in order to give the Court a flavour of the totally false picture which Bahrain is presenting to the Court. While some of these are dealt with in the course of this Reply, in order not to interrupt the flow of Qatar's presentation of the relevant issues in the case, Qatar has set out in Appendix 1 the most significant of these mis-citations and selective quotations which it has detected<sup>41</sup>. In thus drawing attention to the examples given, Qatar would respectfully invite the Court to check carefully the source cited for *any* statement in Bahrain's written pleadings in order to satisfy itself that:

- (a) a significant qualification of the statement has not been omitted from the citation; or
- (b) the document which has been annexed to the Bahrain Memorial or Counter-Memorial in fact corresponds to the description given to it; or
- (c) the document from which the citation has been extracted does not subsequently include a statement contradicting the citation itself; or
- (d) an exaggerated or false title has not been given to a document from which a citation has been extracted; or
- (e) a slanted or selective presentation of a document has not been given.

1.37 Qatar has sought to present the content of the Appendix under these distinct headings; but the Court will understand that some of the examples given could be presented as falling under more than one heading.

1.38 Finally, Qatar finds so many false assertions and mis-statements with regard to Zubarah in paragraphs 151 to 157 of the Bahrain Counter-Memorial that it is obliged to make a general traverse of everything alleged in those paragraphs, simply referring the Court as necessary to the detailed treatment of Zubarah in paragraphs 5.9 to 5.63 of the Qatar Counter-Memorial and in Chapter VI of this Reply.

### **Section 3. Bahrain's Continuing Violations of the *Status Quo***

1.39 In both its Memorial and Counter-Memorial, Qatar has drawn to the attention of the Court various violations by Bahrain of its *status quo* commitments embodied in the 1983 Principles for the Framework for Reaching a Settlement and in the 1987 Agreement between the Parties<sup>42</sup>. Since the filing by the Parties of their Counter-Memorials, Bahrain has continued to violate those commitments. Qatar attaches to this Counter-Memorial a number of *notes verbales* concerning such violations<sup>43</sup>.

1.40 These *notes verbales* speak for themselves, and in general call for no comment. However, Qatar would like to draw to the attention of the Court Qatar's *note verbale* dated 1 August 1998<sup>44</sup>. That *note* refers to the publication in Bahraini newspapers of a statement made by Bahrain's Minister of Housing, Municipalities and Environment according to whom Bahrain was planning, *inter alia*, to build a 22.5 kilometre causeway to connect Hawar to Bahrain. After reminding Bahrain that any such action would be a breach of the Principles for the Framework for Reaching a Settlement and of the 1987 and 1990 Agreements between the Parties, Qatar requested Bahrain to confirm that it had no intention of implementing the reported scheme. To date, Bahrain has not seen fit to reply to this request.

1.41 It is quite clear that under the Second Principle of the Framework agreed in 1983 (as again set out in paragraph (a) of the second point of the 1987 Agreement), any action infringing the *status quo* is null and void and can have no legal effect. In this regard Qatar believes however that Bahrain's insistence, in both its Memorial and its Counter-Memorial, on the relative poverty of its natural resources and the density of its population may not be entirely innocent, but may be designed to lead the Court to believe in particular that the Hawar islands should not be returned to the sovereignty of Qatar because they have become an essential part of Bahrain's territory and economy<sup>45</sup>. Qatar submits that the Court should not allow itself to be misled in this way, for both legal and factual reasons.

1.42 Legally, as has been seen above, the Parties have bound themselves to recognise that any action infringing the *status quo* is null and void and can have no legal effect. Factually, as may be seen from the photographs of mosaics of slides taken of the Hawar islands, it is only in recent years - and in particular since the filing of Qatar's Application in 1991 - that Bahrain has begun to develop civilian facilities on the main Hawar island<sup>46</sup>. While the mosaics made from photographs taken during the period from 1958 to 1977 show only a few military constructions<sup>47</sup>,

the 1991 mosaic shows not only the considerable military development that had taken place on the island since 1977, but also the construction of a palace and associated buildings<sup>48</sup>. The mosaic prepared from photographs taken in April 1997 shows a startling amount of new construction undertaken since 1991<sup>49</sup>. In addition to a new military camp, that mosaic shows paved roadways, a harbour, a jetty, a hotel, two groups of chalets, and other new buildings. As may be seen from the most recent photographic evidence, the trend has continued<sup>50</sup>. For example, the military facilities have been further extended, more chalets have been built, and a housing project has been undertaken.

1.43 This development of the main Hawar island by Bahrain is totally artificial and self-serving. The Hawar islands are naturally barren areas, and were certainly such at the time this dispute crystallised. They have no natural water supply and therefore could not sustain human habitation if water were not transported from Bahrain at great expense. In this regard, Qatar submits that it is telling that Bahrain has gone to no such efforts to develop the southern part of the main Bahrain island, which, like the Hawar islands, is an unpopulated desert area.

1.44 In these circumstances, the Court will appreciate that no account whatsoever should be taken of Bahrain's efforts to create an appearance of economic importance for the Hawar islands. Those efforts are quite artificial, are a violation of the Parties' commitment to maintain the *status quo*, and can have no legal effect.

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#### FOOTNOTES

1 *See*, in particular, in this regard, the *note verbale* from the Foreign Ministry of Bahrain to the Foreign Ministry of Qatar dated 4 April 1999 (QR, Appendix 3, Vol. 5, p. 65).

2 *See*, QM, Annex II.11, Vol. 4, p. 285, at p. 291.

3 Qatar received copies of these highlighted texts, which were submitted by Bahrain to the Court, under cover of the Court's letter dated 17 March 1998.

4 *See*, QM as highlighted by Bahrain, para. 5.1.

5 BCM, para. 366.

6 QM, paras. 10.59, *et seq.*

7 BCM, para. 468.

8 *See*, QM, paras. 3.38 and 5.6; *see*, also, QCM, para. 2.26.

9 *See*, for example, BCM, para. 19.

10 BCM, para. 20.

11 QM, Chap. III, Sect. 3 and Chap. V, and para. 3.38, respectively.

12 QCM, para. 2.14.

13 *See*, QM, paras. 3.19, *et seq.*, and 3.24, *et seq.*

14 BCM, paras. 18-19.

15 BM, para. 20. Bahrain even appears at one point, on the basis of the purest "nominalism", to be claiming over four thousand years of statehood for itself: *see*, BCM, para. 32.

16 BCM, para. 36.

17 BCM, para. 43.

18 *See*, QM, paras. 3.24, *et seq.*, and QCM, paras. 2.59, *et seq.*

19 *See*, BCM, para. 38.

20 BCM, para. 68.

21 *See*, QCM, para. 2.25, and Annex II.75, Vol. 2, p. 413, which is an extract from a book by W.G. Palgrave, describing his travels in 1862-1863. *See*, also, Appendix 1 at the end of this Volume, para. 5.

22 QM, para. 3.44.

23 *See*, QCM, paras. 2.28, *et seq.*

24 QM, paras. 3.56-3.57; *see*, also, paras. 2.35, *et seq.*, below.

25 BCM, para. 22.

26 *See*, QCM, para. 2.9 (which refers to one of Bahrain's own annexes, an Ottoman document which establishes beyond doubt that the *kaza* of Qatar comprised not only Doha and its environs, as Bahrain would have it, but the whole peninsula including Zubarah and Odeid), paras. 2.29, *et seq.*, and 3.40, *et seq.*

27 *See*, paras. 2.39, *et seq.*, below.

28 *See*, for example, BM, paras. 131 and 139, and BCM, paras. 118 and 131-132.

29 BCM, para. 483.

30 BCM, para. 495; italics added; underlining in original.

31 *See*, QCM, paras. 7.24, *et seq.*

32 *See*, also, QM, para. 9.3, and QCM, paras. 7.42-7.43.

33 *See*, for example, QM, para. 12.10.

34 *See*, paras. 3.22, *et seq.*, below.

35 BCM, para. 158.

36 BCM, p. 12.

37 BCM, para. 154.

38 *Ibid.*

39 BCM, para. 537.

40 BCM, Map 1, facing p. 196.

41 *See*, Appendix 1 at the end of this Volume.

42 *See*, QM, paras. 1.16, *et seq.*, and QCM, para. 1.37. As the Court will recall, in its Judgment of 1 July 1994, the Court held that the 1987 Agreement was an international agreement.

43 QR, Appendix 3, Vol. 5.

44 *Ibid.*, p. 57.

45 *See*, for example, BM, paras. 54, *et seq.*, and BCM, paras. 159, 164 and 495, *et seq.*

46 *See*, QM, Appendix 7, Vol. 16; QCM, Appendix 3, Vol. 6; and QR, Appendix 4, Vol. 6.

47 QM, Appendix 7, Vol. 16, Illustrations A, B, C, D and E.

48 *Ibid.*, Illustration F, also reproduced in QR, Appendix 4, Vol. 6.

49 QCM, Appendix 3, Vol. 6, Illustration G, also reproduced in QR, Appendix 4, Vol. 6.

50 QR, Appendix 4, Vol. 6.

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

# REPLY OF THE STATE OF QATAR

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## PART II

### THE GEOGRAPHICAL AND HISTORICAL BACKGROUND

#### CHAPTER II

#### THE TERRITORIAL INTEGRITY OF QATAR

2.1 The territorial integrity of the Qatar peninsula, including its territorial waters and the islands partially or wholly within those waters, was well established long before the 1930s. The history of the gradual establishment and consolidation of Al-Thani authority throughout the peninsula has already been set out in Qatar's previous pleadings<sup>1</sup>. It is however necessary to set the record straight on the general geographical and historical background, given the various extravagant assertions made by Bahrain in its Counter-Memorial. Qatar will endeavour to do this in the following sections, where it will also be seen that Qatar's account of the geography and history in its previous pleadings is confirmed by a wealth of further material from various sources. It is against this background that the specific issues relating to the Hawar islands, Janan and Zubarah, in Chapters IV, V and VI below, must be addressed.

#### Section 1. The Overall Geographical Context

2.2 To summarise the geographical context as already set forth in Qatar's Memorial<sup>2</sup>, Qatar is a peninsula jutting northward into the Arabian/Persian Gulf from the head of the bay known as Dawhat Salwah on the west and, on the east, from south of the inlet known as Khor al-Udaid. Qatar has a southern land boundary with Saudi Arabia. The peninsula is about 180 kilometres long north to south and a maximum of 85 kilometres wide. The Hawar islands and Janan island are located close to the western side of the Qatar peninsula. The ruins of the town of Zubarah are to be found on the north-western coast.

2.3 Bahrain is situated midway along the Arabian/Persian Gulf. It consists of the island of Bahrain itself, together with a number of small islands and islets lying close to its shores, forming a compact group. The inhabited area of Bahrain is in the north, the south being uninhabited desert. The main island of Bahrain is about 43 kilometres in length from north to south, with a breadth of about 12.8 kilometres for most of its length. The other two inhabited islands lie to the north-east and east of the main Bahrain island, the larger being Al Muharraq, and the other Sitrah. They are each joined to the main island by a causeway.

2.4 These geographical facts are important in the context of the historical background, to which Qatar will now turn.

## **Section 2. The Emergence of the Al-Thani as a Political Force in Qatar**

2.5 Qatar will not repeat here the discussion already contained in its Memorial and Counter-Memorial concerning the establishment and consolidation by the Al-Thani of authority and control over Qatar. Suffice it to say that Qatar has already shown that before the arrival of the Ottomans, Mohamed bin Thani was considered to be the head of the province, and that his position as such was recognised by the British in 1868<sup>3</sup>. Qatar has also shown that Sheikh Jassim, Mohamed bin Thani's son, used the Ottoman presence in order to consolidate his rule over Qatar<sup>4</sup>. With respect to Zubarah in particular, Qatar has provided evidence that by 1874, Mohamed bin Thani was exercising his authority in the area, and that Sheikh Jassim continued to exercise his authority there on several occasions thereafter<sup>5</sup>. As to the foot of the peninsula, in particular on the south-western border, Qatar has provided, *inter alia*, several British reports that confirm exercise by the Al-Thani of their authority during the first years of the 20<sup>th</sup> century<sup>6</sup>. Similarly, Qatar has produced British reports demonstrating that Sheikh Jassim controlled tribes in the interior of the peninsula<sup>7</sup>. To quote an author who is also relied upon by Bahrain, Sheikh Jassim (who, it will be remembered, died at an advanced age in 1913):

"... had obviously done much for Qatar besides giving it a more independent status; he had also contributed to the beginning of its development as a state, instituting several social and economic measures to unify Qatar. Once his position was more secure *throughout the peninsula*, for example, he constructed roads to connect the main towns of Qatar"<sup>8</sup>.

2.6 The fact that at the time of the Ottoman presence in Qatar Sheikh Jassim's authority extended far beyond Doha is again confirmed by a report entitled "Revised Summary of Evidence in Support of the Claims of Qatar in the Frontier Question", dated 11 January 1952 which was prepared by the Political Officer in Qatar. That report states as follows, under the heading "Evidence of Acts of [*sic*] Events indicating the Position of the Frontier":

"Shaikh Jasim bin Mohammad al Thani, the Qaimaqam of Watar [*sic*] and his brother Ahmad maintained guards on the frontier, and those guards were posted at or patrolled al 'Oraij [al-Araiq], Qarn Abu Wail, Suda Nithil and Al Muharaf. These guards remained there during the Summer, when the men of Qatar were for the most part away pearl diving and foreign incursions were therefore most to be feared. Shaikh Abdullah when he succeeded Shaikh Jasim, continued this practice. Ghanim bin Saif served on the frontier under both Rulers..."<sup>9</sup>.

2.7 Nevertheless, and despite the additional overwhelming evidence to the contrary, as will be outlined in this Chapter, Bahrain has introduced into its Counter-Memorial the new and imaginative idea that until 1937 the Qatar peninsula was shared out among three "confederations": the "Naim-led tribal confederation in the north (whose allegiance lay with the Al-Khalifa dynasty)"; the "Bedouin tribes of Eastern Arabia who occasionally grazed their flocks in the south of the Qatar peninsula on a seasonal basis (whose allegiance lay with the Al-Saud dynasty)"; and last - and also, Bahrain implies, least - "the pearl-merchant enclave in Doha (the

tiny Al-Thani-led Doha confederation, dominated by the larger, more powerful and tribal-based Bahraini and Saudi sphere of influence...)"<sup>10</sup>.

2.8 This is not only highly misleading but is a grave distortion of what was, in the second half of the nineteenth century, a complex pattern of human geography in the Qatar peninsula. To portray that human geography as consisting of these three elements from the middle of the nineteenth century until 1937 is to ignore entirely the Ottoman presence in Qatar from 1871 to 1916; is to present the Naim during this period as a unified and politically potent force in Qatar instead of a tribe divided in its loyalties; and, by describing the Al-Thani sheikhs as the "pearl-merchant enclave in Doha" dominated by the larger, more powerful and tribal-based Bahraini and Saudi spheres of influence, is deliberately to attempt to downgrade the extent of the authority which the Al-Thani sheikhs unquestionably exercised (and which the British Government acknowledged that they did exercise) in and over the peninsula from the mid-nineteenth century onwards. It is unnecessary to go into great detail here, and Qatar will simply show briefly that Bahrain's representation of the alleged limited scope of the authority of the Al-Thani sheikhs flies in the face of the evidence, including the evidence submitted by Bahrain itself.

2.9 The most that Bahrain seems prepared to acknowledge is that a "power vacuum" in Doha in 1848 allowed the Al-Thani to "achieve local prominence"<sup>11</sup>; but, referring to Chapter 2 of its Memorial, it adds that it has already described "the traditional control of the Al-Khalifa over the inhabitants and territory of the Qatar peninsula from the time they founded Zubarah"<sup>12</sup>. Yet that Chapter reveals only that Bahrain has been unable to provide any real evidence to support this statement. This is particularly true in relation to the period following 1868. Rather, Bahrain itself provides evidence to the contrary, such as the extract from Lorimer's *Gazetteer*, which refers to the Al-Thani having "attained by 1868 to predominant influence in Qatar"<sup>13</sup>. This hardly squares with Bahrain's description of the Al-Thani, some 70 years later, as leading a "tiny" confederation of pearl merchants in Doha.

2.10 Bahrain also ignores the key position of Sheikh Jassim bin Thani as *kaimakam* of the *kaza* of Qatar (to which post he was appointed by the Ottoman authorities in 1876), and the fact that during the Ottoman period Al-Thani authority was gradually extended and consolidated throughout the whole of Qatar<sup>14</sup>. Sheikh Jassim skilfully played off the two major Powers in the region (Turkey and Britain) against each other, complaining to the British authorities against the financial and other exactions of the Ottoman authorities, and complaining to the Ottoman authorities about the misdeeds of the British authorities<sup>15</sup>. It will also be recalled that it was Sheikh Jassim who, after the British authorities had complained to the Ottomans in September 1878 about disorders and piratical activities committed by the inhabitants of Zubarah, attacked and indeed sacked the town as a punishment<sup>16</sup>. He was now, and remained until his death in 1913, the dominant figure in Qatar.

2.11 An Ottoman report dating from 1893, upon which Bahrain relies in an attempt to show that the Al-Thani had little authority among Qatari tribesmen, estimates the number of tribesmen who were subject to Sheikh Jassim as 7,000-8,000<sup>17</sup>; to say the least, this figure is hardly indicative of the alleged status of the Al-Thani as mere pearl merchants in Doha. To the contrary, the number of tribesmen subject to Sheikh Jassim is most impressive when compared with the total population of Qatar some seventy years earlier which, according to Bahrain, numbered only 3,500<sup>18</sup>.

2.12 In fact, it is clear from evidence submitted with this Reply that by the end of the 19<sup>th</sup> century Sheikh Jassim was a force to be reckoned with, and that there was even a possibility that he might try to take possession of Bahrain. As the German Ambassador in Baghdad reported:

"Up to the present, the Kaimakam of the Qatar Peninsula opposite Bahrain, Sheikh Jassim Ibn Thani (who is an Arab himself) has resisted probable British temptations and remained

loyal to the Sultan's government; and might rather volunteer his services in taking possession of the Island of Bahrain for Turkey..."<sup>19</sup>.

2.13 Further specific events show that Sheikh Jassim was capable of amassing large military forces and of posing a serious threat to other powers in the region, and that he had equal standing with other local rulers. The first of these events occurred in 1897-98, after Sheikh Muhamed Al-Sabah of Kuwait had been murdered by Mubarak Al-Sabah, who had taken his place as ruler. When he was appealed to by the murdered Sheikh's sons, Sheikh Jassim assembled a force to march on Kuwait in an attempt to oust the usurper<sup>20</sup>. This caused considerable alarm in Ottoman quarters, and it was decided that military action would have to be taken against Sheikh Jassim in order to prevent him from attacking Kuwait. Thus, a note of 27 November 1897 stated that the number of troops to be despatched against Sheikh Jassim should be 8 battalions (or 4,000 men), with experienced officers<sup>21</sup>.

2.14 Despite these military preparations, a report of a special sitting of the Council on 18 December 1897, signed by the Grand Vizier and various ministers, records the fact that by that time Sheikh Jassim "had set out with the forces under his command for Kuwait" and that his intention was "to occupy and protect Kuwait"<sup>22</sup>. That the Ottomans were right to take this threat seriously is demonstrated by the fact that on 17 January 1898, Sheikh Jassim was at Fao, adjacent to Kuwait<sup>23</sup>. The attack on Kuwait was however averted by the Ottomans, apparently at the last moment, by an appeal to Sheikh Jassim from the Sultan, following which Sheikh Jassim had "started immediately to dismiss the tribes who had gathered" in support of the planned attack<sup>24</sup>.

2.15 A few months later, after Sheikh Jassim had been dissuaded from taking Kuwait, he turned his attention to the Turkish soldiers who were stationed in Qatar, resulting in their being "marooned" in their fort. Again, this situation was brought to the attention of the Ottoman authorities at the highest level, in order to determine what "rational measures" could be taken to "avoid the occurrence of undesirable events against the Sultan's will"<sup>25</sup>. It was felt necessary to hold another special sitting of the Council in this regard, comprising various ministers and the Grand Vizier, where it was determined that Sheikh Jassim's actions constituted "a continual threat to the peace and safety of Nejd"<sup>26</sup>.

2.16 It is moreover ironic that while Bahrain speaks scathingly, and without any supporting evidence, of the Al-Thani being nothing more than the leaders of an alliance of pearl merchants in Doha, an alliance was indeed formed in 1909 which included Sheikh Jassim as one of its leaders. However, this was not a local association of pearl merchants: the other leaders of the alliance were Ibn Saud and Mubarak Al-Sabah of Kuwait. As was reported on 13 December 1909, these three leaders were making preparations for war, and "[t]o put up a barrier against foreign incursions they have established a tripartite agreement for defence and aggression"<sup>27</sup>.

2.17 News of this triple alliance also reached the ears of the British. In the Political Diary of the Persian Gulf Residency for the month of December 1909, it was reported as follows:

"It is reported that he [Abdulaziz bin Saud] intends to attack Hasa in company with members of the Bin Thani family, and that Sheikh Abdullah bin Jasim [Al-Thani] with 3,000 men of the Beni Hajir, Munasir and Katar tribes is ready to assist Abdulaziz and Sheikh Mobarek of Koweit in their attack upon the Ajman. Some people think that the real object of the triple alliance is to attack Hasa. Later reports show that Sheikh Abdullah bin Jasim bin Thani has proclaimed in Katar that any of his subjects who is unable to take part in his proposed expedition, should provide one man with a gun and dromedary. He has compelled each Persian [*sic*; person?] to give him ¼ maund of ghi, 1 maund of flour and some money.

...

It is reported that when Muhammed bin Hithlain, Headman of the Ajman, heard of the intended invasion of the Ajman by Sheikh Mobarek, Bin Saud and Sheikh Abdullah bin Thani, he went to Bin Saud and asked immunity on condition that his tribe will return everything they have plundered, to Sheikh Mobarek and Sheikh Abdullah bin Thani"<sup>28</sup>.

2.18 The Ottomans sent reinforcements to the area to prevent any belligerent action by the tripartite coalition<sup>29</sup>. Nevertheless, it was reported some days later that "Sheikh Abdullah Al-Thani, son of the Qatar Kaimakam is advancing in the direction of north-east Hasa with all the men he has been able to gather from various tribal groups, supposedly for launching a *gazve* [war] on the Ajman"<sup>30</sup>. By 12 January 1910, it was reported that Sheikh Jassim had sent:

"... a force of about 1000 men recruited from three sections of the Beni Hajer tribe and from one section of the Al-Murrah tribe under the command of Abdullah Al-Thani, Jassim's son, and caused the cattle of 3 or 4 groups of Ajman, *at a distance of six days from Hofuf*, to be taken by force with a view to taking revenge on the said Ajman, who had been attacking and pestering his tribes"<sup>31</sup>.

2.19 In this regard a letter dated 16 February 1910 from the Minister of War to the Office of the Grand Vizier reported that Sheikh Jassim, "furious at the Ajman tribe, made Ibn Saud an accomplice to his offence". The letter adds that "While the Ajman are busy recruiting warriors against Ibn Saud, Ibn Saud is preparing a '*gazve*' [war] in Riyadh. On the other hand Abdullah bin Jassim Al-Thani's forces are joining with the Beni Hajer and Al-Manaseer" and that "Mubarak Al-Sabah also is getting ready to join these forces", describing the situation as a "tripartite alliance against the [Ottoman] Government"<sup>32</sup>.

2.20 Two points are particularly noteworthy in the light of these events. *First*, Sheikh Jassim bin Thani, along with his son Abdullah, who succeeded him as Ruler, was in a position of considerable military power, dealing with Ibn Saud on an equal footing and enjoying the allegiance of powerful tribes, to the extent that the Ottoman authorities were wary of him and consulted at the highest level as to the military measures that would be necessary to quell him; and *second*, there is no mention of the Ruler of Bahrain as a significant power, either in the peninsula of Qatar or elsewhere on the Arab mainland.

2.21 Finally, it should be noted that after Sheikh Jassim's death his successor, Sheikh Abdullah, was also far from being a mere Doha pearl merchant. In the Bahrain Political Diary for the month of March 1920, following the observation that:

"... one may say that the actual ruler [*sic*] of Bahrain at the present moment are a clique of three..."<sup>33</sup>,

it was stated that:

"Undoubtedly the triumvirate... are anti-foreign and so anti-British:-... Their difficulty is how to get rid of British control of internal affairs, *yet keep themselves protected from foreign Arab rulers, such as Shaikh Abdullah bin Jassim of Qatar* and Bin Saud. They know the latter particularly would swallow up Bahrain, should British control be removed"<sup>34</sup>.

2.22 As for the idea of a "Naim-led tribal confederation" which somehow exercised the authority of the Ruler of Bahrain in the Qatar peninsula, it is just as fanciful as the idea of the Al-Thani being no more than the leaders of a tiny and insignificant group of merchants in Doha. This "Naim-led tribal confederation" is again something that has appeared for the first time in Bahrain's Counter-Memorial. As will be seen in greater detail in Chapter VI below, there is no evidence of the existence of such a confederation, which Bahrain has conjured out of thin air<sup>35</sup>.

### **Section 3. Relations between the Al-Thani and Nasir bin Mubarak**

2.23 A few words should also be said about a novel theory that Bahrain has put forward in its Counter-Memorial, based on the presence in Doha of Nasir bin Mubarak, a dissident member of

the Al-Khalifah family or, as Bahrain puts it, an "Al-Khalifa pretender"<sup>36</sup>. It appears that Bahrain has put forward this theory in an anxiety to demonstrate that after 1868 the Al-Thani continued to acknowledge Al-Khalifah authority even in the part of Qatar that Bahrain chooses to call "the Doha enclave". This new theory conflicts not only with the evidence, but also with Bahrain's own attitude to Nasir bin Mubarak as expressed in its Memorial<sup>37</sup>.

2.24 The Court will recollect that after his attack on Qatar in 1867, Mohamed bin Khalifah, the then Chief of Bahrain, was forbidden by the 1868 Agreement from returning to Bahrain and was replaced as Chief by his brother, Ali bin Khalifah. Upon plans initiated by Nasir bin Mubarak, Nasir and Mohamed together mounted an attack on Bahrain in 1869 and killed Ali bin Khalifah as well as one of his sons and various other Sheikhs<sup>38</sup>. By reason of his part in these murders, Nasir bin Mubarak was thereafter regarded by the British and by Sheikh Isa, the new Chief of Bahrain, as an outlaw and a pirate. As will be seen below, he was never thereafter recognised as having any rights in, or connection with, Bahrain.

2.25 In 1870, Sheikh Isa of Bahrain was concerned that Nasir might "attempt a descent on [his] islands", and was authorised by the British "by all means [to] repel him", an action which, the British assured Sheikh Isa, would not be regarded as a breach of his obligation to preserve the maritime peace<sup>39</sup>. In April 1872, Nasir bin Mubarak was reported to be living on a pension granted him by the Turkish Government and to have petitioned the Porte to the effect that "half Bahrein belonged to him"<sup>40</sup>.

2.26 In 1874, Nasir bin Mubarak arrived on the Qatar coast, where his presence began to cause great anxiety as regards the security of Bahrain, in view of the possibility of his mounting an attack on Bahrain. In December 1874, a report from the British Resident, Colonel Ross, stated, *inter alia*, that:

"... the presence of Nasir bin Mobarik on the sea coast as a *protégé* of the Turkish authorities is a standing menace to the existing Government of Bahrein. That individual has been considered by the British Government as a pirate and enemy, and it would perhaps not be thought unreasonable to demand that he should be restrained from acting against interests which the British Government is concerned with"<sup>41</sup>.

2.27 Having failed to secure any effective help from the Ottomans in attacking Bahrain, Nasir turned to the British in 1881 and asked for their assistance in recovering his property in Bahrain. On this occasion, Sheikh Jassim bin Thani supported him and asked Colonel Ross to act as mediator between Nasir and Sheikh Isa. However, Colonel Ross replied that no rights of Nasir to any property in Bahrain were recognised, and that any allowance given to him by the Bahrain Government would be on condition of his abandoning his "evil designs" and selecting an approved residence, other than Qatar<sup>42</sup>. It is clear from this that far from regarding Nasir as performing any role of delegated Al-Khalifah authority in Qatar, both the British and Sheikh Isa regarded his presence there as a danger to the security of Bahrain, and sought his expulsion.

2.28 In nevertheless attempting to demonstrate that Nasir bin Mubarak somehow exercised authority over the Al-Thani, Bahrain refers to the treatment that Sheikh Jassim allegedly accorded to Nasir, announcing that Nasir would be Governor and that he himself would act as his assistant<sup>43</sup>. To support this contention, Bahrain relies only on an unsigned and highly speculative "News Agent's report" containing numerous rumours. The facts however show that, even if Sheikh Jassim might occasionally have implied that he was acting under instructions from Nasir, this was to serve his own political ends and to preserve his position vis-à-vis the British.

2.29 In fact, the British authorities regarded Sheikh Jassim bin Thani, and not Nasir bin Mubarak, as being in effective control of the whole of Qatar and fully capable of preventing Nasir bin Mubarak from launching any attack on Bahrain. While Sheikh Jassim appears to have tried from time to time to disclaim responsibility for Nasir's actions, the British were not deceived by such disclaimers, but informed him that he would be held responsible for Nasir's

conduct so long as he was on the Qatar coast. In a letter of 25 February 1881 to Sheikh Jassim, Colonel Ross warned him:

"As regards Nasir bin Mobarek's threats I think that from kindness to you I should point out that your proposal to free yourself from responsibility for his future movements on the Katar Coast can by no means be accepted and allowed. *It is well known that Nasir bin Mobarek's arrangements are in consultation with you that he has no means of undertaking warlike operations except with your consent & aid and that you have power to prevent such movements on the Katar Coast* - also it is certainly your duty to exercise vigilance and prevent any warlike movements by sea.

I therefore from friendly considerations for your position and interest warn you that should Nasir bin Mobarek find means to disturb the peace from your neighbourhood the consequences would be disastrous to you"<sup>44</sup>.

2.30 At the same time, in a report of 26 February 1881 to the Government of India, Colonel Ross noted:

"The letters written by Nasir to Jasim and myself are I think dictated by the latter and the intention is to try to force by intimidation compliance with the objectionable demands of Nasir, and also, when read with Jasim's assertion, to save the latter from responsibility for any future operations undertaken by Nasir against Bahrein..."<sup>45</sup>.

In the same report, he went on to state:

"I would also recommend that instead of Jasim's disavowal of responsibility being admitted he should be especially and strictly warned that any hostile attempts headed by Nasir against Bahrein will be attributed to him..."<sup>46</sup>.

2.31 It was in response to these warnings that, in a letter dated 9 March 1881, Sheikh Jassim denied that he had the power to forbid anyone from landing on or embarking from Qatar's "very large and extensive" coast<sup>47</sup>. The letter containing this denial has been heavily relied upon by Bahrain in an attempt to show the "geographic limitations" of Sheikh Jassim's influence as Chief<sup>48</sup>. When read in context, however, it becomes clear that Sheikh Jassim was making this assertion only in an attempt to convince the British that he had no responsibility for Nasir bin Mubarak's actions.

2.32 In any event, the British continued to refuse to believe Sheikh Jassim's protestations. In a further report of 2 April 1881, the Political Resident reported to the Government of India as follows:

"The information obtained by the agent tends to confirm the opinion I entertained that Jasim bin Mahomed is insincere in his professions of inability to control his son-in-law and continues to entertain the hope of being revenged on the Sheikhs of Bahrein through Nasir bin Mobarek. That he is in any dread of the latter I do not believe"<sup>49</sup>.

A summary of Nasir bin Mubarak's activities in 1880-1881 is contained in the Annual Report on the Administration of the Persian Gulf Political Residency for that year<sup>50</sup>. It is again quite apparent from that Report that Bahrain was under constant threat of attack by Nasir, and that Sheikh Jassim was believed to be "the prime mover and instigator of [his] threatening movements"<sup>51</sup>.

2.33 Against this background, the passage quoted by Bahrain from an incomplete and undated note from the Political Resident of a conversation with Nasir bin Mubarak where Nasir alleged that Shaikh Jassim somehow feared him offers no support for Bahrain's claim of Nasir's authority in Qatar<sup>52</sup>. The Political Resident clearly did not believe Nasir or take his claim seriously. Indeed, the note begins with the words "From the secret conversation with Nasir it appears that Jassim is his inciter"<sup>53</sup>.

2.34 It will be seen therefore that Nasir bin Mubarak was regarded in Bahrain as an outlaw, an enemy and a pirate from the time he participated in the murder of Bahrain's Chief Ali bin Khalifah in 1869, and that he was considered as a constant threat to the security of Bahrain both by the Ruler of Bahrain and the British. In these circumstances, there is plainly no support for Bahrain's contention that his presence in Qatar ensured that Al-Khalifah authority was exercised over "the Doha enclave" until at least 1881. There was simply no question of Nasir bin Mubarak exercising any kind of delegated authority on behalf of the Ruler of Bahrain anywhere in Qatar. As the above account also shows, it was always Sheikh Jassim who exercised power and authority in Qatar and whose help Nasir sought. The British authorities considered Sheikh Jassim as the effective power in Qatar; and by putting pressure on him or delivering warnings to him, they were able to use his authority to ensure that Nasir was never able to mount an effective attack on Bahrain.

#### **Section 4. The 1913 and 1914 Conventions**

2.35 Qatar has already shown that the Anglo-Ottoman Convention, signed on 29 July 1913, recognised the autonomy of the Qatar peninsula under Al-Thani rule<sup>54</sup>. In response, Bahrain has argued in its Counter-Memorial that the Convention was never ratified and so had no legal effect<sup>55</sup>; that in any event the reference to the peninsula "was the result of a last-minute political manuvre put forward on the spur of the moment by the Ottoman Minister to London in 1913"<sup>56</sup>; and that "even as the ink was drying, the 1913 Convention had become largely irrelevant: the Wahhabis, under Ibn Saud, had ejected the Ottomans from Hasa..., the Al-Thani clan was rapidly losing its control over Doha; and the Ruler of Bahrain remained in possession of the northern part of the Qatar peninsula and other territories supposedly given away under the 1913 Convention"<sup>57</sup>. All these arguments are either irrelevant or fallacious, as will now be seen.

2.36 As to the first point, Qatar acknowledges that the 1913 Anglo-Ottoman Convention was not ratified. It was, however, signed by both parties, and Article 11 of the Convention must have been regarded by both of them as declaratory of an existing state of affairs, since it was expressly referred to in Article III of the 1914 Anglo-Turkish treaty, which was ratified<sup>58</sup>. It will be recalled that Article 11 was the provision of the 1913 Convention defining the boundary line separating the Ottoman *sanjak* of Nejd from the peninsula of Qatar. The same article recognised that the peninsula would be governed as in the past by Sheikh Jassim bin Thani and his successors, and contained a declaration by the British Government that it would not allow the interference of the Sheikh of Bahrain in the internal affairs of Qatar, his endangering the autonomy of that area, or his annexing it.

2.37 The boundary line defined by Article 11 of the 1913 Convention was commonly referred to as the "blue line". Recognition by the British of its legally binding nature, despite non-ratification of the Convention, is further confirmed by the attitude taken by the British Government in its boundary negotiations with Saudi Arabia in the 1930s. This attitude was clearly expressed by the British negotiator, Sir Andrew Ryan, in a note to the Acting Saudi Minister for Foreign Affairs dated 15 June 1934, as follows:

"... my Government have instructed me to inform the Saudi Government of their inability to admit that events since the conclusion of the Anglo-Turkish Conventions of 1913 and 1914 have modified the legal position defined in my note of the 28<sup>th</sup> April. They cannot but regard that position as binding on the Saudi Government and as being only susceptible of alteration by agreement between that Government and themselves. So far as the boundaries now in question are concerned, they do not consider that any developments in Arabia since 1914 have been such as to render inappropriate to present circumstances the blue line laid down in the Anglo-Turkish Convention of 1913 and duly confirmed by the convention of 1914"<sup>59</sup>.

2.38 The British thus regarded the provisions of Article 11 of the 1913 Convention as binding, notwithstanding non-ratification of the Convention. But even if the Convention's binding nature might be disputed on purely formal grounds, it is nonetheless of considerable evidentiary value as to the British and Ottoman perception of the situation in Qatar and Bahrain at the time<sup>60</sup>.

2.39 As Qatar has already demonstrated, an analysis of the terms of the 1913 Convention shows that the autonomy of the whole peninsula under Bin Thani rule was recognised, and that the Hawar islands were by implication considered as appertaining to the peninsula<sup>61</sup>. In its Memorial Bahrain argued, flying in the face of the express terms of the Convention, that "what was at issue in the relevant part of the Anglo-Ottoman negotiations was the future of the Ottoman province of 'Qatr', in other words Doha and its environs"<sup>62</sup>. In support of this contention Bahrain relied upon what it calls a "primitive but highly instructive" 1878 map prepared by a Captain Izzet of the Ottoman army. That map, according to Bahrain, "clearly locates 'Qatar' as a place in the far south-east corner of the peninsula"<sup>63</sup>.

2.40 Qatar does not accept the conclusions that Bahrain draws from this "primitive" map, which depicts the Ottoman vilayet of Basrah. As will be shown below, the map is similar to other Ottoman maps depicting territory that the Ottomans claimed as theirs, which included both Qatar and Bahrain<sup>64</sup>. In Qatar's submission, while there are some instances in the Turkish and British records that show that the word "Qatar" was at times used in a narrow sense to refer to Doha, it has generally and historically been used to refer to the whole peninsula over which the Ottomans and the Al-Thani exercised authority. It is thus not surprising, on Captain Izzet's map, to see Doha labelled "Qatar", as the centre of the *kaza* of Qatar.

2.41 For a better understanding of this question, it is instructive to refer to the Ottoman Vilayet Regulation dated 11 August 1872. Item four of Chapter Two, Section One of that Regulation provides as follows:

"The *kaza* is divided into *köys* [villages]. Every *köy* has a municipal administration. Small *daires* [districts] formed of a number of *köys* are not independent *kazas* but are under another *kaza*. These administrative units are called *nahiyes*"<sup>65</sup>.

In a recent report explaining Captain Izzet's map, Dr. Zekeriya Kursun of the University of Marmara states:

"... the *vilayet* (province) of Basrah was made up of the central *sanjak* of Basrah, and of the *sanjaks* of Muntefik, Ammara and Hasa (or Nejd). Every *sanjak* was subdivided into *kazas*, *nahiyes* and *köys* (villages) so that the *sanjak* of Hasa (Nejd) consisted of the *kazas* of Hofuf, Qatif and Qatar, while the *kaza* of Qatar was composed of the *nahiyes* of Zubarah, Udeid and Wakrah in addition to 19 villages. Nominally, Bahrain also fell within the *sanjak* of Hasa (Nejd), although it was not included within any *kaza*, including the *kaza* of Qatar"<sup>66</sup>.

2.42 A wealth of material - some of it supplied by Bahrain itself in its documentary annexes - confirms that the Ottoman *kaza* of Qatar encompassed the whole peninsula, which was entirely distinct from Bahrain. It has already been noted in Qatar's Counter-Memorial that one of the documents produced by Bahrain with its Memorial was clear evidence that the *kaza* of Qatar included the *nahiyes* (sub-districts) of Zubarah and Odeid<sup>67</sup>. Further evidence has now been supplied by Bahrain with its Counter-Memorial. An example is to be found in a letter of 17 October 1891 from the Governor of the *sanjak* of Nejd. According to that letter:

"... there must be built in *the capital of the Kaza of Katar* a government residence and a building large enough for 50 cavalry officers to reside, in each of *Udeyd and Zubara* there must be buildings constructed to house a governor and 30 infantry soldiers, and it is necessary to send additional soldiers and also a corvette to protect the coast"<sup>68</sup>.

The author of this letter, who was the governor of the *sanjak* containing the *kaza* of Qatar, undoubtedly considered that that *kaza* comprised not only Doha, the "capital of the Kaza of Katar", but also Zubarah in the north-west of the peninsula and Odeid in the south-east.

2.43 Further, an Ottoman report concerning Bahrain, Qatar, Nejd and Basra, dated 29 May 1917, but speaking of the situation immediately prior to signature of the 1913 Convention, noted as follows:

"... le point de vue du Gouv. Il. et celui de la Grande Bretagne sont en contradiction formelle, à savoir que la S. Porte considère *la presqu'île* comme faisant partie intégrante de l'Empire, tandis que l'Angleterre dénie cette manière de voir attribuée au Cheik Djassim-Ibn-Sani une indépendance complète"<sup>69</sup>.

These documents and others have been submitted by Bahrain itself, with its Counter-Memorial<sup>70</sup>.

2.44 That the Ottoman administrative unit of "Qatar" was clearly understood by the Ottomans as covering the whole of the peninsula over which Sheikh Jassim bin Thani exercised authority as the *kaimakam* is also demonstrated in a supplement to an undated Ottoman report presented to the Grand Vizier in approximately 1895, which states:

"The place called Qatar, on the coast at a distance of one hundred miles from the Ojeir land station, is a tongue projecting into the sea between Oman and Bahrain Island... Almost the entire population is engaged in fishing and pearl-diving, they also deal in other commercial articles and shipping. The number of their vessels varies between five to six hundred... The administrative centre of this *kaza* is the *kasaba* Al-Bida. The *kasaba* of Al-Bida consists of some 2,500 dwellings made of stone and chalk. It has eleven villages which are on the coast"<sup>71</sup>.

2.45 Ottoman maps confirm the extent of the *kaza* of Qatar. For example, *Map No. 2*, facing page 38, depicts both the *kaza* of Qatar, covering the whole peninsula, and the *kasaba* (town) of Qatar, corresponding to Doha<sup>72</sup>.

2.46 As will be seen below, it was also the general consensus among the continental European powers at the end of the 19<sup>th</sup> century that the whole of the Qatar peninsula was under Ottoman and/or Al-Thani control<sup>73</sup> - a position that even the British had been prepared to recognise in the first years of the Ottoman presence in Qatar. Initial British recognition of this situation is to be found in the Annual Report on the Administration of the Persian Gulf Residency for the year 1874-75. That Report states, with respect to the "Coast from Kutr (Guttur) to the Shatt-al-Arab", that there had been "No alteration... in the status of these provinces which still remain under Turkish control and are occupied at points by Turkish troops"<sup>74</sup>.

2.47 While the British subsequently became less willing to recognise Ottoman control over the Qatar peninsula, this did not prevent them from acknowledging that *de facto* the Al-Thani exercised authority over the whole peninsula during the Ottoman period. As was stated in a British *Military Report on Arabia*, dating from 1904:

"The Katr peninsula to the east of the island of Bahrein is ruled by Sheikh Jasimn-ib-Thani [*sic*], a rich and powerful chief, who has a following of about 2,000 fighting men"<sup>75</sup>.

Also, when the death of Sheikh Ahmed bin Thani, the brother of Sheikh Jassim, was reported by the British in their Administration Report for 1905-1906, it was stated that his death was "a matter for regret as he was disposed to be friendly and was formerly a candidate for active British support in return for his good offices *in preserving the maritime peace off the Katar Coast and pearl banks*"<sup>76</sup>.

2.48 As regards British records relied upon by both Qatar and Bahrain in these proceedings, it will be recalled that Saldanha recorded separately and extensively various historical events relating to Qatar and Bahrain in his *Précis of Katar Affairs* for the period 1873-1904 and his

*Précis of Bahrein Affairs* for 1854-1904 (both published in September 1904) and that he treated the expression "Katar" as applying to the whole peninsula<sup>77</sup>. There is no suggestion in his account that the Ottoman/Al-Thani "Katar" was restricted to a town or to the south-eastern corner of the peninsula or that the remainder of the peninsula was under any Al-Khalifah authority.

2.49 Similarly, Lorimer's *Gazetteer*, published four years later in 1908, separately and extensively records the geography and history of Qatar and Bahrain, respectively. In his description of the "Boundaries" of Qatar, Lorimer not only treats the expression "Qatar" as referring to the entire peninsula but, as has already been seen, includes the Hawar islands as part of "Qatar"<sup>78</sup>.

2.50 In these circumstances, it was therefore quite natural for the 1913 Convention to provide for the renunciation of all Ottoman claims to the peninsula, considered at least by the Ottomans as synonymous with the *kaza* of Qatar, and considered by both the British and the Ottomans as subject to Al-Thani rule.

2.51 Bahrain has argued however that in the context of negotiation of the 1913 Convention, "it is noteworthy that Britain, from the outset in 1911, expressly protected the interests of the Ruler of Bahrain in the Qatar peninsula"<sup>79</sup>. In support of this statement, Bahrain refers to a short extract from a British memorandum of 29 July 1911, as reproduced in a work by J.C. Wilkinson<sup>80</sup>. A fuller extract from that memorandum - in fact only a draft memorandum - was produced with Bahrain's Memorial<sup>81</sup>. It may not be clear, from the context in which it is cited, that this draft memorandum was intended as a response to the Turkish position in the negotiations, and therefore did not necessarily reflect a considered and objective appraisal of the situation. Indeed, the "important rights" of the Sheikh of Bahrain (one of Britain's "clients"<sup>82</sup>) may well have been invoked by Britain as no more than a diplomatic pretext for obtaining the removal of the Ottomans from the peninsula and thus furthering its own interests in the area. This is borne out by the fact that the mention of the Sheikh of Bahrain's "rights" comes under the heading "The respective Interests of Great Britain and Turkey in the Region of the Persian Gulf".

2.52 What is in fact "noteworthy" in this context is that in the subsequent negotiations with the Ottomans Britain did not, as Bahrain rather misleadingly implies, continue to "protect the interests of the Ruler of Bahrain in the Qatar peninsula". Bahrain has produced no further evidence of such "protection", and the fact that the 1913 Convention provided that Britain would not allow the Sheikh of Bahrain to interfere in the internal affairs of the peninsula, to endanger its autonomy, or to annex it, runs directly counter to Bahrain's assertion. Moreover, while under Article 12 of the 1913 Convention Britain obtained from the Ottomans an undertaking that the inhabitants of Bahrain would be allowed to visit the island of Zakhuniya for fishing purposes and to reside there during the winter, no mention was made of any reservation of "important rights" of the Sheikhs of Bahrain on the Qatar peninsula, nor of any supposed rights of the Sheikhs of Bahrain or inhabitants of Bahrain on the Hawar islands.

2.53 Despite this, Bahrain contends that "Even as the ink was drying, the 1913 Convention had become largely irrelevant" since, *inter alia*, "the Ruler of Bahrain remained in possession of the northern part of the Qatar peninsula and other territories supposedly given away under the 1913 Convention"<sup>83</sup>. In support of this contention, Bahrain refers to a British memorandum written one month prior to signature of the Convention, on 30 June 1913<sup>84</sup>. Bahrain's reliance on this document is quite astonishing.

2.54 The British memorandum of 30 June 1913 concerns "the evident intention of the Sheikh of Bahrein to revive his claim to levy tribute". This event has already been mentioned in Qatar's Counter-Memorial. There, Qatar showed, by reference to a document dated 31 July 1913, that far from not having expressed their ultimate view on the matter, as Bahrain had implied in its Memorial<sup>85</sup>, the British firmly rejected the idea that, once the Ottomans had departed, the Sheikh

of Bahrain should be allowed to revive his claim to levy tribute on the Sheikhs of Qatar<sup>86</sup>. The British memorandum now annexed by Bahrain to its Counter-Memorial simply fills in a gap in the story contained in Qatar's Counter-Memorial, and is additional evidence that the British were not prepared to countenance any interference by the Sheikh of Bahrain in the peninsula of Qatar. Thus, after citing the last sentence of Article 10 of what was then the draft 1913 Convention (which became Article 11 in the final version) the author states that "Sir P. Cox should receive categorical and stringent instructions to oppose any such interference".

2.55 It is difficult to see how this could possibly be interpreted as supporting the assertion that at that time "the Ruler of Bahrain remained in possession of the northern part of the Qatar peninsula and other territories supposedly given away under the 1913 Convention"<sup>87</sup>. But Bahrain is perhaps referring to the next sentence of the memorandum, according to which "The Treaty has been a dead letter for decades". This clearly cannot refer to the 1913 Convention - which at that stage had not yet been signed - but is obviously a reference to the undertaking made by the Qatari tribes in 1868, according to which they would pay certain sums of money to the Chief of Bahrain<sup>88</sup>. If there could be any doubt whatsoever in this regard, it is dispelled by the indication on the second page of the British memorandum:

"The following is from Aitchison: 'The tribute *which was only paid for two years* was discontinued when the Turks established themselves in Bidaa"<sup>89</sup>.

2.56 Finally, it may be noted that the question of the line resulting from the 1913 Convention and of the extent of the territory of the Ruler of Qatar came up again in the 1930s, in the context of boundary negotiations between Britain and Saudi Arabia. As was stated in a British memorandum of 15 December 1937:

"The Anglo-Turkish Convention, which came into force with the exchange of ratifications on the 3<sup>rd</sup> June, 1914, but was not published until 1933, and which His Majesty's Government regarded as *the consecration of a territorial situation which had existed for many years previously*, laid down the following lines as the southern and eastern boundaries of Ottoman territory in Arabia:-

...

The so-called 'blue line', which runs due south from a point on the Arabian coast south of Bahrein until it strikes latitude 20° N."<sup>90</sup>.

The same memorandum went on to explain that:

"The Arab States of the Persian Gulf here in question consist of Qatar, the Trucial Sheikhs and Muscat, whose territories have since 1914 and long before that extended continuously along the coast of Arabia from the point on the Persian Gulf where the blue line meets the sea..."<sup>91</sup>.

### **Section 5. The 1916 Treaty**

2.57 Qatar has already discussed the 1916 Treaty between Britain and Qatar in its earlier pleadings, and it is therefore unnecessary to expand upon that discussion at length in this Reply<sup>92</sup>. It should simply be recalled here that the 1916 Treaty reaffirmed the separate status of the territory of Qatar under Al-Thani rule. In its Counter-Memorial Qatar has analysed the text of the Treaty to show that its provisions applied to the entire peninsula of Qatar, its coasts, and its adjoining islands. Qatar has also shown that the obligations of the British Government under Article 10 of the Treaty to protect the Ruler of Qatar and his subjects and territory "from all aggression by sea" must necessarily have covered any Bahraini aggression across the sea on any part of the Qatar peninsula or on the Hawar islands, just as much as did the Agreement of 1868.

2.58 In view of Bahrain's insistence that Qatar is wrong in stating that the 1916 Treaty included the whole Qatar peninsula<sup>93</sup>, it is instructive to refer once more to the Persian Gulf Historical

Summaries, 1907-1928, of which lengthy extracts have already been cited in Qatar's Counter-Memorial<sup>94</sup>. Part of this document, which details the British understanding of the 1913 Convention and the 1916 Treaty, is entitled "El-Katr 1908-16" and opens with the following words:

"The El Katr (or Qatar) Peninsula, which is governed by the Sheikhs of the Thani family..."<sup>95</sup>.

As will be recalled, the document goes on to confirm that:

"Under the unratified Anglo-Turkish Convention of 29<sup>th</sup> July 1913, the Ottoman Government renounced all rights to the Peninsula, which was, as in the past, to continue to be governed by the Sheikhs of the Thani family, while His Majesty's Government engaged not to permit the Sheikh of Bahrein to interfere in the internal affairs of El Katr, to threaten its autonomy or to annex it".

2.59 In addition, Qatar has annexed to this Reply a British military publication entitled *A Handbook of Arabia*, which was published in 1916, the very same year as the British-Qatar Treaty. While recognising that Qatar's "S., or land boundary, is not clearly defined", that *Handbook* nevertheless had the following to say about that boundary:

"Beginning at the foot of the bay called Dohat es-Salwa on the SW., it runs SE. to the wells of Sakak, continuing thence to the E. coast, either ENE., to the N. end of the Naqiyan sand-hills, which run parallel with the sea for 30 miles from a point 10 miles S. of Wakrah, or E. by S., to the S. end of the same hills, and the shore at the N. end of the Khor el-'Odeid"<sup>96</sup>.

It is self-evident from this passage, which follows a description of Qatar as "a peninsula running N. and S. with a maximum length of 80 miles and a breadth, at the base, of 40 miles", that this southern boundary was Qatar's only land boundary and that the whole of the rest of the peninsula to the north of the boundary was considered as being the territory of Qatar.

2.60 Against this background, there is simply no basis for Bahrain's assertion that the 1916 Treaty did not include the whole peninsula. However, in an effort nevertheless to demonstrate that the 1916 Treaty covered "nothing more than the enclave of the Doha confederation"<sup>97</sup> consisting of "Doha and its environs", Bahrain relies on a report of a meeting between the Ruler of Qatar and the British Political Resident, dated 12 March 1934, according to which the Ruler of Qatar had announced that "The [1916] Treaty does not include the interior but only the coast..."<sup>98</sup>. As will be seen, this is a prime example of the mis-citation and distortion by Bahrain of the documentary evidence.

2.61 It is first important to place the Political Resident's report in context. That report recorded discussions relating to the grant of an oil concession by Qatar. It was during those discussions that the Ruler of Qatar claimed that the 1916 Treaty included only the coast. His reason for making this contention was simply that he wanted to be free to grant a concession over the bulk of his territory - the "interior", as opposed to the coastline - to the oil company of his choice, without having to seek British approval for such a concession.

2.62 Second, the Bahrain Counter-Memorial fails entirely to disclose that the Political Resident, in response to what the Ruler had said about the 1916 Treaty not including the interior but only the coast, made the following statement:

"According to Bin Saud'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 extends to the whole of Qatar*"<sup>99</sup>.

## **Section 6. Al-Thani Authority throughout the Peninsula of Qatar was consolidated long before the 1930s**

2.63 It should hardly be necessary, in the light of all the above, for Qatar to provide more evidence to show that Al-Thani authority was consolidated throughout the Qatar peninsula long before the 1930s. However, Bahrain now implies, in its Counter-Memorial, that the Hawar islands could not be regarded as having been attached to Qatar as a political entity in 1938/39 because at that time, so it alleges, the political entity of Qatar did not extend as far as the west coast of the peninsula facing the islands<sup>100</sup>.

2.64 Bahrain's attempt to prove this assertion is, to say the least, disingenuous, and it provides yet further examples of Bahrain's distortion of documents by means of selective quotation. Qatar has already shown above that there is no basis for Bahrain's statement that at the time of the 1916 Treaty "[t]he area controlled by Sheikh Abdullah and the Doha confederation [*sic*] was very limited, being in reality nothing more than the enclave of the Doha confederation"<sup>101</sup>. Qatar has also shown above the falsity of Bahrain's statement that both Sheikh Abdullah Al-Thani and the British considered that the 1916 Treaty concerned only Doha and its environs<sup>102</sup>.

2.65 Bahrain's interpretation of a Foreign Office minute dated 18 January 1934 is equally disingenuous<sup>103</sup>. That minute was written in the context of delimitation of the boundary between Qatar and Nejd. On the basis of one sentence extracted from this document, Bahrain concludes that "Clearly both parties [presumably Britain and Qatar itself] considered that the territory of Sheikh Abdullah was quite limited"<sup>104</sup>, the inference being that the document shows that even in 1934 the territory of Qatar extended only to Doha and its environs. But this is simply not a plausible inference if the document is read in its entirety. Reference to the minute shows that the "large areas which the Sheikh may not be able to protect" were those areas lying directly to the east of the blue line laid down by the 1913 Convention, and thus to the south of Qatar's southern boundary<sup>105</sup>. On the other hand the response to this minute, which is dated 20 January 1934, echoes the 1916 *Handbook of Arabia*<sup>106</sup> and shows that the British considered that Qatar's boundary should be "a line from Dohat-as-Salwas through Sakak to the northern coast of Khor-al-Odaid"<sup>107</sup>. The minute added that this was "the line give [*sic*] by Lorimer"; in other words, this boundary, stretching across the base of the Qatar peninsula, was a recognised fact by at least the early years of the 20<sup>th</sup> century<sup>108</sup>.

2.66 In this context it is interesting briefly to review further evidence relating to the negotiations between Britain and Saudi Arabia in the 1930s, regarding Saudi Arabia's south-eastern boundary.

2.67 In 1935 Saudi Arabia put forward a claim to a frontier line between itself and the "Amirate of Watar" [*sic*: "Qatar"], whose starting point in the west began at "a point on the coast of the sea known as Dohat Salwa"<sup>109</sup>. In other words, at that time Saudi Arabia recognised that the territory of Qatar - as a political entity: an Amirate - was coterminous with its own, and that it necessarily extended to the western coast of the peninsula. As to the southern limit of Qatar's territory - and in this context it should be remembered that Saudi Arabia's interest was of course to push that limit as far north as possible - Saudi Arabia was prepared to recognise that in the west the boundary line should lie between the features known as Jebel Dukhan and Jebel Nakhsh:

"... leaving the area (literally distance) which is situated on its west and which is located between Jebel Dukhan and Jebel An-Nakhsh to the Saudi Arab Kingdom, and Jebel Dukhan and what is behind it on the east to Qatar"<sup>110</sup>.

The line claimed by Saudi Arabia in 1935 is illustrated, together with other relevant lines, on a Foreign Office map contained in the Map Atlas and reproduced as *Map No. 3*, facing this page<sup>111</sup>.

2.68 On several occasions during the negotiations in the 1930s, Saudi Arabia recognised that the Rulers of Qatar had rights in areas which even by 1939, according to the Bahrain Counter-Memorial, were not within "the territorial scope of the recently created political entity of 'Qatar'"<sup>112</sup>. Accordingly, as will be seen, Saudi Arabia never questioned Qatari sovereignty over the areas to the north of the areas it claimed, and nor did the British.

2.69 In 1936 Saudi Arabia stated that it had always taken care not to encroach upon territories that it considered as appertaining to the Ruler of Qatar:

"... Sheikh Yusuf Yasin said that Ibn Saud had not in the past recognised any specific limits to the territories of the Persian Gulf rulers, though he always treated them in a liberal spirit. When the Ikhwan system was being organised [*i.e.* from 1912] he had directed the Ikhwan not to go into the Jebel Dukhan or the Araiq... in order that they should not incommode the Sheikh of Qatar"<sup>113</sup>.

2.70 The British took a firm position vis-à-vis Saudi Arabia, and were not prepared to recognise a claim so far north as Jebel Nakhsh. They based this position on the actual exercise of sovereignty by the Ruler of Qatar, and also on general considerations of physical geography and defence. In 1935 a British negotiator, Mr. G.W. Rendel, reported to the Foreign Office the position he had taken in a conversation with a Saudi representative, who had raised the question of the Qatar Oil Concession that had recently been granted<sup>114</sup>. According to Rendel's report, he had stated that:

"... it [the concession] did not, in fact extend to what we regarded as the frontier between Qatar and Saudi Arabia... in view of our known views on the frontier question *there could be no question of the concession extending over territory the sovereignty over which was in any real doubt*"<sup>115</sup>.

2.71 By early 1937 the Political Resident felt able to report to the India Office that:

"... the question of the frontiers of Qatar and of the Trucial Shaikhdoms has been exhaustively gone into both on the map and on the ground, Loch paying various visits to the Shaikhs concerned... and nothing was withheld from Bin Saud to which he could advance any reasonable claims. I am therefore definitely of opinion that no more territory can be given to Bin Saud in this direction without our sacrificing *the legitimate interests of the Shaikhs in question*, which naturally I assume is not the intention of His Majesty's Government"<sup>116</sup>.

2.72 Finally, it is interesting to note the British attitude to questions of both defence and natural frontiers when it came to defending Qatari claims against Saudi Arabia. In this regard, the British consistently took the view that the integrity of the Qatar peninsula had to be preserved, even if they were resigned to allowing Saudi Arabia to claim territory directly to the east of the blue line, on the ground that the Ruler of Qatar had never claimed such territory. The British negotiator, Sir Andrew Ryan, was therefore instructed by the Foreign Office in 1935 as follows:

"... you should point out the importance which His Majesty's Government attach to establishing a frontier in accordance with geographical, as well as political and tribal considerations. The Qatar peninsula forms a clearly defined and separate geographical unit, and it is only reasonable that the frontier between the Sheikhdom and its neighbours should follow the natural division between the peninsula and the mainland. His Majesty's Government have already expressed readiness to depart from their strict legal position by recognising King Abdul Aziz's sovereignty as extending over the western shore of the gulf known as the Dohat-as-Salwa and over the Ikhwan settlements at the head of the Gulf; but they could never consent to attribute to Saudi Arabia features, such, for example, as the Jebel Naksh, *which form an integral part of the physical structure of the peninsula itself and have always, in fact, been an equally integral part of the Sheikhdom*"<sup>117</sup>.

Consequently, Saudi Arabia was informed a few weeks later that the British Government "could not agree to deprive the Sheikh of Qatar of any portion of the main block of that peninsula"<sup>118</sup>.

## Section 7. The Map Evidence

### A. Introduction

2.73 The cartographic evidence confirms that, after 1868, Qatar was recognised as a separate political entity encompassing the entire peninsula and its adjacent islands. This evidence also shows that Bahrain was consistently portrayed as being limited to a compact group of islands and that the Hawar islands as well as Zubarah were viewed as forming an integral part of Qatar.

2.74 This evidence comes from a wide variety of sources and spans a considerable period of time. It is both official and non-official in nature. For example, maps prepared by government departments in Turkey, Great Britain, France and Italy demonstrate that the territorial integrity of the entire Qatar peninsula was accepted without question. Similarly, maps produced by some of the world's foremost cartographic institutes, as well as those appearing in well-respected atlases, show that the political integrity of Qatar was widely recognised.

2.75 As will be discussed in Chapter IV below, it is well-established that the published works of official government mapping agencies, experienced cartographers and other professional map makers constitute expert opinion evidence of where the limits of a political entity's boundaries lie. When the maps depict a state of political and geographical facts with virtual uniformity throughout a period of long duration, they are entitled to significant weight in confirming the existence of title over the area in question.

2.76 In this section, Qatar will review the cartographic evidence which demonstrates that, as a matter of general repute, the administrative unit of Qatar was viewed as covering the entire Qatar peninsula from the mid-19<sup>th</sup> century onwards. As such, the map evidence fully confirms the historical facts that have been discussed earlier in this Chapter<sup>119</sup>.

2.77 In Chapter IV, Qatar will discuss the implications of the map evidence in connection with the question of sovereignty over the Hawar islands. It will there be shown that the same evidence which demonstrates the territorial integrity of Qatar also confirms that the Hawar islands were consistently viewed as appertaining to Qatar.

2.78 Qatar has furnished with this Reply a Map Atlas covering the period from the 1860s onwards. The Map Atlas contains a broad selection of maps from a wide spectrum of sources, including from official publications and cartographic houses in Turkey, Great Britain, the United States, France, Germany, Russia (including the former U.S.S.R.), Italy, Iran, Poland, Australia and Austria. These maps have been arranged in chronological order so that they can be readily compared with the contemporary historical evidence discussed in this Reply and elsewhere in Qatar's pleadings.

2.79 While Qatar will refer to some of the more representative maps in this Section, the Court is respectfully invited to examine the Map Atlas as a whole. It paints a compelling picture of Qatar's territorial integrity as a political entity and its sovereignty over both the Hawar islands and Zubarah.

2.80 In contrast, the failure of Bahrain to produce any similar map evidence supporting its claims is striking. The absence of such evidence wholly undermines Bahrain's assertion that Al-Thani rule during the relevant period was limited to Doha (or Bida) and that the Hawar islands and Zubarah were deemed to be part of Bahrain. Had Bahrain's view of the situation corresponded to the true position, this would undoubtedly have been reflected in the contemporaneous cartography. But the evidence is to the contrary and fully confirms Qatar's submissions.

### **B. 19<sup>th</sup> century maps**

2.81 The 19<sup>th</sup> century witnessed an impressive growth in map-making. This was due, in part, to newly-developed map-making techniques which resulted in more detailed and accurate maps. The Gulf area became the subject of a wide range of expert cartography which reflected the views of third States and of informed map-makers as to the political status of the region.

2.82 Map No. 1 in Qatar's Map Atlas is an 1863 map produced by the German cartographic house, Dietrich Reimer, in Berlin. It shows the situation five years before the 1868 Agreements

between the British and Mohamed bin Thani, the Chief of Qatar, and Ali bin Khalifah, the Chief of Bahrain, respectively. As previously explained, these agreements effectively treated Qatar and Bahrain as distinct entities separated by the sea as a kind of buffer zone. As one might expect for a pre-1868 map, the Qatar peninsula is labelled "el Bahhrein". Significantly, however, even as of 1863 Bahrain proper was depicted in red while the Hawar islands and the Qatar peninsula were portrayed in blue. Thus, even before the 1868 Agreements had been signed, there is historical map evidence which treats Qatar and Bahrain separately and shows the Hawar islands as appertaining to the Qatar peninsula and not to Bahrain.

2.83 Following the 1868 Agreements, Qatar began to be labelled differently. Map No. 2 in the Map Atlas is a map prepared by J.G. Bartholomew, the British royal cartographer, in 1870. It is entitled *Arabia, Egypt, Nubia & Abyssinia*. While the map continues to refer to the Arabian coast as "El Hasa or Bahrain", Qatar and Bahrain are again treated differently. Qatar, including its islands, is depicted in red while Bahrain is portrayed in yellow. Thus, even by 1870 the distinction between Qatar and the compact group of islands comprising Bahrain was reflected in the contemporaneous cartography<sup>120</sup>.

2.84 During the 1870s and 1880s German maps depicted the political situation in a similar fashion. There are several maps from this period which were produced by Justus Perthes of Gotha<sup>121</sup>. During his distinguished career, Perthes founded an independent publishing company that later became the Geographic-Cartographic Institute. Perthes and the institute he founded published some of the most authoritative maps of the world during the 19<sup>th</sup> century.

2.85 Several maps during this period were prepared by Augustus Petermann, another distinguished cartographer of the time, who produced a series of maps in conjunction with Justus Perthes. As Henry Wilkinson observes in his treatise, *Maps and Politics*:

"A. Petermann was the editor of the German geographical periodical, *Petermann's Geographische Mittheilungen* which, during the period of his control, acquired a worldwide reputation. There was hardly a geographer of repute of any nationality whom Petermann did not know personally"<sup>122</sup>.

2.86 Map No. 5 in the Map Atlas is a particularly revealing map which reflected the situation at the time. The map is labelled "Iran & Turan: Oder Persien, Afghanistan, Balutchistan, Turkestan" and is dated 1875. A copy of this map with an enlargement is as reproduced as *Map No. 7*, facing page 120. By colour-coding, it shows very clearly the Qatar peninsula in green as a unified political entity labelled "Katar" with both Zubarah (labelled "Sabara" on the map) and the Hawar islands depicted as integral parts of Qatar. In contrast, Bahrain is portrayed in a completely different red colour. Further maps prepared by Petermann, under the auspices of the Perthes Institute, were published in 1876<sup>123</sup>, 1878<sup>124</sup>, 1879<sup>125</sup> and 1884<sup>126</sup>. In each instance, the entire Qatar peninsula is clearly labelled "Katar", and the Hawar islands and Zubarah are also shown as part of Qatar. The Bahrain islands, on the other hand, are shown as a separate entity<sup>127</sup>.

2.87 In 1890, the Ottoman authorities prepared a map of the *sanjak* of Nejd showing the relevant area, a copy of which is reproduced as *Map No. 2*, facing page 38<sup>128</sup>. As noted above, the significance of this map lies in the fact that it depicts the *kaza* of Qatar as a separate entity extending over the entire peninsula and including cities such as Doha, which was labelled "Qatar" on the map to indicate that it was the *kasaba* or centre of the *kaza*, Zubarah, and a number of other locations throughout the peninsula. It can thus be seen that the Ottomans themselves in no way deemed that the entity of Qatar was limited to the city of Doha and its immediate surroundings as Bahrain contends.

2.88 In Section 2 above, Qatar referred to a report from the German Ambassador in Baghdad dated 12 March 1896 which referred to Sheikh Jassim bin Mohamed bin Thani as the Kaimakam of the Qatar peninsula<sup>129</sup>. Cartographic evidence from a wide array of sources during the 1890s illustrates the fact that the entire peninsula of Qatar was deemed to constitute a political entity at

this time, and is thus consistent with the views expressed by the Ambassador that Al-Thani rule stretched throughout the peninsula.

2.89 Thus, a map taken from *Letts's Popular Atlas* in 1890 clearly shows the territorial integrity of the entire Qatar peninsula<sup>130</sup>, as does another map which appeared in *The Times Atlas* in 1895<sup>131</sup>. Meanwhile, a large number of German and Austrian maps continued to depict the peninsula as a political unit. Examples of such maps may be found in the Map Atlas, Nos. 16 to 19 and 21 to 23. Moreover, the Century Company in New York also published a map in 1897 which is consistent with the other maps already discussed<sup>132</sup>.

2.90 Throughout the last forty years of the 19<sup>th</sup> century, therefore, maps taken from sources as diverse as Turkey, Great Britain, Germany, Austria and the United States all showed the same thing: namely, that the political entity known as Qatar covered the entire peninsula.

### C. 20<sup>th</sup> century maps

2.91 As the Court will be aware, in 1908 Lorimer produced his *Gazetteer of the Persian Gulf*. This study included a description of Qatar as encompassing the entire peninsula including the Hawar islands and Zubarah<sup>133</sup>. Lorimer's description of Qatar fully accords with the maps of the region that were produced during this period.

2.92 An official map prepared by the Intelligence Division of the British War Office in 1901 is one such map<sup>134</sup>. This map depicts the entire Qatar peninsula under the rubric of "El Katr", while the Bahrain islands are limited to the principal island of Bahrain and its immediately adjacent islands such as Moharraq. The War Office produced a similar map in 1908, corrected to 1911, also showing Qatar as encompassing the entire peninsula<sup>135</sup>.

2.93 A large number of maps produced by third States in the early years of the 20<sup>th</sup> century reflect the same position with respect to the territorial extent of Qatar. These include the following authoritative works:

- Two German maps published by Justus Perthes in 1902 and 1912, respectively, on which the entire Qatar peninsula is labelled "El Katar" and coloured in purple, distinct from the red colour which is used for Bahrain<sup>136</sup>;
- A Polish map reproduced in the 1904 *Wielki Atlas Geograficzny*<sup>137</sup>;
- A 1904 American map produced by C.S. Hammond and Company in New York<sup>138</sup>;
- An official French map prepared for the Service Géographique du Ministère des Affaires Etrangères in 1905<sup>139</sup> which, once again, depicts Qatar, including the Hawar islands, and Bahrain in distinct colours;
- A British map dating from the period 1906-1908 taken from *The Harmsworth Universal Atlas*<sup>140</sup>;
- Further French maps published by the Librairie Hachette in 1907 and again in 1911 and by Armand Colin in the *Atlas Général Vidal-Lablache* in 1909<sup>141</sup>; and
- A British map prepared by J. Bartholomew and George Philip and Son in 1910<sup>142</sup>, which, like previous maps prepared by Bartholomew, portrays the Qatar peninsula and the Hawar islands in the same distinct colouring.

2.94 As discussed in Section 4 above, on 29 July 1913 the Anglo-Ottoman Convention was signed, followed in 1914 by the Anglo-Turkish Convention<sup>143</sup>. From the terms of these agreements and related correspondence, it is clear that the British recognised that Al-Thani rule encompassed the entire peninsula. Bahrain maintains that in the context of the 1913 Convention, Britain purported to protect the interests of the Ruler of Bahrain in the Qatar peninsula<sup>144</sup>. Apart from the historical inaccuracy of this assertion, which has been dealt with above, the cartographic evidence points in the opposite direction.

2.95 The previous discussion has already shown that from at least 1868 up to the early 1900s the territorial extent of Qatar was consistently represented as extending to the whole peninsula. Qatar has not discovered any map evidence indicating that Bahrain retained any territorial or other rights in Qatar. The same holds true for the period following the signing of the Anglo-Ottoman Agreements.

2.96 Map No. 46 in the Map Atlas is a copy of the map that was attached as Annex V to the 1913 Anglo-Ottoman Convention. The map lends absolutely no credence to the theory that Bahrain maintained any territorial interests in Qatar. Indeed, the peninsula is very clearly labelled "Qatar" on the map, while the nomenclature "Bahrain" is limited to the main Bahraini islands.

2.97 In 1914, George Philip and the London Geographical Institute published a map of the area in *Philip's Imperial Atlas of the World*<sup>145</sup>. A copy of this map is reproduced opposite page 54 as *Map No. 4*. As can be clearly seen from the enlargement on the reverse side of the map, facing this page, Bahrain is coloured in red in contrast to Qatar, which is separately labelled on the map and which is portrayed in green, as also are the Hawar (or Warden) islands and Zubarah. There is no suggestion of any Bahraini territorial pretensions either on the peninsula or on its surrounding islands.

2.98 The position is very clearly shown by colour coding on another map published in 1914, this time in *Andree's Allgemeiner Hand-atlas* which was printed in Leipzig<sup>146</sup>. An enlargement of this map also appears in the Map Atlas. The same situation is shown on a selection of Austrian, Italian and British maps of the same period<sup>147</sup>.

2.99 Other prominent reference works from the first part of the 20<sup>th</sup> century confirm the political extent of Qatar at that time. In the 1920s, for example, several prominent British cartographic houses produced maps showing the entire peninsula as belonging to Qatar. In 1921, the London-based company, Cassell & Co., produced *Cassell's New Atlas* which contained a map clearly showing Qatar and its islands in green and Bahrain in red<sup>148</sup>. Philip's *New General Atlas of the World* published in 1922 showed a similar representation of the situation<sup>149</sup>, as did an atlas produced by G.W. Bacon & Co. also in 1922<sup>150</sup>.

2.100 Map No. 71 in the Map Atlas is of particular interest. It was prepared by Major Holmes and reproduced in Rihani's study entitled *Ibn Sa'oud of Arabia* in 1928. Major Holmes had many years' experience in the region as an adviser to various oil companies. The map shows Qatar, which has a distinct colour hatching, as comprising the entire peninsula while the principal Bahraini islands are depicted with a different black colouring.

2.101 In its Counter-Memorial, Bahrain contends that the Hawar islands could not have been regarded as appertaining to Qatar in 1938/39 because the political entity of Qatar did not extend at that time to the west coast of the peninsula off which the islands were located<sup>151</sup>. Apart from the historical evidence discussed earlier in this Chapter which disproves this assertion, the map evidence also directly contradicts the Bahraini thesis. As has been seen, from 1870 onwards the maps in no way suggest that the territorial extent of Qatar excluded either the west coast of the peninsula or its appurtenant islands.

2.102 The final category of maps to be discussed in this context are taken from works published in the 1930s shortly before the British decision of 1939. Here, again, the contemporary cartographic sources show a consistent recognition of Qatari authority over the entire peninsula and its islands.

2.103 In 1932, for instance, the *Encyclopaedia Britannica* (14<sup>th</sup> Edition) published a map which treats Qatar as covering the entire peninsula<sup>152</sup>. The following year, an official map prepared by the General Staff of India gives a similar depiction of the entity of Qatar<sup>153</sup>.

2.104 In 1933, the British Foreign Office produced a very important annotated version of a 1924 War Office map showing the political situation in the area. A copy of this map appears facing

this page, as *Map No. 5*<sup>154</sup>. The handwritten additions to this map were provided by Mr. G. W. (later Sir George) Rendel of the Foreign Office. The map was attached to a memorandum prepared by Rendel in January 1933 which discussed a proposal by the Colonial Office that the Foreign Office should take over its residual responsibilities for the Gulf<sup>155</sup>.

2.105 Until 1932, the Political Resident at Bushire had been responsible to (a) the Government of India for internal affairs of States on the Arab littoral, (b) the Foreign Office, in his capacity as Consul-General of Bushire, and (c) the Colonial Office for questions concerning Ibn Saud and political aspects of the Arab littoral. With the end of the mandate in Iraq, and the transfer of British relations with Ibn Saud to the Foreign Office, it became apparent that the real responsibilities of the Colonial Office in the Persian Gulf had become negligible. In July 1932, the Colonial Office wrote to the Foreign Office suggesting that the Foreign Office should take over the Colonial Office's responsibilities in the Gulf area. The Foreign Office agreed in principle but advised that the decision would have to be taken at Cabinet level. On 5 January 1933, Rendel prepared a draft note for the Secretary of State, Sir John Simon, which was to become the basis for the memorandum submitted to the Cabinet. To this note was attached the map in question (annotated in Rendel's handwriting). The memorandum was discussed by the Foreign Office and the Colonial Office and a few minor amendments were made. At no time was the accuracy of the map called into question.

2.106 Rendel's annotation on the map set out the limits of each of the political entities in the Gulf region. The limits of Qatar and Bahrain are both clearly shown on the map. With respect to Qatar, Rendel left no doubt over the fact that it covered the entire peninsula. As for the limits of Bahrain, Rendel's annotations demonstrate that British officials recognised that its territorial extent was limited to the compact group of islands described by Lorimer and others. Significantly, the Hawar islands were specifically excluded from the limits of Bahrain and included within the limits of Qatar.

2.107 In 1934, the War Office prepared a further sketch map of the Qatar peninsula which was based on "best available authorities"<sup>156</sup>. While the map contains a number of different lines showing where the southern boundaries of Qatar might lie, it left no doubt that the entire peninsula, including the west-facing coast and Zubarah, fell within Qatar's sovereignty. Similar maps were produced by Bartholomew and George Philip and Son in 1934, 1935 and 1936<sup>157</sup>, as well as by H.E.C. Robinson of Sydney, Australia<sup>158</sup>.

#### **D. Conclusion as to the maps**

2.108 From the foregoing discussion, it can be seen that during the relevant period both official government maps and maps prepared by prominent cartographic institutes consistently portrayed the political entity of Qatar as encompassing the entire Qatar peninsula. The existence of cartographic evidence from such a wide variety of sources and spanning such a long period of time lays to rest the unfounded assertion advanced by Bahrain that the political entity of Qatar was limited to areas around the town of Doha and a few surrounding villages. To the contrary, the map evidence produced by Qatar is fully consistent with the historical evidence attesting to Al-Thani authority over the entire peninsula discussed earlier in this Chapter.

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#### FOOTNOTES

1 See, QM, paras. 3.43, *et seq.*, and QCM, paras. 2.28, *et seq.*

2 See, QM, paras. 2.1, *et seq.*

3 See, QCM, paras. 2.25-2.26. The fact that Mohamed bin Thani was considered to be the head of the province - equated with the Qatar peninsula - by the time of the arrival of the Ottomans is now acknowledged by Bahrain's former Agent in this case, Dr. Husain M. Al-Baharna. In his book entitled *British Extra-Territorial Jurisdiction in the Gulf 1913-1971* (Archive Editions,

1998), Dr. Al-Baharna states that "The Al-Jahalmah remained in the Qatar peninsula for some time until their 'almost total destruction' in tribal quarrels. The extension of Turkish influence to Arabia in or about 1871 brought Qatar under Turkish suzerainty, but it *continued* to be governed directly by indigenous Rulers of the dynasty of Al-Thani who still rule Qatar to this day". (QR, Annex II.77, Vol. 2, p. 547; emphasis added). With regard to what is stated in para. 90 of the BCM about the Al-Thani being told in 1871 to raise Turkish flags on their territory, the Report of the Assistant Political Resident of 20 July 1871 upon which Bahrain appears to be relying (BCM, Annex 9, Vol. 2, p. 18) does not say that the Al-Thani were told to raise the flags throughout the whole of their territory. The places where they did raise flags may have been places which the Al-Thani controlled, but most certainly did not exhaust the extent of territory controlled by the Al-Thani at the time. Moreover, Bahrain presents absolutely no evidence of direct Bahraini control of any part of Qatar during the period from 1871 to 1915.

4 See, QCM, paras. 2.28-2.29 and 2.34-2.35, showing British recognition of Sheikh Jassim's authority.

5 See, QCM, paras. 2.42, *et seq.* and 5.17.

6 See, QCM, paras. 2.45-2.46.

7 See, QCM, paras. 2.48-2.50.

8 R.S. Zahlan, *The Creation of Qatar*, London, 1979 (QCM, Annex II.82, Vol. 2, p. 449, at p. 469; emphasis added).

9 QR, Annex II.74, Vol. 2, p. 519, at p. 526. See, for the location of the places mentioned, *Map No. 1*, facing page 22. The same report goes on to state that "Salwah was the traditional battle ground where Qatari tribesmen resisted raiders entering their territory. In 1908, for example Shaikh Abdullah in person chased a party of Bani Hajir and Manasir tribesmen as far as Salwah. A celebrated fracas between a party of Qataris from Khor and some Sa'udi (Manasir) tribesmen took place some 50 years ago at Ghar al Buraid".

10 BCM, paras. 40-41.

11 BCM, paras. 36 and 38.

12 BCM, para. 40.

13 BM, para. 131. It may be noted that Lorimer, unlike Bahrain, does not confuse the peninsula of Qatar with the town of Doha. Mention should also be made here of Bahrain's reference to the understanding of 10 April 1869, signed on behalf of the Chief of Bahrain and Sheikh Mohamed bin Thani and "all the other Chiefs of Guttur" (BCM, Annex 5, Vol. 2, p. 10). That document is untitled, and it is therefore pure invention for Bahrain to refer to it as an "Understanding between representative of the Ruler of Bahrain and representative of the Sheikhs of the Doha confederation". As the enunciation of the signatories shows, the understanding was signed on behalf of all the chiefs of Qatar - not just Doha - and their paramount chief, Mohamed bin Thani.

14 See, QCM, paras. 2.28, *et seq.*, and paras. 2.35, *et seq.*, below.

15 See, QR, Annexes II.11-II.14, II.18 and II.51, Vol. 2, pp. 49-73, 91 and 289.

16 See, QM, para. 8.21, QCM, para. 5.17(2), and para. 6.8(c), below.

17 BCM, Annex 25, p. 69, at p. 77; See, also, QR, Annex II.18, Vol. 2, p. 91, referring to "Jassim Al Thani and all the tribes and people loyal to him".

18 BCM, para. 33.

19 QR, Annex II.19, Vol. 2, p. 97 (translation). The original German reads as follows: "Bis jetzt widersteht jedoch der Kaimmakam der Halbinsel Katar gegenüber Bahrein, Scheikh Djassim Ibn Thani (welcher selbst arabischer Nation ist), den Englischen, wahrscheinlich klingenden

Verlockungen und bleibt der Regierung des Sultans treu; ja, er soll sich sogar erboten haben, die Insel Bahrein definitiv für die Türkei in Besitz zu nehmen...".

20 QR, Annex II.20, Vol. 2, p. 105.

21 QR, Annex II.22, Vol. 2, p. 115. *See*, also, QR, Annexes II.21, II.23, II.24, II.25, II.83 and II.84, Vol. 2, pp. 111, 119, 127, 133, 599 and 607. This was not the first time that the Ottomans had been obliged to send troops against Sheikh Jassim. On 10 April 1893 the Ottoman Minister of War, referring to "the Sultan's decree concerning an inquiry into the military measures necessary to be taken for chastising Jassim Al-Thani", wrote that "if the forces to be sent consisted of 5-6 battalions [2,500 - 3,000 men], it would be much better" (QR, Annex II.17, Vol. 2, p. 83).

22 QR, Annex II.27, Vol. 2, p. 143.

23 *See*, QR, Annex II.29, Vol. 2, p. 159; *see*, also, QR, Annex II.31, Vol. 2, p. 167. A British report, dated 30 December 1897, confirms that Sheikh Jassim and his "large armed following" had arrived at a place "two days march to the south of Kuwait" and had then marched to a place a short distance to the north-east of Kuwait (QR, Annex II.28, Vol. 2, p. 149).

24 *See*, QR, Annex II.29, Vol. 2, p. 159. Despite his compliance with Ottoman wishes, Sheikh Jassim, having retired to Bushire, nevertheless suggested to the Grand Vizier that "As Kuwait is a well developed and prosperous place which is outside the sphere of administration and policies of the State, it might be advisable to benefit from this opportunity of capturing it" (QR, Annex II.30, Vol. 2, p. 163).

25 QR, Annex II.32, Vol. 2, p. 171.

26 QR, Annex II.33, Vol. 2, p. 175; *see*, also, QR, Annex II.31, Vol. 2, p. 167.

27 QR, Annex II.42, Vol. 2, p. 241; *see*, also, QR, Annex II.46, Vol. 2, p. 263. This was not the first time that Sheikh Jassim allied himself with the Saud family. In 1904 it was reported that "Abdur Rahman-bin-Saood is believed to have received yeoman help... from Sheikh Jasim-bin-Thani of El Katr, who supplied him liberally with the sinews of war" (QR, Annex II.36, Vol. 2, p. 207).

28 QR, Annex II.41, Vol. 2, p. 235.

29 *See*, QR, Annex II.43, Vol. 2, p. 245; *see*, also, QR, Annex II.47, Vol. 2, p. 267.

30 *See*, QR, Annex II.44, Vol. 2, p. 249; *see*, also, QR, Annex II.50, Vol. 2, p. 285.

31 QR, Annex II.48, Vol. 2, p. 273; *see*, also, QR, Annex II.47, Vol. 2, p. 267.

32 QR, Annex II.49, Vol. 2, p. 279; *see*, also, QR, Annex II.50, Vol. 2, p. 285.

33 QR, Annex II.56, Vol. 2, p. 325. The "clique of three" did not include Sheikh Isa, the Ruler himself.

34 *Ibid.*, p. 549; emphasis added.

35 *See*, paras. 6.36, *et seq.*, below.

36 BCM, paras. 95, *et seq.*

37 *See*, BM, para. 172, where Bahrain refers to Nasir bin Mubarak as a "renegade".

38 *See*, J.G. Lorimer, *Gazetteer of the Persian Gulf, Oman and Central Arabia*, QM, Annex II.5, Vol. 3, p. 304.

39 *See*, QR, Annexes II.1 and II.2, Vol. 1, pp. 1 and 5.

40 QM, Annex II.7, Vol. 4, p. 56. Far from purporting to be representatives of the ruling Al-Khalifah, in their petition, Nasir and a few others styling themselves "sheikhs from the Island of

Bahrain" described Shaikh Isa and others as "tyrants" who had "forcefully taken over the Island of Bahrain". *See*, QR, Annex II.10, Vol. 2, p. 45.

41 QM, Annex II.7, Vol. 4, p. 63; emphasis added.

42 *Ibid.*, p. 79.

43 BCM, para. 96.

44 QR, Annex II.7, Vol. 2, p. 31; emphasis added.

45 QR, Annex II.8, Vol. 2, p. 35.

46 *Ibid.*

47 BM, Annex 38, Vol. 2, p. 216a.

48 *See*, BM, para. 133.

49 QR, Annex II.9, Vol. 2, p. 41. It may be noted that by this time Nasir bin Mubarak had further allied himself with the Al-Thani family by becoming Sheikh Jassim's son-in-law.

50 QR, Annex II.6, Vol. 2, p. 25.

51 *Ibid.*

52 BCM, para. 96.

53 BCM, Annex 17, Vol. 2, p. 41. *See*, also, QM, Annex II.7, Vol. 4, pp. 82-83. A British Report some years later noted that: "More intimate acquaintance with Sheikh Jasim, the elder brother who was supposed to have resigned all active dealings with the tribal politics of Katar, proves that he is not by any means the weary dotard that he was popularly supposed to be, but that, on the contrary, while it suits him to preserve the fiction that he has retired from active participation in the affairs of Government, nothing of importance is done in Katar without his being consulted, or exercising his influence directly or indirectly" (QR, Annex II.38, Vol. 2, p. 217).

54 *See*, QM, paras. 3.55, *et seq.*, and QCM, paras. 3.40, *et seq.*

55 BCM, para. 124.

56 BCM, para. 125.

57 BCM, para. 127, referring to BCM, Annex 41, Vol. 2, pp. 126-127.

58 QM, Annex II.45, Vol. 5, p. 161.

59 QR, Annex II.59, Vol. 2, p. 349. *See*, also, the Memorandum respecting the Frontiers of the Aden Protectorate, dated 15 December 1937, which stated that Saudi Arabia and the Yemen were "succession States of the Ottoman Empire and as such bound to accept the frontiers constituted by [the blue, violet and 1905] lines, *i.e.*, by the Anglo-Turkish Convention of 1914" (QR, Annex II.71, Vol. 2, p. 477, at p. 481). The same position was also recorded in 1940, when a British memorandum stated that: "... as the 1914 Convention, defining both the Blue and Violet lines, had been ratified, it was legally binding on Ibn Saud in his capacity of successor to the Ottoman Empire" (QR, Annex II.73, Vol. 2, p. 497, at p. 500). It may be noted that in disputing the British position, Ibn Saud relied not on the non-ratification of the 1913 Convention, but rather upon the assertion that the Ottomans had not had the authority to dispose of his territories (*See*, for example, QR, Annex II.60, Vol. 2, p. 353). In this regard the British pointed out that the Saudi argument was disposed of by the treaty which Ibn Saud himself concluded with Turkey on 15 May 1914 (*see* QR, Annex II.62, Vol. 2, p. 409).

60 *See*, in this regard, para. 172 of the Award of the Arbitral Tribunal in the First Stage of the Proceedings between the Government of the State of Eritrea and the Government of the Republic of Yemen dated 9 October 1998, hereinafter referred to as the "*Eritrea/Yemen Award*", a copy of which is being deposited with the Registry pursuant to Article 50, paragraph 2 of the Rules of

Court. The Arbitral Tribunal in that case held as follows: "Eritrea has argued that no legal weight is to be given to [the record of the 1927 Rome Conversations], in the first place because this record was not registered under Article 18 of the Covenant of the League of Nations and in the second place because it cannot be invoked by Yemen, either for that reason or because it was *res inter alios acta*. That this was not registered was undoubtedly because it was not regarded as a treaty between states. *But it was nonetheless an accurate account of what both parties had agreed and was signed by them as such. It is simply evidence of the thinking of the time - this time by both parties - in much the same way as the Tribunal has been presented with a myriad of other evidence in non-treaty form.* Insofar as Yemen wishes to draw it to the attention of the Tribunal, it is not relying on a treaty that is *res inter alios acta*, nor indeed resting its own claim on it. *It is diplomatic evidence, like any other, but of an undoubted interest because it reflects what was recorded by both parties as that which they had agreed to*"; emphasis added.

61 *See*, QM, para. 3.57, and QCM, paras. 3.41, *et seq.*

62 BM, para. 194.

63 BM, para. 21.

64 *See*, para. 4.117, below.

65 QR, Annex II.3, Vol. 2, p. 9. It may also be seen from this Regulation that the Ottoman Empire was divided into provinces known as *vilayets*, each governed by a *vali*, which in turn were divided into *sanjaks*, governed by *mutasarrifs*. *Sanjaks* were then divided into *kazas*, governed by *kaimakams*, the chief *kasaba* or borough in each *kaza* being the place of residence of the *kaimakam*. *Kazas* were subdivided into *nahiyes*, which in turn grouped several villages, or *köys*.

66 *See*, QR, Annex II.75, Vol. 2, p. 531.

67 QCM, para. 2.9, and BM, Annex 66, Vol. 2, p. 279.

68 BCM, Annex 24(b), Vol. 2, p. 52; emphasis added.

69 BCM, Annex 47(a), Vol. 2, p. 144, at pp. 149-150. It may be noted that there was no mention here of any putative rights of the Ruler of Bahrain on the peninsula.

70 *See*, BCM, Annexes 27(b) and 35(b), Vol. 2, pp. 93 and 113. Additional similar evidence is also annexed hereto by Qatar. *See*, QR, Annexes II.16, II.35, II.39, II.40, II.45, II.52 and II.53, Vol. 2, pp. 79, 201, 223, 231, 253, 295 and 299.

71 QR, Annex II.45, Vol. 2, p. 253; *see*, also, QR, Annex II.54, Vol. 2, p. 303, which makes a similar point.

72 This Map is also reproduced as Map No. 15 in the Map Atlas. While this map does not bear a date, it appears from internal evidence to date from c. 1890.

73 *See*, para. 6.8(h), below.

74 QR, Annex II.4, Vol. 2, p. 13; *see*, also, for example, QCM, Annex II.3, Vol. 2, p. 11, and BM, Annex 20, Vol. 2, p. 174.

75 QR, Annex II.37, Vol. 2, p. 211.

76 QR, Annex II.38, Vol. 2, p. 217; emphasis added.

77 QM, Vol. 4, pp. 181 and 9, respectively.

78 QM, Vol. 3, p. 120.

79 BCM, para. 124.

80 J.C. Wilkinson, *Arabia's Frontiers: The Story of Britain's Boundary Drawing in the Desert* (1991), BCM, Annex 121, Vol. 2, p. 397, at p. 399.

81 BM, Annex 78, Vol. 3, p. 413.

82 *See*, Wilkinson, *op. cit.*, p. 72, QR, Annex II.89, Vol. 2, p. 635.

83 BCM, para. 127. Footnote 202 at para. 127 of the BCM is particularly revealing. What is asserted in this footnote is, as Bahrain must be aware, quite contrary to the position taken by the British Government in 1934, that position being based on the Laithwaite memorandum B.430 on the southern boundary of Qatar revised to 5 March 1934 (QCM, Annex III.40, Vol. 3, p. 213), as completed and modified by the letter from Rendel (F.O.) to Laithwaite (India Office) of 16 March 1934 (QCM, Annex III.41, Vol. 3, p. 225). This is the real evidence of the British position on the southern boundary of Qatar in the 1930s, not some spurious reconstruction of history by Bahrain (including the wholly false claim that the Ruler of Bahrain remained in possession of the northern part of Qatar after 1913), combined with some highly dubious legal arguments.

84 BCM, Annex 41, Vol. 2, p. 126.

85 BM, para. 192.

86 QCM, paras. 3.37-3.38, and QCM, Annex III.20, Vol. 3, p. 111.

87 BCM, para. 127.

88 *See*, in this regard, QCM, paras. 3.34-3.36.

89 BCM, Annex 41, Vol. 2, p. 127; emphasis in original.

90 QR, Annex II.71, Vol. 2, p. 477; emphasis added. Although this memorandum is referring to the ratified 1914 Convention, the "blue line" is the line resulting from Article 11 of the 1913 Convention, which was incorporated by reference in the 1914 Convention.

91 *Ibid.*

92 *See*, QM, para. 3.61, and QCM, paras. 3.44-3.45.

93 BCM, paras. 128, *et seq.*

94 QCM, Annex III.57, Vol. 3, p. 335, and QCM, para. 3.45.

95 QCM, Annex III.57, Vol. 3, p. 335.

96 QR, Annex II.55, Vol. 2, p. 313, at p. 316; *see*, also, *Map No. 1*, facing page 22.

97 With regard to the so-called "Doha confederation", *see*, paras. 2.7, *et seq.*, above.

98 BCM, paras. 131-132 and BCM, Annex 122, Vol. 2, p. 410, at p. 411.

99 BCM, Annex 122, Vol. 2, p. 410, at p. 412; emphasis added. *See*, also, Appendix 1 at the end of this Volume, para. 2.

100 *See*, BCM, para. 23.

101 BCM, para. 131; *see*, paras. 2.57, *et seq.*, above. With regard to the so-called "Doha confederation", *see*, paras. 2.7, *et seq.*, above.

102 *See*, paras. 2.60, *et seq.*, above.

103 BCM, Annex 66, Vol. 2, p. 217. This is not an India Office memorandum, as claimed by Bahrain.

104 BCM, para. 132.

105 *See*, para. 2.72, below, with regard to the fact that the Ruler of Qatar did not claim such areas.

106 *See*, para. 2.59, above.

107 BCM, Annex 66, Vol. 2, p. 217, at p. 219.

108 *See*, also, Lorimer, *op. cit.*, QM, Annex II.4, Vol. 3, p. 113.

109 QR, Annex II.63, Vol. 2, p. 419. Bahrain has made reference in its Counter-Memorial to a statement made by a Saudi representative, Sheikh Yusuf Yasin, in the context of this claim (BCM, para. 140) to the effect that the territories of the Sheikhdome of Qatar had "originally consisted of an enclave comprising Doha itself and a limited surrounding area" (BCM, Annex 69, Vol. 2, p. 228). This is a further example of Bahrain taking a citation out of its context. If reference is made to Bahrain's Annex 69, it may be seen that the British representative who had discussed the matter with the Saudi representative stated in this regard, "I refrained from following Sheykh Yusuf in an excursion into a subject on which I felt he was not expertly informed". In any event, Sheikh Yusuf Yasin is reported as having defined the territories of the Sheikhdome of Qatar as having "originally" consisted of an enclave comprising Doha and a limited surrounding area, thereby implying that they had, by 1934, expanded considerably beyond that.

110 *Ibid.*

111 QR, Map Atlas, Map No. 84.

112 BCM, para. 23.

113 QR, Annex II.73, Vol. 2, p. 497, at p. 507; *see*, also, *Map No. 3*, facing this page.

114 *See*, QM, Annex III.99, Vol. 6, p. 507 and the sketch map attached thereto at p. 529.

115 QR, Annex II.65, Vol. 2, p. 431; emphasis added. It may be noted that it was Rendel who produced the annotated map referred to in para. 2.104, below, and attached as Map No. 77 in the Map Atlas.

116 QR, Annex II.68, Vol. 2, p. 451, at p. 457; emphasis added.

117 QR, Annex II.64, Vol. 2, p. 423; emphasis added.

118 QR, Annex II.66, Vol. 2, p. 435. Further British documents confirming this view may be found in QR, Annexes II.67, II.69, II.70 and II.73, Vol. 2, pp. 447, 461, 471 and 497.

119 To the extent that the cartographic evidence confirms the territorial integrity of Qatar, it also shows that the area of Zubarah was always viewed from the mid-19<sup>th</sup> century onwards as forming a part of Qatar's territory. This aspect of the matter will be discussed in Chapter VI where Qatar's sovereignty over Zubarah is addressed.

120 *See*, also, QR, Map Atlas, Map No. 7, which is a similar map prepared by J.G. Bartholomew in 1876.

121 *See, ibid.*, Maps Nos. 3, 5, 6, 8, 9 and 11.

122 H.R. Wilkinson, *Maps and Politics - A Review of the Ethnographic Cartography of Macedonia*, Liverpool University Press, 1951, p. 55.

123 QR, Map Atlas, Map No. 6.

124 *Ibid.*, Map No. 8.

125 *Ibid.*, Map No. 9.

126 *Ibid.*, Map No. 11.

127 Other German maps from the same period are consistent with the Perthes/Petermann maps. *See*, for example, the maps prepared by H. Kiepert in 1874 and 1881 (QR, Map Atlas, Maps Nos. 4 and 10, respectively).

128 *See*, also, QR, Map Atlas, Map No. 15.

129 *See*, para. 2.12, above and QR, Annex II.19, Vol. 2, p. 97.

130 QR, Map Atlas, Map No. 14.

131 *Ibid.*, Map No. 24. The *Times Atlas* map (as also Map No. 29) depicts the southeastern border of Qatar as a diagonal line running from south of El-Bida towards the interior of the Arabian peninsula. It is not known what the source of this line is. However, the entire west-facing coast of Qatar, together with the Hawar islands, are clearly depicted as forming part of Qatar.

132 QR, Map Atlas, Map No. 26.

133 QM, Annex II.4, Vol. 3, p. 109, at pp. 120 and 123.

134 QR, Map Atlas, Map No. 30.

135 *Ibid.*, Map No. 42.

136 *Ibid.*, Maps Nos. 31 and 45.

137 *Ibid.*, Map No. 32.

138 *Ibid.*, Map No. 33.

139 *Ibid.*, Map No. 34.

140 *Ibid.*, Map No. 37.

141 *Ibid.*, Maps Nos. 38, 40 and 43.

142 *Ibid.*, Map No. 41. This map also refers to the Hawar islands as Wardens Islands.

143 *See*, paras. 2.35, *et seq.*, above.

144 BCM, para. 124.

145 QR, Map Atlas, Map No. 48.

146 *Ibid.*, Map No. 49.

147 *See*, for example, the maps reproduced as Maps Nos. 50-57 and 59-65 in the Map Atlas.

148 QR, Map Atlas, Map No. 67.

149 *Ibid.*, Map No. 68.

150 *Ibid.*, Map No. 69.

151 BCM, para. 23.

152 QR, Map Atlas, Map No. 75.

153 *Ibid.*, Map No. 76.

154 *See*, also, QR, Map Atlas, Map No. 77, where the relevant portion of the map has been enlarged so as to enable the details concerning Qatar and Bahrain to be seen more clearly.

155 A copy of this memorandum is attached as QR, Annex II.58, Vol. 2, p. 335.

156 QR, Map Atlas, Map No. 78.

157 *See, ibid.*, Maps Nos. 79-82.

158 *Ibid.*, Map No. 87.

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

**REPLY OF THE STATE OF QATAR**

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### CHAPTER III

#### THE EXTENT OF THE TERRITORY OF BAHRAIN

3.1 In its Memorial and Counter-Memorial, Bahrain constructs a fanciful image of itself as a historical entity comprising an extensive area. Thus it claims that "The Qatar peninsula, along with the Hasa oases, was included within the major geographical and socio-economic unit known to historians as Greater Bahrain"<sup>1</sup>. Bahrain cites no source for the concept of any such socio-economic unit called "Greater Bahrain". However, while Qatar does not deny that there is evidence to indicate that at one time (long before the arrival of the Al-Khalifah in the region) the islands presently comprising Bahrain and certain parts of the mainland were together referred to as "Bahrain", this ceased to be the position long ago. Thus the present Amir of Bahrain, Sheikh Hamad bin Isa Al Khalifa, writing on "Modern Bahrain and its Heritage" tells us:

"The Arabs gave the name 'Bahrain' to the entire coastal length of the apex of the Arab Gulf in the north (including Kazima) to Oman in the south. It included the islands adjacent to the Arab Gulf coastline which were then known as the Awal Islands. This regional name was applied *until the middle of the thirteenth century* when the term began to be applied *more specifically to the group of islands now known as Bahrain*, although the entire area continued to be loosely referred to as 'Bahrain' for centuries afterwards"<sup>2</sup>.

3.2 Another official publication of the State of Bahrain, discussing the origin and scope of the name "Bahrain", similarly indicates that around 656 H. (1258 A.D.) "the island of Awal and the islands around it came to be called Bahrain"<sup>3</sup>.

3.3 Sheikh Hamad also notes that Bahrain was occupied by the Portuguese three centuries later (in 1521) and reproduces a Portuguese map of Bahrain from 1538 which clearly indicates that the Portuguese occupation of what was then "Bahrain" did not extend beyond the main group of islands and did not extend to any other island or any part of the mainland<sup>4</sup>. Similarly, as shown hereafter, when the Persians displaced the Portuguese in 1602, their occupation of "Bahrain" until 1783 (when the Al-Utub and Qatari tribes ousted them) also did not extend to any island adjoining the peninsula of Qatar nor any part of the mainland<sup>5</sup>.

3.4 Another Bahraini source, Al-Nabhani of the National Library of Bahrain, in his History of Arabia, originally published in 1923 and republished in 1986, describes Bahrain as follows:

"Bahrain:

A name given by ancient Arabs to all of the countries located on Basra Gulf coast extending from there to the borders of Oman, with a capital city at Hajar, Al Hassa. Later the name was given to those countries located on the said gulf between (northern latitude 25 - 29 degrees) with Qatar and Kuwait as its extremities. The large part of the Arabian Peninsula which comprises Qatar and the nearby islands was also included. Hence the island of Bahrain in addition to the said countries was called Bahrain. Then the two names were forgotten and the name of Bahrain was devoted only to the main island of today, which in an older time was called Awal (a name of pre-Islam idol).

Bahrain is located 12 miles from Dhahran terra firma at 26 degrees, thirty minutes northern latitude, and 10 degrees, 37 minutes eastern longitude starting from a base at the Holy Mecca. And its entire area including Muharraq is about 80 miles. The length of Manama island north to south is 25 miles while its width is 9 miles. The length of Muharraq island is nearly 5 miles while its width is about two miles"<sup>6</sup>.

Al-Nabhani also describes the other islands comprising Bahrain, but does not include the Hawar islands among them.

3.5 Contrary to its own authoritative writings cited above, which show that from about the middle of the 13<sup>th</sup> century, the name "Bahrein" or "Bahrain" as such was confined to the main island alone or to "the group of islands now known as Bahrain" or, at most, to the main island "and the islands around it", Bahrain now seeks to suggest that the Qatar peninsula was part of "Bahrain" for a much longer period and even in the 19<sup>th</sup> century, for which it places reliance on an 1838 French map by a Colonel Lapie<sup>7</sup> which, Bahrain states, "recognised Bahraini dominance over the peninsula by the simple word 'Bahrein' written in capital letters across the entire territory of what is today Qatar"<sup>8</sup>. However, numerous maps filed by Qatar, including those being filed together with this Reply, and the historical description hereafter of the nature of Bahrain's connections with the mainland during the 19<sup>th</sup> century clearly demonstrate that Colonel Lapie's 1838 map, in including the Qatar peninsula under the rubric "Bahrain", may convey a misleading impression. At most it only reflects, as do a number of other similar maps, the observation of Sheikh Hamad quoted above that for a time the Bahrain Islands and parts of the mainland "continued to be loosely referred to as 'Bahrain'". Other examples are Kiepert's (German) map of 1863<sup>9</sup>, which marks the Qatar peninsula as "el Bahhrein"; Bartholomew's map of 1870<sup>10</sup> which marks the entire mainland coast as "EL HASA OR BAHREIN"; and another Bartholomew map of 1876<sup>11</sup> which marks the peninsula as "Katar" but the Oman coast as "BAHREIN". However, it is important to note that even these maps mark the "Bahrain Islands" separately and in colours clearly distinct from those used for the mainland; and furthermore, each of these maps, as also numerous other maps, shows the Hawar islands in the same colour as that used for the Qatar peninsula including Zubarah and not in the colour used for the Bahrain islands. It is also noteworthy that Kiepert's map of 1874<sup>12</sup> and later editions abandoned the description used in the 1863 map and correctly described the peninsula as "Katar". Bartholomew maps produced in later years similarly carried correct descriptions of the Qatar peninsula<sup>13</sup>.

3.6 It is Qatar's submission that even assuming Bahrain's version of the historical background referred to above is regarded as accurate, it is wholly irrelevant to the issues before the Court in the present proceedings. What is relevant is to consider the territorial scope of what in the words of the Amir of Bahrain, is "now known as Bahrain" and whether the disputed territories on or adjoining the Qatar peninsula which are at issue in these proceedings could be regarded, for any historical or other reasons, to be part of "Bahrain". Qatar has shown and will further demonstrate in this Reply that there is extensive and incontestable evidence of the fact that whatever "authority" or "suzerainty" the Al-Khalifah had over any part of the Qatar peninsula was tenuous at best, in particular after their departure from Zubarah to Bahrain in 1783, and ceased to exist altogether from 1868 onwards<sup>14</sup>. From that year, and in any event from 1871 when the Ottomans arrived in Qatar, "Bahrain" has been comprised only of the main Bahrain island and its immediately neighbouring islands. It will also be shown that this extent of Bahrain's territories is confirmed by numerous sources, including a description of "Bahrain" by Belgrave himself in 1928, as well as a British Military Report of 1933 annexed by Bahrain to its Memorial<sup>15</sup>.

3.7 Bahrain claims, however, that "The State of Bahrain is comprised of an archipelago which includes more than 50 islands, low-tide elevations and shoals..., and the territory on the north-west coast of the Qatar peninsula referred to as the Zubarah region"<sup>16</sup>. Bahrain also contends that apart from the immediately neighbouring islands of the main Bahrain island, "the other principal

islands of the Bahrain archipelago are in the Hawar Islands group, located about 11 nautical miles to the south-east of the main island of Bahrain...<sup>"17</sup>.

3.8 Qatar will now show, by describing the historical evolution of the extent of Bahrain as it is today, that this claim is wholly incorrect and misleading.

### **Section 1. Bahrain from 1783 to 1868**

3.9 Qatar has already shown that the Al-Utub tribe, of which the Al-Khalifah were a section, arrived at Zubarah in Qatar only in 1766, and moved to Bahrain less than 20 years later, after the Arab conquest of Bahrain in 1783<sup>18</sup>. Thereupon, Bahrain was transformed from a Persian dependency into an Arab principality governed by Sheikhs of the Al-Khalifah section of the Al-Utub. Soon after the conquest, the Jalahimah section of the tribe, considering themselves unfairly treated, departed for mainland Qatar, leaving the Al-Khalifah predominant in Bahrain. As Dr. Al-Baharna, Bahrain's former Agent in these proceedings, has pointed out, the Jalahimah "established their sovereignty over the whole peninsula of Qatar in spite of the objection of Al-Khalifah, the Rulers of Bahrain, who regarded Qatar as their dependency".<sup>19</sup> A descendant of the Jalahimah, Rahmah bin Jabir, later regarded as "the most influential personage at the time in Qatar"<sup>20</sup>, mounted numerous attacks upon and became the scourge of the Al-Khalifah of Bahrain<sup>21</sup>. As Bahrain confirms, soon after the conquest, the Al-Khalifah moved their headquarters from Zubarah to Bahrain<sup>22</sup>. Historical records show that thereafter, the Al-Khalifah involvement in mainland Qatar had to do only with internecine family disputes, and the use of locations on Qatar's west coast by exiled members of the family for preparing to retake Bahrain.

3.10 The Al-Khalifah occupation of Bahrain was followed by a confused period until 1820 with struggles for control over the island by Muscat, the Wahhabis and Persia. During this period, the Al-Khalifah acknowledged from time to time their submission to one or other of these powers. Confirmation of the fact that Al-Khalifah authority can hardly be said to have been continuously exercised over Bahrain itself - let alone Qatar - from 1783 is to be found in a number of historical sources. An India Office historical Memorandum of July 1934 on Bahrain records that in 1799, the Sheikhdome paid tribute to Persia, following a declaration of war against Bahrain by the Imam of Muscat<sup>23</sup>. The Imam occupied Bahrain from 1800 to 1801. Thereafter it fell under the influence of the Wahhabis from 1803 to 1809, and under their strict control from 1810 to 1811. By 1809, with the help of Rahmah bin Jabir, the Wahhabis had also taken control of the whole of the Qatar peninsula and in 1810, they appointed an agent based in Bahrain to supervise the administration of Bahrain, Hasa and Qatar and the "Shaikhs of Bahrain and Qatar paid tributes through him"<sup>24</sup>. This appears to be the last point of time when most of the Arabian shore of the Gulf including Qatar and the islands of Bahrain were under one authority - but that of the Wahhabis and not the Bahrainis. The India Office Memorandum also records that in 1811, "the islands were freed from Wahabi rule by the Imam of Muscat, when the Uttabis were restored to power" but, as claimed by the Imam, "in subordination to Muscat"<sup>25</sup>. In 1816, Bahrain again sought the protection of the Wahhabis against Muscat, but in 1820 "the Rulers of Bahrein made full submission to the Imam of Muscat and agreed to pay him a tribute of 30,000 dollars..."<sup>26</sup>.

3.11 In the meantime, Bahrain was shown to be assisting the piratical Qawasim, and in 1817 it was reported that Bahrain "... could itself hardly be regarded otherwise than as a piratical settlement"<sup>27</sup>. The British action in 1819 against the Qawasim crippled these allies and exposed Bahrain to a threat of occupation by the Ruler of Oman. Bahrain was thereafter admitted to the General Treaty of Peace of 1820 by the British as part of their effort to achieve maritime peace. Qatar has shown that although the British appeared to think that the Treaty also applied to the Qatar peninsula, the Political Resident found in 1823 that the people of Qatar had no knowledge of the Treaty<sup>28</sup>.

3.12 Qatar has also shown that while the 1820 Treaty could be said to have laid the initial foundations of the State of Bahrain, Bahrain could hardly be considered to have become a

sovereign State in 1820<sup>29</sup>; nor was it at that time a stable political entity. As Dr. Al-Baharna, dealing with events in the Gulf region during 1830 to 1845, points out:

"Bahrain during this period was internally and externally unstable. Externally, the Ruler of Bahrain, who had previously paid tribute to the Wahhabi rulers of Najd, now stopped that payment and the relations between Bahrain and the Wahhabis underwent a great strain which, in 1833, developed into war between the two countries"<sup>30</sup>.

Dr. Al-Baharna goes on to state:

"The internal situation in Bahrain was disturbed from 1830 until 1843 by dynastic quarrels between the Shaikhs, which finally resulted in Shaikh Muhammad ibn Khalifah expelling his uncle Shaikh Abd Allah, the Ruler, and seizing power himself. Shaikh `Abd Allah spent the rest of his life endeavouring to regain Bahrain by asking the help of the British, the Persians and the Sultan of Muscat"<sup>31</sup>.

A document submitted by Bahrain with its Counter-Memorial referring to events of 1833 notes:

"The inhabitants of Qatar..., being more vulnerable to attack by land, submitted to the Wahabis and, when the Shaikh of Bahrain crossed to Qatar to remonstrate with them, stated explicitly that they would, if called upon to do so, join the Wahabis in an attack on Bahrain"<sup>32</sup>.

3.13 As is recorded (in another document annexed to Bahrain's Counter-Memorial) by the historian, J.B. Kelly:

"Shaikh 'Abdullah ibn Ahmad had wielded sole authority in Bahrain since the death of his nephew and co-ruler, Shaikh Khalifah ibn Salman, in May 1834. So bad was his government, and so feeble his authority over his head-strong sons and kinsmen, that Bahrain rapidly fell into a state of disorder. Towns decayed, trade declined abruptly, and emigration reached alarming figures, as many of the island inhabitants fled from the extortions of the Al Khalifah"<sup>33</sup>.

3.14 Writing on the internal affairs of Bahrain during 1826-1838, Lorimer also notes that:

"...the lot of the Shaikh's subjects in Bahrain was growing, from day to day, less endurable; and the islands were being rapidly depopulated by emigration. The towns were in a state of ruin and decay, and house rents had fallen to one-eighth of what they had been only a few years before. Six sons of the Shaikh pretended to exercise separate and independent power, and their attention was chiefly devoted to extracting money from merchants and other men of means. The ordinary subject in Bahrain had no acknowledged rights; his domestic animals, even, were frequently seized on pretext of corvée and were not returned. The result was a general exodus of the inhabitants to every quarter of the Persian Gulf"<sup>34</sup>.

3.15 The Court will note two aspects of the position during 1833-1843 described in the above historical sources: firstly, that "Bahrain" as such is taken to comprehend only insular (or *island*) territories; and secondly, although the Al-Khalifah might have been involved with tribes or events on the mainland, they were hardly in a position to administer Bahrain itself as a viable principality, and there could be no question of their exercising any effective dominance or control over the peninsula of Qatar or any other part of the mainland coast which Bahrain might claim was part of "Greater Bahrain". Bahrain's assertion that the 1838 French map by Colonel Lapie "recognised Bahraini dominance over the peninsula"<sup>35</sup> is therefore wholly unfounded.

3.16 The India Office Memorandum of July 1934 also records that:

- In 1830-31, Bahrain formally submitted to the Wahhabi Amir, agreeing to acknowledge his supremacy and to pay tribute to him, a state of affairs which lasted until 1833;
- In 1836, Bahrain agreed again to pay tribute to the Wahhabi Amir, a situation which lasted until 1838;

- In 1839, Bahrain submitted to the Egyptians, acknowledging their supremacy and agreeing to pay tribute;
- In the early 1840s, "internal dissensions in the Sheikhdome between the ruler, Sheikh Abdullah, and his grand-nephew and co-ruler, Sheikh Mohamed, became increasingly bitter", leading to a four-month civil war in 1843, won by Mohamed, against whom Abdullah subsequently intrigued from 1843 to 1849;
- In 1847, the ruling Sheikh of Bahrain agreed to pay tribute to the Wahhabi Amir;
- In 1849, the Sheikh asked to be taken under British protection;
- In 1856, "the Sheikh's internal government continued to go from bad to worse"<sup>36</sup>.

3.17 Lorimer records that towards the end of the year 1859, in view of another Wahhabi threat, Sheikh Mohammed made simultaneous applications for protection to the Persian Governor of Fars and to the Turkish Wali of Baghdad:

"The response of the Turks was delayed by the absence of the Wali from his headquarters; but a Persian agent in the person of one Mirza Mehdi Khan, a well-known Anglophobe, almost immediately arrived in Bahrain, the Persian flag was hoisted, and Persian sovereignty was proclaimed. Scarcely, however, had these ceremonies been performed, when Muhammad Baig, the emissary of Mustafa Nuri Pasha appeared; the Persian flag was again lowered; and the Turkish flag was raised in its place. To complete the absurdity of the situation the Persian agent refused to leave Bahrain or to surrender his imaginary authority in the Shaikhdome"<sup>37</sup>.

3.18 This confusion was only resolved upon the British decision in 1861 that the tranquillity of the Persian Gulf seemed to demand that Bahrain should be regarded as subject neither to the Sublime Porte nor to Persia; and that the independence of the principality should be recognised<sup>38</sup>.

3.19 In other words, during the whole period when Bahrain claims that the Al-Khalifah Sheikhs were exercising sovereign authority or dominance throughout Qatar, there were very few intervals when the Al-Khalifah were themselves independent of other powers. Indeed, it was only in 1861 that, for their own purposes - *i.e.*, the maintenance of maritime peace and the exclusion of the Ottomans and Persians from Bahrain - the British "*decided... to regard the Sheikh as an independent ruler*"<sup>39</sup>.

3.20 From the background described above, it will be seen that even before 1868, "Bahrain" was essentially regarded as "an island" or, at most, a compact group of adjoining islands, and it is therefore not surprising that, beyond its unsubstantiated assertions, Bahrain has not been able to produce any credible evidence to show that it was regarded as having any authority in any territory outside the Bahrain islands and by no means, as Bahrain argues, throughout the peninsula for more than a century until 1871<sup>40</sup>. The fact simply is that during the period before 1868, although a section of the Naim tribe on the Qatar peninsula might have professed "allegiance" to the Rulers of Bahrain, and the Al-Khalifah may have had connections with other mainland tribes, any authority of the Al-Khalifah over such tribes was no more than theoretical. It is for this reason that even an historical reference to the Sheikh of Bahrain's "suzerainty" over Qatar in the middle of the 19<sup>th</sup> century is characterised as "more apparent than real"<sup>41</sup>.

3.21 Furthermore, there is no evidence that because of any such uncertain "suzerainty", the expression "Bahrain" ever came to include any territory other than the main island, or at most the compact group consisting of the main Bahrain island and the immediately adjoining islands. There was therefore no "Greater Bahrain" in existence in the years preceding 1868 upon which any Bahraini claim to the Hawar islands or Zubarah could be founded.

## **Section 2. Bahrain after 1868**

3.22 The misbehaviour of Sheikh Mohamed Al-Khalifah which led to the signing of the Friendly Convention between the British and Bahrain in 1861 has already been described in Qatar's Memorial and Counter-Memorial<sup>42</sup>. Qatar has also described in detail the continuing piratical activities of Sheikh Mohamed and his treacherous and destructive sea-borne attack of 1867 on Qatar which led to the British displacing him by Sheikh Ali as the Chief of Bahrain and to the signing of the 1868 Agreements with the Chiefs of Bahrain and Qatar<sup>43</sup>. Qatar has further shown that these Agreements recognised Bahrain and Qatar as separate entities and that it was historically acknowledged that after the Agreements of 1868 and the Ottoman arrival in Qatar "the political connection, such as it was, between Bahrain and Qatar came to an end"<sup>44</sup>.

3.23 From the description given above, it will have been seen that the references to the history of the Portuguese occupation show "Bahrain" to comprise only the main island of that name and the adjoining islands, of which a map is reproduced in Sheikh Hamad bin Isa Al Khalifa's publication referred to above<sup>45</sup>. The Persian presence in "Bahrain" up to 1783 as well as the subsequently revived Persian claim of sovereignty over Bahrain did not generally extend beyond the main island, though in some records relating to the Persian claim there is a reference to "Bahrain" consisting of "five islands". However, at no time was there any mention of "Bahrain" as including the Hawar islands or any part of the peninsula of Qatar. When the claim was pressed in 1886, the message conveyed to the British Foreign Minister was in the following terms:

"(1) The Shah wished to establish his authority effectually over *the island* either by sending a Governor or by instituting the Sheikh as the representative of the Persian Government.

(2) The Shah would wish that the maritime police should continue in the hands of the British naval forces, and lastly

(3) he considered that the London Foreign Office letter to the Persian Minister at the Court of St. James dated April 29<sup>th</sup>, 1869, recognized his sovereignty over *the island*..."<sup>46</sup>.

3.24 In December 1927 and January 1928, the London *Times* newspaper reported Persian protests to the League of Nations, together with a description of Bahrain. The issue of 29 December 1927 which reproduces the letter of protest from the Persian Ministry of Foreign Affairs to the Secretary General of the League of Nations refers to "Bahrain" as "an island State, consisting of five islands"<sup>47</sup>. Another report, contained in the issue of 5 January 1928, notes:

"The Shah's Government has raised a singular and unexpected claim to the Bahrain Islands, a group of one large and four smaller islands some twenty miles from the Arabian mainland"<sup>48</sup>.

3.25 When the claim was ultimately resolved in 1970, it was as a result of the Shah of Iran's announcement that "the *island's* inhabitants were welcome to decide their own fate".<sup>49</sup>

3.26 A number of maps published by Persian/Iranian sources from time to time show that Persian/Iranian authorities regarded only the main Bahrain island and its immediately adjoining islands as the territory which they claimed as Persian. This is particularly clear from the official Iranian Ministry of Defence Map of 1960<sup>50</sup> as well as the National Iranian Oil Company maps of 1965 and 1968<sup>51</sup>, all of which show the Bahrain group of islands as part of Persia/Iran. There is no indication whatsoever in any of this cartographical material that the Hawar islands or Zubarah were ever regarded as part of "Bahrain", to which Persia, by then Iran, continued to lay a claim until 1970.

3.27 Another independent (German) source confirms the extent of Bahrain described above in relation to the Persian claim to Bahrain. In a dissertation compiled in 1940 by Wolfgang Smend which considered the merits of the Persian claim, "Bahrein" is described in the following terms:

"... Around 20 miles from the shores of El-Hasa lies a group of islands. Seven islands belong to this group: Bahrein, Moharreq, Sitrah, Nebbi-Saleh, Sayah, Khasselfah and Arad. This archipelago takes its name from the largest and most important island, Bahrein"<sup>52</sup>.

3.28 The limited extent of Bahrain is similarly apparent from Ottoman documents, particularly those relating to the Ottoman efforts to claim sovereignty over Bahrain. A Turkish dictionary published in 1888-89 defines Bahrain as follows:

"BAHREIN

Bahreïn, in other words the island of Aval, is situated west the Gulf. It is a large island in the Hecir Gulf. It lies in the 26° north latitude and 48° 10' east longitude. The length from north to south is about 50 km and its width is about 16 km. The land is low and flat. It has 60 small villages and a town of 25000 to the north called Mun'ima. The people deal in pearl diving. Good quality pearls are obtained in abundance on the coast. The small island by the name of Ard lies in the proximity. Although it is ruled by an Imam, it had in the past always subordinated to a state, and was for a while under the domination of the Portuguese and later of Iran and the Muscat Imam, before coming under the sovereignty of the Ottomans"<sup>53</sup>.

3.29 A later Turkish source, Ismail Hakki Bey Tewfik, in an official publication of the Turkish Ministry of Foreign Affairs, dated 1931, also defines "Bahrain" as follows:

"In the past, al-Hasa and Qatar were included under the name Bahrain, but today, Bahrain refers only to a group of five islands which are:

- 1- Bahrain. Its previous names are: Aval, Oval, Havila and Tulus
- 2- Moharrek
- 3- Umm Na'san, uninhabited island
- 4- Sitra
- 5- Nabi Salih.

These five islands are located to the east of Arabia and to the southwest of the Gulf of Basra, *i.e.*, 30.4 km. from the portion of the coast formed by the Qatar peninsula and the angle formed by Al-Hasa and Qatar"<sup>54</sup>.

3.30 It is also of interest to note that during the period when the Ottoman Empire maintained its claim of sovereignty over Bahrain as well as Qatar, Ottoman maps showed both Qatar (including the Hawar islands) and Bahrain as part of the Ottoman Empire<sup>55</sup>. Qatar would invite attention to the fact that the so-called "primitive but highly instructive" map of 1878 by Capt. Izzet annexed (opposite page 6) by Bahrain to its Memorial, which is stated to be a "Map of THE VELAYAT of Basra" is clearly a map of this category and cannot therefore be relied upon to support Bahrain's contention that it "shows the Hawar Islands as a part of Bahrain"<sup>56</sup>.

3.31 Additionally, and contrary to what Bahrain describes as comprising the "State of Bahrain", all other significant historical references to or descriptions of "Bahrain" after 1868 specify only the main Bahrain island and its immediately neighbouring islands as constituting the principality or State of Bahrain. The following are some examples:

(a) In a British memorandum of March 1874 concerning the claims of Persia and the Ottomans to Bahrain, the extent of Bahrain territory was described as:

"... a small group of islands, three in number, on the south-west side of the Persian Gulf, in the centre of Bahrein Bay, the principal of which is Bahrein (or Aval), lying about ten miles off the Coast of Arabia"<sup>57</sup>.

(b) A British Report of the Persian Gulf Political Residency for the year 1878-1879, published in 1880, records:

"... it may be interesting to note that, according to Arabian writers, the name Bahrain, now restricted only to the islands so called, once extended to a tract of mainland including El-Katif and El-Katr"<sup>58</sup>.

(c) In a paper presented to the Royal Geographical Society in November 1889 by J. Theodore Bent after a trip to the Bahrain islands to pursue archaeological activities, he describes Bahrain as:

"The group of islands known as the Bahrein (Arabic dual form of Bahr, i.e. two seas) lies in a bay of the same name about 20 miles off the coast of El Hasa, in Arabia, in the Persian Gulf. Bahrein, the largest, is 27 miles long by 10 wide.

... The second island in point of size is Moharek, north of Bahrein, and separated from it by a strait one mile broad; it is of horseshoe form, seldom more than half a mile broad, and is about five miles in length. The rest of the group are mere rocks: Sitrah, four miles long, with a village on it of the same name; Nebbi-Saleh; Sayeh, and Khaseifah, and to the east of Moharek, Arad, three-quarters of a mile in length, with its date-grove, and a large double fort thereon of Portuguese construction, either an island or a peninsula at low tide. Arad is the only island which retains its ancient name; the others, according to Strabo, Pliny, and Ptolemy, having been called Tyros or Tylos, and Tharros"<sup>59</sup>.

Bent also notes that while the Al-Khalifah once held other territory, "... now the Bahrein Islands is all that is left to them...". Bent provided a map of what he considered to be the territory of "Bahrain" which is reproduced on the opposite page for convenience of reference, as *Map No. 6*.

(d) Similarly, a report of the German Ambassador to Persia, in connection with a visit in 1902 to the islands, describes Bahrain in terms almost identical to those used by Bent. He states:

"The Bahrain group of islands in the Persian Gulf includes the main island of the same name which has a length of 51 km from north to south and a width of 16 km. The

capital and centre of trade is Menahme [Manama] in the north with 12,000 inhabitants, mostly Arabs and followers of the Muslim Sunni sect. The little island of Noharreg [Muharraq] is situated near the main island and only separated from it by a shallow, narrow inlet with a capital of the same name, and winter residence of the sheikhs and rulers of the whole group of islands, to which belong the islands of Sitra, Nebbi Saleh, Sayeh, Khaseifa and Arad..."<sup>60</sup>.

(e) Lorimer, in his account published in 1908, describes the main "Bahrain Island" and its features and distinguishes it from the "Bahrain principality". Consistent with the position after 1868, he describes the principality/sheikhdom of Bahrain as follows:

"The present Shaikhdom of Bahrain consists of the archipelago formed by the Bahrain, Muharraq, Umm Na'asan, Sitrah and Nabi Salih islands and by a number of lesser islets and rocks which are enumerated in the articles upon the islands: taken all together these form a compact group almost in the middle of the gulf which divides the promontory of Qatar from the coast of Qatif..."<sup>61</sup>.

(f) This description of "Bahrain" territory was thereafter consistently adopted by British authorities. Thus:

(i) The *Handbook of Arabia*, published in 1916, states:

"The present Sheikhdome of Bahrein consists of the archipelago formed by the islands of *Bahrein, Muharraq, Umm Na'asan, Sitrah and Nebi Salih*, with a number of lesser islets and rocks. The whole forms a compact group almost in the middle of the gulf which separates the promontory of El-Qatar and the coast of Qatif"<sup>62</sup>.

(ii) In a report of the British India Office of 1928 entitled "Status of Certain Groups of Islands in the Persian Gulf", contained in the Persian Gulf Historical Summaries 1907-1928, the Bahrain archipelago is described as consisting only of "the islands of Bahrein, Muharraq, Umm Na'assan, Sitrah, and Nabi Salih, and a number of lesser islets and rocks forming part of the same compact geographical group"<sup>63</sup>.

(iii) On 3 May 1933, Laithwaite, of the India Office, referring to the territories of Bahrain, also gave an almost identical description and stated that the dominions of the Ruler of Bahrain may be regarded as consisting of "the Island of Bahrein, and of the adjoining islands of Muharraq, Umm Na'assan, Sitrah and Nabi Salih... in considering any grant of a concession in respect of his 'dominions' or 'Bahrain'"<sup>64</sup>.

(iv) As Qatar has pointed out, in response to a telegraphic request from London on 2 August 1933 for a marked map showing the area recognised as the Bahrain islands, the acting Political Resident sent a despatch on 4 August enclosing a map published in 1906 by the Survey of India<sup>65</sup>. The map enclosed with the despatch is unfortunately missing from the British archives, but the despatch itself describes it as showing "... the main island of Bahrain, the islands of Muharraq, Sitrah and Nabi Salih and certain islets"<sup>66</sup>. The despatch also states that the enclosed map "... does not show the island of Umm Nassan (and some petty islets) which lies about two miles off the West coast of Manama island...". Finally, paragraph 3 of the despatch summarizes the position as follows:

"The whole of the islands shown on the enclosed map, and also Umm Nassan and the petty islands mentioned in the second paragraph of this letter are included in the general term Bahrain Islands".

(v) A year later, in Laithwaite's Memorandum of 14 July 1934 (mentioned above in connection with the Persian claim to Bahrain), the same description of "Bahrain" was repeated:

"The Principality of Bahrein consists of the archipelago formed by the islands of Bahrein, Muharraq, Umm Na'asan, Sitra, and Nabi Salih, and by a number of lesser islets and rocks".

Laithwaite added:

"Taken altogether these form a compact group almost in the middle of the V-shaped gulf on the Arabian littoral of the Persian Gulf which divides the independent Arab Trucial Sheikdom of Qatar from the coast of Qatif in the Kingdom of Saudi Arabia"<sup>67</sup>.

(vi) The British Military Report and Route Book compiled in 1939 and published in 1940 describes Bahrain as follows:

*"General Description* - The Sheikdom of Bahrein consists of the archipelago formed by the islands of Manama, Muharraq, Umm-Na'san, Sitrah and Nebi Sala, with a number of lesser islets and rocks. The whole forms a compact group almost in the middle of the bight which separates the promontory of Qatar and the mainland of Hasa"<sup>68</sup>.

In a detailed description thereafter of the physical geography of Bahrain, the report deals only with each of the five islands mentioned above, describes the principal towns and important places in Bahrain, the BAPCO area, and certain civil amenities. The report also sets out an alphabetical list of the principal villages in Bahrain. No mention at all is made of the Hawar islands or any other part of the Qatar peninsula.

3.32 It will be seen therefore that from 1908 to 1934, all five descriptions of Bahrain in British records, as also one compiled in 1939, are virtually identical and clearly demonstrate that "Bahrain" during that period was regarded by the British as comprised only of the five named islands. Added to all this evidence are the numerous maps included in the Map Atlas provided by Qatar with this Reply which similarly show "Bahrain" as consisting of a limited group of islands. Qatar would invite particular attention to two of the maps, as they are official British maps and therefore of high evidentiary value:

(i) A portion of the Admiralty Chart No. 748-B of 1917 showing a red line within which lies the Arabian peninsula<sup>69</sup>. This map shows "Bahrain" specifically marked by a circle enclosing the same compact group of islands.

(ii) The War Office map of 1924 with annotations by the Foreign Office made in 1933<sup>70</sup>. As discussed in Chapter 2, Section 7, above, this map was annotated by Mr. G.W. (later Sir George) Rendel in connection with a proposal to transfer the duties in regard to Persian Gulf States from the Colonial Office to the Foreign Office<sup>71</sup>. This map, from British records, again shows "Bahrein" as consisting of a group of islands which does not include the Hawar islands or Zubarah.

This British cartographical material is therefore fully consistent with all the descriptions of "Bahrain" in the British records from 1908 to 1939 set out above.

3.33 In addition to the above, important evidence to the effect that Bahrain consisted only of a "group of islands now known as Bahrain"<sup>72</sup> and not "an archipelago which includes more than 50 islands, low-tide elevations and shoals... and the territory on the north-west coast of the Qatar peninsula referred to as the Zubarah region..." including the Hawar Islands<sup>73</sup>, is provided by Belgrave himself and in an annex to Bahrain's own Memorial.

3.34 Belgrave, in an article published in the *Journal of the Central Asian Society*, in 1928 - two years after he had taken up his official position in Bahrain - described Bahrain as follows:

"The Bahrain archipelago is a group of small islands about seventeen miles off the Arab coast half-way down the Persian Gulf.

The town of Manama, the capital and commercial centre of the principality, is situated at the northern point of an island of the same name. This, the largest of the islands, is about thirty miles long and ten miles wide at the centre. It is separated from Muharrak

Island, which contains the second largest town, by a stretch of sea, a mile wide, which becomes dry land, except for a narrow channel, at high tide. There are two smaller islands covered with palm groves and several rocky uninhabited islets.

The names 'Manama' and 'Muharrak' mean respectively 'The place of sleeping' and 'The place of burning'. It has been suggested that the former island was used as a place for burying and the latter island as a place for cremations either by inhabitants or by people from the mainland many centuries ago. On Manama Island there is an area of many miles covered with thousands of ancient tumuli: some of these burial mounds are over fifty feet high. There has been much controversy about their origin, which has not yet been definitely settled..."<sup>74</sup>.

3.35 A British Military Report of 1933, reproduced as an Annex to Bahrain's own Memorial, describes Bahrain as follows:

#### "BAHREIN

*General Description.* - The Sheikdom of Bahrein consists of the archipelago formed by the islands of Manama, Muharraq, Umm-Na'san, Sitrah and Nebi Sala, with a number of lesser islets and rocks. The whole forms a compact group almost in the middle of the bight which separates the promontory of Qatar and the mainland of Hasa"<sup>75</sup>.

It is important to read this description with a "map of Bahrain and Qatar to accompany the Military Report on the Persian Gulf (drawn from WO Sheet G.39)"<sup>76</sup>. As the Court will no doubt notice, there is no mention of Hawar or Zubarah in the above description; furthermore, Bahrain is represented on the map as quite distinct from Qatar and its adjoining islands including the Hawar islands and there is no indication or mention of the Hawar islands or any territory on the mainland as being part of Bahrain.

3.36 It will be seen therefore that for a long time, the expression "Bahrain" has either meant the main island or, at most, encompassed a compact group of islands which have been specifically named from time to time, and that the Qatar peninsula and its adjoining Hawar islands have not been included in any objective description of what is meant by the term "Bahrain".

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#### FOOTNOTES

1 BCM, para. 32.

2 Sheikh Hamad bin Isa Al Khalifa, *First Light - Modern Bahrain and its Heritage* (QR, Annex II.79, Vol. 2, p. 555; emphasis added).

3 Sheikh Abdullah bin Khalid al-Khalifa (Bahrain's Minister of Justice and Islamic Affairs) and Michael Rice (eds.), *Bahrain through the ages - the History* (QR, Annex II.78, Vol. 2, p. 551).

4 Sheikh Hamad bin Isa Al Khalifah, *op. cit.* (QR, Annex II.79, Vol. 2, p. 555).

5 *See*, para. 3.23, below.

6 Al-Nabhani, *Al-Tuhfa al-Nabhaniya fi Ta'rikh al-Jazira al-'Arabiya*, Cairo, 1923, republished in 1986 (QR, Annex II.80, Vol. 2, p. 561).

7 BM, map facing p. 5.

8 BM, para. 16.

9 QR, Map Atlas, Map No. 1.

10 *Ibid.*, Map No. 2.

11 *Ibid.*, Map No. 7.

12 *Ibid.*, Map No. 4.

13 *Ibid.*, Maps Nos. 41, 59, 80 and 81.

14 *See*, Chap. II and Chap. III, Sect. 2 of this Reply.

15 *See*, paras. 3.34-3.35, below.

16 BM, para. 42.

17 *Ibid.*, para. 43.

18 QM, paras. 3.17-3.18 and 8.9-8.10.

19 H. Al-Baharna, *The Legal Status of the Arabian Gulf States, op. cit.* (QR, Annex II.76, Vol. 2, p. 537).

20 QM, Annex II.5, Vol. 3, p. 250.

21 *Ibid.*, p. 247.

22 BM, para. 19.

23 QR, Annex II.61, Vol. 2, p. 359.

24 QM, Annex II.5, Vol. 3, p. 250; BCM, Vol. 2, p. 341.

25 QR, Annex II.61, Vol. 2, p. 537.

26 *Ibid.*

27 QM, Annex II.5, Vol. 3, p. 252.

28 QM, para. 3.20 and QM, Annex II.15, Vol. 5, p. 21.

29 QCM, para. 2.60.

30 QR, Annex II.76, Vol. 2, p. 537.

31 *Ibid.*

32 BCM, Annex 110-112, Vol. 2, p. 341.

33 BCM, Annex 114, Vol. 2, p. 360.

34 QM, Annex II.5, Vol. 3, p. 265.

35 BM, para. 16.

36 QR, Annex II.61, Vol. 2, p. 359.

37 QM, Annex II.5, Vol. 3, p. 295.

38 *Ibid.*

39 QR, Annex II.61, Vol. 2, p. 359, at pp. 380-381; emphasis added.

40 BCM, paras. 68-69.

41 QM, Annex II.4, Vol. 3, p. 141.

42 *See*, for example, QM, paras. 5.3-5.4.

43 QM, paras. 3.35, 5.5 and 5.6.

44 QM, Annex II.4, Vol. 3, p. 141.

45 *See*, QR, Annex II.79, Vol. 2, p. 555.

46 QM, Annex II.7, Vol. 4, p. 90; emphasis added.

47 QR, Annex II.57, Vol. 2, p. 331.

48 *Ibid.*

49 QR, Annex II.85, Vol. 2, p. 615; emphasis added.

50 QR, Map Atlas, Map No. 91.

51 *Ibid.*, Maps Nos. 94 and 96.

52 QR, Annex II.86, Vol. 2, p. 621. "*Bahrein*. Die politische und wirtschaftliche Bedeutung der Insel und ihre völkerrechtliche Zugehörigkeit, Göttingen, 1940" ["Bahrein. The Political and commercial importance of the island and its international appurtenance"]. The original German text reads as follows: "... Etwa 20 Meilen von der Küste des El-Hasa Gebietes entfernt liegt eine Inselgruppe. Zu ihr gehören sieben Inseln: Bahrein, Moharreq, Sitrah, Nebbi-Saleh, Sayah, Khasseifah und Arad. Nach der grössten und wichtigsten Insel, Bahrein, trägt dies Archipel seinen Namen."

53 QR, Annex II.15, Vol. 2, p. 75. The claim of Ottoman sovereignty over Bahrain in reality remained nothing more than a paper claim. Even that was expressly abandoned in the Anglo-Ottoman Convention of 1913.

54 QR, Annex II.87, Vol. 2, p. 625. The same author wrote to similar effect in 1932, in the *Zeitschrift für Geopolitik* (QR, Annex II.88, Vol. 2, p. 631).

55 *See*, QR, Map Atlas, Maps Nos. 35 and 36, which thus show Bahrain as part of the Ottoman Empire.

56 BM, para. 21.

57 QM, para. 5.31 and Annex III.28, Vol. 6, p. 137.

58 QR, Annex II.5, Vol. 2, p. 19.

59 QR, Annex II.82, Vol. 2, p. 577.

60 QR, Annex II.34, Vol. 2, p. 181. The original German reads as follows: "Die Bahrein Inselgruppe im Persischen Golf umfasst die Hauptinsel gleichen Namens mit einer Ausdehnung

von 51 km von N. nach S. und einer Breite von 16 km. Auf derselben befindet sich im Norden die Hauptstadt und das Handelszentrum Menahme mit einer Einwohnerzahl von 12000 Köpfen, wovon die meisten arabischer Abkunft, und mohamedanisch-sunnitischer Religion sind. Von der Hauptinsel nur durch eine seichte, schmale Bucht getrennt, liegt das Inselchen Noharreg, mit der Hauptstadt gleichen Namens und der Winterresidenz des Scheichs und Beherrschers der ganzen Inselgruppe, wozu noch Sitra, Nebbi Saleh, Sayeh, Khaseife und Arad gehören".

61 QM, Annex II.3, Vol. 3, p. 88.

62 QR, Annex IV.1, Vol. 4, p. 1.

63 QM, Annex II.10, Vol. 4, p. 276.

64 QM, Annex III.84, Vol. 6, p. 431.

65 QM, para. 6.22.

66 QM, Annex III.90, Vol. 6, p. 457.

67 QR, Annex II.61, Vol. 2, p. 359.

68 QR, Annex II.72, Vol. 2, p. 489.

69 QR, Map Atlas, Map No. 58.

70 QR, Map Atlas, Map No. 77; *see*, also, paras. 2.104, *et seq.*, above, and *Map No. 5*, facing page 56.

71 QR, Annex II.58, Vol. 2, p. 335.

72 *See*, para. 3.1, above, and QR, Annex II.79, Vol. 2, p. 555.

73 *See*, BM, paras. 42-43.

74 QR, Annex II.81, Vol. 2, p. 567. Belgrave's article was of course written before the construction of the causeway linking Manama to Muharraq.

75 BM, Annex 330, Vol. 6, pp. 1446-1447.

76 QR, Map Atlas, Map No. 76.

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

**REPLY OF THE STATE OF QATAR**

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### PART III

#### THE HAWAR ISLANDS AND OTHER TERRITORIAL QUESTIONS

#### CHAPTER IV

#### THE HAWAR ISLANDS

##### **Section 1. Introduction: The Territorial Integrity of Qatar and Qatar's Sovereignty over the Hawar Islands**

4.1 Qatar has shown that as a result of the 1868 Agreements incorporating undertakings by each of the chiefs of Qatar and Bahrain not to commit any breach of the maritime peace, the sea was to act as a buffer between Bahrain and Qatar, which were thus considered to be distinct and separate entities, with Qatar's territory consisting of the mainland peninsula and its adjoining islands.

4.2 Bahrain, however, has chosen to make a fanciful submission to the Court that the reference to the "Qatar" peninsula was only to "a geographical feature"<sup>1</sup>; that Bahrain continued to have "authority and control" over parts of the Qatar peninsula until 1937<sup>2</sup>; and that the British only recognised Abdullah Al-Thani as the "Shaikh of Qatar" when they signed the 1916 Treaty<sup>3</sup>. Bahrain carries this fanciful assertion to the point that it questions proximity (or the location of most of the Hawar islands within Qatar's territorial waters) as a valid basis for Qatar's title to the Hawar islands, stating that it is pointless to argue that the Hawar islands were attached to Qatar when "the territorial scope of *the recently created political entity of 'Qatar'* simply did not reach the west coast of the *Qatar peninsula nearest the Hawar islands*"<sup>4</sup>.

4.3 In this introductory Section, Qatar invites the Court's attention to the detailed evidence furnished in Chapters II and III of this Reply, supplementing the undisputed evidence already presented in its Memorial and Counter-Memorial<sup>2</sup>, this evidence conclusively establishing the territorial integrity of Qatar as constituting the whole peninsula of that name (and therefore including its west coast), its territorial waters, as well as the adjoining islands situated partly or wholly within its territorial waters, including the Hawar islands.

4.4 With regard to the Hawar islands themselves, Qatar has also provided extensive evidence in support of its long-standing title to these islands. Such evidence includes:

a) The 1868 Agreements, designed to ensure maritime peace by separating the territories of Qatar and Bahrain, the necessary implication being that the Hawar islands must form part of Qatar's territory and not Bahrain's territory, from which Bahrain could continue to threaten Qatar;

b) Lorimer's description in 1908, in his *Gazetteer of the Persian Gulf*, of the Hawar islands as part of Qatar;

c) The apparent refusal of the Ruler of Bahrain to lay claim to the Hawar islands in 1909 despite a suggestion by the British Political Agent (Prideaux) who was anxious to contain Ottoman expansion<sup>6</sup>;

d) As indicated above, the absence of any exclusion of Hawar or any other islands adjoining the peninsula of Qatar from the territories of Qatar referred to -

- in the 1913 Anglo-Ottoman Convention which expressly preserved rights of Bahrain's fishermen in Zakhnuniya<sup>7</sup>;

- in the 1916 British-Qatar Treaty;

- in the British Political Resident's discussion with the Ruler of Qatar in 1934<sup>8</sup>; or

- in the Qatar Oil Concession Agreement with APOC in 1935;

e) The description of the Hawar islands as part of Qatar in the British Admiralty War Staff (Intelligence Division) Survey of 1915<sup>9</sup>;

f) The exclusion of Hawar (as part of Bahrain) in the 1923 map (signed by Holmes acting on behalf of Bapco) attached to the draft first Bahrain Concession Agreement<sup>10</sup>; the absence of any reference to the Hawar islands in Bahrain's Concession Agreement of 1925; and the inclusion of the islands in the territories of Qatar in the Iraq-Petroleum Company's map of 1933 (preceding the Qatar Oil Concession of 1935)<sup>11</sup>;

g) Numerous official and unofficial British, Iranian, Turkish and German maps of Qatar showing Hawar as part of Qatar; in particular, the two official British maps of 1917 and 1924 (the latter with Foreign Office annotations made in 1933)<sup>12</sup>;

h) Numerous maps from renowned publishing houses in Europe and elsewhere similarly showing the Hawar islands as part of Qatar;

i) The absence of the Hawar islands from descriptions of Bahrain after 1868 (Chapter III, above);

j) A number of other documents from the British archives which show that the Hawar islands were regarded as part of Qatar right up until 1937, including;

- an official British Report of the India Office of 1928 (reproduced in the *Persian Gulf Historical Summaries 1907-1928*) entitled "Status of certain Groups of Islands in the Persian Gulf", where the Bahrain archipelago is defined as consisting of specific named islands which do not include the Hawar islands<sup>13</sup>;

- an India Office letter of 3 May 1933 (written by Laithwaite) giving an almost identical description of Bahrain as that in the 1928 Report referred to above<sup>14</sup>;

- the acting Political Resident's telegram of 31 July 1933 to the Secretary of State for India stating that "Hawar Island is clearly not one of the Bahrain group" with which the India Office agreed<sup>15</sup>;
- a description of a marked map showing the area recognised as Bahrain islands submitted by the Political Resident on 4 August 1933 to the Secretary of State for India clearly indicating that Bahrain's territory did not include the Hawar islands<sup>16</sup>;
- a report of an aerial reconnaissance by the Royal Air Force prior to the 1935 British assurance of protection of Qatar's territories, including a photograph of Hawar attached to it<sup>17</sup>;
- the Qatar - APOC Oil Concession Agreement of 1935;
- the note by G.W. Rendel of 30 December 1937 confirming that the Hawar islands were geographically part of Qatar<sup>18</sup>; and
- The view expressed by Prior (who was the British Political Agent in Bahrain from April 1929 to November 1932 and the Political Resident from September 1939 to May 1946) that the Hawar islands "belong to Qatar, a view supported by Lorimer"<sup>19</sup>.

All of these materials have been described in detail in Qatar's Memorial<sup>20</sup>, its Counter-Memorial<sup>21</sup>, and this Reply.

4.5 Qatar will now demonstrate that the Hawar islands, in addition to all the evidence referred to above, in view of their proximity to the mainland of Qatar and their legal status by virtue of being situated entirely within Qatar's territorial waters, must clearly be regarded as being part of Qatar.

## **Section 2. Proximity and Qatar's Title to the Hawar Islands**

4.6 In Section 1 of this Chapter, Qatar has set out in clear and concise terms the basis of its claim of sovereignty over the Hawar islands and examples of the evidence upon which it relies to sustain that claim. In this context, Qatar relies not only upon the fact that the majority of the islands and islets constituting the Hawar islands lie wholly or partially within a three-mile territorial sea limit from the mainland coast of Qatar (that limit being the one recognised by Qatar and Great Britain in the 1930s), but also that *all* of them now lie within a twelve-mile territorial sea limit from the mainland coast (that limit being the one currently applied by Qatar). Moreover, documentary and map evidence from British and other sources shows that the Hawar islands were generally acknowledged to appertain to Qatar (and *not* to Bahrain) at least up until 1936.

4.7 Map No. 9 facing page 145 of the Qatar Memorial demonstrates the precise location of the islands and islets constituting the Hawar islands in relation to a territorial sea limit of three nautical miles drawn from the coast of the Qatar mainland, measured at high tide. Reference should also be made to Map No. 5 facing page 50 of the Qatar Memorial which gives further details of the close proximity of the Hawar islands to the mainland of Qatar. It will be seen that of the seventeen islands and islets constituting the Hawar islands as claimed by Bahrain in its "preliminary statement" of 29 May 1938, eleven (including the main Hawar island) are located wholly or substantially within that three mile limit. These are:

1. South Sawad (Suwad al Janubiyah);
- 2-4. Al Wakara (Juzur al Wakur);
- 5-9. Bu Sedad or Bu Saada (Juzur Bu Sadad);
- 11 North Sawad (Suwad ash Shamaliyah);
17. Hawar island (Jazirat Hawar).

In addition, the three mile limit drawn on Maps Nos. 5 and 9 virtually bisects Janan island. Of the six remaining islands or islets, one - Al Mahzoura (Umm Kharurah or Umm Haswarah) - may lie just outside the three mile limit so measured; alternatively, the three mile limit may just cut across the southernmost tip of the island. It will also be noted that the northern half of the main Hawar island lies to the westward of three of the islands which may lie just outside the three mile limit so measured on Map No. 9:

10. Al Mahzoura (Umm Kharurah);

12-13. Al Hajiat (unnamed islets).

4.8 The nearest of the Hawar islands identified on Map No. 9 to the coast of Bahrain island is Al Maotoradh (Rabad al Gharbiyah) which lies 18.75 kilometres distant from the nearest point on Bahrain island and only 13.38 kilometres distant from the nearest point on the mainland of Qatar at high tide<sup>22</sup>. It thus still lies nearer to the mainland of Qatar than to the coast of Bahrain island.

4.9 It will also be seen from Map No. 5 that, at low tide, a distance of only 250 metres separates the extreme south-easterly tip of Hawar island (at Hadd ad Dib) from the mainland of Qatar; and that a distance of only 150 metres separates Suwad al Janubiyah from the mainland of Qatar. This of course explains Weightman's observation that it was possible to wade from the mainland to Hawar island (Jazirat Hawar) at low tide<sup>23</sup>. It will also be seen that, even at high tide, only 1.2 kilometres separates the south-easterly tip of Hawar island from the mainland of Qatar<sup>24</sup>.

4.10 It is also worth noting that if the measurement of three nautical miles from Qatar's mainland were taken from the low water mark rather than the high water mark, three-quarters of Umm Kharurah (Map No. 9) or Umm Haswarah (Map No. 5) would lie within the line so drawn, as would the whole of Janan island and a significantly greater part of Hawar island itself.

4.11 It remains only to add that a twelve-mile limit drawn from the coast of the Qatar mainland, even measured at high tide rather than at low tide, would wholly encompass all seventeen of the Hawar islands identified on Map No. 9 to the Qatar Memorial<sup>25</sup>.

4.12 Qatar has already demonstrated that the authority of successive Al-Thani Rulers of Qatar gradually extended from Doha and its immediate surroundings throughout the whole of the peninsula of Qatar during the second half of the nineteenth century<sup>26</sup>. This is attested to by many authorities, Turkish and German as well as British. As regards British sources, the Court will recall Lorimer's description (written in the early 1900s) of political conditions in Qatar from 1850 onwards:

"By the middle of the nineteenth century, however, the Shaikh of Bahrain had established a suzerainty - more apparent than real - over Qatar, and was represented at Bida (Dohah) by a political agent who was a member of his own family. In 1868 direct negotiations took place between the British Government and the tribal Shaikhs of Qatar; and, in the result, the interest of the Shaikh of Bahrain in Qatar was limited to the receipt of tributes probably on behalf of the Wahhabi Government of Najd. In 1872 the Turks established a garrison in Dohah; and with the cessation of the Wahhabi Zakat the political connection, such as it was, between Bahrain and Qatar came to an end"<sup>27</sup>.

4.13 That Lorimer is a reliable authority on the geography and history of Qatar at the beginning of the twentieth century is beyond dispute. His findings are certainly based on the knowledge available to British officials in the Gulf at the time<sup>28</sup>.

4.14 Lorimer does of course refer to and describe the main Hawar island in the geographical part of his *Gazetteer* entries covering the "West side of Qatar"; but it is interesting and, Qatar would submit, illuminating that no reference whatsoever is made to the "Hawar Islands" in his article on the Bahrain Principality which describes the present Sheikdom of Bahrain as consisting of:

"... the archipelago formed by the Bahrain, Muharraq, Umm Na'asan, Sitrah and Nabi Salih islands and by a number of lesser islets and rocks which are enumerated in the articles upon the islands: taken all together these form a compact group almost in the middle of the Gulf..."<sup>29</sup>.

4.15 In such a detailed and massive compilation as the volume of Lorimer's *Gazetteer* published in 1908 which is devoted to geographical and statistical data, the attentive reader would expect to find in the article on the "Bahrain Principality" (as distinct from the article on "Bahrain Island") at least some minimal reference to the Hawar islands if, as Bahrain claims, they were at the time an integral part of the territory of Bahrain.

#### **A. Significance of the principle of proximity in the present case**

4.16 It is this misperception of the facts by the British authorities in 1939 which, in Qatar's view, led them essentially to ignore the significance of the principle of proximity as far as title to the Hawar islands is concerned. A meticulous search of the British archives for 1938-1939 reveals that no consideration at all was given in London at this time to the legal status of islands located wholly or partially within the seaward limit of the territorial sea of Qatar (at that time, three miles).

4.17 Let us now consider Weightman's official reports on the Hawar islands in the present case. The most important is his letter of 22 April 1939 to the Political Resident embodying his assessment of the merits of the respective claims of Bahrain and Qatar to the Hawar islands<sup>30</sup>. The Court will note how consistently this assessment is weighted in favour of Bahrain as against Qatar. Weightman reports the existence of "two villages" in the main Hawar island, some of the houses being "occupied throughout the year". Water is admittedly in short supply and has to be brought across from Bahrain. Pearling boats were beached in Hawar on a visit which Weightman had paid to Hawar the previous week. The letter is replete with references to Dowasir "ownership" of Hawar, deriving "directly from the authority of the Al Khalifah" (this being a reference to a supposed grant of 1800 to the Dowasir from the Qadi of Zubarah, evidence of which has never been produced). Qatar has consistently disputed the relevance and indeed accuracy of the so-called "evidence" adduced by Bahrain in 1938/39 and again in the Bahrain Memorial and Counter-Memorial to justify attribution of the Hawar islands to Bahrain. Qatar is indeed of opinion that Weightman's more honest opinion of the strength of the Bahrain claim to the Hawar islands is expressed in the Intelligence Summary of the Political Agent, Bahrain, for the period 16-31 March 1940, when, after describing the banishment of one of the nephews of the Ruler of Bahrain to Hawar for a "particularly revolting drunken bout", he comments:

"The pleasures of Hawar are confined to watching a few fishermen gut their catch, and the result of this action should be admirable"<sup>31</sup>.

By this time, of course, the British decision of 11 July 1939 had already been given, and there was no longer any need for dissimulation by Weightman.

4.18 Bahrain also seeks to invoke evidence of the display of State functions and governmental authority on the Hawar islands over the past 60 years or so. Qatar would submit that most of this evidence can and should be ignored by the Court insofar as it involves Bahrain activities on or in relation to the islands since April 1936, when Bahrain for the first time put forward its claim of title. For the rest, Qatar contests the relevance and indeed truth of the "evidence" presented by Bahrain in this context<sup>32</sup>. Qatar has never of course denied that fishermen from various places frequented the Hawar islands during the winter months. But these were activities of private individuals and clearly did not constitute evidence of the exercise of governmental authority by Bahrain.

4.19 In all the circumstances, the Court may well conclude, as did the Arbitral Tribunal in the *Eritrea/Yemen Award* of 9 October 1998:

"In these circumstances where for all the reasons just described the activities relied upon by the parties, though many, sometimes speak with an uncertain voice, it is surely right for the Tribunal to consider whether there are in the instant case other factors which might help to resolve some of these uncertainties. There is no virtue in relying upon 'very little' when looking at other possible factors might strengthen the basis of decision"<sup>33</sup>.

4.20 This was part of the reasoning which led the Arbitral Tribunal to pay close attention to the principle of proximity (or contiguity) as a key element in its consideration of the conflicting claims of title to the Red Sea islands in dispute in that case. Proximity (or contiguity) may not in and of itself be determinative of sovereignty over islands lying off the mainland territory of a State and not so closely linked to the mainland as in effect to form an integral part thereof. But it is clearly a highly relevant criterion in circumstances where there is little or no evidence of official activity on the islands in dispute, whether because they are uninhabited or uninhabitable by reason of the absence of water, or only seasonally inhabited for the same reason. In such circumstances, proximity may indeed prove to be the decisive criterion; but this is likely to depend on the precise location of the islands, since a distinction has to be drawn between islands situated outside the territorial sea of a State and islands within the territorial sea.

4.21 Let us consider first the case of islands situated outside the seaward limit of the territorial sea of a State, that seaward limit being determined as of the time when a dispute as to sovereignty over these islands first arises. In the 1930s, both Qatar and Bahrain claimed a three-mile belt of territorial sea, following British practice in this respect. Now, let us consider the *locus classicus* where the principle of proximity is discussed in relation to title to territory. This is the award of the sole arbitrator (Judge Huber) in the *Island of Palmas* arbitration<sup>34</sup>. In that award, Judge Huber stated:

"In the last place there remains to be considered *title arising out of contiguity*. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State"<sup>35</sup>.

It should be noted that this lengthy citation from Judge Huber's award applies only to islands *situated outside territorial waters*. In the Bahrain Memorial, reference is made to a comment by Sir Gerald Fitzmaurice on the principle of proximity<sup>36</sup>. For once, Sir Gerald may have been in error; for in the original article in which the comment occurs<sup>37</sup>, Sir Gerald truncates this citation from Judge Huber's award by omitting, *inter alia*, the crucial phrase "situated outside territorial waters".

4.22 On the other hand, Sir Gerald, in the self-same article, concedes that proximity may have indirect effects:

"Thus, in the absence of anything to the contrary, it may lend colour to a contention that the disputed territory is in fact under the same sovereignty as the neighbouring or contiguous territory, or that State authority known to be exercised in the latter territory has been exercised in the former too. In short, contiguity or proximity is not a *ground* of title but may in certain circumstances afford some evidence of its existence"<sup>38</sup>.

4.23 Sir Gerald likewise refers with approval in this important contribution to the principle of natural or geophysical unity which he discusses under the heading "The question of entity or natural unity". Here is what the learned author says:

"This question can have far-reaching consequences. Not only may it powerfully affect the play of probabilities and presumptions, but also, if it can be shown that the disputed areas (whether by reason of actual contiguity or of proximity) are part of an entity or unity over which *as a whole* the claimant State has sovereignty, this may (under certain conditions and within certain limits) render it unnecessary - or modify the extent to which it will be necessary - to adduce specific evidence of State activity in relation to the disputed areas as *such* - provided that such activity, amounting to effective occupation and possession, can be shown in respect of the entity as a whole. Such a position would seem to result from the principle established by the *Island of Palmas* case that 'sovereignty cannot be exercised in fact at every moment on every point of a territory'<sup>39</sup>.

4.24 But it is not only Fitzmaurice who takes this view of the matter. So also does Sir Humphrey Waldock. In an early article, Waldock advances the proposition that, within the principle of effective occupation:

"... proximity may, in certain circumstances, operate to raise a presumption of fact that a particular state is exercising or displaying sovereignty over outlying territory in which there is no noticeable impact of its state activity"<sup>40</sup>.

Indeed, Judge Levi Carneiro, in his separate opinion in the *Minquiers and Ecrehos* case, upholds a similar viewpoint:

"... the Minquiers and the Ecrehos are closer to Jersey than the mainland. They must be regarded as attached to Jersey rather than to the mainland. They must be included in the archipelago. These islets were, and continue to be, a part of its 'natural unity'. It is for this reason that they remained English as did the archipelago itself"<sup>41</sup>.

4.25 Other noted authorities in fact go even further. Thus, Gidel entertains no doubt that an island or islet located within the territorial sea of a State or other territorial entity falls within the sovereignty of that State or entity even in the absence of an effective taking of possession of the island or islet. In analysing the principle of geographical contiguity or proximity, Gidel states:

"Ce principe a pour conséquence que les îles situées dans les eaux territoriales d'un Etat relèvent de plein droit de sa souveraineté, en l'absence même d'une prise de possession effective par cet Etat. Le principe de contiguïté sagement entendu ne va pas au-delà; mais dans cette mesure il doit être considéré comme faisant partie du droit international commun"<sup>42</sup>.

4.26 Waldock also went beyond the view which he expressed in 1948 in the *British Yearbook of International Law*<sup>43</sup> in the context of an opinion which he gave to the British Government in 1952, where he states:

"The only exception to the principle that the contiguity of an island does not by itself constitute a valid title is where an unoccupied island lies so close to the coast as actually to be within territorial waters. Then, a presumption arises that the island has been appropriated by the coastal State"<sup>44</sup>.

4.27 That a distinction can and should be drawn in this context between islands situated outside the territorial sea and islands situated within the territorial sea seems self-evident, since the reasons of security which create a presumption that an island situated within the territorial sea of the mainland territory of a State appertains to that State obviously do not apply (or do not apply to the same extent) to an island situated outside that territorial sea. Qatar does of course accept that the principle of proximity by itself will not be determinative of title to any island or group of islands *situated outside the territorial sea of a State*. Bowett, writing in 1979 of islands lying in the high seas, that is to say, outside the territorial sea of a State, has this to say:

"Here there is no rational reason for any presumption of sovereignty based on contiguity. Indeed, the instances of islands belonging to one State but lying nearer to the mainland of another are so numerous as to defeat any idea that sovereignty could, or should, be based on contiguity *per se*"<sup>45</sup>.

Among the examples given by Bahrain of States exercising sovereignty over islands that are closer to another State's territory than to their own are the Channel Islands (closer to France than to Britain), St. Pierre and Miquelon (closer to Canada than to mainland France), many of the Aegean Islands (closer to mainland Turkey than to mainland Greece), the Netherlands Antilles (closer to Venezuela than to the Netherlands) and the Nicobar Islands (closer to Sumatra, Indonesia, than to India). These are some of the examples given by Bahrain<sup>46</sup>. Qatar does not contest that they are valid examples; but it is certainly of interest to note that nearly all of the examples given by Bahrain are of *permanently* inhabited islands which lie *outside* a three-mile belt of territorial sea appertaining to the mainland State<sup>47</sup>. In other words, they are irrelevant to the case of the Hawar islands, where, as will be seen from Maps Nos. 5 and 9 submitted to the Court as part of the Qatar Memorial<sup>48</sup>, more than half of the islands in the Hawar group lie either wholly or partially within three nautical miles of Qatar's mainland coast<sup>49</sup>.

4.28 In considering the application of the principle of proximity in the particular case of the Hawar islands, one must also bear in mind the particular historical circumstances and the relevance of local custom and practice.

4.29 Qatar submits that the principal historical circumstances which must be borne in mind are the events of 1867/68<sup>50</sup>. As a result of these events, the British in effect recognised the existence of the separate entity of Qatar, distinct from Bahrain and separated from it by the sea. The Chiefs of Qatar and Bahrain were required to enter into written engagements not to commit a breach of the maritime peace. British "recognition" of the separate identity of Qatar as an entity distinct from Bahrain was accorded within the context of the maintenance of the maritime peace; it accordingly covered the coasts of mainland Qatar and the immediate off-shore islands adjoining the mainland, in particular the Hawar islands.

4.30 Local custom and practice also suggest that the principle of proximity was frequently applied in the Gulf to determine the appurtenance of uninhabited or only seasonally inhabited islands. In this context, Qatar would recall the dispute between Britain (acting for Bahrain) and the Ottoman Empire over the ownership of Zakhnuniya, a small island close to the coast of what is now Saudi Arabia. As Qatar has already pointed out:

"There are indeed striking similarities between the island of Zakhnuniya and the Hawar islands. Zakhnuniya, like the Hawar islands, lies close to the mainland of an adjacent State and distant from Bahrain. In both cases the islands are unsuitable for permanent occupation"<sup>51</sup>.

The Ottoman authorities, when the dispute first manifested itself in 1910, based their claim to Zakhnuniya exclusively on proximity to the mainland<sup>52</sup>; and eventually, Britain accepted that Zakhnuniya was part and parcel of the mainland coast which at the time appertained to the Ottomans<sup>53</sup>.

4.31 In this context, it is noteworthy that the Ottoman military authorities at this time adhered firmly to the proximity principle in the determination of title to coastal islands. Thus, in a letter from the Ottoman Ministry of War to the Office of the Grand Vizier dated 25 July 1909, it is stated:

"Intelligence has been received to the effect that British agents pay occasional visits to the islands in the Persian Gulf and plant there flagpoles and then claim rights of possession in the region. Unless transferred by agreement to another State, such islands close by the coast should naturally belong to the State in possession of the contiguous land. Britain should be advised of the fact that by planting flagpoles on the islands near the coast of Hasa and Qatar, she cannot be allowed to claim any right over the said portion of land. It is my duty to stress this need"<sup>54</sup>.

Given the date of this letter, the incident referred to seems likely to have resulted from Prideaux's visit in April 1909 to Zakhuniya and Hawar. It can therefore be assumed that the Ottoman authorities at this time most assuredly did not recognize that Bahrain had any claim of title to the Hawar islands.

4.32 The dispute between Britain (acting for Bahrain) and Saudi Arabia over title to the Lubainah islands was also eventually resolved in 1958 by application of the proximity principle, the islet closer to the coast of Bahrain being given to it and the islet closer to the mainland of Saudi Arabia being attributed to the latter. All other arguments advanced by Bahrain from time to time, based on ancient occupation, turtle catching, a private sale deed, the beaconing of the disputed islets, and the Anglo-Ottoman Convention of 1913, were set aside, the eventual solution being founded exclusively on the principle of proximity<sup>55</sup>.

4.33 The British authorities in the Gulf were also prepared in the 1930s to apply the principle of proximity to the determination of title to islands lying close to the mainland territory of other sheikhdoms with which Britain had special treaty relations. In 1936/37, the British authorities in the Gulf and in London mounted an enquiry into the appurtenance of certain small and uninhabited (or only seasonally inhabited) islands in the Gulf. Among these islands was the small (uninhabited) island of Al Junaina lying just over four miles off the mainland coast of Abu Dhabi at high tide. It accordingly lies further offshore than the nearest point on the main Hawar island lies to the mainland coast of Qatar. The Acting Political Resident in the Gulf (Caroe, in the temporary absence of Fowle) was nonetheless clearly of the view that this island should be considered as appertaining to Abu Dhabi:

"Al Junaina The Acting Political Resident recommends that in view of the close proximity of this Island to the mainland of Abu Dhabi, it should be taken as belonging to that Sheikh"<sup>56</sup>.

Both the India Office and the Foreign Office accepted this recommendation without comment<sup>57</sup>.

4.34 It would thus appear that the failure of the British authorities in the Gulf and in London to appreciate, in the period between 1936 and 1939, the significance of the application of the principle of proximity to the Hawar islands may have been attributable, at least in some measure, to their reliance on the misleading statement in Lorimer that the Hawar islands lie about five miles off the mainland coast of Qatar, rather than to any rooted objection to the relevance of the principle as such.

### **B. Legal status of islands wholly or partly situated within the territorial sea of a State**

4.35 We have already noted that Bowett draws a clear distinction between islands situated seaward of the outer limit of the territorial sea of a State and islands lying within the territorial sea of a State. As regards islands lying within the territorial sea of a State, Bowett states:

"Here the presumption is that the island is under the same sovereignty as the mainland nearby, and this presumption would apply to islands long-established and

those which might suddenly appear as a result of volcanic action or even gradually appear as a result of alluvial deposits from a river estuary"<sup>58</sup>.

However, the author, after citing Lindley<sup>59</sup> in support of his position, goes on to qualify his own view in the following terms:

"This can be no more than a presumption, for not infrequently islands under the sovereignty of one State lie within a distance from the shore of another State which is less than the limit of territorial waters. Hence, the presumption is displaced where proof of sovereignty in another State is adduced"<sup>60</sup>.

4.36 Obviously, even assuming that Bowett is right on this point (and his view is certainly disputable), a presumption such as the one to which he refers is highly unlikely to be displaced where the island or group of islands lying wholly or partially within the territorial sea of another State is either uninhabited (as was the case with most of the Hawar islands, at least in the mid-1930s) or is only inhabited on a seasonal basis. Qatar submits that this is the case with the Hawar islands which, at least as regards the period prior to 1936, were never *permanently* inhabited, but at most only inhabited during the winter by fishermen from other parts of the Gulf. As Qatar has shown, it is only in recent years, and more particularly since 1991, that Bahrain has, in flagrant violation of its obligation to respect the *status quo*, engaged in substantial construction activities, both military and civilian, on Hawar<sup>61</sup>.

4.37 The Court will also be aware that there is authority for the proposition that the occasional use of an island in the high seas by fishermen from a particular State is insufficient to confer title to the island on that State. This was certainly the view of the sole arbitrator (the Queen of Spain) in the *Aves Island* arbitration between the Netherlands and Venezuela in 1866; she was clearly unimpressed by the occasional use of the island by Dutch fishermen, and awarded the island to Venezuela on the basis of succession to Spain<sup>62</sup>. A highly significant passage in the *Aves Island* award states:

"While it appears to be an established fact that the inhabitants of St. Eustache, a Netherlands possession, go turtle fishing and egg collecting on the island of Aves, that fact cannot support the claim to sovereignty as this amounts merely to a temporary and precarious occupation of the island, the fishing in this instance not being an exclusive right but the consequence of its having been abandoned by the inhabitants of the immediate vicinity, or by the lawful owner"<sup>63</sup>.

The Court will of course recall that, in this part of the Gulf in the 1930s, fishing was *not* regarded as an exclusive right but was common to all the tribes on the southern littoral. A similar view was taken by Judge Hsu Mo in his separate opinion to the Court's judgment of 18 December 1951, in the *Norwegian Fisheries* case, where he stated:

"[A]s far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State"<sup>64</sup>.

If this is the position with respect to islands located beyond the outer limit of the territorial sea, the same position must *a fortiori* hold good for islands located within the territorial sea of another State<sup>65</sup>.

4.38 The presumption that islands lying within a three mile territorial sea limit from a mainland coast appertain to that mainland coast is of ancient origin. Right back to the time of Grotius in the seventeenth century, it has been accepted by all international lawyers that a small belt of territorial sea is essential to safeguard the security of the coastal State and to protect its financial and commercial interests. There have been diverging views among States (at least until very recently) as to what the breadth of that belt of territorial sea should be, but the concept that a belt

of territorial sea should be regarded as attaching to and forming an extension of the mainland coast developed in parallel with the emergence of the principle of the freedom of the high seas. As the perceptive United States Secretary of State, Elihu Root, pointed out at the beginning of the twentieth century:

"... the new principle of freedom, when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone that is recognized in the international law of today"<sup>66</sup>.

We need not trace the history of the breadth of the territorial sea from early acceptance of the so-called "cannon shot" rule of three nautical miles which, for many years, was accepted by major maritime powers such as Great Britain, the United States of America, France, Germany and the Netherlands, to the eventual acceptance in the United Nations Convention on the Law of the Sea of 1982 of a twelve-mile limit for the territorial sea. During the second half of the twentieth century, many States pressed for an extension of the breadth of the territorial sea in the interests of the security of the coastal State, and this pressure finally led to the endorsement of the twelve-mile limit in the 1982 Convention.

4.39 But if we consider the position as it was in the mid-1930s, both Qatar and Bahrain, following British practice in this respect, claimed at that time a three nautical mile belt of territorial sea surrounding their coasts. One noted authority observes that even during all these years of contention and dispute about the limits of the territorial sea, no one ever questioned the sovereign jurisdiction of the coastal State to a minimum of three nautical miles as absolutely essential for its security and protection<sup>67</sup>.

4.40 Attention was directed in the Qatar Memorial to the case of the *Anna* of 1805 where, in the context of the arrest by a British privateer of the United States vessel *Anna* at the mouth of the River Mississippi - more specifically, at a point more than three nautical miles from the mainland but less than two miles from alluvial islands formed at the mouth of the river - Sir William Scott (later Lord Stowell) drew attention to the dangers to the security of the United States which would inevitably arise if these islands were not acknowledged to appertain to the United States as the coastal State<sup>68</sup>. It may be worth adding that, in his judgment in the *Anna*, Sir William Scott also stressed:

"I think that the protection of territory is to be reckoned from these islands [the alluvial islands]; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed"<sup>69</sup>.

The ship was accordingly restored with costs and damages because it was held to have been captured within the "territory" of the United States.

4.41 Attention was also directed in the Qatar Memorial to the decision of the Judicial Committee of the Privy Council in the 1916 case of *Secretary of State for India in Council v. Chelikani Rama Rao and others*<sup>70</sup>, where Lord Shaw, delivering the opinion of the Privy Council, stressed the confusion which might be produced if islands emerging within the three mile limit could be seized by the first comer. The Privy Council cited with approval the judgment of Sir William Scott in the *Anna* case and went on to say that the general law, as stated, was "supported by the preponderant considerations of practical convenience" and therefore declared that the ownership of islands formed within the territorial seas<sup>71</sup> was in the British Crown.

4.42 The judgment of Lord Stowell in *The Anna* marked the origin of what came to be known subsequently as the "portico doctrine". This has been described in the following terms:

"Eventually the rule emerged that every island, wherever located, generated a territorial sea, so that the 'portico doctrine' came to possess independent integrity as a means of attributing sovereignty over offshore features which fell within the attraction of the mainland, and in some cases as a means of including shoals and reefs in the baselines from which the territorial sea was to be measured"<sup>72</sup>.

4.43 British State practice in the mid-nineteenth century was, broadly, consistent with this approach, and indeed brought about a development of the "portico doctrine". Islands lying within a three nautical mile belt of territorial sea were accepted as belonging to the coastal State. Thus, a dispute arose between Britain and Spain in the nineteenth century regarding the right of British fishermen to land on the uninhabited "keys" (islets) surrounding much of the mainland of Cuba and fish in adjoining waters. A formal Spanish note of 3 May 1852 protested this practice, stating that the keys "are only a continuation of the Island of Cuba and a defence to the same", and adding that the islands "have always been considered as an appendage of [Cuba]"<sup>73</sup>. Britain did not dispute Spain's title to all the Cuban keys although for some time it argued that only the inhabited keys were entitled to a territorial sea. However, in 1869, the Law Officers of the Crown advised that:

"The Cays on the north coast of Cuba... appear to us to come within the principle laid down by Lord Stowell in the case of the *Anna*... and that the Spanish right of jurisdiction extends to a distance of a marine league seawards from those Cays, and over all the Banks which may be enclosed within those Cays and the Mainland of Cuba"<sup>74</sup>.

The then United States Secretary of State (Seward), in a letter of 10 May 1863 to the Spanish Minister, while protesting the six-mile territorial sea claim in respect of Cuba, took a broadly similar position:

"The... line of keys is properly to be regarded as the exterior coast line, and... the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys"<sup>75</sup>.

4.44 The British Government adopted an even more forward position as regards islands lying off the coasts of Bermuda and Jamaica between 1862 and 1864. On 3 November 1864, the British Law Officers, in an opinion relating particularly to Jamaica, stated what they conceived to be the general law regarding the outer limit of the territorial sea in the following terms:

"... in places where the possession of particular rocks, reefs or banks naturally connected with the mainland of any part of Her Majesty's territories, is necessary for the safe occupation and defence of such mainland, Her Majesty's Government also claim the waters enclosed between the mainland and those rocks, reefs or banks whatever may be the distance between them and the nearest headland"<sup>76</sup>.

All this was of course subject to the right of innocent passage of foreign ships through the territorial sea, so that the sovereignty of the coastal State over its territorial sea was never absolute but was restricted as a result of the operation of the right of innocent passage. Subject to this, however, a three-mile belt of territorial sea came to be accepted unequivocally during the nineteenth century as an extension of the territory of the coastal State - "fully under the dominion or sovereignty of the adjoining State"<sup>77</sup>.

4.45 The sovereignty of the coastal State over its territorial sea and seabed does not of course depend upon its occupation of these features; it exists because the territorial sea is the necessary appurtenance of the land territory of the State. As Hershey stated in 1912:

"The Land Domain of a State also includes all islands formed within its territorial waters, and the territorial subsoil beneath its land and water surface"<sup>78</sup>.

The latest edition of Oppenheim endorses the position that the sovereignty of the coastal State extends to the belt of territorial sea adjoining its mainland coast:

"It was formerly contested whether the territorial sea was subject to the sovereignty of the coastal State, but it is now generally accepted that 'the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory'"<sup>79</sup>.

The only qualification added by Oppenheim is that the sovereignty over the territorial sea is, unlike that over internal waters, subject to the enjoyment of certain rights of innocent passage and of transit by vessels of all nations.

4.46 This position is now formalised in Article 2 of the 1982 Convention on the Law of the Sea which states:

1. The sovereignty of a coastal State extends beyond its land territory and internal waters... to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the airspace over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law".

4.47 Thus a State which has sovereignty over the coastal landmass has also, *ipso jure*, sovereignty over the adjacent territorial sea, which is accepted as a simple prolongation of the State's land territory. The notions of "contiguity" or "proximity" accordingly apply *a fortiori* in relation to features wholly or partially located within the territorial sea of a State, since the sovereignty of the coastal State extends *by operation of law* to the territorial sea. It is no doubt this consideration which prompted Judge Huber, in his award in the *Island of Palmas* case, to limit his rejection of any claim of title over an island based upon notions of contiguity or proximity to "islands situated outside territorial waters"<sup>80</sup>. As regards islands situated within territorial waters, it may be inferred that Judge Huber was, to put it at its lowest, most assuredly not excluding title to islands arising solely or principally by virtue of the notion that the sovereignty of the coastal State extends to all features located wholly or partially within its territorial sea.

4.48 Sir Robert Jennings adopts a rather similar position. In principle, he takes the position that contiguity "cannot be a root of title independent of possession". But he then goes on to make a most significant qualification to this general principle:

"Thus, assuming that a certain parcel of territory is 'contiguous' in a geographical sense to a certain sovereignty, this can never mean that the same sovereign has title over that parcel of territory without more ado. *It does not constitute, like the territorial sea, an inalienable appurtenance, in the sense that it could not in law belong to any other State than that which is sovereign over the principal territory*"<sup>81</sup>.

A claim to title to an island located *outside* the territorial sea of the claimant State based upon the contiguity principle "cannot be a root of title independent of possession" although it may, according to the learned author, provide "evidence raising some sort of presumption of effective occupation; a presumption that may be rebutted by better evidence of sovereign possession by a rival claimant"<sup>82</sup>.

4.49 An interesting parallel can be drawn between the acceptance of the territorial sea as an extension or continuation of the land territory into the sea, on the one hand, and the much later recognition in the 1950s of the continental shelf as the extension of the seabed and subsoil of the

territorial sea into the adjoining seabed and subsoil of the continental shelf. The parallel is not an exact one, but it is close enough. The Court will certainly recall its own pronouncement in its 1969 judgment in the *North Sea Continental Shelf* cases, where it stated that:

"... the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right"<sup>83</sup>.

Even more tellingly, the Court, in that case, emphasised "the principle - constantly relied upon by all the Parties - of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State"<sup>84</sup>.

4.50 If, as the Court has thus emphasised, the bed of its territorial sea is under the full sovereignty of the coastal State, then surely everything that is naturally located, wholly or partially, within the seaward limit of that territorial sea is also under the full sovereignty of the coastal State<sup>85</sup>. Indeed, it would seem to be a necessary presumption from the legal status of the territorial sea and seabed that any natural feature capable of occupation, whether inhabited or uninhabited, which lies wholly or partially within the seaward limit of the territorial sea of the coastal State at the relevant time must be recognized as appertaining to that State. This by itself would clearly exclude the possibility that a natural feature (such as an island) lying wholly or partly within the accepted belt of territorial sea of a coastal State could be *res nullius* and therefore open to occupation by another State.

4.51 There remains the possibility of acquisition of territory by long, continuous and undisturbed possession. This involves either acquisition of title to territory by possession which has been so long established that its origins are not only beyond question but also unknown (the so-called "immemorial possession" of private law) or where the claimed right of sovereignty rests upon a manifestly defective title or is even of wrongful origin, but where the "adverse possession" has continued over a long and undisturbed period of time. Where title is claimed on the basis of adverse possession, the claimant must not only display acts of sovereignty but there must also be acquiescence on the part of the original owner. Sir Robert Jennings maintains that prescription:

"... is a portmanteau concept that comprehends both a possession of which the origin is unclear or disputed, and an adverse possession which is in origin demonstrably unlawful. For prescription, therefore, the possession must be long-continued, undisturbed, and it must be unambiguously attributable to a claim to act as sovereign. It depends as much on the acquiescence of the former sovereignty as on the consolidation through time of the new"<sup>86</sup>.

Sir Gerald Fitzmaurice has also provided some illuminating insights into the notion of prescription. For Sir Gerald, one of the key elements in prescription as a means of *acquiring* title is passivity on the part of the other claimant or claimants:

"The essence of a prescriptive claim (using that term in the acquisitive sense, and not in the sense of immemorial possession...) is that encroachments, or an adverse taking of possession, or jurisdictional acts that were in their inception illegal or invalid, have gradually operated to create title by a process of tacit acquiescence on the part of the original sovereign, amounting in the end to a tacit abandonment or surrender of its sovereignty"<sup>87</sup>.

Now, it is amply clear from the history of the dispute between Qatar and Bahrain over title to the Hawar islands, that Qatar *never* acquiesced in the unlawful activities of Bahrain in taking over the Hawar islands in the mid-1930s but constantly and repeatedly protested to the British

authorities about these activities<sup>88</sup>. Accordingly, there is no room for the operation of the notion of acquisitive prescription as a means whereby Bahrain could have acquired title to the Hawar islands since 1936.

4.52 It is significant in the context of the current dispute between Qatar and Bahrain as regards title to the Hawar islands that, even where steps may have been taken after a war to transfer title to islands lying off the mainland coast of a defeated Power to one or more of the victorious Powers, title to all islands and islets within the three mile belt of territorial sea appertaining to the mainland coast of the defeated Power has been stipulated to remain with that Power. The classic example is the treatment of the Aegean islands under the Treaty of Lausanne, 1923. Qatar does not take a position on the continuing dispute between Greece and Turkey as to title to certain islets and rocks off the Anatolian coast of Turkey. It simply wants to draw attention to certain relevant provisions of the Treaty of Lausanne of 1923. Following the Balkan wars of 1912, the Ottoman Emperor, by virtue of Article 5 of the Treaty of London of 30 May 1913, left it to the six major European Powers of the time (Germany, Austria-Hungary, France, Great Britain, Italy and Russia) to decide upon the fate of the Ottoman islands in the Aegean Sea with the exception of Crete and Mount Athos. A decision of the Six Powers of 13 February 1914 required Greece to restore to Turkey the islands of Imbros and Tenedos, but also determined that Greece should retain final possession of the other islands in the Aegean Sea which it was then occupying.

4.53 Article 12 of the Treaty of Lausanne in terms confirmed the Six-Power decision of 13 December 1914 "regarding the sovereignty of Greece over the islands of the Eastern Mediterranean, other than the islands of Imbros, Tenedos and Rabbit Islands, particularly the islands of Lemnos, Samothrace, Mytilene, Chios, Samos and Nikaria, .... subject to the provisions of the present Treaty respecting the islands placed under the sovereignty of Italy which form the subject of Article 15"<sup>89</sup>. Before considering the terms of Article 15, it is as well to remind ourselves that paragraph 2 of Article 12 provides that:

"Except where a provision to the contrary is contained in the present Treaty, the islands situated at less than three miles from the Asiatic coast remain under Turkish sovereignty".

In addition, it should be noted that paragraph 2 of Article 6 of the Treaty of Lausanne provides more generally that:

"In the absence of provisions to the contrary, in the present Treaty, islands and islets lying within three miles of the coast are included within the frontier of the coastal State".

4.54 Article 15 of the Treaty of Lausanne deals with the Dodecanese Islands and provides that Turkey renounces in favour of Italy all rights and title over 13 named islands which are now [in 1923] occupied by Italy, "and the islets dependent thereon", and also over the island of Castellorizzo<sup>90</sup>. As a general sweep-up clause, Article 16 of the Treaty required Turkey to renounce all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty-

"... and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned".

4.55 Qatar has drawn attention to these provisions of the Treaty of Lausanne only to demonstrate that even the territorial clauses of a relatively recent peace treaty acknowledge that islands lying within a three mile limit of the mainland coast of a Power defeated in war should continue to be acknowledged as appertaining to that Power.

4.56 In the context of an analysis of the principle of proximity in its application to the Hawar islands, Qatar notes that Bahrain has invoked the precedent of the Award of 14 February 1985 of

the Arbitral Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau to argue that it would have been:

"... illegitimate to ignore, under the guise of 'simplification' ... the 'bouclier' (shield) constituted by the Bijagos Islands in the *Guinea/Guinea-Bissau* case..."<sup>91</sup>

Bahrain puts forward this argument in order to counter Qatar's demonstration that, as a matter of the law of the sea, Bahrain is *not* entitled to invoke what it asserts to be "legally relevant" insular and other maritime features to be taken into account in the delimitation of the single maritime boundary between Qatar and Bahrain. As will be seen in paragraph 9.74, below, Bahrain's invocation of the *Guinea/Guinea-Bissau* Award in that particular context is mis-conceived. On the other hand, the Court will wish to consider the *Guinea/Guinea-Bissau* Award in the context of the principle of proximity in its application to the Hawar islands. What is highly relevant to the treatment of the Hawar islands in the present case is the treatment of the Bijagos Islands in the *Guinea/Guinea-Bissau* Award<sup>92</sup>.

4.57 The geographical situation of the Bijagos Islands immediately off the coast of Guinea-Bissau may be compared with that of the Hawar islands off the coast of Qatar, as is illustrated by *Map No. 16*, facing page 352 in this Reply. As was stated by the Arbitral Tribunal in the *Guinea/Guinea-Bissau* case:

"These islands [the Bijagos islands], which trading vessels must circumnavigate to the north, west or south, are 2 to 37 nautical miles away from the nearest coast, and are separated from each other by never more than 5 miles of shallow waters interspersed with reefs"<sup>93</sup>.

The Court will note that the Bijagos islands lie much further off the coast of Guinea-Bissau than the Hawar islands lie off the coast of Qatar.

4.58 A Convention of 1886 between France and Portugal had *inter alia* determined that all offshore islands located between the Cape Roxo meridian, the coast and a southern limit represented by a line following the thalweg of the Cajet River, should belong to Portugal. The Arbitral Tribunal eventually found that the 1886 Convention did *not* determine the maritime boundary between the respective possessions of France and Portugal in West Africa. It therefore had to determine itself the course of the maritime boundary between Guinea and Guinea-Bissau.

4.59 In approaching this task, the Arbitral Tribunal found it necessary to distinguish three types of islands, of which only the first two are relevant to the case of the Hawar islands:

"(a) The coastal islands, which are separated from the continent by narrow sea channels or narrow water-courses and are often joined to it at low-tide, must be considered as forming an integral part of the continent.

(b) The Bijagos Islands, the nearest of which is two nautical miles from the continent and the furthest 37 miles, and no two of which are further apart than 5 miles, can be considered, if the 12-mile rule accepted by the Parties is applied, as being in the same territorial waters as each other and as being linked to those of the continent.

(c) There are also the more southerly islands scattered over shallow areas..., some of which may be taken into account for the establishment of baselines and be included in the territorial waters"<sup>94</sup>.

4.60 In the event, both the coastal islands as defined and the Bijagos Islands were taken fully into account as appertaining to Guinea-Bissau, but the course of the maritime boundary between the two adjacent States was drawn so as to reflect the general configuration of the West African coastline as a whole. The interesting feature of the Award in the context of the present case between Qatar and Bahrain is what is said in paragraph 95. The considerations stated at (a) and (b) in the above citation from this paragraph of the award can be applied *mutatis mutandis* to the

Hawar islands and give significant support to the application of the principle of proximity in determining title to islands located wholly or partly within the territorial sea appertaining to a mainland coast.

### **C. The relevance of the Award of 9 October 1998 of the Arbitral Tribunal in the *Eritrea/Yemen* case**

4.61 Qatar might in principle have been prepared to confine its arguments based on the close proximity of the Hawar islands to the mainland of the State of Qatar to the highly significant factual and legal considerations which it has so far developed in this Section of its Reply. But there has of course been a most important development in recent months which, in Qatar's submission, provides strong support for Qatar's claim of sovereignty over the Hawar islands. This is of course the Award of the Arbitral Tribunal of 9 October 1998, in the first stage of the proceedings between Eritrea and Yemen covering territorial sovereignty and scope of the dispute.

4.62 The dispute between Eritrea and Yemen on territorial sovereignty relates to overlapping and conflicting claims of title to islands in the Red Sea. The Arbitral Tribunal, having been entrusted with the task of defining the scope of the dispute between Eritrea and Yemen "on the basis of the respective positions of the two Parties" eventually ruled that it was required to make an Award on sovereignty "in respect of all the islands and islets with respect to which the Parties have put forward conflicting claims, which include Jabal al-Tayr and the Zubayr group, as well as the Haycocks and the Mohabbakahs"<sup>95</sup>.

4.63 The Award describes the islands and islets in the Red Sea in dispute between Eritrea and Yemen in the following terms:

"The disputed islands and islets range from small to tiny, are uniformly unattractive, waterless, and habitable only with great difficulty"<sup>96</sup>.

The Court will hardly need reminding that this description of the disputed islands in the Red Sea is not all that different from the picture which Qatar has painted of the Hawar islands in the mid-1930s before their unlawful occupation by Bahrain<sup>97</sup>. Hawar island is of course larger in area than any of the disputed Red Sea islands or islets; but it was certainly (in the mid-1930s) waterless and, as Qatar has consistently maintained, uninhabitable on any permanent or sustained basis. Indeed, another sentence in the description in the *Eritrea/Yemen* Award of the disputed islands and islets in the Red Sea is, in Qatar's submission, equally applicable to the Hawar islands:

"During the earlier periods the islands seem often hardly to have been noticed by coastal countries other than by local traditional fishermen who used them for shelter and their waters for anchorage"<sup>98</sup>.

Finally, the Court will wish to note another sentence in the Award descriptive of the disputed islands in the Red Sea, but, in Qatar's submission, equally descriptive of the Hawar islands as they were in the mid-1930s before Bahrain unlawfully occupied them. The Arbitral Tribunal, after recalling that neither Eritrea nor Yemen had formulated any claim that the disputed islands were located within historic waters, states (again evoking the parallel with the Hawar islands):

"Moreover, none of the Islands is inhabited on other than a seasonal or temporary basis, or even has the natural and physical conditions that would permit sustaining continual human presence"<sup>99</sup>.

4.64 Further reference will be made to the Award in the *Eritrea/Yemen* case in Section 4.D of this Chapter in the context of the discussion of the traditional freedom of fishing in the waters of the Gulf of tribesmen owing allegiance to differing Rulers<sup>100</sup>. It will be seen that the parallels, in terms of geography, between the Hawar islands and the disputed Red Sea islands and islets are matched by a similar concordance between the nature of the socio-economic activities carried

out by fishermen in the Red Sea and by fishermen along the southern shore of the Gulf, at least up until relatively recent times.

4.65 But even more relevant to the present dispute between Qatar and Bahrain over the Hawar islands than the similarities between them and the disputed Red Sea islands and islets in the *Eritrea/Yemen* arbitration are the observations which the Arbitral Tribunal makes in its Award about the principle of proximity. Before coming to the specific geographical situation of the Mohabbakah and Haycock Islands in relation to the mainland coast of Eritrea, it may be useful to recall exactly what is said in the Award about proximity as evidence of title:

"So there is some presumption that any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the state on the opposite coast has been able to demonstrate a clearly better title"<sup>101</sup>.

The Award then proceeds to analyse the principle of natural or geographical unity invoked by Yemen as encompassing the entire chain of islands (including the Haycocks and the Mohabbakahs), with the exception of the northern islands. The Award quotes with approval the passage from Sir Gerald Fitzmaurice's 1955-6 article in the *British Yearbook* which has been cited at paragraph 4.23, above, and then makes a very important point:

"These ideas, however, have a twofold possible application in the present case. They may indeed, as Yemen would have it, be applied to cause governmental display on one island of a group to extend in its juridical effect to another island or islands in the same group. *But by the same rationale a complementary question also arises of how far the sway established on one of the mainland coasts should be considered to continue to some islands or islets off that coast which are naturally 'proximate' to the coast or 'appurtenant' to it.* This idea was so well established during the last century that it was given the name of the 'portico doctrine' and recognised 'as a means of attributing sovereignty over off-shore features which fall within the attraction of the mainland'<sup>102</sup>.

4.66 The Arbitral Tribunal then proceeds to apply these considerations to some of the disputed islands and islets in the Red Sea. It considers first the case of the Mohabbakahs:

"The Mohabbakah Islands are four rocky islets which amount to little more than navigational hazards. They are Sayal Islet, which is no more than 6 nautical miles from the nearest point on the Eritrean mainland coast, Harbi Islet and Flat Islet; all three of these are within twelve nautical miles of the mainland coast. Finally, there is High Islet, which is less than one nautical mile outside the twelve-mile limit from the mainland coast, and about five nautical miles from the nearest Haycock island, namely South West Haycock"<sup>103</sup>.

4.67 This geographical situation of the Mohabbakah Islands led the Arbitral Tribunal to conclude that it did not need to decide whether Italian title to these islands survived the Treaty of Lausanne and passed thereafter to Ethiopia and then to Eritrea:

"It is sufficient for the Tribunal to note that all the Mohabbakahs, other than High Islet, lie within twelve miles of the Eritrean coast. Whatever the history, in the absence of any clear title to them being shown by Yemen, the Mohabbakahs must for that reason today be regarded as Eritrean. No such convincing alternative title has been shown by Yemen"<sup>104</sup>.

The Tribunal justified including High Islet within the scope of this determination by admitting that it lay just over twelve nautical miles from the territorial sea baseline, but nonetheless concluding that:

"... here the unity theory might find a modest and suitable place, for the Mohabbakahs have always been considered as one group, sharing the same legal destiny. High Islet is certainly also appurtenant to the African coast"<sup>105</sup>.

4.68 In rejecting what it refers to as "the ingenious theory" enunciated by Eritrea whereby the "leap-frogging" method of determining the baseline of the territorial sea could be applied so as to include an entire chain, or group, of islands, where there is no gap between the islands of more than twelve miles, the Arbitral Tribunal expresses the basic principle in the following terms:

*"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). But there is no like presumption outside the coastal belt, where the ownership of the islands is plainly at issue"*<sup>106</sup>.

The Court will note that there has to be a "fully-established case to the contrary" to rebut the "strong presumption" in favour of the coastal State.

4.69 The Haycocks lie outside a twelve-mile limit drawn from the mainland coast of Africa. Despite this, and primarily because of general historical considerations leading to the development of the "portico doctrine", the Tribunal also applied the proximity principle to determine the fate of the Haycocks. After referring to the fact that, by virtue of various *firman*s of the Ottoman Sultan, the African coast of the Red Sea and the islands off it were placed under the administration of Egypt, the Tribunal continues:

*"There seems little doubt that this African-coast administration would have extended to the Mohabbakahs and the Haycocks. At this time the territorial sea was limited to three miles, and there were still grave doubts about the nature and extent of the territorial waters regime. Nevertheless there was a feeling, based upon considerations of security as well as of convenience, that islands off a particular coast would, failing a clearly established title to [the] contrary, be under the jurisdiction of the nearest coastal authority. As mentioned above, this was sometimes called the 'portico doctrine'"*<sup>107</sup>.

4.70 It was on the basis of these considerations that the Arbitral Tribunal determined that the three small islands comprising the Haycocks, although lying outside a twelve mile limit from the mainland coast of Eritrea, should be attributed to Eritrea.

4.71 The foregoing analysis of the Award of 9 October 1998, in the first stage of the case between Eritrea and Yemen, sufficiently demonstrates its relevance to the present dispute between Qatar and Bahrain, insofar as that dispute embraces the question of conflicting claims of sovereignty over the Hawar islands. The *dicta* about proximity in the Award, although directed to the particular cases of the Mohabbakahs and the Haycocks in the Red Sea, clearly apply *mutatis mutandis* to the Hawar islands; indeed, they apply *a fortiori*, given that, according to the testimony of Weightman in 1938, it was possible at low tide, to wade, in three feet of water at most, from the mainland of Qatar out to the nearest point on the main Hawar island, which is only 250 metres distant. The Hawar islands are therefore not simply "proximate" to the mainland of Qatar; the main island is virtually part and parcel of the mainland.

#### **D. Conclusion**

4.72 Qatar is confident that the Court will wish to take all these considerations into account in deciding upon the conflicting claims to the Hawar islands of the two States. In Section 4 of this Chapter of its Reply, Qatar will show that there is no reliable or plausible evidence that Bahrain has a "historic title" to the Hawar islands; that the claim as to the arrival of the Dowasir on the Hawar islands about 1800 is unsupported by any real evidence, as is the claim that the Dowasir maintained a regular and continuous residence on the islands thereafter; and that the claim that the Dowasir "occupied" the Hawar islands on behalf of the Ruler of Bahrain is in any event

disproved by the evidence, which demonstrates that this tribe frequently changed its allegiance. On the contrary, Qatar has demonstrated that Bahrain effected a secretive and clandestine "occupation" of the Hawar islands in 1937 and thereafter sought to build up the pretence that the seasonal visits of Dowasir fishermen provided the basis for Bahrain's claim of title. In the absence of any reliable or plausible evidence of Bahrain's title prior to Bahrain's unlawful occupation of the Hawar islands in 1937, Qatar relies on the strong presumption that it has always had title to the Hawar islands by virtue of the principle of proximity and the geographical position of the islands vis-à-vis the mainland of Qatar.

4.73 Qatar would wish at this stage to remind the Court of three highly significant circumstances which, in Qatar's submission, also have to be taken into account by the Court when considering the respective claims of Qatar and Bahrain to sovereignty over the Hawar islands. The first is the mistaken view held by the British authorities in London as to the location of the Hawar islands. Relying on the descriptions of the Hawar islands given by Lorimer and in the Admiralty publication *A Handbook of Arabia* prepared in 1916, the responsible authorities in London were clearly of the view in 1938/39 that the main Hawar island lay well outside the (then) three mile belt of territorial sea appertaining to the mainland coast of Qatar; both of these official publications describe the main Hawar island as lying 5 miles west of Ras Aburuk (which, though not inaccurate, is highly misleading since, as already indicated, the *nearest* point on the main Hawar island to the mainland coast is, at low tide, only some 250 metres from the mainland at the tip of the spit of that island (Hadd ad Dib on Map No. 5 facing page 50 of the Qatar Memorial)). The British authorities in London clearly did not appreciate the true geographical position of the Hawar islands. Weightman had in fact alerted them to the facts, though in a rather throwaway manner. After stating, in far too unqualified a manner, that geographical propinquity cannot be held by itself to raise any special presumption favourable to Qatar, he reveals:

"This I believe to be correct even though at low springs it is possible (as I am informed though I have not verified this by experiment) to wade from the Qatar mainland to a certain point on the main Hawar Island in about three feet of water"<sup>108</sup>.

4.74 But this does not appear to have made any impact upon officials in London. We still find Hemingway (India Office) boldly asserting on 12 May 1939 (after receipt of Weightman's important letter of 22 April 1939) that "... the islands are separated by... five miles (more than three) of shallow water from the mainland..."<sup>109</sup>; and neither Gibson nor Peel contradicts him on this point. Hemingway's reference to "(more than three)" makes it apparent that he was fully aware of the significance of a three-mile belt of territorial sea<sup>110</sup>. The failure of the Political Agent in Bahrain and of the relevant British authorities in London to attach any significance to the fact that the majority of the Hawar islands, including the three largest islands, were located wholly or partially within a three-mile belt of territorial sea measured from Qatar's mainland coast is striking.

4.75 The second highly significant circumstance is linked to the first. Reference has been made above to Weightman's important letter of 22 April 1939, analysing the respective claims of Qatar and Bahrain to the Hawar islands. It is worth noting that Weightman *nearly* got it right, even if, in the end, his bias in favour of Bahrain led him astray. The Court is invited to look again carefully at paragraph 4 of the letter from Weightman to Fowle of 22 April 1939<sup>111</sup>. The first sentence of this paragraph, although it seems to be dismissive of the principle of contiguity (or proximity), in fact leaves room for its application in certain cases:

"A claim for sovereignty based merely on geographical contiguity is, as I understand it, of little practical value save possibly in respect of an unoccupied area of land *or an island lying contiguous to or in the territorial waters of the State raising the claim*"<sup>112</sup>.

Weightman then gets diverted into the difficult task of seeking to establish that there is sufficient evidence to show that the Hawar islands have been occupied, whether temporarily or permanently, for the past 150 odd years. Even if he had been right in stating that there *was* sufficient evidence to this effect (which he was not), this would dispose of only the *first* of the two exceptions (that relating to an occupied area of land) and not of the *second*, that is to say, the case of an island lying contiguous to or in the territorial waters of the State concerned - in this instance, Qatar. In order to escape from the need to analyse the applicability of the second of the two exceptions in the case of the Hawar islands, Weightman then disavows the second of his two exceptions and reverts to an absolutist position by stating baldly that geographical propinquity cannot be held by itself to raise any special presumption favourable to Qatar. This precedes immediately the revelation that it is possible at low tide to wade from the mainland to a point on Hawar island in about three feet of water; so Weightman was well aware that Hawar island itself lay at least partly within the then three-mile belt of territorial sea appertaining to the mainland of Qatar and that a number of other islands in the Hawar group lay wholly within that three-mile belt.

4.76 The third highly significant circumstance to which Qatar would wish to draw attention is also linked to the first. It might be thought that the Foreign Office Legal Advisers would have been asked for their views on the recommendation made by the Political Resident (Fowle) on the basis of the analysis made by Weightman in his letter of 22 April 1939, given that the Second Legal Adviser to the Foreign Office (Mr. W.E. - later Sir Eric - Beckett) had already advised on the procedure to be followed in the written exchanges which preceded the decision. But this does not appear to have happened; at any rate, there was no specific request within the Foreign Office for legal advice on this aspect. The Foreign Office was not of course the lead department on matters relating to the Gulf at this time; and in May/June 1939 there would have been many other important issues requiring an input from the three Foreign Office lawyers whose services could be called upon. It is just possible (although this is inevitably speculation) that, had one of the Foreign Office Legal Advisers been asked to consider the merits of the conflicting claims to the Hawar islands in May/June 1939 in the light of Weightman's letter of 22 April 1939, he would have picked up the point that the great majority of the islands were located within a three-mile belt of territorial sea measured from Qatar's mainland coast and would have concluded that this was at the very least a highly material factor.

### **Section 3. The Extensive Map Evidence supporting Qatar's Sovereignty over the Hawar Islands**

#### **A. Introduction**

4.77 In this section, Qatar will discuss the impressive collection of map evidence from a wide array of independent sources which supports Qatar's position that from the mid-1800s up to the "provisional" British decision of 1936 the Hawar islands were consistently recognised as appertaining to Qatar. This evidence not only reinforces the description of Lorimer and many others that the islands were deemed to be part of Qatar, but also confirms Qatar's title to the islands by virtue of their close proximity to the Qatar mainland discussed in the previous section.

4.78 A number of the relevant maps depicting the Hawar islands as an integral part of Qatar have already been referred to in Chapter II, above. Given the fact that the islands constitute a virtual extension of the Qatari mainland, it is not surprising that the extensive cartographical evidence which depicts the territorial integrity of Qatar throughout the peninsula also shows the islands as belonging to Qatar. Once again, it should be emphasised that these maps are derived from highly reputable cartographic institutes and official government departments located in numerous countries. Thus, Qatar has presented maps from sources in Great Britain, France, Germany, the United States, Russia (including the former U.S.S.R.), Italy, Austria, Iran, Australia and Poland, all of which portray the Hawar islands as part of Qatar.

4.79 It should be pointed out that the maps appearing in the Map Atlas are but a sample of the relevant cartography. Qatar has only reproduced a representative selection of maps so as not to overburden the Map Atlas. Nonetheless, to supplement this collection, Qatar has deposited separately with the Registry a number of additional maps pursuant to Article 50 of the Rules of Court.

4.80 With respect to official maps produced by government departments, the maps in question represent the considered views of government agencies as to the political and territorial situation in the region. With respect to non-official maps produced by expert cartographers or appearing in atlases issued by reputable publishers, they constitute important expert opinion evidence of general repute of the kind that has been recognised as relevant by the Court and arbitral tribunals in the past.

### **B. The legal relevance of the maps**

4.81 Qatar does not rely on the map evidence as creative of its title to the Hawar islands. That title results from the operation of law and from the historical facts analysed earlier in this Reply. For their part, the maps represent confirmatory evidence of an historical nature evidencing the fact that Qatar's title to the Hawar islands was never seriously questioned prior to the "provisional" British decision of 1936.

4.82 In considering the probative value of cartographic evidence from non-official sources, courts and tribunals have accorded considerable weight to maps which show a consistent pattern over a long period of time. Sir Gerald Fitzmaurice addressed the issue in the following way in an article he wrote for the *British Year Book of International Law*:

"Both sides in the *Minquiers* case adduced evidence tending to show what was the view taken on the question of sovereignty by what might be called non-official but professional opinion - geographers, scientists, publishers of standard atlases, well-known authors, the evidence of maps, &c. Such considerations can never be conclusive. But they may furnish important evidence of general opinion or repute as to the existence of a certain state of fact, and *pro tanto*, therefore, may support the conclusion that that state of fact does actually exist"<sup>113</sup>.

4.83 The Chamber of the Court in the *Burkina Faso/Mali* case made a similar observation. With respect to maps that are not annexed to the text of a boundary agreement, the Chamber stated:

"... maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts"<sup>114</sup>.

The Chamber went on to note that technically reliable maps have the value of "corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps"<sup>115</sup>.

4.84 There are three characteristics of the maps produced by Qatar which underline their legal relevance in this case. First, all of the maps were prepared by independent sources or, in the case of the official British maps, by a country which had special interests in the region. None of the maps were prepared for litigation purposes, thus confirming their status as representing an objective view of the situation. Second, the maps depict the political alignments of the area in a virtually uniform style. Third, a number of the maps are from official sources, and thus have an even greater evidentiary value. Although each map must be assessed on its own merits, the value of a series of maps which consistently depicts the same territorial situation "cannot but be considerable, either as indications of general or at least widespread repute or belief, or else as confirmatory of the conclusions reached... independently of the maps"<sup>116</sup>.

4.85 The legal relevance of such maps has been reaffirmed as recently as last year by the Tribunal in the *Eritrea/Yemen* case. As noted in the previous Section, the first stage of that case

involved a dispute over islands in the southern Red Sea which possess a number of characteristics similar to the Hawar islands in this case. Both parties to the *Eritrea/Yemen* case adduced maps to show the political affinity of the islands in question. While there was some inconsistency in the map evidence, the Tribunal noted that it provided "important evidence of general opinion or repute"<sup>117</sup>, and that the general trend was that "Yemeni map evidence is superior in scope and volume to that of Eritrea"<sup>118</sup>. The Tribunal thus concluded that "looked at in their totality the maps do suggest a certain widespread repute that these islands appertain to Yemen"<sup>119</sup>.

4.86 In the present case, with the exception of a very "primitive" map prepared from Ottoman sources which is totally inconclusive on the territorial situation and which will be discussed below, Bahrain has presented no map evidence which supports its contention. The voluminous map evidence introduced by Qatar, on the other hand, confirms the view that the Hawar islands formed part of Qatar, consistently depicting them in the same colour as the peninsula throughout the relevant period. It follows that the map evidence is entitled to even greater probative value in this case given the consistent picture it paints as to the status of the islands and the limited extent of Bahrain.

### C. 19<sup>th</sup> century maps

4.87 As noted in Chapter II, even before the 1868 Agreements between Great Britain and the Rulers of Qatar and Bahrain, there is map evidence which indicates that the Hawar islands were deemed to be part of the Qatar peninsula<sup>120</sup>. Map No. 1 in the Map Atlas is an 1863 map produced in Kiepert's *Neuer Handatlas*. This map clearly portrays Bahrain in red while the Hawar islands are depicted in a different colour matching that of the Qatar mainland. As the map suggests, the islands were seen as naturally appertaining to the mainland coast off which they lay.

4.88 Starting in the 1870s, reputable cartographic sources from a variety of publishing houses showed Qatar as a political entity distinct from Bahrain. In virtually every instance, the Hawar islands can be seen by colour coding to form part of Qatar.

4.89 During this period, Germany in particular had well-developed cartographic expertise. A large number of maps of the region were produced under the auspices of Justus Perthes, Augustus Petermann and Dietrich Reimer during the last thirty years of the 19<sup>th</sup> century which portrayed the territorial situation in a consistent manner.

4.90 The maps numbered 3, 4, 5, 6, 8 and 9 in the Map Atlas are samples of such maps produced in the 1870s. On each one of these maps, the Hawar islands are very clearly depicted in the same colour as the Qatar mainland while Bahrain is distinguished by different colouring. Qatar has reproduced as *Map No. 7*, facing this page, one of these maps - a map prepared by Justus Perthes in 1875<sup>121</sup> - which is representative of the kind of map produced at the time. As can be seen from the enlargement of the map on the reverse side, the Hawar islands are separately labelled and are shown to form part of Qatar. Zubarah also features prominently on the map as part of Qatar.

4.91 Subsequent maps prepared by Justus Perthes in 1884, 1894 and 1895 present a similar picture<sup>122</sup>, as do maps published by Dietrich Reimer in 1881, 1893 and 1895<sup>123</sup>, and by Verlag von Velhagen & Klasing in 1893 and 1896<sup>124</sup>.

4.92 Significantly, British maps of the same period are consistent with their German counterparts. In 1870 and again in 1876, for example, J.G. Bartholomew of Edinburgh published maps of the Arabian Peninsula which showed the islands as appertaining to Qatar<sup>125</sup>. By 1876, Qatar was being labelled on the maps as a separate entity. The 1895 and 1900 editions of the *Times Atlas* also contained maps evidencing the appurtenance of the Hawar islands to Qatar<sup>126</sup>, as did a map appearing in *Lett's Popular Atlas* in 1890<sup>127</sup>.

4.93 In addition, reference may also be made to an official Russian map prepared by the General Staff in 1894 (Map No. 20 in the Map Atlas) which depicts Qatar as a distinct entity - coloured in a greyish brown tint - encompassing the peninsula including the Hawar islands. In contrast, Bahrain is depicted in a red colouring.

#### D. 20<sup>th</sup> century maps

4.94 The map evidence supporting Qatar's title to the Hawar islands is equally compelling during the first forty years of the 20<sup>th</sup> century. It comes from an even wider variety of sources than the maps from the previous century. Highly reputable cartographic establishments such as the Justus Perthes Institute, George Philip and Son, J.G. Bartholomew and the Librairie Hachette continued to treat the Hawar islands as part of Qatar. In addition, there is cartographic evidence from official sources in Great Britain, Russia and Iran, as well as from publishing houses in the United States, Austria, Italy, Australia and Poland, which confirms the fact that the islands were perceived as being part and parcel of the political entity of Qatar.

4.95 It is not necessary to review each of the maps from this period which confirm the status of the Hawar islands. The Court is respectfully referred to the Map Atlas, starting with Map No. 29, where some fifty maps have been reproduced showing a consistent pattern with respect to the islands after 1900. Qatar will limit its comments here to a discussion of a few of the key maps which are illustrative of the collection as a whole.

4.96 Reference has already been made to the significance of the 1913 Anglo-Ottoman Convention, the 1914 Anglo-Turkish Convention and the British-Qatar Treaty of 1916, in which the separate status of the Qatar peninsula was reaffirmed<sup>128</sup>. Suffice it to note that a whole series of maps produced contemporaneously with these events confirm that the Hawar islands were viewed as appertaining to Qatar.

4.97 Map No. 48 in the Map Atlas is a map produced in the 1914 edition of *Philip's Imperial Atlas of the World*. The map is devoted to the Arabian Peninsula, and the Hawar islands (labelled Warden Islands on the map) stand out as being part of Qatar. Similarly, maps from the 1914-1915 period published in Leipzig, Vienna and Rome are fully in accord. They all portray the islands in the same colour as the Qatar mainland<sup>129</sup>.

4.98 During the negotiation of the Treaty of Peace with Turkey, British officials carefully reviewed the territorial situation on the Arabian Peninsula including along the Red Sea coast and in the Gulf. In 1920, the Foreign Office prepared a memorandum setting out Britain's position with respect to its Arabian policy<sup>130</sup>. Attached to this memorandum were the formal proposals of the British delegation to the peace talks dealing with the settlement of the Arabian Peninsula. The Peninsula was defined in the memorandum as comprising all territories, other than those of the Kingdom of the Hedjaz and the British Protectorate over Aden, situated within a line the course of which was defined in the memorandum<sup>131</sup>. The line itself was depicted in red on a map attached to the proposal.

4.99 The map in question was originally prepared by the British Admiralty in 1917. A copy of this map has been reproduced as *Map No. 8*, facing page 122, with an enlargement of the relevant area facing this page, and may be found as Map No. 58 in the Map Atlas. The relevant provisions of the British proposal contained in Article 2 describing the course of the red line that appears on the map were as follows:

#### "Article 2

For the purpose of this treaty the Arabian Peninsula includes (1) all territories other than those of the Kingdom of the Hedjaz and the British Protectorate over Aden and its surrounding territorial zone; and (2) the islands, whether previously Turkish or not, which lie within the line which is defined hereafter.

This line extends from-

- (a) The boundary line between Arabia and Egypt at the head of the Gulf of Akaba, approximate latitude 29° 27' north, longitude 34° 56' east (British Admiralty Chart No. 8 A), to
- (b) The western extremity of the reef extending westwards from the island of Tiran; then to
- (c) The south-west rocks off Great Hanish Islands, approximate latitude 13° 39' north, longitude 42° 35' east (British Admiralty Chart No. 2523), thence through the extreme south-west point of Sheikh Malo off Cape Bab-el-Mandeb, to
- (d) The 100-fathom contour line in the Gulf of Aden in approximate latitude 12° 29' north, longitude 43° 36' east (British Admiralty Chart No. 2523); thence along the 100-fathom contour line, as indicated on the British Admiralty Chart No. 1012, round the south-east coast of Arabia, to
- (e) Latitude 22° 30' north, longitude 59° 55' east (British Admiralty Chart No. 1012), off Ras-el-Had; thence to
- (f) Latitude 26° 31' north, longitude 56° 33' east, in the entrance to the Persian Gulf (British Admiralty Chart No. 2873 A); then through the northernmost points of the islands of Tanb, Nabiyu Tanb, Sirri and Halul, to
- (g) The point where the eastern extremity of the southern border of Iraq meets the Persian border as fixed by the Treaty of Erzeroum".

4.100 It can be seen from this language that the Arabian Peninsula was deemed by Great Britain to include the islands which fell within the line so described. For present purposes, it is the portion of the map showing the Gulf which is of particular interest. As can be seen from the enlarged portion of this map, the Hawar islands were located inside this line and were thus considered by the British as being part of the Arabian Peninsula. Bahrain, in contrast, was explicitly excluded from this description by virtue of the fact that a red enclave was drawn around the Bahrain islands, thus carving them out for separate treatment, and the word "Bahrain" itself was underlined in red to emphasise the fact that it was being treated separately.

4.101 As discussed in Chapter III above, it is striking that the territorial limits of Bahrain as recognized by the Foreign Office in 1917 *excluded* the Hawar islands which clearly fell to the southeast of the enclave. The obvious conclusion was that Britain considered the islands to appertain to the mainland coast of Qatar, and thus to the Arabian Peninsula as a whole, off which they lay. Thus, there is compelling evidence from official British sources that as of 1917 the islands were deemed to form part of Qatar - a position which was fully consistent with the other cartographic evidence of the time discussed in this Section and with the description given by Lorimer and many others.

4.102 There is a further important point bearing upon this map which deserves mention at this stage. For this same map, together with the accompanying Foreign Office memorandum, was introduced in the *Eritrea/Yemen Arbitration* to illustrate the British position with respect to islands located in the southern Red Sea. It is apparent that the Tribunal in that case attached importance to this map and the territorial situation evidenced by the red line. This can be seen from paragraph 151 of the *Eritrea-Yemen Award* where the Tribunal made the following observation:

"The initial position of Great Britain at the peace talks at Sèvres was that the islands lying east of the South West Rocks off Greater Hanish island should be placed under the sovereignty of the independent chiefs of the Arabian mainland"<sup>132</sup>.

4.103 Significantly, the decision of the Tribunal on the question of sovereignty over the Red Sea islands matched precisely the line adopted in the 1917 map and in the 1920 memorandum.

Specifically, the islands lying east of the line depicted on the map were adjudged to belong to the Arabian side of the Sea - *i.e.*, to Yemen - while the small rocks lying to the west of the line were confirmed as being Eritrean. As for the situation in the Gulf, the map made it clear that the Foreign Office regarded the Hawar islands in the same way - *i.e.*, as appertaining to the Qatar mainland - while Bahrain was perceived as being an entirely separate entity.

4.104 In 1918, the Director General of the Political Affairs Department of the Italian Ministry of Colonies published an official map which reflected a similar position<sup>133</sup>. Once again, the Hawar islands can be seen to form part of Qatar while the islands of Bahrain, Muharraq and Umm an-Na'san are portrayed as appertaining to Bahrain.

4.105 Throughout the 1920s, British, French and Italian maps continued to show the Hawar islands as appertaining to Qatar. The Court will find a selection of these maps in the Map Atlas<sup>134</sup>. Included in this selection is the very important map produced by Major Holmes and published in Rihani's book in 1928 showing the islands as part of Qatar's territory<sup>135</sup>. This map is virtually identical to the signed map of 1923 attached to the draft Bahrain concession of that year<sup>136</sup>. Holmes was intimately familiar with the area as a result of his work in the oil sector, and his views therefore have considerable weight.

4.106 As noted in Chapter II, in 1924 the British War Office produced a map of the Gulf on which Mr. G. Rendel of the Foreign Office subsequently made several annotations outlining the limits of the various political entities along the Gulf littoral<sup>137</sup>. The map with Rendel's annotations was widely circulated in 1933 amongst official British circles and was attached to a memorandum which was sent to the Foreign Office, India Office and Colonial Office describing the situation<sup>138</sup>. The political extent of Qatar, including the fact that the Hawar islands were treated as part of Qatar, can be readily seen on the map on which the islands are clearly labelled. By the same token, Rendel circumscribed the limits of Bahrain by drawing a blue line around the islands in much the same way as Bahrain had been enclaved in the 1917 British map referred to above. The Hawar islands fell well to the east of that line and formed part of Qatar.

4.107 The fact that the map failed to attract any comment or objection from the India Office, Foreign Office or Colonial Office in 1933 is evidence of the fact that the territorial limits of Qatar and Bahrain were not considered to be in question by the British at that time. In short, there was absolutely no suggestion at the official level that the Hawar islands were perceived as being anything other than Qatari.

4.108 Two official maps produced in the Soviet Union in 1937 and 1939/40, respectively, provide further evidence of the view of third States at the time that the Hawar islands appertained to Qatar<sup>139</sup>. The 1937 map, published by the Cartographic Department of the People's Commissariat for Internal Affairs, shows Qatar, including the Hawar islands, in green while Bahrain, which has a line drawn around it on the map, is depicted in a grey colour. The 1939/40 map also shows Qatar, including the Hawar islands, as a separate entity.

4.109 As for non-official maps of the period, they too continued to show the islands as part of Qatar. Map No. 82 in the Map Atlas - a map published by George Philip and Son Ltd. in 1936 - is a particularly clear example of the kind of expert cartography that was being produced at the time and is similar to maps produced in 1931 and 1934 by George Philip<sup>140</sup>. The map shows Qatar as extending over the entire peninsula. The Hawar islands are depicted in the same distinct orange colouring as the mainland of Qatar in contrast to the islands of Bahrain which are coloured in pink. It will be noted in passing that Zubarah is also shown as being part of Qatar.

4.110 For a period of at least 70 years prior to the British decisions of 1936 and 1939, both official and non-official maps portrayed a consistent treatment of the Hawar islands. The map evidence is very extensive. It overwhelmingly confirms Qatar's position that the Hawar islands were widely recognised as appertaining to Qatar and that the territorial extent of Bahrain as a compact group of five islands was also recognised. In these circumstances, Bahrain's extravagant

assertion that the Hawar islands "have always and in all ways been foreign territory in relation to the State of Qatar" is completely unfounded<sup>141</sup>.

#### **E. The failure of Bahrain to produce map evidence supporting its claim**

4.111 The Court will recall that, in its Memorial, Bahrain advanced the contention that the evidence of its authority over the Hawar islands prior to 1916 was "well documented" and that after 1916 that evidence was "overwhelming"<sup>142</sup>. One would have expected such bold assertions to be supported by the contemporary map evidence. Remarkably, however, Bahrain has failed to introduce any cartographic evidence from either official sources or from non-official cartographic institutes supporting its contention.

4.112 The lack of independent cartographic evidence supporting Bahrain's claim during the relevant period undermines the credibility of the case presented by Bahrain as a whole. With respect to issues of territorial sovereignty, the existence of expert opinion evidence in the form of maps and official cartography is an important element in confirming a claim to title. Where such evidence is lacking, or where it directly contradicts the thesis being advanced, the conclusion must be that the claimant party has failed to establish an important element of its claim. Recognition is a key factor in demonstrating a claim to title, and independent map evidence, particularly from official sources, constitutes an important element of such recognition.

4.113 Bahrain's failure to produce any relevant maps supporting its position is all the more striking given the fact that Qatar, with its Memorial, presented a sample of such maps demonstrating that the Hawar islands were recognised in the contemporary cartography as belonging to Qatar<sup>143</sup>. These materials go unanswered by Bahrain in its Counter-Memorial, thus leaving the impression that Bahrain is uncomfortable with the map evidence. But the map evidence, as explained above, is an important component of recognition which is in principle of significant value in assessing territorial questions.

4.114 In point of fact, the collection of maps presented by Qatar with its Memorial and in this Reply demonstrates not simply the appurtenance of the Hawar islands to Qatar, but also the limited extent of Bahrain. In the light of the weight of the map evidence, it is perhaps not surprising that Bahrain has chosen to ignore the maps altogether. At the end of the day, the relevant cartography undermines Bahrain's contention both as to Bahrain's claim over the Hawar islands and with respect to its claim to Zubarah.

4.115 The only "map" introduced by Bahrain from the seventy-year period between 1868 and 1939 is a very rough sketch map said to have been prepared by Captain Izzet of the Ottoman army in 1878<sup>144</sup>. That map, which even Bahrain is forced to concede is "primitive", lends no support to Bahrain's claims. Moreover, Bahrain fails to disclose the fact that it only produced the southern half of the map in question. Qatar is furnishing the Court with a copy of the entire map which shows that Bahrain's contentions have no merit.

4.116 The "map" in question is in reality no more than a rough outline of the *Vilayet* of Basrah. Bahrain purports to find significance in the fact that in the very rough hand colouring of the map the Hawar islands appear to be coloured in blue in the same way as Bahrain. From a glance at the map, the Court will be able to see that this colouring proves nothing supporting Bahrain's claim. The Qatar peninsula is also outlined in blue, as is the entire coast stretching to the north and other areas on the map. Other blue shaded areas appear on the map on the Arabian mainland to the west of Bahrain, in the region of al-Hufuf and to the north in areas that now form part of Iran and Iraq. Nowhere does Captain Izzet explain what the significance of this colouring is. Nor can any conclusions be drawn from the existence of shading in a number of different areas on the map. What is apparent is that Captain Izzet was doing no more than to outline the limits of the *Vilayet* of Basra, as in fact the map itself expressly confirms - limits which included both Qatar and Bahrain.

4.117 The practice of Ottoman cartographers of portraying the limits of Ottoman territorial possessions or *vilayets* in one colour, without distinguishing by colour coding different entities within a particular *vilayet*, is confirmed by two further Ottoman maps that Qatar has reproduced as Maps Nos. 35 and 36 in the Map Atlas. Both maps are taken from the Ottoman State Pocket Atlas published in 1906/07. The first map - No. 35 in the Map Atlas - shows the limits of the Ottoman *vilayet* of Basrah shaded in pink. It will be observed that this map depicts Qatar and Bahrain in the same colour as part of the *vilayet* of Basrah in much the same way as the map prepared by Captain Izzet. The second map - No. 36 in the Map Atlas - shows Ottoman territorial possessions on the Arabian peninsula. It uses the same technique of colouring, once again drawing no distinction between Qatar and Bahrain. It can therefore be seen that the map prepared by Captain Izzet, on which Bahrain relies, in no way evidences that the Hawar islands were considered to form part of Bahrain or that Zubarah, for that matter, was deemed to be Bahraini<sup>145</sup>.

#### **F. Conclusion as to the maps**

4.118 In summary, Qatar has shown that there are literally scores of reliable, independent maps from both official and non-official sources which confirm the fact that the territorial extent of Qatar stretched over the entire Qatar peninsula and that the Hawar islands were deemed to be part of that entity. In contrast, Bahrain was consistently portrayed as being confined to a limited group of islands excluding the Hawar islands and, of course, Zubarah.

4.119 The map evidence is thus entirely consistent with the historical picture that Qatar has drawn attention to regarding the respective territorial extent of the two Parties during the relevant period. It also demonstrates that the doctrine of proximity, discussed in the previous Section of this Chapter, was seen to apply to the Hawar islands as a natural part or extension of Qatar's territory.

#### **Section 4. The Lack of Evidence for Bahrain's Claim to have exercised Sovereignty over the Hawar Islands from the 18<sup>th</sup> Century to the Present Day**

##### **A. The so-called "evidence of Arab historians" from antiquity**

4.120 Bahrain contends in its Memorial that its title to the Hawar islands is based upon "Bahrain's original dominance and authority over all the territories in the Gulf of Bahrain and the Qatar peninsula..."<sup>146</sup>. Bahrain reiterates this contention in its Counter-Memorial and goes on to state:

"The historical genesis of Bahrain's title to the Hawar Islands lies in the original dominions of Greater Bahrain (the territories in the Gulf of Bahrain and its littoral, including the Qatar peninsula; see Section 2.2.A). The Hawar Islands' connection with Bahrain was recognised in antiquity and pre-dates the presence of the Al-Khalifa dynasty in the region"<sup>147</sup>.

4.121 Qatar has already pointed out above that Bahrain has tendered no evidence of a "major geographical and socio-economic unit known to historians as Greater Bahrain"<sup>148</sup>.

4.122 However, Bahrain cites three documents in an attempt to show that Arab historians from antiquity have included the Hawar islands within the territories of Bahrain.

4.123 The first document of 1082 A.D.<sup>149</sup> and the second document of 1166 A.D.<sup>150</sup> refer in somewhat cryptic terms to "Hawar", name individuals who "resided in" or "occupied" it and mention that this "town" of Hawar "belonged to Bahrain...". These documents do not identify the location of this "Hawar", nor do they describe the "Bahrain" to which this "town" might have belonged. Furthermore, translations obtained by Qatar from its own experts show gross errors in Bahrain's translations of the Arabic documents<sup>151</sup>. The Court will see that it is impossible to conclude that this "town" of "Hawar" is the same as the waterless Hawar islands in dispute in the present proceedings, particularly as there is no evidence whatsoever even to suggest that the

Hawar islands were inhabited at that time. Such evidence as is available even in respect of the much more recent period from 1864 to 1932 suggests that the islands were only seasonally "frequented by fishermen"<sup>152</sup>.

4.124 The third document has no date and does not mention Hawar at all<sup>153</sup>. It is therefore wholly irrelevant to Bahrain's claim of title to Hawar.

4.125 The important fact is that the first two documents are from the 11<sup>th</sup> and 12<sup>th</sup> centuries, *i.e.* well before 1258 A.D., at least up to which date the peninsula of Qatar is shown by Bahraini writings to have been included in the territory described as "Bahrein"<sup>154</sup>. Accordingly, even if the "Hawar" mentioned in the first two documents were the Hawar island of the present dispute, it would be logical to conclude that it appertained to what was referred to at that time as "peninsular Bahrain" (now called Qatar), rather than to the island of Bahrain, which at that time was actually called "Awal".

4.126 Clearly therefore this so-called connection of Hawar with "Bahrain" is of no avail to Bahrain but can in fact be construed as demonstrating Hawar's association in antiquity with the peninsula of Qatar.

### **B. The evidence of Bahrain's so-called "historical dominance" over Qatar**

4.127 Bahrain makes the remarkable assertion in its Counter-Memorial that "the territory of Bahrain consisted of the islands of Bahrain and the entire Qatar peninsula" and that "nothing during the 19<sup>th</sup> Century dislodged Bahrain's authority from the Doha region of the peninsula until the Ottoman invasion of Arabia in 1871", the inference being that Bahrain retained authority over all other parts of the peninsula and its adjoining islands even after that date<sup>155</sup>.

4.128 Qatar has already shown that after the British Agreements with the Chiefs of Qatar and Bahrain in 1868, entered into in the context of maintaining the maritime peace, the two principalities came to be regarded as separate entities<sup>156</sup>. Their separate status was reaffirmed upon the Ottoman arrival in Qatar in 1871 and on numerous occasions thereafter<sup>157</sup>. In fact, for the next 65 years (until 1936), there is no evidence of any claim by Bahrain of any interest or exercise of authority in mainland Qatar (or its adjoining islands) except a so-called "claim" in relation to Zubarah which itself was never accepted. This is confirmed, if need be, by the British *Handbook of Arabia* of 1916, which states as follows:

"Prior to 1868, the Sheikh of Bahrein claimed suzerainty over El-Qatar, and was represented at Dohah by a member of his family. But in that year, as a result of negotiations conducted by the British Government, the interest of this Sheikh was limited to the receipt of tribute, and this ceased on the occupation of Dohah by the Turks in 1872"<sup>158</sup>.

4.129 Similarly, Dr. Al-Baharna of Bahrain, writing as an objective scholar in 1968, has noted that the 1868 British Agreement with Qatar marked a deviation from the former British position whereby Qatar was regarded as a dependency of Bahrain. It acknowledged, for the first time in the history of the peninsula, the independence of Qatar and the title of Sheikh Mohamed bin Thani as its Ruler owing no allegiance to Bahrain<sup>159</sup>. Dr. Al-Baharna has also recorded that "the extension of Turkish influence to Arabia in or about 1871, brought Qatar under Turkish suzerainty, but she continued to be governed, directly, by indigenous rulers of the dynasty of the Al Thani"<sup>160</sup>.

### **1. Qatar's independence and payment of "tribute"**

4.130 Bahrain goes on to claim however that in 1868, the submission of the Sheikhs of Qatar to Bahrain was formalised by their promise to pay the annual tax and to obey Al-Khalifah authority<sup>161</sup>.

4.131 Qatar has already dealt with this contention in some detail in its Counter-Memorial, where it has been shown that the agreement by the tribes of Qatar to pay a sum of money totalling 9,000 krans per annum to the Chief of Bahrain was expressly stated by the British not to affect the independence of Qatar in relation to Bahrain, and indeed that the money was paid on by the Chief of Bahrain to the Wahhabi Amir<sup>162</sup>. This is now also confirmed by an Annex submitted by Bahrain with its Counter-Memorial, which shows that the Ruler of Bahrain received not one penny of the money to be paid by the Qatar tribes, since 4,000 krans were to be paid to the Naim tribe in exchange for their protection of the peninsula, and the balance of 5,000 krans was expressly stated to be "on account of the zekat payable to Bin Seoud"<sup>163</sup>. Further confirmation of this position, if any were needed, is also available from a communication addressed by the Political Resident, Lt. Col. Pelly, to the Chief of Bahrain on 13 August 1870, reminding the latter:

"As regards the krans 5,000 received from Guttur, you are aware that, under the agreement made on 27<sup>th</sup> Zilhaj, 1285/10<sup>th</sup> April 1869, this annual sum was to be transferred by the Chief of Bahrein to the Wahabee Ameer, and I would beg you to carry this stipulation into effect"<sup>164</sup>.

In a further letter of the same date, Pelly also informed the Wahhabi Amir that:

"Five thousand krans were received from Guttur in conformity with the previous agreement on account of the Bahrein Chief, and were by him to be transferred to your Highness. I have requested the Bahrein Chief, in the event of this transference not having been already made, to carry it into effect"<sup>165</sup>.

4.132 The Court will also recall that when the question of payment of the "tribute" to the Chief of Bahrain again arose only three years after the 1868 Agreements, in a report of 28 October 1871, C.M. Aitchison stated:

"... it is shown that the arrangement as to the tribute payable by Guttur to Bahrain is to be considered *not to affect the independence of Guttur in relation to Bahrain* but is to be considered a fixed contribution by Guttur and Bahrain combined in view to securing their frontiers from molestation by the Naim and Wahabee Tribes more particularly during the Pearl diving season"<sup>166</sup>.

4.133 It is therefore Qatar's submission that upon the recognition of Qatar and Bahrain as separate entities in 1868 and later on as separate States, Bahrain's so-called "historical dominance" as a basis for any claim to the territory of Qatar including the Hawar islands is not supported on the facts or in law.

## **2. Bahrain's distortion of the events of 1867/68 and of the significance of the 1861 agreement in this respect**

4.134 In yet another attempt to play down the historical significance of the 1868 Agreements, Bahrain gives a particularly imaginative account of the events of 1867/68. Its interpretation of the 1861 Friendly Convention and of the actions taken by the British in accordance with the Convention in 1867/68 is so distorted that Qatar cannot let it pass without comment. Bahrain's version of these events is that it was "by virtue of the 1861 Anglo-Bahrain Treaty that Britain intervened in the 1867-1868 rebellion of the Doha confederation"<sup>167</sup>. This is quite clearly a fallacious interpretation. Qatar has already shown that *firstly*, the 1861 Convention followed breaches of the maritime peace originating in Bahrain and that under Article 2, the Ruler of Bahrain undertook "*to abstain from all maritime aggressions...*"<sup>168</sup>; that *secondly*, it was Bahrain (together with the Ruler of Abu Dhabi) that attacked Qatar<sup>169</sup>; and that *thirdly*, it was Bahrain that was punished by the British for a breach of Article 2 of the 1861 Convention when Sheikh Mohamed was displaced and Captain Pelly not only obtained the Agreement of 1868 from the new Chief, Sheikh Ali, providing for payment of compensation amounting to 100,000 dollars,

but also "destroyed both fort and cannon and burnt [his] three war crafts, lying immediately under the walls of the fort" in Bahrain<sup>170</sup>.

4.135 In contrast, Mohamed bin Thani, described as the "Chief of El-Kutr", was required to pay no such penalties, but simply to refrain from breaching the maritime peace. In other words, it was quite clear that in the eyes of the British it was the Bahrain sheikhs who had violated the terms of the 1861 Convention<sup>171</sup>.

4.136 As Qatar has already shown, the 1868 Agreements following these developments were clearly intended to restrain Bahrain from committing any further breach of the maritime peace across the sea upon mainland Qatar and obviously also its adjoining Hawar islands, with Qatar undertaking a corresponding obligation in respect of the Bahrain islands.

4.137 A few words need also to be said about the examples that Bahrain has picked out from the description in Qatar's Memorial of the 1867/68 events, which allegedly demonstrate the exercise of Bahrain's authority in the peninsula at that time<sup>172</sup>.

4.138 *First*, Bahrain cites Qatar's Memorial for evidence of "Bahrain arresting individuals in the Qatar peninsula", the inference being that Bahrain exercised routine and unchallenged police activities in Qatar. The paragraphs referred to do not however support any such inference. Rather, Qatar has shown that when a Qatari tribesman was seized and deported (rather than arrested), the headmen of Al-Bida and Wakrah took measures to expel the Sheikh of Bahrain's representative from Wakrah, and obtained the release of the tribesman from Bahrain<sup>173</sup>. This then led to Bahrain's treacherous imprisonment of Sheikh Jassim bin Thani when he was invited to Bahrain to resolve the dispute, and in turn to hostile encounters between the Sheikhs of Bahrain and Abu Dhabi and the people of Qatar, including the Naim tribe<sup>174</sup>. This is hardly evidence of the exercise of authority by Bahrain in Qatar.

4.139 *Second*, Bahrain claims that Qatar's Memorial provides evidence of "Bahraini subjects in the Qatar peninsula apologising to the Ruler of Bahrain for their behaviour" and of "the son of the leader of the Doha merchants supplicating the Ruler of Bahrain in relation to taxes"<sup>175</sup>. While it is true that, according to the evidence relied upon by Qatar, "the headmen of Qatar apologis[ed] to the Shaikh [of Bahrain] for their behaviour"<sup>176</sup>, there is no intimation that this was because they recognised that they were "Bahraini subjects"; rather, it is clear that they did so in an attempt to restore the peace, not realising that "on the part of the ruler of Bahrain the proceedings were merely a blind to cover preparations for revenge"<sup>177</sup>. As for the second statement, it is quite frankly puzzling, since nowhere in Qatar's Memorial or in the supporting evidence is it stated that Sheikh Jassim bin Thani was "supplicating the Ruler of Bahrain in relation to taxes".

4.140 Bahrain cites as a *third* instance of the exercise of its authority over Qatar, as allegedly recognised in Qatar's Memorial, Bahrain's "imposing taxes throughout the Qatar peninsula"<sup>178</sup>. However, reference to the cited passage in Qatar's Memorial shows, quite to the contrary, that Sheikh Ahmed of Bahrain had the "apparent *intention* to impose a tax upon the inhabitants of Qatar, which had led to a general movement of hostility throughout the population" and which indeed provoked a battle between Sheikh Ahmed and the Naim tribe of Qatar in which Sheikh Ahmed was killed<sup>179</sup>. Again, this is hardly evidence of the peaceful exercise of authority.

4.141 *Fourth*, Bahrain contends that a further instance of the exercise of its authority in Qatar is to be found in its "defeating and punishing the Doha rebels"<sup>180</sup>. This is in fact a reference to the attack in 1867-68 by the Sheikhs of Bahrain and Abu Dhabi on Doha and Wakrah, described by Lorimer as a "treacherous outrage"<sup>181</sup>, and a breach of the 1861 Convention for which, as shown above, they were punished by the British<sup>182</sup>.

### **C. The evidence of the Belgrave diaries and Bahrain Government Reports**

4.142 It is Qatar's contention that Bahrain did not exercise any authority or otherwise deal with events or situations on the Hawar islands before its illegal occupation of the main island in 1937. Qatar wishes to draw the Court's attention to fresh evidence now available to it in support of this contention.

4.143 Qatar has now examined some of the extremely detailed day-to-day diaries kept by Charles Belgrave<sup>183</sup> who assumed the post of Financial Adviser to the Ruler of Bahrain in 1926 and who, by 1928, had become the Ruler's Adviser and was described as having become "so far as internal administration was concerned... to all intents and purposes the ruler of the State"<sup>184</sup>. Belgrave's accounts in his diaries are indicative of the extensive areas in which he rendered services or gave advice to the Ruler of Bahrain and other Bahrain Sheikhs regarding administrative affairs in relation to the Bahrain islands. These accounts also indicate that from time to time Belgrave undertook numerous trips to various parts of the islands either in connection with his work or for recreation. An examination of the Belgrave diaries shows that at no time during the ten years of his presence in Bahrain prior to 1936 is there any mention of Belgrave having anything to do with any activities on or affairs of the Hawar islands that might indicate that the Hawar islands were regarded as part of "Bahrain"; nor is there any indication that he ever visited the islands prior to 1937. His only references to any part of the territories of Qatar are to Zubarah, in respect of which he makes entries, generally with clear disapproval, regarding the Ruler of Bahrain's so-called claim to Zubarah which is the subject-matter of fuller discussion later in this Reply<sup>185</sup>. As Qatar has already shown in its Memorial and Counter-Memorial and further explained in this Reply, the first occasion on which there was even a suggestion of a possible claim to the Hawar islands by the Ruler of Bahrain came up in 1933, when consideration was being given to the question of an oil concession over Bahrain's unallotted area. In considering the extent of what constituted the territories of "Bahrain", the British authorities firmly concluded that the Hawar islands were clearly not part of "Bahrain". Although Bahrain now claims that the British authorities were aware of Bahrain's claim to the Hawar islands in 1933, there is no reference in Belgrave's diaries of 1933 to any such claim. The Hawar islands are mentioned for the very first time in Belgrave's diaries on 23 April 1936, *i.e.* a few days before Bahrain decided to send a formal written claim for the first time in respect of the Hawar islands by Belgrave's letter of 28 April 1936. This first entry and a significant entry on the next day are in the following terms:

"23 April 1936: Didn't go to Biladya meeting but went round to see Sh. Abdulla there after the meeting. Discussed oil and the new agreement and especially the question of our right to the Hawar Group of islands which the Shaikhs fear the Agency will not allow. I think myself it is quite incontestable".

"24 April 1936: ... then went to the Shaikh's where I talked oil with the Shaikh, Abdulla and Sulman for two solid hours. However we came to some decisions".

Then followed the formal Bahrain claim to the Hawar islands in Belgrave's letter to the Political Agent on 28 April 1936. It is intriguing, to say the least, as to why the Sheikhs had serious doubts as to whether the British would allow this claim whereas Belgrave found it "quite incontestable", notwithstanding his own description of the islands that comprised Bahrain in 1928<sup>186</sup>.

4.144 It was only after the reversal of the British opinion of 1933 by the "provisional" decision of July 1936 to the effect that the Hawar islands belonged to Bahrain that Belgrave wrote about a number of visits to Hawar and of various Bahraini activities on the Hawar islands. As Qatar has already shown in its Counter-Memorial, all such activities stemmed from or were associated with Bahrain's illegal occupation of the Hawar islands<sup>187</sup>.

4.145 Qatar has now also had a further opportunity of examining the official Government of Bahrain Annual Reports and Budgets for a number of years which have been published from

1343 H. (1924-25) as well as a comprehensive Administrative Report covering the eleven years from 1926 to 1937, which was prepared by Belgrave in 1937 and published in that year. As in the case of his personal diaries, this latter Report, going back to 1926 (and in some subjects going further back than 1926), makes no mention of Hawar whatsoever either in relation to security, public works, agriculture or any other activities, in contrast with the islands forming Bahrain.

4.146 Similarly, there is no mention of Hawar in any of the Annual Reports or Budgets until the Report for 1349 H. (March 1937 to February 1938)<sup>188</sup>. These facts must necessarily support Qatar's assertion that there was no Bahraini official presence or activity on the Hawar islands before 1936 or 1937. The Reports for subsequent years, which *do* record Bahraini activities on Hawar, support the conclusion that Bahrain only occupied the Hawar islands (clandestinely) in 1936-37. Thus the Report for 1937-1938 refers, under the heading "Special Projects", to additional new works undertaken during the year, in which it includes "the Hawar Fort" (p. 8); it also refers to the increase in the police force partly to replace the naturals in Hawar fort (p. 10); as already shown, it further notes "the fort and pier at Hawar were completed at the end of the year...." (p. 11) and that "Expenditure on the Hawar Fort was not allocated in the 1356 [1937-38] Budget"<sup>189</sup>; and it refers in a list of "Estimates" of expenditure for 1357 H. to "New Works - Major", in which it includes provision for "Completion of Hawar Police Station" (p. 46). Finally, and significantly, the Report records:

"The need for a Government motor launch has become more urgent since the increased development in the Hawar Islands. During the year considerable expense was incurred in hiring launches for police patrols. A serviceable launch fitted with a powerful 60 h.p. Kelvin engine is being built for the Government in the Bahrain boatyards". (p. 49).

4.147 The Annual Report for the next year (1938-39) makes a further reference to the budget and expenditure for "Completion of Hawar Fort", including "the cost of erecting about twenty stone beacons on various islands in the Bahrain waters" (p. 10); it also refers to "Drilling an artesian well at Hawar, which reached over 400 feet without producing water" (p. 11); to the fact that "A police launch equipped with a 75 h.p. 'Kelvin' Ricardo Engine was built during the year... [and] is used for coastal patrol work and for plying between Bahrain and Hawar"; and it states that "A barbed wire fence was built around the Fort at Hawar and several of the water cisterns were repaired" (p. 17)<sup>190</sup>. Another important event recorded is that "the main Island of the Hawar Group was surveyed and a map of the island has been made" (p. 18)<sup>191</sup>. This makes a highly revealing contrast with the fact that the above-mentioned Administrative Report of 1937 (for 1926-1937) refers to the fact that the survey of villages and cultivated areas in Bahrain was commenced some twelve years earlier and completed in around 1930 (p. 26)<sup>192</sup>.

4.148 Subsequent Annual Reports similarly record activities in Hawar, such as expenditure on "Mosque at Hawar and Water Tanks"<sup>193</sup> and note that there is no water supply in Hawar and the old cisterns needed to be repaired<sup>194</sup>.

4.149 Qatar therefore submits that the conspicuous absence of references to any Bahraini exercise of authority in the Hawar islands, either in the Belgrave diaries, the official Administrative Report of 1937 or the Bahrain Government official Annual Reports until 1937-1938, is telling proof of lack of any Bahraini activity or exercise of authority in Hawar not only before 1936 but even in 1937; and that the sudden appearance as well as the nature of items related to the Hawar islands after 1937-38 in Belgrave's diaries and Bahrain's official Reports is convincing proof of Bahrain's illegal occupation of Hawar in 1937.

#### **D. Bahrain's allegations regarding activities on the Hawar islands**

4.150 Bahrain's claim to sovereignty over the Hawar islands by virtue of the British decision of 11 July 1939 has already been shown to be flawed on various grounds set out in Qatar's

Memorial, its Counter-Memorial and elsewhere in this Reply. Qatar has also shown that there is no basis for Bahraini claim of title to the Hawar islands arising, after 1868, out of any "original" or "historical" dominance of extensive areas in the Gulf region. Bahrain's alternative contention that its title to the Hawar islands is also supported on other grounds will now be examined.

### **1. The alleged Dowasir occupation**

4.151 The main basis of Bahrain's claim to the Hawar islands continues to be its contention that the Dowasir tribe, whom it chooses to designate as "Bahrain subjects", settled in Hawar at the beginning of the 19<sup>th</sup> century. Qatar has shown that apart from this contention, all other evidence with which Bahrain seeks to support its claim to Hawar consists in effect of actions or activities by Bahrain after its illegal occupation of the Hawar islands subsequent to the British "provisional decision" of 1936 reached in the context of negotiations for a concession after the discovery of oil<sup>195</sup>. It cannot therefore be invoked in support of Bahrain's claim to the Hawar islands.

4.152 Qatar will now show that there is no proof of the alleged Dowasir occupation of the Hawar islands since the beginning of the 19<sup>th</sup> century as Bahrain "subjects" or otherwise. Qatar will further show that at least until the discovery of oil in the Gulf region in the 1930s, the Hawar islands, being without any water supply and relatively barren, were in effect uninhabited territory frequented only by fishermen from various places in the Gulf during the winter season; that Bahrain has not established that the Dowasir were the only fishermen who frequented the Hawar islands or that they were its subjects; and that even assuming they were, their seasonal visits to the Hawar islands and their private activities cannot and do not sustain a claim of Bahraini sovereignty over the Hawar islands.

### **2. The allegation concerning the Qadi's permission for the Dowasir to occupy the Hawar islands**

4.153 Bahrain states in its Memorial and Counter-Memorial that in about 1800, members of the Dowasir tribe sought and obtained permission from the Qadi of Zubarah, "an official of the Al-Khalifa family" to settle on the Hawar islands<sup>196</sup>. Bahrain has in addition claimed that its sovereignty over the Hawar islands was supported by "the *continuous peaceful presence* of a population subject to Bahrain"<sup>197</sup>.

4.154 Bahrain cites no evidence to establish that any Qadi of Zubarah granted the permission as alleged or otherwise. The only evidence upon which it appears to base this contention is the official report of 4 April 1909 of Major Prideaux in respect of his visit to Hawar. That report merely recounted a conversation with a Dowasir individual, who happened to be in Hawar at the time, in the course of which, Prideaux states:

"this individual... told me that he had at first thought that the Launch was a Turkish gunboat, a visit from which they quite expected to receive. He also told me that Zakhnuniya was undoubtedly a possession of the Chief of Bahrain, but that the Dowasir regarded Hawar as their own independent territory, the ownership of this island having been awarded to the tribe by the Kazi of Zubara more than 100 years ago, in a written decision which they still preserve.

The contesting tribe named Al bu Tobais now is apparently extinct, but as the Kazi of Zubara was in those days an official of the Al Khalifah, the island would seem to be a *dependency of the mainland State*, which the Chief of Bahrain *still claims as morally and theoretically his*"<sup>198</sup>.

4.155 The Court will no doubt see that this hearsay evidence can hardly form the basis of a title to territory. Furthermore, the so-called "written decision" has never been shown to have been preserved by anyone or produced at any time at all. However, Weightman, when making his recommendations in his letter of 22 April 1939 to the Political Resident, simply accepted this as evidence, although he noted:

"The Political Agent mentioned a written decision, which however now seems to have disappeared"<sup>199</sup>.

And certainly no such "written decision" was provided to Major Prideaux.

4.156 Qatar would draw particular attention to the fact that even in Major Prideaux's view as expressed in the passage reproduced above, he considered "the island would seem to be a dependency of the mainland State". In this context, the mainland State could only be Qatar, which, according to Prideaux, "the Chief of Bahrain still *claims as morally and theoretically* his". Prideaux was clearly conscious of the fact that after 1868 the British no longer regarded the Ruler of Bahrain as having any rights on the mainland (as declared by the Governor-General in Council in 1874)<sup>200</sup> and was therefore careful (and correct) not to use any language indicating the Ruler of Bahrain as having any legal interest on the Qatar peninsula or the adjoining islands. It must necessarily follow that the Hawar island referred to above as "a dependency of the *mainland State*", *i.e.*, Qatar, must also therefore be regarded as having ceased to have any connection with the Chief of Bahrain. In no way could Bahrain at this time, *i.e.*, in 1909, have been plausibly referred to as "the mainland State".

4.157 As regards Bahrain's contention that a Qadi sitting in Zubarah could have granted permission to the Dowasir to reside in the Hawar islands so as to provide a basis of title to territory, Qatar must point out that there is no evidence whatsoever of any such official functioning in Zubarah in 1800. The Court will recollect that the Al-Khalifah had already departed from Zubarah and moved their headquarters to Bahrain soon after 1783<sup>201</sup>. Furthermore, Qatar has also shown that there is hardly any evidence of the involvement of the Al-Khalifah chiefs in the territories of Qatar after 1783 except for occasions when some members of the Al-Khalifah family took refuge in the vicinity of Zubarah following internecine conflicts. Bahrain itself has provided a list of the occasions when various members of the Al-Khalifah family took refuge on the Qatar coast or planned attacks on Bahrain to be able to return there<sup>202</sup>. None of this is evidence of exercise of Bahrain's authority over any part of the coast of the Qatar peninsula.

4.158 Qatar has also shown that in the first two decades of the 19<sup>th</sup> century, the coast of Qatar was intermittently under Wahhabi control or the control of Rahmah bin Jabr (a sworn enemy of the Al-Khalifah) in association with others, including at times the Wahhabis or the Ruler of Muscat<sup>203</sup>. Bahrain itself was subject to Muscat during 1800-01, to the Wahhabi Amir from 1803-1811; again to Muscat from 1811 to 1816; once again to the Wahhabi Amir in 1816; to the Persians in 1816-17; and paid tribute again to Muscat in 1820<sup>204</sup>. Qatar has reproduced Lorimer's observations for the period 1826-1838 to show that the Al-Khalifah hardly effectively ruled the Bahrain islands at the time<sup>205</sup>. It is Qatar's submission that in these circumstances, it is inconceivable that there was any functioning Al-Khalifah central authority on the Qatar coast at Zubarah, or even in Bahrain, from where any Qadi could have granted any valid permission to the Dowasir of any formal nature which could form the basis of title to territory, *i.e.*, to the Hawar islands.

4.159 There is thus nothing to show that in the year 1800 the Chief of Bahrain was in a position to make or was engaged in making grants of land anywhere on the Qatar peninsula or its coasts, and there is no credible basis whatsoever for Bahrain's contention - a mere allegation - that the Dowasir occupied Hawar from 1800 onwards under a grant of some kind from any Bahraini authority. Furthermore, a Qadi is not known to have the power to make grants of land. That is a power which can only be exercised by a Ruler. On the other hand, the duties of a Qadi consist only of deciding disputes when two Muslims approach him for the purpose. He is generally required to sit, for this purpose<sup>206</sup>, in a mosque so as to be easily available to Muslims from anywhere<sup>207</sup>.

### 3. The Dowasir as Bahraini "subjects"

4.160 As regards Bahrain's claim that the Dowasir were its "subjects", Qatar has already shown that the Dowasir were a large and autonomous tribe who frequented a number of places in the Gulf region; and that they were a particularly independent community who did not accept that the Rulers of Bahrain had any political authority over them. In the *Western Sahara* case, the Court considered that tribal allegiances, to support any claim for sovereignty, must be real and evidenced by acts manifesting acceptance of political authority<sup>208</sup>. No such evidence is offered by Bahrain for the period before 1936 in regard to the Dowasir who seasonally frequented the Hawar islands<sup>209</sup>.

4.161 Qatar has further shown that when, in the 1920s, the Ruler of Bahrain, at the instigation of the British, sought to introduce certain reforms to apply to the pearl-fishing Dowasir of Bahrain, they regarded this as an encroachment on their independent status and, as confirmed by Bahrain, simply left Bahrain in 1923 for the Dammam promontory in Saudi Arabia. During the period of their stay in Dammam for a number of years, their seasonal fishing visits to the Hawar islands would have stopped, if only because of the distance involved<sup>210</sup>.

4.162 In its anxiety to show that the Dowasir occupied the Hawar islands during the period before and after their emigration from Bahrain, Bahrain states:

"During the time that the Bahraini Dowasir absented themselves from Bahrain, they left their villages of Budaiya and Zellaq on the main island of Bahrain and the Hawar Islands, thereby demonstrating that they acknowledged the Hawar Islands were also under the authority of the Ruler of Bahrain"<sup>211</sup>.

Bahrain further states:

"Indeed, the fact that the Dowasir protest consisted of *leaving* the Hawar Islands is a compelling indication that they considered that they were removing themselves *from the territory of Bahrain; they asked and were ultimately permitted to return to Bahrain*"<sup>212</sup>.

Bahrain provides no evidence whatsoever for either of these statements. In any event, there is nothing here indicating that the Dowasir, either as Bahraini subjects or otherwise, permanently occupied the Hawar islands.

4.163 In 1927, Ibn Saud began to canvass for their return to Bahrain and the Dowasir sought permission to do so. They were clearly not welcome by many, including Belgrave, as is indicated by the following entries in Belgrave's diaries:

"Wednesday 5<sup>th</sup> January 1927

... The market closed again in the morning owing to a scare among the Jews, someone called out 'the Dawasir are coming' & all at once closed their shops. Barrett & Parke persuaded them to open shops again. The Dawasir are the Arabs who were exiled to the coast.

Saturday 26<sup>th</sup> March 1927

... I personally consider the return of the Dawasir is a great mistake, they oppressed their divers & the Bahrainis & were arrogant & truculent, but they are more like Arabs than these people. Motored out to the Shaikh's in the afternoon in his new Studebaker, a large comfortable car. He wanted to show me a letter from Bin Saoud, Sultan of Nejd, approving of the return of the Dawasir to Bahrain, & also to discuss the question of their rights. He looks at it all in quite the wrong way considering that the Dawasir are the oppressed prodigal sons, naturally they are all getting at him to grant them favours.

Friday 15 April 1927

Looked up the Dawasir secret files, all very interesting, telegrams from Viceroy, Thomas (then Colonial Sec.) & the complete history of their intrigues with bin Saoud who egged them on to get up against the Government. Found that they had been clearly told that if they left the place their estates would be confiscated.

30 October 1927

.... Motored out to Budeya. Waited there some time talking to the Dawasir Shaikhs. They are all squabbling with each other as one party wish to come back and the others are trying to prevent them.

13 March 1928:

.... Yesterday night Abdulla bin Jabr came in & had a long talk about the Dawasir business, said that what the Shaikh really wanted was that PR [Political Resident] should give him a letter saying that he was not to pay back the rents so that he could tell Bin Saoud that he wanted to but could not do so. The PR talked about it a few days ago and was entirely against giving them back.

11 April 1928:

Left off early as I wanted to settle the Dawasir business which I got finished. They are an intolerable nuisance..."

These entries (and other similar entries could be cited) sufficiently reveal Belgrave's dislike of the Dowasir.

4.164 Notwithstanding Belgrave's diary entry for 11 April 1928, the Dowasir were still drifting back to Bahrain as late as 1933, as will be seen from the following extract from the Bahrain Government's Annual Report for 1351 H. (1932-33):

"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"<sup>213</sup>.

Furthermore Qatar has already drawn attention to King Ibn Saud's letter of 6 April 1928<sup>214</sup> where he makes representations to the British authorities and the Ruler of Bahrain on behalf of "our Duwasir subjects who are residing in Damman [who] have represented to us concerning their certain rights in Bahrain". Taken together with all the other circumstances described above, this hardly indicates that the Dowasir were Bahrain's "subjects" in the 1920s and the period before 1936.

#### **4. Permanent or seasonal habitation of the Hawar islands**

4.165 In Bahrain's first formal written claim made by Belgrave on 28 April 1936 it was stated:

"At least *four* of the larger islands *are permanently occupied* by His Excellency's subjects who live there in stone houses as well as barastis and who are the owners of valuable fishtraps round the coasts of the islands which they acquired by purchase or gift under the seal of the late Shaikh of Bahrain, Shaikh Sir Isa bin Ali al-Khalifah, and also His Excellency Shaikh Hamad"<sup>215</sup>.

This was the first and last occasion when Bahrain claimed that "four" islands were "permanently occupied". Bahrain clearly investigated the factual position only subsequently; thereafter, without formally withdrawing the initial claim, Bahrain presented evidence only with respect to the main island. As to habitation, Belgrave reiterated in his letter of 22 December 1938/3 January 1939 to the Political Agent that:

"... The inhabitants of Hawar reside there permanently keeping their goods and chattels in their houses and their boats, when not in use, on the shore of the islands"<sup>216</sup>.

As noted below, Bahrain now concedes that the islands were only seasonally visited by the Dowasir<sup>217</sup>.

4.166 Despite the absence of any credible evidence to support Bahrain's earlier claim of permanent occupation of Hawar, Weightman seems in effect to have accepted Bahrain's claim of long and permanent Dowasir occupation, stating in his assessment of the relative claims of Qatar and Bahrain in his letter of 22 April 1939, that:

"... I am not able to state definitely that these Dawasir have for the past 150 years occupied Hawar at all seasons of the year, though those now in residence there claim that this is so. On the other hand the cemeteries, the water cisterns, the ruins of the old fort which I have myself seen and the type of house in use all provide evidence of consistent occupation for at least the greater part of the year"<sup>218</sup>.

4.167 In its Counter-Memorial, in addition to reiterating its claim that "in the early 19<sup>th</sup> Century, a branch of the Dowasir tribe settled in the Hawar Islands after having sought and obtained permission to do so from an official of the Ruler of Bahrain", Bahrain itself now states:

"In 1845, the same branch of the Dowasir tribe was granted permission from the Ruler of Bahrain to settle on the main island of Bahrain. The Bahrain Dowasir *have maintained their loyalty to the Ruler of Bahrain* to the present day, and have lived in Bahrain throughout this time *except for a brief period of three and a half years in the mid-1920s*"<sup>219</sup>.

4.168 Qatar has shown above the lack of any basis for a Qadi's grant of any permission to the Dowasir "in the early 19<sup>th</sup> Century". Now, Bahrain appears at least to concede the lack of Dowasir loyalty to the Ruler and their absence from Bahrain (and therefore presumably their ceasing to frequent the Hawar islands) for a number of years in the mid-1920s.

4.169 Before dealing with Bahrain's assertion of permanent or continuous Dowasir presence on the Hawar islands, Qatar must point out that there is no evidence to support Bahrain's above account of the Dowasir arrival in the region. Lorimer records that:

"The *Dawasir of Bahrain* are said to have immigrated from Najd, whence they gradually moved eastwards and, after spending several years by the way on Zakhnuniyah island, finally arrived in Bahrain about 1845 *under the leadership of the grandfather of their present Shaikh*. They have now about 800 houses at Budaiya and 200 at Zallaq, both places on the west side of Bahrain Island. About 30 households of the tribe are settled at *Dohah in Qatar* and perhaps the same number *in the town of Kuwait*. Offshoots from the *Bahrain community of Dawasir* exist *in the Persian coast district of Dashtistan at Chah Kutah* and its dependent villages and at the village of *Jazireh in Bushehr* harbour"<sup>220</sup>.

4.170 Two conclusions can be drawn from Lorimer's account. Firstly, the only Dowasir "stopover" recorded while they were en route from Nejd to Bahrain is Zakhnuniyah and there is no basis whatsoever for stating that the Bahraini Dowasir first went to the Hawar islands in "about 1800" or "in the early 19<sup>th</sup> Century" before arriving in Bahrain in 1845. Clearly, "the grandfather of their present Shaikh" gave no information to his descendants to support any such claim! Furthermore, as may be seen from *Map No. 9*, facing page 150, the Dowasir movement from Zakhnuniyah to Budaiya and Zellaq on the west coast of Bahrain main island would appear to be a natural route to follow instead of going across to the Hawar islands adjoining the west coast of Qatar. Secondly, the presence of "offshoots from the Bahrain community of Dawasir" in

Doha, Kuwait and the Persian Coast has never been claimed to be or regarded as a credible basis for any sovereignty or other rights for the Ruler of Bahrain in those territories.

4.171 Turning now to the question of the extent to which the Hawar islands were inhabited before 1936, Bahrain now concedes, contrary to Belgrave's claims in his letters of 28 April 1936 and 22 December 1938/3 January 1939 quoted above, and in addition to the Dowasir absence in the 1920s, that:

"Many of the Dowasir *who lived on the main island of Bahrain* spent five months of the year there during the pearling season and the remainder of the year on the Hawar Islands"<sup>221</sup>.

4.172 The Court will not fail to notice that Bahrain refers to those Dowasir "*who lived on the main island of Bahrain*"<sup>222</sup>. Accordingly, any Dowasir visits to the Hawar islands were not only admittedly seasonal but were also irregular and therefore wholly insufficient (and even irrelevant) in the context of a claim to sovereignty.

4.173 Bahrain insists however that "although the presence of some Hawar Islanders was seasonal, the settlement was nevertheless permanent"<sup>223</sup>. Qatar submits there is no evidence to support this bald statement in respect of any permanent Dowasir settlement on the Hawar islands before 1936 and will show, by reference to other available evidence, that in view of the uninhabitable nature of the Hawar islands in the period before 1936, the islands were only seasonally visited, that the visitors were generally fishermen from countries in the region, and that their activities cannot be the basis of any title to territory. Such evidence includes the following:

(a) The *Persian Gulf Pilot* published between 1864 and 1932, though it contains numerous political inaccuracies or inconsistencies, is relatively consistent in its geographical treatment of the Hawar islands. The description in the 1864 Edition is as follows:

"On the west side of the entrance to this inlet is a group of islands, little explored, the largest of which is called Hawar, and is about 10 miles long, and *frequented by fishermen*.

There is no channel inside these islands, and, outside them, there is a gap in the survey, which leaves it undecided whether or no[t] there is any channel between them and Bahrein island"<sup>224</sup>.

The subsequent editions of the *Persian Gulf Pilot* for the years 1883, 1890 and 1898 are either identical or very similar<sup>225</sup>. Each of these descriptions notes that the island is "frequented by fishermen". The 1898 description adds that "[t]he waters, in and about these islands, are unsurveyed". The descriptions in the next four editions, *i.e.* of 1908, 1916, 1924 and 1932, all refer to the Hawar "group of islands" as "little explored" and the fact that the waters around the islands are shallow and unsurveyed. In these reports, there is no further mention even of fishermen frequenting the islands.

(b) Lorimer in his geographical description of Qatar (published in 1908) in describing "Hawar (Jazirat)" states:

"About 10 miles long, north and south, and roughly parallel to the Qatar coast. There are no wells, but there is a cistern to hold rainwater built by the Dawasir of Zallaq in Bahrain, who have houses at two places on the island and use them in winter as shooting boxes. Fishermen also frequent Hawar. The island is adjoined on the north by Jazirat Rubadh and on the south by Jazirat Janan, while Jabalat Ajirah and Jazirat Suwad lie in the channel between it and the mainland"<sup>226</sup>.

(c) The Political Agent, Prideaux, in his letter of 20 March 1909, states:

"The facts are that Dowasir of Budaiya and Zellaq on the north-west coast of Bahrain are in the habit of every winter partially migrating to Zakhunniya and Hawar Islands for fishing (sharks as well as edible fish) and hawking..."<sup>227</sup>.

The Lorimer and Prideaux accounts thus indicate that seasonal (winter) visitors undertook only hunting or fishing on the island.

(d) Consistent with the above accounts, the Ruler of Qatar in his statement of 27 May 1938 stated that Hawar was used by fishermen during the fishing season "as they do in other islands which is considered a usual practice" (paragraph 4)<sup>228</sup>. He again referred to the question of the permanent occupation of Hawar in his comments of 30 March 1939. He questioned the statement made by the Bahrain Government that the Hawar islands were "inhabited by their subjects in a permanent manner" (paragraph 4). In paragraph 5 the Ruler described the islands as follows:

"they are barren, without water and unfit as a pasturage for herds, and was [*sic*] in the past completely without inhabited buildings and by no any way [*sic*] can be called villages or anything that approaches the meaning of this word, and generally unfrequented except by fishermen who come from time to time, or who pull up their fishing boats (for 'a dry' or repairs) temporarily... and who then leave"<sup>229</sup>.

The Ruler apparently regarded the Hawar islands as being subject to the "widely prevalent custom" whereby islands were left free as refuges which fishermen could utilise in winter "for fishing by setting fish traps and nets on the shores of the islands... [and] build dwellings and water reservoirs as there is no water available on the islands"<sup>230</sup>. In his marginal comments on the Ruler of Qatar's comments of 30 March 1939, Weightman also admitted that there was such a custom. Even Bahrain now alleges that non-Dowasir Bahrainis were present in Hawar<sup>231</sup>. It offers no credible evidence to show that such non-Dowasir (if they existed at all) were only Bahrainis. On the contrary, apart from the well-known fact that fishermen from around the Gulf followed the practice of visiting different islands including the Hawar islands to undertake fishing and were freely allowed to do so by the rulers in the region, it has been shown that residents and fishermen from Qatar also frequented the Hawar islands. The Court will recall the Ruler of Qatar's complaint of 8 July 1938 regarding the wrongful detention by the Bahraini authorities of a Qatari subject and his boat and Weightman's acknowledgement of it<sup>232</sup>; as well as evidence of Qatar fishermen who frequented the Hawar islands and who, from their own knowledge, deposed that the Dowasir fishermen who frequented the Hawar islands were in fact permanently settled in Bahrain (at Zellaq)<sup>233</sup>.

(e) An important aspect with regard to habitation on the Hawar islands is the absence of any source of water supply in the islands. After the Ruler of Qatar in his comments of 30 March 1939 pointed out that the islands were barren and without water, suggesting thereby that they were uninhabitable, Bahrain began to claim that rain-water was collected in a number of cisterns and that additional needs were met by bringing water from Bahrain. Weightman, in his assessment of the relative claims of Qatar and Bahrain in his letter of 22 April 1939, simply accepted Bahrain's bare unfounded statement and observed, *inter alia*:

"... Hawar suffers from the absence of a permanent water supply, since the cisterns to which reference is made in the Bahrain counter-claim are only full after heavy rain and are subject to loss both from evaporation and from leakage. There was, for instance, heavy rain in Hawar a month ago, filling the cisterns to the brim, but the local people informed me that this water would be exhausted within three months. Water therefore, during much of the year, has to be brought across from Bahrain and this naturally restricts the number of persons remaining there permanently and makes it necessary for them to send their goats (except a few in milk) and their cattle across

to Bahrain. Nevertheless a few people do remain there throughout the year, though whether this is equally true of the past I cannot say"<sup>234</sup>.

While Bahrain acknowledges that there is no natural source of ground water on the Hawar islands<sup>235</sup>, it speaks of the existence of eight cisterns to store rain-water (as against the descriptions of Lorimer and Prideaux, according to which the fishermen had built one/two cisterns). Bahrain also claims that "in addition to the water supplied from the cisterns, water was also brought from Bahrain and stored in the water tanks of pearling boats"<sup>236</sup>. Bahrain then cites an individual claiming to be a former Hawar island resident as stating:

"Additionally, if we were fishing near the west coast of the Qatar peninsula, we would go to Zekrit. There was a spring there where we could get fresh water"<sup>237</sup>.

The only evidence Bahrain cites of water being brought from Bahrain is Belgrave's letter to Weightman of 22 December 1938/3 January 1939 which was clearly self-serving and unresponsive in any other way. Bahrain further states:

"In the light of the geographical proximity of the Hawar Islands to the west coast of the Qatar peninsula, it is noteworthy that the inhabitants of the Hawar Islands shipped water from within Bahrain and not from the Qatar peninsula, except if they were fishing very close to the coast, when they would use the spring at Zekrit"<sup>238</sup>.

Considering the close proximity of the spring in Zekrit, it would clearly be more reasonable to assume that fishermen on Hawar who were short of water would secure it from a nearby spring rather than incur great expense for the water to be brought all the way from Bahrain in pearling boats.

4.174 In Qatar's submission, all available evidence referred to above, from the 19<sup>th</sup> century and at least up to 1936 in the present century, demonstrates the seasonal and temporary nature of visits of fishermen to the Hawar islands, the lack of any permanent habitation of the islands, and the complete absence of any State control or activity by Bahrain on these waterless and relatively barren islands. Nothing of what is really known of human activity on Hawar supports any Bahraini claim of sovereignty over the islands.

4.175 In its Counter-Memorial, Bahrain contends there is "evidence in the public record" of what it now calls "regular" as against "permanent" habitation of the islands by Bahrain "including evidence dating from 1821-1829, 1845, 1873, 1908, 1909, and 1911, in addition to the 1930s"<sup>239</sup>. An examination of each of the sources relating to these dates shows no basis for such "regular" habitation of the islands by Bahrain. The evidence of 1821-1829 refers to a report of Captain G. Brucks which merely describes Hawar island and states "It has two fishing villages on it"<sup>240</sup>. The next reference is to the passage from Lorimer quoted above, showing the arrival of the Dowasir in Bahrain in 1845 by way of Zakhnuniya. This passage does not refer to Hawar at all. Bahrain has suggested that in 1873, the Ruler of Bahrain was staying in the Hawar islands and helped to rescue some Ottoman soldiers. There is no evidence whatsoever for this suggestion<sup>241</sup> though there is some evidence of Bahraini Sheikhs visiting various locations in the islands for hunting (as they also visited various locations in Saudi Arabia). But that would not in any way support any claim of "regular" habitation of the Hawar islands. The source mentioned for 1908 is another passage from Lorimer quoted above, which merely mentions that the Dowasir of Zallaq in Bahrain have houses at two places on the island which they use in winter as shooting boxes. The sources for 1909 are the letters from Prideaux after his visit to the Hawar islands mentioned above; and the reference to 1911 relates to an assurance in a letter given by the Ruler of Bahrain to the Political Agent that an unemployed Dowasir seaman who was in Hawar and was to be offered a pearling assignment would appear if required. The letter suggests he may already have another pearling job. The letter also shows, if anything, the temporary nature of the unemployed

seaman's presence in Hawar. Finally, as regards the evidence of the 1930s, Bahrain merely refers the reader to a whole section in its Memorial.

4.176 Further evidence has recently been uncovered by Qatar which in any event wholly undermines the Bahraini assertion that members of the Dowasir tribe owing allegiance to Bahrain had had a long-standing settled presence on Hawar prior to 1936 and maintained that settled presence after the occupation of Hawar by Bahraini officials and forces in the year 1937. Mention has already been made of Alban, who succeeded Weightman as Political Agent in October 1940 and served in that capacity until January 1942. On 13 December 1940, *i.e.*, well after the British decision of July 1939, Alban paid a brief visit to Hawar island, less than two months after Weightman's departure. The following is his report as recorded in the Intelligence Summary of the Political Agent, Bahrain for the period 1 to 15 December 1940:

"On December 13th (Friday) I visited the Hawar Island in the 'Felix Jones'; Captain J.B. Howes and Dr. R. Holmes also came. We started from the Bahrain Petroleum Company's pier at Sitra at 9 a.m. and arrived off North Hawar village at 12.30. We landed at the pier and were saluted by a guard of naturs, after which we examined the recently built Fort which is fitted with an electric light plant (only used when any of the Shaikhs are present). The Fort has recently been surrounded by a barbed wire fence. There are 12 naturs [Policemen] who are changed at intervals. *A few Dawasir from Zellaq were in residence; they apparently like Hawar in winter and return to Zellaq in summer. We also saw some of the other Islands of the group*"<sup>242</sup>.

These italicised sentences coincide perfectly with the evidence which Qatar has produced from several sources to the effect that Hawar was, prior to the Bahraini occupation of the islands in 1937, occasionally visited by itinerant fishermen from various Gulf states during the winter months, but that there was no settled community on the islands, far less "a settled population with a pattern of regular habitation", as Bahrain claims<sup>243</sup>. Bahrain may have initiated a programme of public works on Hawar in the many years which have elapsed since its unlawful occupation of the islands in 1937, but that is another matter. The question is: what was the factual position on Hawar in, say, 1935, immediately before Bahrain first lodged a formal claim of title to the Hawar islands? If Alban has correctly described the situation as it was in December 1940, is it not more than likely that this had been the position in 1935, even assuming that, by 1935, those members of the Dowasir tribe who had been accustomed to wintering on Hawar had revived this practice after their voluntary exile in Saudi Arabia from 1923 onwards (as to which there is no evidence)<sup>244</sup>?

4.177 Apart from the fact that none of the evidence referred to by Bahrain supports the claim of "regular" habitation of the Hawar islands, it will also be seen that the nature of the activities mentioned could not in any event be the basis for any Bahraini "sovereignty" over the islands.

4.178 Qatar has drawn attention to the fact that Bahrain has cited no evidence at all of any exercise of political authority over, or *its acceptance* by, the Dowasir who may temporarily have visited the Hawar islands during the winter season. Qatar has shown that in his conversation with Prideaux, the Dowasir he met on Hawar in 1909 claimed the island for themselves. The following entry in Belgrave's diaries describing his (first) visit to Hawar in the spring of 1938 also indicates the lack of any acceptance of Bahraini authority over the Dowasir:

"... In the evening I went to the village & drank coffee with the headman, rather a tiresome old fellow, they resent us having developed the place which in the past was never visited & which they seem to consider as their own property, a roaring gale, I have no intention of returning tomorrow if weather continues so bad"<sup>245</sup>.

Even assuming any political ties between the Ruler of Bahrain and the Dowasir, the account contradicts Bahrain's claim that the Dowasir accepted the Ruler's authority in the Hawar islands.

In fact, it clearly shows Belgrave himself confirming that no one in the past ever visited the Hawar islands on behalf of the Bahraini authorities.

4.179 As observed in the Advisory Opinion of the International Court of Justice of 1975 in the *Western Sahara* case:

"Political ties of allegiance to a ruler, on the other hand, have frequently formed a major element in the composition of a State. Such an allegiance, however, if it is to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority"<sup>246</sup>.

4.180 Furthermore, evidence of individual activities such as seasonal fishing and some hunting (hawking) for which purpose the seasonal visitors built temporary houses (or shooting boxes), cisterns to store water and the existence of cemeteries, cannot sustain any claim to sovereignty.

4.181 As indicated above, there was until recent years a traditional pattern of freedom of fishing in the Gulf and other parts of the Arab region. S. H. Amin in his *Treatise on International and Legal Problems of the Gulf* states:

"The fishing activities in the Gulf have been traditionally governed by the Shariah/Islamic Law. The Shariah does not have a comprehensive legal theory in respect of fishery. The provisions applicable to fishing activities are scattered throughout various parts of Islamic legal theories, in particular those parts relating to public assets (anfal), as well as hunting and slaying (al-sayd va el-zabaha), eating and drinking (atamah va el-ashrabah), acquisition of property (malekiyyah), and State revenue (kharaj). 'Anfal', or public assets, include all national resources and raw material, whether in land or sea or space. They belong, exclusively, to God and *are not, in any way, subject to exclusive rights of persons*, individually or collectively. Individuals may use and exploit the oceans, seas, and rivers, in a reasonable manner, as much as required, without restriction. As soon as one person acquires or possesses a quantity of fish, from river or sea, the fish will become the possession of the fishermen. All these parts of Shariah, taken together, indicate that God is the proprietor of the fishing stocks. They could not, therefore, be subject to exclusive rights of any particular people, either individually or collectively. So, although fish stocks in Shariah are considered as ownerless property, ownership is, in fact, deemed to be vested in the State. Thus, the fish come under the ownership of the fishermen by actual possession, but the State may collect revenue from commercial fishermen. However, no restriction could be imposed upon individuals under Shariah with respect to the fishing industry.

In the absence of strict provisions in Islamic law concerning the fishing industry, the customs and traditions of the local inhabitants have provided a workable, if not universal and binding, framework. Thus, it is submitted that fishing in the Gulf is 'governed by customs and usages of immemorial standing'. However, neither the exact nature nor the scope of these traditional rights and customs is defined. In 1949, Saudi Arabia, and all British Protected Arab Emirates in the Gulf, issued Proclamations asserting their exclusive rights to the continental shelves adjacent to their coasts. It was specified in these Proclamations that they should not be interpreted as affecting fishing activities. Similarly, the Saudi Arabian Proclamation of 1958, extending the territorial sea of the Kingdom to 12 miles, effectively conceded that fishing rights were accorded equally to all the various peoples of the Gulf and only to them. Foreign nationals had no fishing rights in the area. Intrusion by outsiders, except possibly kinsfolk of the coastal people of the Gulf, has always

been resented and was discouraged by the British, prior to their 1971 withdrawal from the Gulf"<sup>247</sup>.

4.182 There are many traces in the recent Award by the Arbitral Tribunal in the *Eritrea-Yemen* Arbitration of what Qatar has been arguing in its previous pleadings as regards the traditional freedom of fishing in the waters of the Gulf of tribesmen owing allegiance to differing Rulers:

"The reported data clearly indicate that the population living around the southern part of the Red Sea on the two opposite coasts have always been inter-linked culturally and engaged in the same type of socio-economic activities. Since times immemorial, they were not only conducting exchanges of a human and commercial nature, but they were freely fishing and navigating throughout the maritime space using the existing islands as way stations... *These activities were carried out for centuries without any need to obtain any authorizations from the rulers on either the Asian or the African side of the Red Sea and in the absence of restrictions or regulations exercised by public authorities.*

This traditionally prevailing situation reflected deeply rooted cultural patterns leading to the existence of what could be characterized from a juridical point of view as *res communis* permitting the African as well as the Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at the local markets on either side of the Red Sea. Equally, the persons sailing for fishing or trading purposes from one coast to the other used to take temporary refuge from the strong winds on any of the uninhabited islands scattered in that maritime zone without encountering difficulties of a political or administrative nature"<sup>248</sup>.

Thus, there are many striking parallels between the socio-economic activities carried out by fishermen in the Red Sea and by fishermen along the southern shore of the Arabian Gulf, at least up until relatively recent times. It should, however, be noted that the Award attaches no weight to evidence of individual fishing practices as constituting state activity supporting a claim to sovereignty over the islands concerned. The Tribunal states:

"... although substantial evidence of individual fishing practices in the record may be taken as a different form of '*effectivité*' - *i.e.*, one expressive of the generally effective attitude and practice of individual citizens of Eritrea or of Yemen - it is not indicative as such of state activity supporting a claim for administration and control of the Islands. This varied and interesting evidence, on both sides, speaks eloquently concerning the apparent long attachment of the populations of each coast to the fisheries in and around the Islands, and in particular that around the Zuqar-Hanish islands. *However it does not constitute evidence of effectivités for the simple reason that none of these functions are acts 'à titre de souverain'*. For state activity capable of establishing a claim for sovereignty, the Tribunal must look to the state licensing and enforcement activities concerning fishing described above"<sup>249</sup>.

4.183 The Award seeks to draw conclusions from what it refers to as "the limited life on the Islands". Qatar takes the view that, *mutatis mutandis*, these conclusions are applicable to life on the Hawar islands at least prior to the unlawful occupation of Hawar by Bahrain in 1937:

"The first conclusion must be that settled life on the Islands does *not* exist, but that episodic or seasonable habitation occurs, and that it appears to have taken place for many years. Eritrea asserts that its fishermen have been predominant, and Yemen asserts the reverse. There is no evident manner in which the Tribunal can, on the basis of the sparse and conflicting evidence before it, decide the matter one way or the other. The likelihood is not that one nationality prevailed and the other was absent, but that both were present on the Islands in varying numbers and at various times -

and that any precise calculation of relative use would, over time, reveal what may be perceived as a genuinely common use of the waters and their resources.

The second conclusion appears to be that the manner of living on the Islands is equally indiscriminate: some fishermen stay on their boats; others sleep on the beach; some construct small shelters; others use larger shelters; some consider their structures 'settlements'. The one thing that is clear from the record is that there is no significant and permanent dwelling structure, or in fact any significant and permanent structure of any other kind, that has been built and that has been used to live in.

The third conclusion is that it is not clear from the evidence, in spite of occasional references to 'families' staying on the Islands, whether any family life is in fact present on the Islands. Inasmuch as the use of the islands is necessarily seasonal, this would seem to be *a priori* inconsistent with family life in the sense of family units migrating to a location where normal community activities continue, as for example with nomadic herdsmen.

The final conclusion must be that life on the Islands, such as it is, is limited to the seasonal and temporary shelter for fishermen. The evidence shows that many of them, of both Eritrea and Yemen nationality, appear to stay on the islands during the fishing season and in order to dry and salt their catch, but that residence, although seasonal and regular, is also temporary and impermanent"<sup>250</sup>.

4.184 The evidence which Qatar has submitted to the Court as regards human activity on the Hawar islands prior to their unlawful occupation by Bahrain in 1937 is broadly consistent with this description of human activity today on the disputed Red Sea islands. Qatar is of course in no position to determine the extent to which the current situation as far as the Hawar islands is concerned differs from the pre-1937 situation, given Bahrain's continuing unlawful occupation of the islands and its consistent attempts to modify the *status quo* against which Qatar has consistently protested. Qatar in any event contends that Bahrain's claim of title to the Hawar islands (first advanced in 1936) must be determined on the basis of the situation as it existed before Bahrain's unlawful occupation of the islands.

4.185 In support of its claim of effective exercise of authority in Hawar, Bahrain has also contended that in the past, *fidawis* of the Sheikh of Bahrain were sent to arrest people on Hawar<sup>251</sup>. Bahrain's claim to the Hawar islands of 28 April 1936 refers to no such practice or any evidence of it. In any event, at most this only means that *fidawis* pursued criminals attempting to hide on a deserted island.

4.186 Another example of evidence in support of Bahraini sovereignty cited by Bahrain is that disputes about fish traps in Hawar were settled in Bahraini Courts. But Qatar has shown that the two judgments produced by Bahrain in this connection are of no evidentiary value, as it was common for Qadis in one Moslem country to settle disputes between Moslem subjects of another country or in regard to property located in another country<sup>252</sup>.

4.187 It must be reiterated that the post-1936 activities cited by Bahrain in support of its claim cannot be invoked by Bahrain in support of its claim to sovereignty. The fort was admittedly built in 1937-38 and the mosque was also built (and not just repaired) at the same time. There is evidence to suggest that Bahrain began to spend money on repairs of the cisterns also after its illegal occupation of Hawar<sup>253</sup>. Prior to that, the cisterns appear to have sufficed for the purpose of storing water for the short periods during which fishermen were present on the island. Furthermore, it has already been shown that there is no evidence of any police operations or the issue of licences by Bahrain for the extraction of gypsum in the period before Bahrain's occupation of the islands in 1937.

## **5. Lack of evidence of habitation from 1937 onwards**

4.188 Qatar considers it relevant to point out that the Hawar islands were relatively barren and unfit for permanent habitation (though suitable for picnics) even after Bahrain had occupied the main island in 1937 and carried out various "improvements". This is apparent from descriptions given in Belgrave's diaries of visits to Hawar as follows:

"Friday 1st April 1938:

Went by camel to the end of the island. Took four men from the camel section, we were out about five hours, I enjoyed it but got very very stiff & sore. I have not had a long camel ride for about 15 years so am quite unaccustomed to it. It was very hot & dry & then quite suddenly, on our way back, the wind turned shamaal & blew very strong, a real gale, all the afternoon & night. There are some nice places in the island & after rain it must look very attractive. This year all the plants & brushwood are dry but there are quantities of plants showing how green it must be some years. Saw a lot of big nests, sea birds, sort of fish hawks. Had a pleasant bathe in a delightful little sandy bay, the water was not too cold, lay on the sand & dried, in the sun, & got very sunburned...

Friday 29th April 1938:

Got up at a reasonable time & went down to the pier & had a very nice bathe, quite deep water & absolutely clear, then, after breakfast, went in the launch right round the other side among the islands, which have all got cairns on them now painted red & white. Quite cool; a very pleasant trip. Landed at one of the islands & climbed up the cliffs, then had a bathe. Rather shallow water. Took Said & two other lads of the Camel section, they bathed too. Got back rather late. Had lunch & then slept till 5 pm when I went out for a ride on one of the camels, almost an hour, taking some of the camel men with me. Pleasant exercise, not unpleasantly hot, a cool breeze in the evening. I really enjoy this place & hate the idea of its being spoilt by oil.

Sunday 19th March 1939:

Went to Hawar, drove to Sitra where I met the launch, took just over three hours to cross but we went the longest way to avoid the rough sea as it was blowing strong. Quite a good trip though rather bumpy. Had an excellent late lunch which I cooked myself, stewed pigeon with vegetables. Slept & then went for a walk along the [illegible] very fine air, had a look at the mosque which we are building and took coffee with two Arabs in the village, it looked even poorer than usual, but they all seemed pleased to see me. A strong shamaal roaring round the tower, but rather a cosy feeling. Had to stuff some of the loopholes with paper to keep the Gale out.

Friday 28th June 1940:

Went to Hawar, car to Sitra & by sea in the 'Hawar', pleasant cool day. Went ashore on one of the islands, looking for nests but found no eggs, at least only one, too late in the season. The naturals looked very smart & the whole place clean & neat. Had a late lunch & then slept, took a walk in the evening & had a bathe & slept out on the roof, very dry & cool & enjoyed the change. Marvellous starry night & quite still, lovely sunset. It's a pleasant place for a rest".

4.189 The Ruler of Qatar's statement that the Hawar islands are relatively barren and would entail hardships to inhabitants<sup>254</sup> is further supported by the fact that even after the British decision of July 1939 in favour of Bahrain, (*i.e.*, after Bahrain had "won" the islands but found no oil on them), the islands seem to have been used for banishing individuals for misbehaviour of one kind or another or for hunting as in the past. Even Weightman himself was frank enough, at least *after* the British decision of 11 July 1939, to downplay the impression which he had carefully cultivated in 1938/39 that Hawar was occupied during the greater part of the year. In

fact, there is evidence to show that, in the early 1940s, Bahrain used the main Hawar island as a penal colony to which offending Bahrainis (particularly junior members of the ruling family) could be banished. The following is a report by Weightman included in the Intelligence Summary of the Political Agent, Bahrain, for the period 16-31 March 1940:

"In the last two or three years some of the younger members of the Shaikhly Family, though not the sons of Shaikh Hamad himself, have caused considerable scandal by their drunkenness. After a good deal of encouragement His Highness was induced to promise that if they continued to be drunk and disorderly he would deal very firmly with them, and this promise has now been put into effect in one case. Shaikh Ali, son of His Highness' brother Shaikh Abdullah, indulged in a particularly revolting drunken bout a few days ago and has now been banished for an indefinite period to Hawar. *The pleasures of Hawar are confined to watching a few fishermen gut their catch, and the result of this action should be admirable*"<sup>255</sup>.

The underlined sentence is hardly consistent with Weightman's previous reports on conditions in Hawar<sup>0</sup>!

4.190 A similar case of banishment to Hawar occurred in 1945. The following is the relevant entry in the Belgrave diaries:

"21 April 1945:

.... Sh A [Sheikh Abdullah] first with a long complaint about Rashid, his son, who got drunk & beat a butcher. He asked that he should be sent to Hawar, HH [the Ruler of Bahrain] agreed".

More such cases occurred in 1949, according to the Belgrave diaries:

"14 February 1949:

Court, quite a long session, had one of the Khubjal Shaikhs up again for being drunk, he having just returned from a period at Hawar.

21 February 1949:

... Court but very dull cases, dealt with [illegible] Abdel Rahman one of the Khalifah who was drunk, sent him to Hawar for 6 months, having consulted HH [Ruler of Bahrain] first".

4.191 Belgrave records numerous other similar incidents in his diaries:

"Thursday 28 March 1940:

Sh Khalifah discussed the deportation of Ali bin Abdulla to Hawar, we decided to send him there tomorrow night. It will cause a sensation.

Thursday 24 May 1945:

Fort. Very busy morning in office and at the customs, Hesketh brought in a new labour man who had a lot of questions to ask about workmen etc, Sh Abdulla called to say that his son Rashid was to be brought back from Hawar, having done about 6 weeks there, I think a bit longer would have been better.

Saturday 7 April 1951:

HH & Sh A, the latter has been at Hawar on a hunting trip & looked very well after it.

Thursday 25 September 1952:

Had an appeal court with Sh Abdulla & afterwards Sh Khalifah [illegible] reported about the doings of Ali bin Abdulla who as usual is drunk & making a dangerous nuisance of himself. Sh A agreed to send him to Hawar.

Saturday 24 January 1953:

Tackled HH about his going home, but he wouldn't say anything definite. He didn't seem to mind the FO suggestion that he should take not more than 4 people with him. Sh A came in & discussed some dope which is said to cure drinking which he wants his son Ali to take, Ali has been allowed to return from his long banishment to Hawar. HH didn't stay very long.

Saturday 21 November 1953:

... Sh Abdulla came in, he had been hunting to Hawar but returned hurriedly owing to the very strong Shamaal, the first this year..."

4.192 So there is clear evidence that, throughout the 1940s and 1950s (but not earlier), the Bahraini ruling family used Hawar island partly as a convenient penal colony, to which more junior family members could be banished in the event of their misbehaviour, and partly as a convenient (if isolated) venue 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 as evidenced in its Annual Reports from 1937-1938 onwards<sup>1</sup>. All this further demonstrates the unsuitability of the Hawar islands for permanent habitation of the kind Bahrain alleges.

#### **Section 5. The Bahrain and Qatar Oil Concession Negotiations between 1925 and 1939 and the Events Leading to the Reversal of British Recognition of Hawar as part of Qatar**

4.193 Bahrain's account of the oil concession negotiations in respect of Bahrain's "unallotted area" draws pointed attention to the British efforts to secure the concession for the British Company, PCL (a group Company which replaced APOC after the latter received a concession over the whole of Qatar) and how the Hawar islands came to be regarded as part of this area in 1936. Bahrain further shows that these efforts did not succeed because the American Company, BAPCO, which had obtained the first concession from the Ruler of Bahrain in 1928 and a mining lease in 1934, threatened to reduce its oil production (which would result in a reduction of royalties payable to the Ruler of Bahrain) if the new concession was not given to it. Bahrain goes on to contend that when BAPCO delivered a similar threat to oppose a British attempt to insist that a concession at least in respect of the Hawar islands should be granted to PCL, "Britain realised that its hands were tied" because as Weightman pointed out in February 1939, any such insistence would have a "devastating effect" on the prestige of the British in the Gulf who would be regarded as having served their own interest at the cost of Bahrain<sup>2</sup>. While Bahrain's account of the concession negotiations from 1936 to 1939 is incomplete and inaccurate in some important respects, it does highlight and support the fact, and therefore Qatar's contention, that the Hawar islands, contrary to earlier British views, were simply treated as Bahrain territory from 1936 onwards. Accordingly, the so-called "arbitration" in 1938-1939 leading to the British decision of 11 July 1939 was nothing short of a sham.

4.194 The Court will recall that in its Memorial, Qatar drew attention to events that showed bias in favour of Bahrain on the part of British officials when dealing with the first formal claim to the Hawar islands made by Bahrain on 28 April 1936<sup>3</sup>. It is Qatar's submission that there was no evidence and therefore no valid basis for the British "provisional" decision of 1936 treating Hawar as belonging to Bahrain; and that the inclusion of the Hawar islands in the territory of Bahrain for which the new concession was being negotiated during 1936 to 1940 demonstrated clear pre-judgment by British officials. An accurate and comprehensive account of the negotiations for a concession over Bahrain's unallotted area, read with some of the evidence referred to in Bahrain's Counter-Memorial, as well as an analysis of the attitudes and procedures adopted by various British officials at the time, which Qatar will now set out, provides further strong evidence of such bias and pre-judgment and shows that both the British "provisional" decision of 1936 and the later decision of July 1939 that the Hawar islands belonged to Bahrain, are vitiated.

4.195 After BAPCO had applied in 1932 for an extension of its prospecting licence from the Ruler of Bahrain in respect of the latter's dominions and in the context of determining the unallotted area for which the concession was still to be granted, Laithwaite of the India Office, in a letter of 3 May 1933 to the Petroleum Department, noted that:

"... in considering any grant of a concession in respect of his 'dominions' or 'Bahrein' it would seem necessary to have a clear understanding as to precisely what is covered..."<sup>4</sup>.

In the same letter, he stated:

"The Sheikh maintains a rather nebulous claim to certain areas on the Arab coast, with which it is unnecessary to deal here. His dominions may be regarded as consisting of the Bahrein archipelago. The Bahrein archipelago consists of the Island of Bahrein, and of the adjoining islands of Muharraq, Umm Na'assan, Sitrah and Nabi Salih"<sup>5</sup>.

In a further letter of 9 August 1933, Laithwaite wrote:

"We have been considering whether there is any risk, in view of the reference to the Sheikh's 'territories' in the Agreement of December, 1925, [the first concession] of a claim being put forward by the [American] Syndicate to rights in respect of Hawar and the area in Qatar to which a vague claim is maintained by Bahrein and to which Colonel Loch refers in his telegram of 23<sup>rd</sup> July No 27 to the Colonial Office. The exploration licence granted under the Agreement of 2<sup>nd</sup> December 1925... is... in respect of 'the whole of the territories under' the Sheikh's '*control*'. This seems clearly to exclude areas in Qatar and presumably also would exclude Hawar which belongs in any case geographically to Qatar, and is the westernmost and largest of a group of islands just off the Qatar coast on the west side of the entrance of Duhat-al-Adhwan"<sup>6</sup>.

Laithwaite's acceptance of the proposition that a reference to "the whole of the territories under" the *control* of the Ruler of Bahrain would exclude Hawar surely establishes that at the time, the Ruler of Bahrain exercised *no* authority in or over the Hawar islands.

4.196 Qatar has provided other compelling evidence in support of the British view expressed on a number of occasions in 1933 that the Hawar islands belonged to Qatar<sup>7</sup>. Further evidence of this view is the War Office map annotated by the Foreign Office (G.W. Rendel) in 1933 and referred to above clearly showing the Hawar islands as part of Qatar<sup>8</sup>. In fact even in 1934 during negotiations for the Qatar Oil Concession of 1935, when the Ruler of Qatar suggested the concession territory could only include the coast and not the interior, the British Resident disagreed and firmly asserted "... you are the Ruler of all Qatar and the Treaty [of 1916] extends to the whole of Qatar"<sup>9</sup>. He made no exception in respect of the Hawar islands.

4.197 Bahrain simply brushes aside all this evidence and merely picks on the references in 1933 to its "nebulous" or "vague" claims to contend that the British were therefore aware of Bahrain's claims in 1933 but, strangely, fails to realise that such claims were ignored and clearly not recognised.

4.198 As Qatar has shown in its Memorial, the British view of 1933 was precipitately reversed after Bahrain, in connection with the resumed negotiations for an oil concession for its "unallotted area" made a formal claim to the Hawar islands in April 1936<sup>10</sup>. With regard to Qatar's allegations of British bias in connection with this reversal, beginning with the so-called "provisional" British decision of 9 July 1936 and culminating in the final decision of 11 July 1939 "giving" Bahrain the Hawar islands, Bahrain makes the rather obscure statement that:

"The facts plainly show, to the contrary, that if Britain had allowed itself to be guided by such impulses rather than by legal principle, it would have favoured the grant of the Hawar Islands [ownership] to Qatar"<sup>11</sup>.

4.199 But then, having assumed that Britain would not have allowed itself to be guided by such impulses, Bahrain contradicts itself by stating a few paragraphs later that after the establishment in Bahrain of what was for all practical and economic purposes an American Oil Company (BAPCO) "... Britain was to do its utmost to promote the interests of British oil companies over those of American oil companies"<sup>12</sup>; and that when the Anglo-Persian Oil Company (APOC), regarded as a British company, "decided to join the competition for the Bahrain unallotted area", this:

"... increased Britain's concern to ensure that any additional concession rights awarded to the American-owned BAPCO were confined to as small an area as possible"<sup>13</sup>.

4.200 In support of this statement, Bahrain refers to a letter from the British Political Resident to the Secretary of State for the Colonies of 22 June 1933 stating:

"it seems to me there are obvious advantages in having a second competitor, especially British, in the field"<sup>14</sup>;

and to another letter from the British Political Resident to the British Political Agent of 29 June 1933, reproducing a part of a "Reply received from His Majesty's Government" stating:

"It would, as you will appreciate, be much more satisfactory from our point of view if remainder [Bahrain] Island were to be developed by Anglo Persian Oil Company or Iraq Petroleum Company..."<sup>15</sup>.

4.201 The Government's Reply went on to suggest that Loch should therefore inform Belgrave confidentially of APOC's interest and make it clear to him that the Government's advice on BAPCO's offer would necessarily turn to some extent on whether or not there was substantial competition in the field; and "that in Shaikh's own interest it is most desirable that he should avoid committing himself in any way to HOLMES [then acting for BAPCO] pending receipt of our advice"<sup>16</sup>.

4.202 It may be noted however that at the time (in 1933) this did not in any way affect the British view that the Hawar islands were part of Qatar. This is obvious from the subsequent telegram written by the Political Resident himself on 31 July 1933 stating that "Hawar Island is clearly not one of the Bahrain group" as well as Laithwaite's letter of 9 August 1933 referred to above to Starling, of the Petroleum Department, pointing out that the Hawar island was not under the control of the Ruler of Bahrain and belonged geographically to Qatar<sup>17</sup>.

4.203 Another significant development in 1933 relating to the unallotted area was triggered by a letter of 17 May 1933 from Holmes to the Political Agent reporting, after a meeting with the Ruler of Bahrain, that the Ruler had agreed to accept an offer from BAPCO for exclusive exploration rights throughout his territories including all the islands and all the territorial waters<sup>18</sup>. This was disputed by the Ruler and, at the same time, questions arose with regard to the size of the Sheikh's territories and territorial waters. The Ruler of Bahrain was greatly disturbed to discover at this stage that his unallotted land area was much less than he had imagined. 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 38000 acres, including towns, cemeteries and gardens"<sup>19</sup>.

4.204 As Belgrave notes in his diary in the entry for 15 August 1933:

"Very busy morning. Fort, office, police & customs. Drafted some important letters. Went to see the Shaikh at the Palace to talk oil. He was very disappointed at Holmes Company having withdrawn their offer for the additional area, he gave me orders to

write a letter about that and about the question of "half the island". He has always assumed that 100,000 acres was half but actually the rest is only about 30,000 acres. Talked also about the new stamps, he was very disappointed as he expected his own head on them, not George's. However, he agreed with complete lack of enthusiasm, to my sending a set to the King & a letter from him. He was disappointed and angry about the oil. Motored in evening & then went in to Mespers".

4.205 In a letter of 16 August 1933, Belgrave then proceeded to inform the Political Agent that, until recently, the Ruler had suffered from a "grave misapprehension regarding the additional area" and stated:

"Although the [1925] concession is for 100,000 acres, which corresponds to 100,000 feddans, His Excellency has always assumed that the concession covered half of the total area of Bahrain, apart from the fore-shore and territorial waters. His Excellency is of the opinion that His Britannic Majesty's Political Agents were also under this impression as when referring to the additional area the expression 'other half' has been in general use... His Excellency feels that while references were being freely made to the other 'half' of the island during the lengthy negotiations [*sic*] on the subject he should have been informed that this 'half' was in reality an area very considerably less than half the total area of Bahrain"<sup>20</sup>.

4.206 The Political Agent in a letter to the Political Resident disputed that the Agency had ever employed the term "half" and suggested that the misunderstanding might have its origin in a description of the Ruler of Bahrain's territories by Holmes in 1928<sup>21</sup>. It appears possible that this episode, together with the fact that the first discovery of oil had occurred a short while earlier and the desperate financial position in which Bahrain found itself in 1933-1934, also led to efforts to try and increase the size of the Ruler's territories to be covered by the new oil concession and thereby try and earn higher royalties for him.

4.207 As already indicated, the negotiations in connection with a concession relating to the unallotted area were suspended in August 1933 after BAPCO sought an extension of its prospecting licence<sup>22</sup>. Bahrain however states in its Counter-Memorial that two of the Bahraini Sheikhs told Belgrave that the British had dissuaded Bahrain from coming to terms with the American Company over the additional area in order to help APOC to get a footing in Bahrain<sup>23</sup>.

4.208 As Qatar has already shown, after the negotiations for the concession over Bahrain's unallotted area were resumed in 1936, and just after PCL submitted a proposal for a concession on 16 April 1936, Bahrain decided for the first time to make a formal claim to the Hawar islands by its letter dated 28 April 1936 from Belgrave to the Political Agent<sup>24</sup>. The contents of this letter have already been analysed by Qatar, showing that the claim was expressly made in the context of negotiations for a concession over the unallotted area<sup>25</sup>. The letter contains numerous inaccuracies (such as the number of islands in the Hawar group) as well as false statements (that at least 4 of the larger islands were permanently occupied by Bahraini subjects), etc. When PCL became aware of Bahrain's new claim, it protested on the very next day by a letter of 29 April 1936 to Walton in the India Office, stating:

"We are, as you know, now negotiating with the Shaikh of Bahrain for that part of his group of islands which has not already been given to the Californians. *He has commenced by claiming that the Island of Hawar is part of his dominions*"<sup>26</sup>.

The letter went on to assert:

"This island is, in fact, situated off the west coast of Qatar, from which it seems to be not more than  $\frac{3}{4}$  miles distant at its nearest point. The island is shown on the official map of Qatar which was signed by the Shaikh of Qatar and by Mr. Mylles and *which forms part of the Qatar Concession*. This map, I believe, was seen and approved by

the Political Resident and, perhaps, the India Office. All this points to its forming part of Qatar and not of Bahrain"<sup>27</sup>.

The letter concluded with a request for a clarification regarding the opinion of the Government of India on the following question: "to which potentate... does the island belong?"<sup>28</sup>. This request in the context was in effect for a confirmation of PCL's view rather than a request for what Bahrain calls "an advisory opinion".

4.209 As already shown, it was only after April 1936, when negotiations for an oil concession over Bahrain's unallotted area had been resumed and after Bahrain had advanced its formal claim to the Hawar islands, that British officials began to express opinions contrary to the position recognised by the British in 1933 and even 1934, which then was that the Hawar islands were part of Qatar<sup>29</sup>.

4.210 Thus Loch, the Political Agent, in his letter of 6 May 1936 forwarding to the Political Resident Bahrain's formal letter of 28 April 1936 claiming the Hawar islands, while admitting that "past correspondence... is not available to me", nonetheless proceeded to express the view (accepting the bare assertions in Belgrave's letter and without calling for any evidence) that there was real substance in Bahrain's claim and then went on to state also "that it might in certain circumstances suit us politically to have as large an area as possible included under Bahrain"<sup>30</sup>.

4.211 The Political Resident (Fowle), without having seen any evidence in support of Bahrain's claim, similarly took the position that he was "incline[d] to the view that Hawar should be regarded as belonging to the Shaikh of Bahrain and that the burden of disproving his claim lies on the Shaikh of Qatar"<sup>31</sup>.

4.212 While Bahrain's formal claim of 28 April 1936 was being considered in London, the question of which company could secure Bahrain's new concession for its unallotted area (which at that time was not regarded as including the Hawar islands) was simultaneously receiving attention, BAPCO having informed the Political Agent in June 1936 that it was definitely interested in concession rights over all the area of Bahrain and its territorial waters<sup>32</sup>. In that regard, a Foreign Office Minute of 26 June 1936 records, *inter alia*:

"HMG would certainly prefer that PCL should get this concession, but they would raise no objection to the BPC securing it subject to their receiving the necessary political safeguards and to their being convinced that the concession was in the best interests of the Shaikh"<sup>33</sup>.

4.213 Soon thereafter, another British official, Starling of the Petroleum Department, writing to the India Office on 3 July 1936 in the context of his concern for "securing a measure of British control" over oil supplies from the Gulf area, suggested:

"... There is, however, the possibility that H.M. Government may consider it desirable to suggest to the Sheikh that it might be a good thing to give the remainder of Bahrain to Petroleum Concessions Ltd." <sup>34</sup>.

He went on to suggest that "in view of the issues involved it might be as well if we were to have an inter-departmental discussion on the whole matter"<sup>35</sup>.

4.214 Such an inter-departmental meeting was therefore held on 9 July 1936 where Starling, among others, was present. The opening paragraph of the Minutes of this meeting records:

"The meeting first examined the question of the ownership of the Hawar Islands. It was agreed that on the evidence at present available these Islands appear to belong to the Sheikh of Bahrein, and that the burden of disproving his claim lay on any other potential claimants. It was agreed that the Sheikh of Bahrein should be informed accordingly"<sup>36</sup>.

In other words, the question of ownership of the Hawar islands was hurriedly decided in favour of Bahrain, notwithstanding the lack of any effort to examine previous records (of 1933), other appropriate evidence, or the views of the Ruler of Qatar. As will be seen hereafter, though the decision was regarded as "provisional" in nature, it was in fact treated as final and acted upon as such.

4.215 At the same inter-departmental meeting, Starling pushed his point further and, as Bahrain itself points out, the Minutes of the meeting record:

"Mr. Starling [of the Petroleum Department] then suggested that His Majesty's Government should exert a *sub rosa* influence to *induce* the Sheikh to give the concession for the unallotted area to [PCL]. He said that he *hoped that United States concerns would gradually disappear from the Gulf and that the whole area would fall under British control*"<sup>37</sup>.

As Bahrain also points out, the underlined text was later deleted and replaced with the following:

"if the [PCL] could secure the remainder of Bahrain, it might give them a better chance in any renewal of negotiations to acquire the Standard of California's interests in the Gulf, thus strengthening the British position in the area"<sup>38</sup>.

4.216 The change in the views of British officials in the Gulf on the ownership of the Hawar islands between 1933 and 1936 as mentioned above, and the record of the inter-departmental meeting on 9 July 1936 suggest that by that date at least some British officials were inclined to believe that attributing the Hawar islands to the Ruler of Bahrain (even if only "provisionally") would help to persuade him to grant the new concession over the "remainder of Bahrain" to PCL<sup>39</sup>. The possibility that such a belief existed is further strengthened by the fact that the so-called "provisional" decision of 9 July 1936 that the Hawar islands were part of Bahrain was immediately communicated to Belgrave at a meeting on 10 July 1936; and although he was also told that an official ruling could only be given after ascertaining whether the Sheikh of Qatar had a claim, Belgrave immediately stated that the Sheikh of Bahrain would enter the island in the list of his possessions to be given to PCL<sup>40</sup>. Bahrain further states that:

"... it was clear to all parties that the oil concession negotiations with the Ruler of Bahrain were to proceed on the understanding that the Hawar Islands were included within the territories of Bahrain"<sup>41</sup>.

4.217 In response to the Skliros letter of 29 April 1936 (reproduced above), PCL was informed of the "provisional" British decision in favour of Bahrain by the India Office on 14 July 1936. However, from this time onwards, the British authorities not only permitted but even participated in concession negotiations on the basis that the Hawar islands were part of "the unallotted area" of Bahrain, *i.e.*, without taking any steps (until much later) to finally determine this vital issue of the territorial sovereignty over the Hawar islands.

4.218 Reporting on 17 July 1936 to the India Office on the progress of the negotiations, Belgrave outlined the terms offered by each of the two companies and said (in the words of J.C. Walton of the India Office) that both companies, in particular BAPCO, appeared to attach great value to the oil prospects of the Hawar islands<sup>42</sup>. The Ruler of Bahrain suggested soon thereafter that the additional area might be divided between the two companies, with the area that included the Hawar islands being offered to PCL, and the rest of Bahrain "proper" to BAPCO<sup>43</sup>. Both the companies found the idea of dividing the additional area unacceptable. BAPCO desired to obtain a concession over the whole additional area, and clearly the real attraction for PCL (for which it began to get support from the British officials) was to secure a concession not just over the Hawar islands but over areas in Bahrain "proper"<sup>44</sup>. After a meeting at the India Office, Longrigg of PCL, in a letter of 11 September 1936, summarised the PCL objectives in the following terms<sup>45</sup>:

"In the Bahrain group of islands, we intend to obtain a Concession for all the territory (including territorial waters) not already leased to the Bahrain Oil Company..."

He went on to state (now without any protest):

"... The question of ownership of Hawar Island was referred by us to you, and you have replied that it should be considered as Bahrain territory".

He further stated:

"The Company proposes to make Bahrain the administrative headquarters of its activities, not only in that Island, but in the whole Persian Gulf area. It is therefore shipping to Manama the necessary equipment for the drilling and geological parties proposed... Mr. E.V. Packer, whose appointment as Company's Manager in that area you have already approved... will take up his residence at Manama on October 19<sup>th</sup>..."

PCL was therefore assuming by September 1936 that not only were the Hawar islands to be regarded as part of Bahrain, but also that it would secure the concession for the unallotted area as a whole; and it was therefore already planning to make Bahrain the principal PCL base in the Gulf region.

4.219 The pre-supposition that the Hawar islands were part of *Bahrain's* unallotted area had further hardened into a working, and unchallenged, assumption by 1 October 1936. A record of a meeting held in the India Office on that date, the record itself being dated 5 October 1936<sup>46</sup>, indicates that Belgrave was to ascertain informally from PCL whether that company would be interested in an oil concession limited to the Hawar islands only, or to the Hawar islands plus the small islands in the immediate vicinity of the two main Bahrain islands. In other words, it was by now taken for granted that it would be the Ruler of Bahrain who would be granting such a concession. This meeting was attended not only by Belgrave, but also by Walton (India Office) and Fowle, who was in London at the time.

4.220 It must be pointed out however that not every British official concerned regarded the "allotment" of the Hawar islands to Bahrain with equanimity. Thus G.W. Rendel of the Foreign Office recorded, well over a year after the 1936 "provisional" decision:

"... As regards the Hawar Islands at No. 17, I cannot help regretting that the India Office went so far as they seem to have done in *allotting* these islands to Bahrein. They are obviously, from the geographical point of view, a part of Qatar, and since the Qatar oil concession is held by a British company, while the Bahrein concession is held by a purely American company, I should have thought that interest, as well as geography, ought to have led us to *allocate* them to Qatar"<sup>47</sup>.

The Court will no doubt notice that even Rendel, though an opponent of the so-called "provisional" decision, in December 1937 appeared to be assuming that the "allocation" of the Hawar islands to Bahrain was final.

4.221 On 1 May 1937, the Ruler of Bahrain suspended negotiations for one year on the ground that the question of Zubarah was occupying his attention to the exclusion of all other matters<sup>48</sup>. By the time the negotiations were resumed in 1938, PCL had given up the idea of applying for a concession over the whole of the unallotted area in the light of the Ruler's known desire to divide the area<sup>49</sup>. PCL therefore sought British approval to approach the Ruler of Bahrain for a concession over two areas, one being a limited area on the Bahrain islands and the second which included the Hawar islands group<sup>50</sup>.

4.222 In April 1938, the Political Resident (Fowle) noted in a Memorandum that until the unallotted area had come to the fore there had been no object in the British Government's giving a definite decision on the ownership of Hawar<sup>51</sup>. Now, however, that PCL wanted to commence negotiations with the Ruler of Bahrain concerning this area in which Hawar was situated, the

British Government would have to give a decision. Fowle recommended that the Ruler of Qatar be informed that, in the light of these oil negotiations, the question of sovereignty of Hawar (and Fasht Dibal) had now to be decided, and that he be asked for his views on this; but that he be informed that "[o]n the evidence at present available to HMG these islands [*sic*] appear to belong to the Sheikh of Bahrein". In the same Memorandum, Fowle also expressed the view:

"From the political point of view it will suit quite well if we give Hawar to Bahrein, as this will balance our previous decision of giving Zubara to Qatar"<sup>52</sup>.

4.223 It is important to note that from the first half of 1938 onwards developments in negotiations for a concession over the unallotted area proceeded in parallel with what Bahrain refers to as the "arbitration" over the Hawar islands, leading to decisions on the two issues at almost the same time, *i.e.* between April and July 1939. It will be recalled that two months before Fowle's above memorandum of 5 April 1938 (*i.e.* in February 1938), the Ruler of Qatar had already complained to the Political Agent (Weightman) orally about Bahrain's illegal activities on Hawar and that in May 1938 he filed his formal written protest against these activities<sup>53</sup>.

4.224 In April 1938, Fowle also recommended at a meeting in London that the concession negotiations be postponed until the ownership of Hawar and Dibal had been decided<sup>54</sup>. Although this was not in fact done, it is of interest to note the comments of PCL on the proposal for the postponement. Qatar has already drawn attention to the cynical attitude of PCL which was now being adopted<sup>55</sup>. While PCL had initially supported the principle that its concession with the Ruler of Qatar covered the Hawar islands as part of the Ruler's territories, it now retreated from this position. At the London meeting, Longrigg of PCL stated that there was no need for a postponement inasmuch as sovereignty over the "islands" in question (*i.e.*, the Hawar group and Fasht Dibal) did not concern the company; if, reasoned the company, the islands belonged to Qatar, then they came within its Qatar concession; if, on the other hand, they belonged to Bahrain, the company was merely running the risk of paying for the same thing twice, a risk it was prepared to take<sup>56</sup>.

4.225 PCL was thus prepared to take a calculated risk in allowing Hawar to be included among the territories over which the Ruler of Bahrain was entitled to grant a concession, in the expectation that this would secure for it additional territories on or around the Bahrain islands. It would make no difference to PCL to which of the two Rulers it would have to pay royalties in respect of any oil produced in Hawar, as long as PCL could secure a concession over some additional territory from the Ruler of Bahrain. PCL was clearly prepared to take such a risk in view of the support it expected to secure and did in fact secure from the British Government to persuade the Ruler of Bahrain to grant it a concession over at least a part if not the whole of the territory comprised in the Bahrain islands themselves.

4.226 Around the same period, a note made by Gibson of the India Office contains the following significant indication of the thinking in the India Office:

"If a concession over Hawar were given to either Company it would probably be necessary to give a ruling on the question of ownership; if it should be found that the island belonged to Qatar it would presumably follow that it was already included in the Petroleum Concessions Limited Qatar concession, *but in our view it almost certainly belonged to Bahrein*"<sup>57</sup>.

4.227 In two separate letters on 22 May 1938, Weightman forwarded to the Political Resident and the Secretary of State for India a description of the areas to be offered by the Ruler of Bahrain to the two companies<sup>58</sup>. The area for PCL clearly included the Hawar islands, although two days earlier, *i.e.* on 20 May 1938, Weightman had written to the Ruler of Qatar inviting him to state his case on the Hawar islands and to provide evidence of it as rapidly as possible<sup>59</sup>. In retrospect therefore, this letter to the Ruler of Qatar can hardly be said to be part of an unbiased

process of "arbitration", as Bahrain's ownership of Hawar was already being taken for granted in complicated negotiations for an oil concession covering the unallotted area as a whole (including the Hawar islands). This is confirmed by the fact that both the Political Resident as well as the British Government (in the India Office, Foreign Office, Admiralty and Petroleum Department) approved the Ruler's division of the unallotted area<sup>60</sup>.

4.228 PCL was generally satisfied with the Ruler's scheme of division<sup>61</sup>. But at this stage, BAPCO, which already held a concession over a large part of Bahrain territory, delivered a significant threat. It warned that if any part of the concession was offered to another company, BAPCO's retort could be to slow down production on its existing Bahrain concession, resulting in a reduction in the Ruler of Bahrain's royalties<sup>62</sup>. The Ruler and his family were greatly alarmed at this threat and showed a disposition to go back on the scheme that the Ruler of Bahrain had proposed and communicated to BAPCO and PCL. BAPCO thereafter repeated its threat of slowing down production, and made a new offer for a concession covering the *whole* area under the dominion of the Ruler of Bahrain<sup>63</sup>. The Ruler of Bahrain now indicated (on 9 June 1938) that he wished to abandon the original scheme and give the whole area, *with the exception of the Hawar islands*, to BAPCO. In his letter, he stated:

"Our reason for making this decision is that we do not wish to endanger our revenue from oil by causing the Bahrain Petroleum Company Limited to reduce its work in Bahrain. We believe that this would result if Petroleum Concessions Limited were allowed to introduce themselves into our territory, *except at Hawar*"<sup>64</sup>.

4.229 In a letter of 10 June 1938, the Political Agent (Weightman) reported to the Political Resident (Fowle) that the Al-Khalifah Sheikhs believed it was out of the question to resist the threat made by BAPCO and that they confidently believed the British Government would appreciate their position<sup>65</sup>. Weightman noted that, in giving PCL even a concession covering Hawar alone, the Ruler was to that extent ignoring BAPCO's threats, which were directed towards obtaining the whole of the unallotted area without exception. However, he observed that BAPCO had indicated in the past that it did not regard Hawar as likely to yield oil, and that the Ruler of Bahrain and his family felt very definitely that the allocation of Hawar to BAPCO would involve them in unending difficulties in the future. As to the latter, he elaborated as follows:

"Indeed both Mr. Belgrave and I have little doubt, from remarks which His Highness has passed, that he has some confused idea in his mind that the grant of a concession for Hawar to the Bahrain Petroleum Company [BAPCO] might result in the loss of his sovereignty over that group of Islands"<sup>66</sup>.

4.230 In another letter of 10 June 1938 to the Political Resident, Weightman noted that if BAPCO's threat was carried out it would have devastating economic consequences for Bahrain and that he did not consider that the British Government could advise the Ruler of Bahrain to disregard it. He went on to state:

"No one can doubt that His Highness' original wish was to discharge some part of his debt of gratitude to the British Government and to give proof of his loyalty by offering a British Company (he is unaware of the cosmopolitan composition of Petroleum Concessions Limited) a substantial part of his territories, while at the same time `pleasing' the American Company which had succeeded, where an English Company had failed, in providing him with great wealth. These admirable sentiments *must now yield to the knife which he and his family see at their throats*"<sup>67</sup>.

Despite the threat, however, Weightman thought that Hawar could still be hived off from the unallotted area and given to PCL. As to this, he stated:

"Hawar is a different matter. It seems impossible for the Al Khalifah to consider Hawar without at the same time wondering how much they can annoy or perhaps damage the Al Thani of Qatar. His Highness has this absurd conviction that, whatever 'the engineers' may say, there is oil in Hawar, and if the Company operating in Qatar can produce oil from Hawar for Bahrain it will give him immense, if childish, pleasure. He does not want to offer Hawar in any case to the Americans [BAPCO]... and the present intention is that if an agreement cannot be reached with Petroleum Concessions Limited then Hawar will remain outside any concession. At the same time, the Shaikh seems to think that Petroleum Concessions Limited can work Hawar alone without taking any oil found into Qatar. I have told him that this is quite impossible, but so far he fails to face the fact..."<sup>68</sup>.

4.231 The Court will not miss the significance of these observations which demonstrate that quite apart from any prospect of finding oil in the Hawar islands and regardless of whether he had any rights to them, an important motive for the Ruler of Bahrain to occupy the Hawar islands in 1937 was his general dislike of the Al-Thani of Qatar and perhaps his desire to obtain revenge for Qatar's action in 1937 in Zubarah.

4.232 In the hope of saving Hawar for PCL, Weightman went on to observe:

"... they [BAPCO] have protested on various occasions that Hawar is of no interest from the point of view of producing oil; and there is moreover on record the definite suggestion made by the Company's representative in London that Hawar should be given to [Petroleum Concessions Limited]..."<sup>69</sup>

4.233 The Political Resident concurred with Weightman. By letter dated 19 June 1938 to the India Office, he recommended that the Government inform the Ruler of Bahrain that they did not wish to interfere with his decision of 9 June 1938 (to open negotiations with PCL for the Hawar Islands, and with BAPCO for the rest of the unallotted area). The loss to the Bahrain Government if BAPCO were to carry out its threat, he stated, would "be ruinous to the State"<sup>70</sup>. Here, then, was Fowle now actively engaged in the process of securing the Hawar islands for PCL from the *Ruler of Bahrain*. Yet, in parallel, in the course of what Bahrain refers to as an "arbitration" (a term the British Government itself never used), on the very next day, 20 June 1938, he forwarded the Ruler of Qatar's "detailed claim" to the Secretary of State for India<sup>71</sup>. It is noteworthy that he proposed that this should be given to Bahrain, and Bahrain's "counter-claim" obtained, but that at the same time he recommended that the Ruler of Qatar's request to see Bahrain's "counter-claim" should be rejected<sup>72</sup>.

4.234 At an inter-departmental meeting held at the India Office (where Belgrave was present), on 7 July 1938, it was decided to recommend that the Ruler of Bahrain postpone the concession negotiations in the light of BAPCO's threat. Belgrave reported that the Ruler and his family were in favour of closing with BAPCO but were prepared to give Hawar to PCL. There was no truth, however, he asserted, "in the suggestion that the Sheikh was disposed to *give* Hawar to PCL from a fear that if he did not HMG might be influenced to decide the question of the ownership of Hawar in favour of Qatar"<sup>73</sup>.

4.235 The Ruler of Bahrain was firmly opposed to postponement, and by October 1938 he even changed his mind with regard to Hawar, advising the Political Agent (Weightman) that he no longer wished to offer this area to PCL though he had not till then decided whether to exclude the Hawar islands from the proposed new concession to BAPCO or to include them and mark them as "closed to operations"<sup>74</sup>.

4.236 In another letter of 18 October 1938, Weightman considered some of the political considerations at play and stated:

"The main and most important question, however, is that of our relations with Bahrain. *Is it sound, save for reasons of the most extraordinary urgency, to imperil our friendship with the one loyal Sheikdom in the Gulf?* [*i.e.* by opposing the Ruler's views]"<sup>75</sup>.

4.237 The Political Resident (Fowle) considered that the Ruler of Bahrain's comments had much weight. However, in a letter dated 3 November 1938 to the India Office, he expressed - for what appears to be the first time - the view that the British Government should insist that a concession over Hawar be granted to PCL because of its geographical proximity to Qatar:

"It will be seen that the Shaikh now does not even wish to give Hawar to Petroleum Concessions Limited. I am not of opinion that we should accept this... *Hawar geographically is outside the Bahrain area and adjoining Qatar*, where Petroleum Concessions Limited already have a concession and in fairness therefore it should go to them"<sup>76</sup>.

4.238 The Court will no doubt notice that Fowle was now giving reasons for his opinion which were almost identical to those given by British officials in 1933 (and by G.W. Rendel of the Foreign Office in 1937) in support of Qatar's title to the Hawar islands<sup>77</sup>. He was doing so, however, in support only of *PCL's claim* to a Bahraini concession covering the Hawar islands and not Qatar's ownership of the Hawar islands! He advised, accordingly, that the British Government should inform the Ruler that it agreed to his proposal, provided that Hawar was allotted to PCL but not otherwise. The Court will also notice that Fowle was making this recommendation at the point of time when under the agreed so-called "arbitration" procedure Bahrain was still to submit its "counter-claim" (which it actually submitted on 22 December 1938) and yet Fowle was assuming that Hawar was within the gift of the Ruler of Bahrain to "give" to PCL<sup>78</sup>.

4.239 It will be seen therefore that although at this time the so-called "arbitration" in respect of sovereignty over Hawar was also proceeding apace, the attention of all concerned was on how to get *the Ruler of Bahrain* to grant a concession over the Hawar islands to PCL. No one was even thinking of the possibility of a decision in favour of Qatar on the question of sovereignty.

4.240 On 9 January 1939, PCL submitted a new offer and on the same day, the Political Resident sent a telegram to the Secretary of State for India in which he renewed his earlier recommendation that the Ruler should be informed of the British Government's desire that Hawar be granted to PCL<sup>79</sup>. Here again, Fowle's recommendation was being made on the basis that Hawar was to be "given" by the Ruler of Bahrain when, in the so-called "arbitration", Bahrain's "counter-claim" *had been forwarded to the Ruler of Qatar, and his further comments were awaited*. The Secretary of State for India nevertheless also acted on Fowle's advice. Responding to a query from the Ruler as to whether the British Government had any political objection to his granting a concession to BAPCO extending "over our [Bahrain's] whole territory"<sup>80</sup>, he stated, in a telegram dated 14 January 1939, that:

"[The Ruler] may be assured that whatever conclusions he arrives at as a result of negotiations this will not affect goodwill of His Majesty's Government. His Majesty's Government think however that it may be convenient for His Highness at this stage of negotiations to inform him of their views in regard to one portion of area namely the Hawar islands. *Owing to the contiguity of these islands to Qatar* where an oil concession is being operated by P.C.L. the grant of concessional rights to B.P.C. in Hawar would be open to objection and His Majesty's Government consider that it would be appropriate at least to allow P.C.L. the opportunity to acquire concessional rights therein. His Highness should however be assured that in informing him of their views in regard to a concession in Hawar, His Majesty's Government are not in any way *prejudicing* the question of sovereignty over Hawar islands. The choice of

P.C.L. rather than B.P.C. as concessionaires could not *affect adversely* his claim to the islands"<sup>81</sup>

4.241 Here then was the Secretary of State himself directing that the Ruler of Bahrain be informed that "the grant of concessional rights to B.P.C. [BAPCO] in Hawar would be open to objection"; that PCL should at least be given the opportunity to acquire such concessional rights in Hawar; but that the Ruler should be assured that the British Government was not in any way "*prejudicing* the question of sovereignty over Hawar islands" (*sic*); and that "his choice of P.C.L. rather than B.P.C. [BAPCO]... could not affect '*adversely*' his claim to the [Hawar] Islands". The Political Agent duly informed the Ruler of the British Government's views on 15 January 1939<sup>82</sup>.

4.242 Acting on the British Government's suggestion, the Ruler (through Belgrave) invited from PCL an offer covering the Hawar islands alone, and enquired of BAPCO whether its offer for the whole unallotted area would be affected if the Hawar islands were to be excluded<sup>83</sup>. But BAPCO, who had recently submitted a revised bid with improved financial terms<sup>84</sup>, now changed its view and delivered its second all-important threat, stating in effect that it must also have Hawar. At a meeting held on 17 January 1939, BAPCO made it clear that it was not interested in a part of the area but only in the whole, and stated that its offer would be withdrawn if the area were to be divided<sup>85</sup>. BAPCO's representative (F.A. Davies) said that he was astounded at the request to know what offer the company was prepared to make for the additional area, excluding the Hawar group, because:

"all through the present negotiations the whole of the area has been under discussion and there had been no mention of excluding Hawar..."<sup>86</sup>.

The Ruler and the others present agreed that this was the case. The Ruler went on, however, to explain that he had merely excluded Hawar in order "to prevent complications and difficulties in the future which might arise *owing to the proximity of Hawar to the Petroleum Concession Limited concession* [in Qatar]<sup>87</sup>". He tried to argue that "Hawar was a very small island *and very far away*<sup>88</sup> and its loss to the company would not cause them any material loss"<sup>89</sup>. Replying to this, Davies explained that the chief reason why his company were unwilling to bid for a divided area was not because of the possible value of the area but because they did not want another company to hold an oil concession anywhere within the Ruler's territory since they knew, from past experience, that if two companies held a concession in so small a country it would cause difficulties and misunderstandings which would damage BAPCO's position vis-à-vis the Ruler<sup>90</sup>.

4.243 By a letter of 6 February 1939, signed by all the Bahrain Sheikhs, the Political Agent was informed that BAPCO's offer for "the whole area, including Hawar" was financially more advantageous for Bahrain than the alternative of dividing the concession area into two<sup>91</sup>. Before making a final decision, the Sheikhs therefore sought the advice of the British Government.

4.244 As Bahrain itself has stated, this was the stage at which "Britain realised that its hands were tied"<sup>92</sup>.

4.245 Reporting to the Political Resident on 12 February 1939, the Political Agent (Weightman) expressed the view that it was no longer possible for the British Government to press the Ruler of Bahrain to grant Hawar to PCL as the net effect upon Bahrain of granting a concession to PCL would be financially disastrous and was regarded by the Bahrain Sheikhs as an invitation to bankruptcy<sup>93</sup>. Here again, Weightman was assuming Bahrain's ownership of Hawar and making his recommendation not to insist on the Ruler of Bahrain granting a concession in respect of Hawar to PCL while the Ruler of Qatar's comments on Bahrain's "counter-claim" in the so-called "arbitration" were still awaited. Summing up the probable consequences if the British Government were to insist on the Bahrain Government granting Hawar to PCL, he stated:

"... the essence of the existing situation is that the Bahrain Petroleum Company's offer is made dependent on their obtaining the entire Unallotted Area. This being the case,

and since the details of the present negotiations must inevitably become public property, it is scarcely too much to say that the grant of a concession for Hawar to Petroleum Concessions Limited under the advice of His Majesty's Government *will be as disastrous to the prestige and position of His Majesty's Government in Bahrain and in this part of the Gulf generally as to the Shaikh and his administration...* [I]t requires little imagination therefore to realise the devastating effect of the almost inevitable comment, if His Majesty's Government insist on Hawar going to Petroleum Concessions Limited - 'the British have served their own interests at the cost of 1 ½ million pounds to the Shaikh of Bahrain'. The effect of hostile propaganda, overt and covert, which might be based on such a statement is incalculable..."<sup>94</sup>

and:

"...for the reasons which I have stated above it is no longer possible, without incurring the gravest risk to the prosperity of Bahrain and, in direct consequence, to the future good relations between His Majesty's Government and the Bahrain Shaikhs, to exert pressure to obtain Hawar for them [PCL]"<sup>95</sup>.

Weightman went on to suggest that there was only one alternative to approving the grant of an unrestricted concession to BAPCO; namely, while allowing BAPCO to obtain a concession for the whole unallotted area, to insist that no operations should be conducted in Hawar until such time as the Ruler, acting on the advice of the British Government, might pronounce them unobjectionable. Weightman concluded:

"It is distasteful to be compelled to recommend the withdrawal of the support hitherto afforded to a partially British Company in its attempts to obtain a footing in Bahrain. Nevertheless it seems inevitable to me that commercial advantages must yield to the over-riding interests of His Majesty's Government and of the Bahrain State"<sup>96</sup>.

The Court will note that nowhere in this important letter is any reference made to the possibility that the Hawar islands might be regarded as appertaining to Qatar.

4.246 The Political Resident (Fowle), in a letter of 14 February 1939 to the Secretary of State for India, agreed generally with Weightman's views, asserting that "it seems to me definitely that the only course open to His Majesty's Government is *to permit the Shaikh [of Bahrain] to include Hawar in the Bahrain Petroleum Company's concession*"<sup>97</sup>. He disagreed, however, with Weightman's suggestion that BAPCO should not work Hawar, since he considered that:

"it would be difficult to give adequate reasons to the Shaikh or the Bahrain Petroleum Company *why, having obtained Hawar in their concession, they should not work it*"<sup>98</sup>.

4.247 It will be seen therefore that in February 1939, while supposedly conducting an "arbitration" in respect of the ownership of the Hawar islands and two months before they were to assess the evidence and make their recommendations on the issue, both the officials (the Political Agent, Weightman and the Political Resident, Fowle) were unreservedly and unequivocally acting on the basis that the Hawar islands belonged to Bahrain. Fowle was formally stating to the Secretary of State for India that (apart from the embarrassment to the British Government) it would not be possible to give a valid explanation to BAPCO for preventing the company from working Hawar once they had "obtained Hawar in their concession"<sup>99</sup>.

4.248 Bahrain contends however that one avenue still remained open, because as yet no *formal decision* had been issued as to which of the two Rulers possessed sovereignty over the Hawar islands; and that even at this stage, the British Government could have decided in Qatar's favour and saved the Hawar islands for PCL but that it was unable to do so because the evidence available supported Bahrain's ownership over the Hawar islands<sup>100</sup>. However, the sequence of

events described above clearly shows that after the view that the Hawar islands were part of Qatar, which had been clearly held by the British until at least 1933/1934, had been reversed by the British "provisional" decision of 9 July 1936, the Hawar islands became something in the nature of a bait which could be held out to Bahrain so as to secure the Ruler's agreement to the grant of a concession over the unallotted area as a whole (which included considerable areas in Bahrain itself) to PCL. Consequently, from 1936 to the first quarter of 1939, complicated and elaborate negotiations (or manoeuvres?) took place in which British Ministers and officials in London and the Gulf actively participated and during which it was simply taken for granted at all material times that Bahrain's unallotted area included the Hawar islands and that it was for the Ruler of Bahrain to grant a concession over it. By the time BAPCO finally made its threat and notified its firm refusal to allow Hawar to be excluded, it was clearly too late for the British authorities then to try and retrieve the position by reversing the "provisional" decision of July 1936 and holding that there was evidence to justify that the Hawar islands belonged to Qatar! Any such decision would clearly have had the same consequence as described in Weightman's letter of 12 February 1939, *i.e.*, the devastating effect of the almost inevitable comment that the British had served their own interests "at the cost of... the Shaikh of Bahrain [*sic*]" and the fact that this would have been "disastrous to the prestige and position of His Majesty's Government in Bahrain and in this part of the Gulf generally"<sup>101</sup>. Further, as Fowle pointed out in February 1939, once BAPCO had "obtained" Hawar in its concession from the Ruler of Bahrain, it would be impossible to prevent it from working it.

4.249 Accordingly, well before 22 April 1939, when Weightman engaged in what, in retrospect, appears to have been the farcical exercise of analysing the evidence on whether the Hawar islands belonged to Bahrain or Qatar<sup>102</sup>, there was already a firm pre-judgment that the islands belonged to Bahrain, or, to use Bahrain's terminology, "Britain's hands were already tied". There was accordingly never any question of Weightman, Fowle or the British officials in London rendering an objective decision in what Bahrain persists in calling an "arbitration". There was therefore no legal basis for the "decision" of 11 July 1939. Qatar has already shown there was no evidence to support the reversal in 1936 of the earlier British view that Hawar was part of Qatar. The provisional British decision of July 1936 and the final decision of 11 July 1939 were both therefore clearly vitiated by bias and pre-judgment as well as the other defects to which Qatar has drawn attention in its previous written pleadings.

4.250 There is one final mystery in all this. The British Government were well aware (and had indeed been aware since they made their provisional decision in favour of Bahrain in July 1936) that they would eventually have to undertake the task of determining whether the Hawar islands appertained to Qatar or to Bahrain. This would have to be done before any oil concession covering the Hawar islands could be granted, since only the Ruler of the sheikhdom having sovereignty over these islands could grant such a concession. Despite this, the British Government and its representatives in the Gulf encouraged the competing oil companies (PCL and BAPCO) to make bids for the so-called "additional area" (including the Hawar islands) to the *Ruler of Bahrain*, thereby assuming that the Ruler of Bahrain alone was entitled to grant an oil concession covering the Hawar islands. Thus, PCL (Qatar's concessionaire) had already entered into direct negotiations with the Ruler of Bahrain in the spring of 1936 with a view to offering terms for a new concession covering the "additional area". After the British Government had made their "provisional decision" in favour of Bahrain in July 1936, the British representatives in the Gulf (both the Political Resident and the Political Agent in Bahrain) were quite content to see competition between the oil companies as regards payments to be made to the *Ruler of Bahrain* under a new concession covering the "additional area" as a whole or (preferably) under two concessions, one covering Hawar (to go to PCL) and the other covering the remainder of the so-called "additional area". It is indeed apparent that the events following the making of the "provisional decision" in favour of Bahrain in July 1936 operated for all practical purposes to convert that "provisional decision" into a definitive decision with

immediate effect. There is certainly ample evidence that Fowle and other officials in London acted on that basis long before 11 July 1939<sup>103</sup>. It is indeed noteworthy that, as late as 30 June 1939, PCL, in a final and cynical *volte face*, sent a letter to the Under Secretary of State for India drawing attention to this development. That letter states *inter alia*:

"In spite, however, of the provisional, or limited, nature of the ruling under reference<sup>104</sup>, it appears that the Hawar group have subsequently come to be treated as *de facto* Bahrain territory; so much so, that both this Company and another have been encouraged to make offers to the Shaikh of Bahrain for a concession to include the Hawar group"<sup>105</sup>.

The letter concludes by stating in its final paragraph that:

"... the original negotiator of the Qatar Concession in 1935, Mr. C.C. Mylles, was and remained under the impression that Hawar formed part of the Concession area... Our information from Bahrain is to the effect that representatives of that Government are mapping reefs, etc. in waters immediately adjacent to the Qatar Peninsula and which would appear, under any but altogether exceptional circumstances, to belong to the Ruler of Qatar. The fact that the latter has no British adviser and no Political Agent seems to create a certain danger that the Bahrain State - between which and himself very bad relations exist at present - may be encroaching at his expense: which, in the present case, would also be the expense of the Company".

Qatar has been unable to trace a reply to this letter.

## **Section 6. Events leading up to and following the British Decision of 1939 on the Hawar Islands**

### **A. Further evidence of bias against Qatar on the part of certain British officials in the Gulf in the matter of the conflicting claims to the Hawar islands, and of pre-judgment in favour of the Bahraini claim**

#### **1. Bias**

4.251 Evidence of the bias of Weightman and Fowle in favour of Bahrain and against Qatar in the matter of the dispute over the Hawar islands is spread throughout the voluminous official records in the British archives of the time. Attention has been drawn to a number of instances of such bias in Section 5 above and also in Qatar's previous written pleadings<sup>106</sup>. So far as Weightman is concerned, the most blatant (and indeed alarming) example of his general anti-Qatar bias is to be found in the letter covering the Packer Report of 5 December 1939, which he sent to the Political Resident (Prior) on that date. In that letter, Weightman is seen to be contemplating with equanimity (if not approval) the eventual assassination of the heir-apparent to the then Ruler of Qatar:

"But when he [the then Ruler of Qatar] dies and Shaikh Hamad comes into power I should anticipate a rapid acceleration of the tempo of agitation. I doubt very much if there will be any armed rising, for the Ruling Family have the best arms by a long way. But I should certainly anticipate a murder and quite candidly I think it would be to Qatar's advantage in the long run if Shaikh Hamad bin Abdulla passed out. We have of course recognised him as heir-apparent but that does not involve us in protecting him from assassins, fortunately"<sup>107</sup>.

The writer of this extraordinary letter was of course the central figure in the decision-making process as regards the Hawar islands completed less than six months previously. There can surely be no more compelling proof of his general bias against Qatar (and in favour of Bahrain) in the matter of the Hawar islands so eloquently reflected in a number of his interventions in the decision-making process (if indeed it can be called that). Weightman's bias in this matter also

manifested itself in some serious instances of pre-judgment of the issue; the more significant examples of these will be taken up under the "pre-judgment" heading.

4.252 Fowle's bias against Qatar in the matter of the Hawar islands was not so pronounced as Weightman's; but it existed nonetheless. It is demonstrated by his failure to inform the Ruler of Qatar of the formal Bahraini claim to Hawar lodged in 1936, and of the subsequent "provisional decision" by the British Government in favour of the Bahraini claim. Nor can it be plausibly objected that Fowle was unaware that the Ruler of Qatar had a claim to the Hawar islands. His letter of 25 May 1936 to the Secretary of State for India acknowledges the existence of a dispute between the two sheikhdoms by shifting the burden of proof on to the Ruler of Qatar, notwithstanding that at least half of the land area of the main Hawar island and the totality of the land area of a number of other islands in the Hawar group lay within a three-mile limit drawn from the mainland of Qatar:

"... I incline to the view that Hawar should be regarded as belonging to the Shaikh of Bahrain and that the burden of disproving his claim lies on the Shaikh of Qatar"<sup>108</sup>.

It may be objected that, at the time, Fowle was unaware of the geographical position of the Hawar islands in relation to the mainland of Qatar. All the more reason, then, for his informing himself more fully of the facts before committing himself to a viewpoint which was unsupported by the evidence available to him, *had that evidence been subjected to serious scrutiny*. To be fair to Fowle, it was he who recommended in the procedural proposals which he put forward on 5 April 1938 that a second letter be sent to the Ruler of Bahrain asking him to postpone negotiations with the oil companies concerned until the ownership of Hawar and Fasht Dibal had been decided. But this proposal was strongly opposed by PCL and seems subsequently to have been quietly dropped. Again, as with Weightman, Fowle's general bias in favour of Bahrain and against Qatar in the matter of the Hawar islands can be seen in a glaring instance of pre-judgment.

## 2. Pre-judgment

### (a) Fowle

4.253 As Political Resident in the Gulf during the period leading up to the making of the British decision of 11 July 1939. Fowle bears a heavy responsibility for the injustice. He shared with other British officials a general mistrust of the Ruler of Qatar, of the heir-apparent and of their close advisers; and, to the extent that he had any knowledge of conditions in Qatar at the time, he no doubt viewed the sheikhdom as a poverty-stricken and barren wasteland in comparison with Bahrain. More than sixty years on, it is no doubt easier to see where matters began to go wrong. In Qatar's submission, the fundamental error was to assume that the negotiations with the competing oil companies (PCL and BAPCO) over a concession covering the so-called "additional area" of Bahrain (which would include the Hawar islands) could be carried forward and indeed virtually completed *before* a decision was taken on whether the Hawar islands belonged to Bahrain or to Qatar; and it is to Fowle's credit that he initially recommended that these negotiations be postponed pending a formal decision on the ownership of the Hawar islands and Fasht Dibal. The oil concession negotiations should *not* have been continued on the assumption that the "additional area" of Bahrain included the Hawar islands, at least until title to those islands had been definitively determined. As has been fully demonstrated in Section 5 above, to proceed otherwise was in effect to treat the "provisional decision" in favour of Bahrain, arrived at with only the most perfunctory consideration, as the final decision. This would explain, even if it does not excuse, the instances of pre-judgment by Fowle. The most glaring example of pre-judgment by Fowle is to be found in his letter of 3 November 1938, to the Secretary of State for India<sup>109</sup>. The whole of that letter (written more than eight months before the British decision of 11 July 1939) assumes that the grant of an oil concession covering the so-called Bahrain "additional area", which would include the Hawar islands, is in the gift of the

Ruler of Bahrain. A postponement of the oil concession negotiations would be wholly unacceptable to the Ruler who would "certainly feel that his interests and those of his State have been sacrificed". Furthermore, "the knowledge that His Majesty's Government had prevented the Bahrain State from increasing its income considerably would naturally have a deplorable effect not only locally but in the neighbouring Arab countries". All this is but a prelude to what follows. The British authorities had thought that they had persuaded the Ruler of Bahrain to divide the "additional area" into two, so that PCL would be given a concession covering the Hawar islands, the remainder of the "additional area" being given to BAPCO. However, as Fowle now reports:

"It will be seen that the Shaikh [of Bahrain] now does not even wish to give Hawar to Petroleum Concessions Limited. I am not of opinion that we should accept this ... Hawar geographically is outside the Bahrain area and adjoining Qatar, where Petroleum Concessions Limited already have a concession and in fairness therefore it should go to them"<sup>110</sup>.

Here is a most glaring instance of pre-judgment, since Fowle is assuming, more than eight months prior to the British decision of 11 July 1939, that the grant of an oil concession covering Hawar is within the gift of the Ruler of Bahrain. It is perhaps not altogether surprising that Fowle should have taken this position which was broadly shared by the competent British officials in the Gulf and in London, and also by the oil companies concerned. The confusion stemmed of course from the initial presupposition that Hawar was (or at any rate should be) within the gift of the Ruler of Bahrain in the context of an oil concession (or concessions) covering the "additional area". It will be seen that this pre-supposition had already hardened into a working, and unchallenged, assumption as early as 1 October 1936. A record of a meeting held in the India Office on that date, the record itself being dated 5 October 1936<sup>111</sup> indicates that Belgrave was to ascertain informally from PCL whether that company would be interested in an oil concession limited to the Hawar Islands only, or to the Hawar islands plus the small islands in the immediate vicinity of the two main Bahrain islands. This clearly presupposes that it would be the Ruler of Bahrain who would be granting such a concession. So here is, in all probability, the first instance of pre-judgment of the issue. This meeting was attended not only by Belgrave, but also by Walton (India Office) and Fowle, who was in London at the time.

#### **(b) Weightman**

4.254 Qatar has already given a blatant example of pre-judgment by Weightman in the early months of 1939. His letter to Fowle of 12 February 1939 sought to weigh up the financial and other advantages and disadvantages of the respective bids put in by BAPCO and PCL for the "additional area"<sup>112</sup>. The BAPCO bid was for the "additional area" as a whole (including the Hawar islands); the PCL bid was for a concession covering only the Hawar islands and their territorial waters. As pointed out in paragraph 3.161 of the Qatar Counter-Memorial, there are two passages in that letter which provide clear evidence of pre-judgment. The first is in paragraph 8(b), where Weightman expresses the view that "... there can be little genuine doubt that sovereignty [over Hawar] rests with Bahrain". The second is in paragraph 9(b) where Weightman states: "When once His Majesty's Government award Hawar to Bahrain...".

#### **(c) British officials in London**

4.255 But it was not only Fowle and Weightman in the Gulf who pre-judged the outcome of the decision-making process (if in fact it can be called that) set in train on 20 May 1938, when the Ruler of Qatar was formally invited to present his evidence in support of his sovereignty over the Hawar islands "at the earliest possible moment". It was also officials in the India Office in London.

4.256 In addition to the pre-judgment by Walton (India Office), already discussed above<sup>113</sup>, Gibson (India Office) was equally guilty of pre-judgment of the final outcome. In a note dated 14

July 1938, he comments on the Foreign Office suggestion that the Ruler of Qatar be given an opportunity to respond to the Bahrain claim and states:

"The suggested postponement of the Bahrein Unallotted Area negotiations<sup>114</sup> would remove any element of urgency from the question of deciding the ownership of the Hawar Islands, *and since the issue will almost certainly be decided in favour of Bahrein it would be as well to leave the Shaikh of Qatar with no feeling of grievance that his case had not been fully heard...*"<sup>115</sup>

4.257 Gibson seems also to have prepared the draft letter from Peel (India Office) to Bagallay of 6 July 1938, which advances a pure pre-judgment argument to deny to the Ruler of Qatar an opportunity to comment on the Bahrain case:

"We are inclined to think that for practical reasons there would be no advantage in inviting the Shaikh of Qatar's observations on the Bahrein case, since it is pretty clear that he has no evidence to bring forward in his own support"<sup>116</sup>.

4.258 When it is recalled that as recently as 1933 numerous British officials in London, including Laithwaite (India Office) and Rendel (Foreign Office), were clearly of the view that the Hawar islands appertained to Qatar, evidence of both bias and pre-judgment of the issues by other British officials in the Gulf and in London between 1936 and 1939 is striking.

4.259 The question may of course be asked: Why did Britain favour Bahrain so noticeably over the issue of Hawar at this time? There is evidence to suggest that it may have included some, if not all, of the following elements:

a) Having regard to the "provisional decision" of 1936, British officials in the Gulf and in London, in pursuit of their overall petroleum policy, were anxious to secure for PCL a concession covering the "unallotted areas", but, as a minimum, a concession covering the Hawar islands only.

b) Both the Political Agents (Loch and Weightman), together with Fowle, were largely ignorant of the geography (both physical and human) of Qatar in the 1930s.

c) The lack of any resident British political representative in Qatar at the time meant that this ignorance could not be easily dispelled.

d) The Political Agent, being resident in Bahrain but being required also to follow events in Qatar, was exposed to a constant barrage of anti-Qatar propaganda by the Al-Khalifah sheikhs.<sup>117</sup>

e) The Ruler of Bahrain was constantly complaining to Belgrave and indeed to the Political Agent about the meagre payments made to him by the oil companies during the 1930s, and would clearly benefit financially from the grant of a new oil concession which would include Hawar.

f) Some British officials (for example, Hemingway of the India Office) believed that a British decision in favour of the Ruler of Bahrain's claim to Hawar would afford "an opportunity to mollify any resentment which he may feel at our treatment of the Zubara question in 1937"<sup>118</sup>; in other words, a decision in favour of Bahrain on Hawar would or could compensate for Britain's lack of support for Bahrain over Zubarah.

4.260 There is ample documentary evidence to support point (e). Among that evidence is an official Government of Bahrain publication entitled *Administrative Report for the Years 1926-1937*<sup>119</sup>. This is prefaced by a foreword entitled "General Review" written by Belgrave himself and dated December 1937. Included in this foreword is a very brief account of the financial turbulence which so afflicted Bahrain during this period:

"During the period under review the State has suffered violent financial fluctuations; first comfortable prosperity based on the pearl trade, then severe financial depression resulting in drastic curtailment of all activity and expansion, then recovery and a

sudden tremendous increase in revenue which, in my opinion, would have been more advantageous if it had come gradually"<sup>120</sup>.

4.261 More detail is given in the section of the Administrative Report devoted to finance:

"In 1348 (June 1929 - May 1930) there was an alarming fall in the revenue due to the slump in the pearl trade which was owing to general financial depression in Europe, and especially the increasing competition of cultured pearls which were produced in Japan. From then, until money began to pour in from oil, the income of the State decreased rapidly, and the financial future of the State caused the gravest anxiety to those who controlled its finances...

The most acute years of the crisis in Bahrain were 1351 and 1352 (May 1932 - April 1933 and April 1933 - April 1934). In these years, the revenue shrunk to Rs 6,84,000/- and Rs 7,26,000/-. In 1353 (April 1934 - April 1935), the Bahrain Government sold to the British Government three large areas on Muharraq island and Manamah, from which the net profit to this Government was just over one lac. Although this sum was not normal revenue, it was included in the revenue of the year and it enabled me to balance the Budget"<sup>121</sup>.

4.262 One can in fact have a good deal of sympathy for Belgrave, whose primary duty was to rationalise the finances of Bahrain. In this context, he was confronted with the collapse of the pearl trade, combined with a world-wide depression. In addition, his diaries show that during the period from 1927 to 1935, he was regularly being pressed by the Ruler of Bahrain and other importunate members of the ruling family to increase substantially the payments made to them out of the Civil List<sup>122</sup>. It can be seen from these diary entries how concerned Belgrave was about the profligacy of certain members of the ruling family. For Belgrave, therefore, the prospect of securing for Bahrain an additional source of oil revenues through the grant of a new concession or concessions covering the so-called unallotted area was an alluring one, particularly if the unallotted area was to include the Hawar islands - an area in which the oil companies were known to be interested at this time. Qatar is not suggesting that this was the only factor which motivated Bahrain to put forward its formal claim to the Hawar islands on 28 April 1936; but it clearly provided an important and indeed powerful incentive to Bahrain to seek to ensure that the Hawar islands were included in Bahrain's so-called unallotted area. Belgrave's diary entry for 12 November 1935 demonstrates the seductive allure of a substantial increase in Bahrain's oil revenues ("... He [Skinner] said that I would be absolutely safe in assuming a revenue from oil [in 1936] of 40 lacs, *i.e.* £300,000 but it might go up to £600,000, our present revenue is only £60,000 so it's a tremendous increase...") - and this without taking into account any additional revenues which might accrue from a new concession covering the so-called unallotted area which would, in Bahrain's perception, include the Hawar islands. It requires no great effort of imagination to assume that the prospect of securing new sources of revenue from a concession which would cover *inter alia* the Hawar islands was a prime motive for the formal claim to the islands submitted by Belgrave to the Political Agent on 28 April 1936.

### **B. Qatar has never alleged any "conspiracy" between Britain and Bahrain**

4.263 The Court will recall that Qatar's position has always been that the prior consent in writing of the Rulers of Bahrain and Qatar (which was not given) would have been required in 1939 if the British Government was to be empowered to give a binding decision on which of the two sheikhdoms had sovereignty over the Hawar islands; and that, even if it could be established that Qatar had given its prior consent to the making of such a decision, the procedure followed by the British Government in 1938/39 was so defective, the evidence on which the British Government based that decision was so fragmentary and so uncertain, and the conduct of the British Government in pursuing its investigation of the respective claims of title was so clearly affected by continuing and persistent evidence of bias and prejudgment on the part of key British

officials, that the "decision" of 11 July 1939 (if it can in truth be called a "decision") was vitiated on a number of grounds, including error, and cannot be permitted to stand<sup>123</sup>. Indeed, there is a question as to whether the view expressed by the British Government on 11 July 1939 can be accounted a decision at all, given the clear evidence now assembled in Section 5 of this Chapter of the determination of the British authorities in the Gulf, in the pursuit of *British* oil and other interests, to "award" the Hawar islands to Bahrain, a determination which is itself sufficient to deprive the so-called "decision" of any authority whatsoever.

4.264 Qatar strenuously denies that it has ever alleged a "conspiracy" between Britain and Bahrain to dispossess Qatar of the Hawar islands. The charges made by Bahrain in paragraph 376 of the Bahrain Counter-Memorial are accordingly as malicious as they are grossly exaggerated.

4.265 In this context, it is necessary to distinguish between what Qatar is no longer alleging, and what it continues to allege on the basis of documents other than those which it has now stated it will disregard. Qatar is still far from satisfied with the authenticity of the petition enclosed with Belgrave's letter to the Political Agent of 22 December 1938/3 January 1939 (the so-called Bahraini "counter-claim"). The Court will recall that, in the section of the Packer Report of 5 December 1939 devoted to the Hawar islands<sup>124</sup>, the following is stated:

"Bahrain have been 'in possession' of the main Hawar Island for some time & in a position to annex & mark anything they pleased within reach of their fort.

*It is not known on what authority or documents the annexations have been made, certainly the document held by one Mohd. bin Ahmad bin Shahin Dausari given him by Shaikh Isa of Bahrain has been in all probability considerably exceeded, as only nine names were quoted by him"*<sup>125</sup>.

4.266 This citation provokes a whole series of questions. As we know, the Sheikh Isa of Bahrain to whom reference is being made died in early December 1932. So the "document" held by Mohd. bin Ahmad bin Shahin Dausari must have been prepared before December 1932. It seems highly likely, by virtue of the content of the Packer Report of 5 December 1939, that this document was the "spontaneous" petition annexed by Belgrave to the Bahraini "counter-claim" of 22 December 1938/3 January 1939<sup>126</sup>. That "spontaneous" petition was subscribed to by 19 (and not nine) persons. The most plausible explanation of this somewhat ungrammatical passage (it is not clear whether it was Mohd. Bin Ahmad bin Shahin Dausari or Sheikh Isa who "quoted" the nine names) is that Sheikh Isa had (no doubt in return for some pecuniary or other reward) required Mohd. bin Ahmad bin Shahin Dausari to procure additional signatures or thumb impressions for this "spontaneous" petition; unfortunately, Mohd. bin Ahmad bin Shahin Dausari had procured too many. Qatar submits accordingly that no credence can be attached to this "spontaneous" petition annexed to Bahrain's counter-claim of 22 December 1938/3 January, 1939, *not* because of any evidence which Qatar has pledged itself to disregard, but rather because of the evidence in the Packer Report. After all, the Packer Report was submitted in evidence by Bahrain itself, and Packer was a pretty reliable informant of Weightman's.

4.267 Bahrain also accuses Qatar of having directly impugned Fowle (Political Resident from 1932 to 1939) in its alleged "conspiracy", citing four paragraphs from the Qatar Memorial to sustain this accusation<sup>127</sup>. But if one looks at the references given in footnote 499 to paragraph 378 of the Bahrain Counter-Memorial, it will be seen that there is no substance in this charge. Paragraph 6.35 of the Qatar Memorial barely mentions Fowle, but rather concentrates on Loch's immediate reaction to the Bahraini formal claim to the Hawar islands lodged on 28 April 1936. Paragraph 6.37 of the Qatar Memorial does mention Fowle, but its content is purely factual and has not been denied by Bahrain. Paragraph 6.116 of the Qatar Memorial does mention Fowle and Weightman's partiality for Bahrain on the issue of title to the Hawar islands, but this is simply in the context of differentiating the position as regards bias and pre-judgment in this case from that

found to exist in the *Dubai/Sharjah Border* arbitration. Finally, paragraph 6.163 of the Qatar Memorial provides no support for the Bahraini accusation; it is simply summing up the Qatar arguments underpinning the complaint that the Bahraini arguments adduced in their preliminary statement of 29 May 1938 were never subjected to critical scrutiny. Qatar sticks by what it states in paragraph 6.163 of the Qatar Memorial, and certainly does not regard that paragraph as impugning Fowle in Bahrain's fantasy of a vast conspiracy between Britain and Bahrain to dispossess Qatar of the Hawar islands.

4.268 By the same token, the paragraphs of the Qatar Memorial cited in footnote 500 to paragraph 378 of the Bahrain Counter-Memorial do not, notwithstanding the Bahraini allegations, impugn Loch in Bahrain's fanciful "conspiracy" theory. Certainly, paragraphs 6.35 and 6.37 of the Qatar Memorial do not, being entirely fair and justified comment on a letter whose authenticity is not in doubt.

4.269 Similarly, Qatar has never alleged that Weightman was a participant in a massive "conspiracy" to deprive Qatar of its sovereignty over the Hawar islands. What Qatar has alleged (and continues to allege) is that Weightman was biased against Qatar in the context of the dispute over the Hawar islands; and that, as the Political Agent, the British official in the Gulf entrusted with the task of making an objective assessment of the merits of the respective claims of Qatar and Bahrain to the Hawar islands, Weightman pre-judged the decision which had to be taken by his superiors by assuming, well before the eventual decision taken on the basis of his analysis of the facts, that that decision would be in favour of Bahrain<sup>128</sup>.

4.270 Qatar reiterates that it has never alleged any "conspiracy" between Britain and Bahrain. The paragraphs in the Qatar Memorial which are invoked in paragraph 379 of the Bahrain Counter-Memorial to support the Bahraini charge that Qatar seeks to implicate Britain directly in Bahrain's "fictitious" conspiracy no less than 12 times are, in any event, those paragraphs which draw on documents which Qatar has now pledged itself to disregard.

4.271 Qatar is in no sense withdrawing its charges against Weightman and, to a lesser extent, Fowle, of bias in favour of Bahrain, and against Qatar, in the matter of the dispute over title to the Hawar islands, nor its charges against Weightman, Fowle and certain British officials in London of pre-judgment of this issue. However, Qatar would wish to emphasize yet again that these are charges against named individuals, based on incontestable evidence in the British archives; they are *not* charges that the British Government as such, or the Government of India at the time, engaged or in any way participated in a conspiracy to dispossess Qatar of its title to the Hawar islands. This evidence has been invoked simply to demonstrate that the British decision of 11 July 1939, attributing the Hawar islands to Bahrain, is vitiated on a number of grounds.

4.272 Belgrave was not of course a British official in the Gulf at the relevant time. He had been appointed financial adviser to the Government of Bahrain in 1926 and remained in Bahrain until well after the Second World War. As has already been noted, he rapidly gained the confidence of the then Ruler of Bahrain and was saddled with other important responsibilities such as acting for Bahrain in contacts and negotiations with those oil companies interested in exploring and exploiting Bahrain's petroleum resources, whether on-shore or off-shore. He thus became intimately involved, but as a *Bahraini* rather than a *British* official, in Bahrain's efforts to acquire the Hawar islands in the 1930s.

4.273 Mention has already been made in the Qatar Memorial of the close relations between Belgrave and Weightman during the latter's term of office as Political Agent from October 1937 to October 1940<sup>129</sup>. There is not much to add from the additional Belgrave diary entries which Qatar has now been able to consult, particularly since there do not appear to be any Belgrave diaries covering the year 1937 (a crucial year in the history of this dispute), and the diary entries for 1938 are short and sporadic, and cover only the first five months of the year. The following

entries in the Belgrave diaries do however shed some additional light on the relationship between Belgrave and Weightman:

5 February 1939: "... At the fort in afternoon & then Weightman came over & discussed oil - as usual..."

7 August 1939: "... Shs A & S [Abdulla and Sulman] came in & stayed some time, discussed HH [Ruler] in India, got a letter from HW [Weightman]..."

5 September 1939: "Out at the camp all morning with HW..."

26 September 1939: "... Dinner with HH [Ruler] at the Palace, quite a pleasant affair, then to GPs [Geoffrey Prior's] house for drinks. A somewhat chilly atmosphere, he and HW [Weightman] don't hit it off - both having made up their minds to dislike each other before they met".

19 October 1939: "... I went out with HW in evening to dinner with Phillips and then to the cinema..."

4 June 1940: "HW and I drove out to see HH, also present Shs A & S. Discussed additional area oil concession and the agreement between Brit Govt & Coy..."

4.274 The pen portraits of key officials in the Gulf which Belgrave drew in the 1920s and the 1930s are illuminating. Belgrave's opinion of Prior in his earlier incarnation as Political Agent between 1929 and 1932 is, perhaps surprisingly in the light of later developments, favourable; but he is critical of Loch's performance, while acknowledging that some of the problem may be attributable to Loch's deafness. On balance, he rates Fowle highly, although complaining of his off-handedness. The additional entries concerning Weightman cited above confirm the strength of the bond between Belgrave and Weightman. It is unfortunate to say the least, that there appear to be no entries in the copies of the Belgrave diaries housed in the Gulf Documentation Unit of the University of Exeter or deposited with the Court for certain key periods during the 1930s. It is of course understandable that there should be no diary entries for the months June to December 1938, when Belgrave was on leave in England. But it is surprising that there appear to be no entries for:

- (a) most of May 1936 (last entry, 12 May) and the remainder of 1936; and
- (b) the whole of 1937.

4.275 In this context, the Court will wish to be aware that, on 15 December 1998, a letter was addressed by the law firm acting for Qatar to Messrs. Wiltshires (the firm of solicitors which, according to Qatar's state of knowledge, acts for Mrs. Sarah Belgrave-Lock, the possessor until recently of the Belgrave diaries) enquiring about Volume 17 of the diaries covering the period from 13 May 1936 to 13 January 1938, which is missing from the collection of the diaries deposited with the Court. A reminder was sent to Messrs. Wiltshires on 2 February 1999<sup>130</sup>. No reply has yet been received to those communications.

### **C. Prior's and Alban's criticisms of the 1939 decision**

4.276 Bahrain's attempt to discredit the views of Prior and Alban on the 1939 decision is wholly unconvincing. In the Bahrain Counter-Memorial it is argued that Prior's statements reflected:

"... nothing more than his tentative, personal opinion, expressed on the basis of unverified, inaccurate and incomplete information, which was immediately discredited and properly ignored by senior British officials"<sup>131</sup>.

4.277 Bahrain seeks to base this criticism on the assumption that both Prior and Alban were ignorant of the local circumstances in general, and of the relationship between the Hawar islands and Qatar in particular. Paragraph 290 of the Bahrain Counter-Memorial is careful to point out that Weightman had served as the British Political Agent in Bahrain for three years and "had

thoroughly investigated and commented on the claims advanced by both parties"; and that Fowle had been British Political Resident in Bushire for over 7 years and had examined and accepted the views of Weightman, as did the British and Indian Governments. What Bahrain carefully conceals from the Court is that Prior was not a neophyte in Gulf affairs. As we know from the Belgrave diaries, Prior had been secretary to the then Political Resident (Prideaux) as long ago as 1926<sup>132</sup>. He was the British Political Agent in Bahrain between April 1929 and November 1932 - a period of some 3½ years - and was fully familiar with all areas of contention between Qatar and Bahrain, having been Loch's immediate predecessor. He was therefore fully entitled to state, as he did in his letter to Peel of 26 October 1941:

"During 3½ years in Bahrain I never heard anything to suggest that these islands belonged to Bahrain, and believed them to belong to Qatar, a view supported by Lorimer"<sup>133</sup>.

4.278 Alban was also no newcomer to the problems between Bahrain and Qatar, notwithstanding Bahrain's egregious reference to "his relative lack of knowledge and appreciation of regional affairs" and "his complete lack of appreciation of the Dowasir tribe's connection with the Ruler of Bahrain"<sup>134</sup>. In fact, Alban had already served as Political Agent in Bahrain from April 1927 to November 1927, during the temporary absence of Barrett in Kuwait<sup>135</sup>. Alban was therefore familiar with the Dowasir problem, as it was during his relatively brief term of office as Political Agent in 1927 that, much to Belgrave's disgust, strong pressures were being put on the Ruler of Bahrain to return the money confiscated from the Dowasir who had gone into temporary exile from Bahrain in 1923. To seek to characterise Prior and Alban as being totally unfamiliar with the problems between Bahrain and Qatar on their appointments as Political Resident (in September 1939) and as Political Agent (in October 1940) respectively is demonstrably false.

4.279 Prior, on his appointment as Political Resident in September 1939, was immediately confronted with the fall-out from the British decision of 11 July 1939, declaring that the Hawar islands belonged to the State of Bahrain and not to the State of Qatar. He was himself immediately persuaded that a serious injustice had been done to Qatar<sup>136</sup>, and never wavered in that view. In no way was his reaction "tentative"; nor was it expressed on the basis of unverified or inaccurate information. Prior was however conscious that his predecessor (Fowle) and his Political Agent (Weightman, who did not leave Bahrain until October 1940) were the two officials in the Gulf who had been the principal protagonists of the Bahraini claim to the Hawar islands. He was also persuaded that both the British Government and the Indian Government had been seriously misled by Fowle and Weightman. It is indeed hardly surprising that, as early as 26 September 1939, Belgrave should have formed the view that Prior and Weightman "don't hit it off".<sup>137</sup>

4.280 In the circumstances, Prior had to exercise caution in expressing his view. He was now confronted with a *fait accompli*. It was obvious that some time would have to elapse before there would be any realistic prospect of having the issue reopened. This explains his dilatoriness in following up his initial reaction as reflected in his manuscript minute of 25 September 1939. The story is set out in full in paragraphs 6.102 to 6.109 of the Qatar Memorial. There is one element that Qatar would wish to add to this account of the events following the British decision of 11 July 1939. There is an entry in the Belgrave diaries dated 1 July 1940 which states *inter alia*: "HW very edgy and keyed up these days". Qatar would suggest that the reason why Weightman might have been "edgy" and "keyed up" on 1 July 1940 is that he would by that date have received a copy of Prior's telegram No. 366 of 7 June 1940, to the Secretary of State for India<sup>138</sup>, and was no doubt in the process of formulating his response of 3 July 1940<sup>139</sup>. Weightman would therefore have felt that his conduct in the matter of the Hawar islands was being called in question; he was indeed entitled to feel "edgy" and "keyed up", having to deal with a new Political Resident who did not share his prejudices about Qatar and its relationship to Hawar.

## **Section 7. The Bahraini Claim that the British Decision of 11 July 1939 resulted from a Process of Arbitration and is therefore *res judicata***

### **A. The misleading nature of the chronology in Section 3.2 of Chapter III of the Bahrain Counter-Memorial**

4.281 The chronology given in paragraph 374 of the Bahrain Counter-Memorial for the steps taken prior to the British decision of 11 July 1939 is thoroughly misleading. The Court will not be surprised to note that Bahrain again simply ignores the crucial events of 1936 including Bahrain's formal claim to the Hawar islands presented to Loch (the Political Agent) on 28 April 1936, and Britain's provisional decision of July 1936 in favour of that Bahraini claim, neither of these developments having been notified to the Ruler of Qatar<sup>140</sup>. As the chronology given in paragraph 374 of the Bahrain Counter-Memorial begins only in February 1938, it also ignores the clandestine occupation of Hawar effected by Bahrain in 1937 following the Zubarah incident earlier that year<sup>141</sup>. Indeed, the first item in the Bahraini chronology in the Bahrain Counter-Memorial (which should not have been the first item in any event) could more truthfully be re-phrased as follows:

"February 1938: British Political Agent meets Ruler of Qatar in Doha. Political Agent does not reveal that Bahrain made formal claim to the Hawar Islands in April 1936, and that Britain made provisional decision in favour of Bahraini claim to Hawar in July 1936; nor does he report in writing to the Political Resident that the Ruler protests against activities of the Bahrain Government in building and drilling for water on Hawar. The Ruler claims that the Hawar Islands belong to Qatar and that the Bahrainis have no *de jure* rights in Hawar, although they have occupied the island. Political Agent claims to have reported all this verbally to the Political Resident, presumably shortly after the conversation, but the only written record is in his letter to the Political Resident of 15 May 1938"<sup>142</sup>.

4.282 It is a further indication of Weightman's attitude towards Qatar in this matter of the Hawar islands that, although he consistently relies on the fact that Qatar has not made a claim to certain geographical features whereas Bahrain has made such a claim, he should unaccountably have failed to register with his superior that the Ruler of Qatar had asserted his sovereignty over the Hawar islands orally in February 1938. Not that this would have come as any surprise to the Political Resident (Fowle), given that the latter had already acknowledged the existence of a latent dispute between Bahrain and Qatar over title to Hawar as early as 25 May 1936<sup>143</sup>.

4.283 What is even more indicative of Weightman's deep-seated prejudice against Qatar is the thoroughly misleading nature of the report on Hawar which he includes in his Intelligence Summary for the period 1 to 15 April 1938. The report on Hawar states:

"I visited Hawar Island on the 15<sup>th</sup> April and inspected the new Bahrain Police Post there. The fact that no complaint has been received from the Shaikh of Qatar while this very solid building was under construction is an interesting omission, apparently indicating his acceptance of Bahrain's rights in Hawar"<sup>144</sup>.

The falsity of this report (and the Intelligence Summary was signed off by Weightman on 25 April 1938) is proved by Weightman's own letter to the Political Resident of 15 May 1938<sup>145</sup>, drafted some three weeks after he had approved his Intelligence Summary for the period 1 to 15 April. In his letter to the Political Resident of 15 May 1938, which forwards a copy of the Ruler of Qatar's protest of 10 May 1938, Weightman confesses:

"It is true that on my visit to Dohah in February Shaikh Abdullah bin Qasim stated that he had received information that *the Bahrain Government were building* and were drilling for water in Hawar, which they had no right to do"<sup>146</sup>.

So much for the assertion that no complaint had been received from the Ruler of Qatar while the police post was under construction. Weightman himself is forced to admit that he had received a direct protest from the Ruler in February 1938, a protest which he had not even reported to his superior.

4.284 The chronology in paragraph 374 of the Bahrain Counter-Memorial is misleading as much for what it conceals as for what it reveals<sup>147</sup>. Thus, there is a description of Weightman's letter to the Ruler of Qatar of 20 May 1938. What that description does not reveal is the pressure which Weightman is putting on the Ruler of Qatar to submit his evidence as rapidly as possible:

"My friend, I am sure you will realise how important it is that your formal claim, supported by all the evidence which you can produce, should be sent to me at the earliest possible moment, and I trust you will use your best endeavours to ensure that there shall be no delay in this"<sup>148</sup>.

The hypocrisy of this injunction becomes apparent when it is recalled that Weightman was well aware at the time that Bahrain had made a formal claim to the Hawar islands more than two years previously, that Britain had provisionally decided in favour of the Bahraini claim just under two years previously, and that Bahrain had utilised this intervening period to attempt to strengthen its claim to the Hawar islands, for example, by the erection of beacons and the stealthy "occupation" of the main island. It is even more apparent when account is taken of the coincidence in time of Weightman's letter to the Ruler of Qatar of 20 May 1938, and his two separate letters to the Political Resident and the Secretary of State for India of 22 May 1938 which contained a description of the areas to be offered by the Ruler of Bahrain to the two competing oil companies (PCL and BAPCO)<sup>149</sup>. As the area to be offered to PCL included the Hawar islands, it is apparent that what Bahrain terms the "arbitration" was a mockery from the outset, since Weightman was already, at the time when he was requesting the Ruler of Qatar to present his evidence on the Hawar islands, actively proceeding on the clear assumption that they appertained to Bahrain<sup>150</sup>.

4.285 The Bahraini chronology likewise does not reveal that the "preliminary statement" of Bahrain's case put in by Belgrave to Weightman on 29 May 1938 was entirely unsolicited, Weightman having written to Belgrave on 20 May 1938, specifically informing him: "Should it become necessary to request the Bahrain Government to submit a counter-claim supported by evidence, I will address you again in due course"<sup>151</sup>. Possibly Weightman thought that the case for Bahrain was so open and shut that the Bahrain Government should not even be called upon to respond to the expected Qatari claim. It is also significant that the Bahraini "preliminary statement" was not revealed to the Ruler of Qatar, although it was later treated as a key document<sup>152</sup>.

4.286 The Bahraini chronology is also deceptive in places. Thus, against the date 22 March 1939, Weightman is recorded as stating in a letter to the Ruler of Qatar of that date "... you must remember that you had unlimited time in which to make your original claim...". Bahrain fails to remind the Court of Weightman's earlier letter to the Ruler of Qatar of 20 May 1938, in which he presses the Ruler to submit his evidence without delay<sup>153</sup>. So much for the "unlimited time" which the Ruler of Qatar is said to have enjoyed. Indeed, it is hardly surprising that the Ruler of Qatar, in the face of this peremptory demand for an early response, should have given his initial response on 27 May 1938<sup>154</sup>, just one week after having been requested to present his evidence on the Hawar islands.

4.287 Finally, the Bahraini chronology, besides ignoring the significant events relating to Hawar which occurred between 1933 and 1936<sup>155</sup>, also maintains absolute silence about the circumstances surrounding the "occupation" of the main Hawar island by Bahrain, almost certainly during the year 1937. This is perhaps understandable since the Ruler of Bahrain would have found it awkward to admit that he had, at a time when the British authorities had

"provisionally" decided in favour of his claim to Hawar but had informed him that this was not a final decision, for example, by organising the construction of a fort on Hawar, by building a new mosque there, and by beaconing outlying islets in the vicinity of the main Hawar island, to seek to strengthen the Bahraini claim to the Hawar islands.

**B. The Ruler of Qatar's protests of February and May 1938 against Bahrain's unlawful occupation of the Hawar islands incorporate an invocation of the British/Qatar Treaty of 1916 in order to secure Bahraini withdrawal from Hawar. They did not involve any express or implied consent to any process of "arbitration" by the British authorities and certainly not to any process involving a binding decision on the conflicting claims to Hawar**

4.288 On 10 May 1938, the Ruler of Qatar put in writing the protest against Bahraini action on Hawar which he had already made orally to Weightman (Political Agent) in February of that year. He repeated this protest in slightly different language in his further letter to Weightman of 27 May 1938. The wording of the Ruler of Qatar's letter of 10 May 1938 clearly amounts to a direct invocation of the British/Qatar Treaty of 1916<sup>156</sup>; and both letters call upon the British Government to ensure that Bahrain withdraws from the Hawar islands. Thus, the Ruler of Qatar's letter to Weightman of 10 May 1938 draws attention in a dignified manner to the wrongful Bahraini action in occupying Hawar and requests the aid of Britain in requiring the Bahrainis to withdraw:

"I have said previously that I do not like to create difficulties and disputes unless I see a deliberate encroachment on my country which is not admissible by any civil law, rules and regulations. As I am bound to His Majesty's Government by strong relations, friendship and alliance, and am aware that they are well acquainted with these parts and their political and geographical conditions, I deem it necessary to report the matter to you at the first instance and protest against the interferences and actions taken by the Bahrain Government at Hawar, which is a dependency of Qatar...

I preferred to inform you, as it is necessary for me to do, and hope that you will let me know of your decision as it is necessary to take prompt action and to prevent the aggressors who ventured to take these actions without my knowledge. I am quite confident that you will, in order to keep the peace and tranquillity, do what is necessary in the matter"<sup>157</sup>.

4.289 Weightman's report to Fowle (Political Resident) of 15 May 1938, enclosing a copy of the Ruler of Qatar's letter of 10 May is a masterly exercise in obfuscation<sup>158</sup>. Weightman casually attempts to explain away why he had failed to report in writing his earlier conversation with the Ruler of Qatar in February 1938, when the latter had formally protested against the activities of Bahrain on Hawar. There are two key sentences in this letter:

"As I reported to you verbally I attempted to draw him [the Ruler of Qatar] by saying that I had always heard that the Bahrain Government claimed Hawar as part of the Bahrain possessions, to which he replied that it was true that they had occupied Hawar but that they had no 'de jure rights' there. *He changed the conversation immediately and it was evident that at that time he was by no means prepared to lay a formal claim to the Hawar group of islands*"<sup>159</sup>.

The italicised sentence is a striking example of Weightman's self-induced delusion. Why should the Ruler of Qatar make a formal protest against the Bahraini "occupation" of Hawar if he himself did not maintain a "formal claim" of title to the Hawar islands? If the Ruler says that the Bahrain Government have no *de jure* rights in Hawar, it is because these *de jure* rights are vested in himself. This is not just an excusable misunderstanding on the part of Weightman. It is a deliberate exercise in self-deception, designed to provide a seemingly plausible reason why he had failed to alert the Political Resident and the Government of India in February 1938 that the

Ruler of Qatar had at that time asserted his claim of title to the Hawar islands in the face of the unlawful Bahraini occupation of the islands.

4.290 In addition, in retrospect, it seems fairly obvious that Weightman was seeking to deny to the Ruler of Qatar even the opportunity of having his rights to the Hawar islands considered! That is why it is a plain mis-use of language to equate consideration of the Ruler of Qatar's case on the Hawar islands in 1938/39 with an "arbitration" or indeed any other form of judicial or quasi-judicial process. Weightman clearly wished to short-circuit the "proceedings", having convinced himself that the Hawar islands appertained to Bahrain and that the oil concession negotiations should, in the interests of the Ruler of Bahrain, be brought to a rapid conclusion.

4.291 The Ruler of Qatar's letter to Weightman of 27 May 1938 elaborates on his initial protest in certain respects<sup>160</sup>. Its tone is, however, again dignified, notwithstanding the highly provocative action of Bahrain in secretly occupying Hawar:

"It is a clear fact that the islands of Hawar are still a dependency of Qatar as other similar islands. The Bahrain Government have only recently occupied them which fact made me move in the matter and submit protests against it"<sup>161</sup>.

The Ruler of Qatar summarizes his complaint under five headings. Under the first heading, he states that it is hardly necessary for him to explain the position of the Hawar islands in detail as his correspondent (Weightman) knows them better. Under the second heading, he asserts his right of ownership over the Hawar islands. Under the third heading, he states uncompromisingly:

"Since the date of declaring the independence of Qatar and recognition of my rulership over it, this island [Hawar], as other islands, has been belonging to Qatar. The Bahrain Government were not in occupation of it until recently when they openly interfered there. This made me object and submit my complaint to you"<sup>162</sup>.

Under the fourth heading, he questions what authority the Bahrain Government have to claim Hawar and on what ground they are justified in taking the action they have taken. Under the fifth heading, he requests the British Government:

"... to note this complaint and restrict the Bahrain Government from unlawful interference in the rights of others as far as there is no legal ground on which they can base such acts".

4.292 The Ruler of Qatar might have been a good deal less diplomatic in his language if he had been aware at the time that the British authorities had already (in 1936) made a "provisional decision" in favour of the Bahraini claim to Hawar, but had deliberately withheld from him news of this development; and that the British authorities, in the context of oil concession negotiations with the Ruler of Bahrain which were proceeding in parallel with consideration of his protest, were acting on the assumption that the Hawar islands formed part of Bahrain's "additional area" for which the Ruler of Bahrain was entitled to grant a concession<sup>163</sup>. At this time (1938), the Ruler of Qatar was an innocent abroad; he knew nothing of the 1936 "provisional decision" of the British Government and was largely ignorant of the political realities and of the ruthless tactics of multi-national oil companies when seeking to obtain a new oil concession.

4.293 It is true that in his second letter of 27 May 1938, the Ruler of Qatar also requested Weightman as Political Agent:

"... to stop the activities and interferences which the Bahrain Government are undertaking in Hawar Islands until the matter is decided by His Majesty's Government in the light of justice and equity as you have said in your letter"<sup>164</sup>.

The Ruler was of course anxious that the British authorities should take his protest seriously and investigate the circumstances in which Bahrain had unlawfully occupied Hawar in 1937, in order to bring about a withdrawal of Bahraini forces and officials from the islands. In the light of what

we know now, it is hardly surprising that the British authorities in the Gulf took no action on the first element in this two-pronged request; and the evidence of pre-judgment of the dispute in favour of Bahrain is so overwhelming as to deprive of all credibility the assurance given (ironically) by Weightman that the matter would be decided by the British Government "in the light of truth and justice". The Ruler of Qatar did of course accept at the time that the Political Agent should look into the issue carefully, being wholly unaware of what was going on in the oil concession negotiations with the Ruler of Bahrain which were being conducted in parallel, and of the evidence of Weightman's bias against Qatar as regards the conflicting claims of Qatar and Bahrain to sovereignty over the Hawar islands. But the Ruler most certainly did not give his consent to any process of "arbitration" involving a binding decision by the British Government on these conflicting claims.

**C. The falsity and irrelevance of the Bahraini argument that criticisms of the conduct of Weightman, Fowle and other British officials in the Gulf between 1936 and 1939 in relation to the conflicting claims to the Hawar islands are inadmissible in the absence of Britain as a party to the present proceedings between Qatar and Bahrain**

4.294 In paragraphs 382 to 387 of its Counter-Memorial, Bahrain argues that Qatar's allegations (which Bahrain falsely characterises as including a charge that Britain engaged with Bahrain in a ten-year conspiracy to deprive Qatar of its title to the Hawar islands) are inadmissible in the present proceedings in the absence of Britain as a party to these proceedings. This argument is unsustainable on the facts and on the law. Qatar will deal separately with these two elements.

**1. The facts**

4.295 Qatar has never alleged that Britain colluded or conspired with Bahrain to dispossess Qatar of the Hawar islands. Qatar has of course been obliged to reveal that certain British officials in the Gulf - Weightman in particular, but also, though to a lesser extent, Fowle and Loch - displayed a notable bias against Qatar (and consequently in favour of Bahrain) in the matter of the dispute over the Hawar islands. These are allegations directed against named individuals on the basis of unchallenged documents in the British archives of the time. The Qatari allegations of pre-judgment by named British officials in the Gulf and in London are similar in character.

4.296 These allegations are not and never have been allegations directed against the British Government as such. The fact that named officials may have misconducted themselves in the course of an enquiry (if indeed it could even be styled an "enquiry") has, in Qatar's submission, the consequence that any Governmental decision reached as a result of that enquiry is rendered invalid; but Qatar has never claimed, and does not now claim, that the United Kingdom as a State bears international responsibility for the injury caused to Qatar by virtue of the British decision of 11 July 1939. It is Qatar which has throughout these proceedings drawn attention to the real efforts made by Prior and Alban (the successors to Fowle and Weightman as Political Resident and Political Agent respectively) between the autumn of 1939 and the end of 1941 to rectify the injustice done to Qatar by the British decision of 11 July 1939; it is of course Bahrain which has sought by all means to discredit the views of Prior and Alban, not only by expressing unfounded doubts about their knowledge of Qatar and the Hawar islands<sup>165</sup>, but also by stigmatising their views as being based on "unverified, inaccurate and incomplete information"<sup>166</sup>. The example given of Alban's "inaccurate" information is his comment that it is possible to wade from Hawar to the mainland at low water; but Weightman says the same in his letter of 22 April 1939 to Fowle<sup>167</sup>, so this example is clearly as unfounded as the allegation is malicious. It remains only to add that the falsity of the charge that Alban had never visited the Hawar islands is comprehensively proven by the report of his visit to the islands on 13 December 1940<sup>168</sup>.

4.297 There is also the highly relevant consideration that, for more than thirty years, the British Government has accepted that the issue of title to the Hawar islands, together with the

differences between Qatar and Bahrain over the two shoals of Fasht Dibal and Qit'at Jaradah, and the course of the 1947 line, were suitable for reference to arbitration or other form of third-party judicial settlement<sup>169</sup>. In other words, the British Government were fully aware as early as 1965/66 that Bahrain wished to have the course of the 1947 line modified and was prepared to have that issue referred to arbitration; that Qatar wished to have its sovereignty over the Hawar islands recognised and was prepared to have that issue, together with the dispute over the course of the 1947 line and the other differences between Bahrain and Qatar relating to Fasht Dibal and Qit'at Jaradah, referred to arbitration; but that Bahrain in the final analysis rejected the idea of referring all these issues to arbitration simultaneously because of its reluctance to countenance the inclusion of the question of the Hawar islands among the issues to be submitted to arbitration<sup>170</sup>. The British Government, in 1965/66, never took the position vis-à-vis Qatar that it would object to a reference to arbitration of the question of the Hawar islands, although it was fully aware that the Government of Qatar had objected strenuously and consistently to the British decision of 11 July 1939, upholding Bahrain's claim to the islands. The British Government was indeed content at this time that all these identified issues in dispute between Qatar and Bahrain should be referred to arbitration, and approved the Government of Qatar's nomination of Professor Charles Rousseau of France as its arbitrator<sup>171</sup>.

## 2. The law

4.298 On the law, Bahrain has invoked the judgment of the Court in the *East Timor* case in support of its argument that "Qatar's allegations of British wrongdoing cannot be considered by the Court in the absence of Great Britain as a party"<sup>172</sup>. Having referred in passing to the *East Timor* case as a recent authority, Bahrain goes on to say that "it is unnecessary for Bahrain now to refer to the authorities in any detail"<sup>173</sup>. Qatar begs to differ. Qatar is of course aware that, in the *Monetary Gold* case<sup>174</sup>, the Court was called upon to decide on submissions by Italy that the monetary gold in question should be assigned to Italy by way of priority over other claimants, including Albania (which was not a party to the particular proceedings). The Court explained that, in order to decide that question, it would be necessary to determine whether certain Albanian legislation of 1945 was contrary to international law. That was an issue only as between Italy and Albania. The Court made reference to Article 62 of the Statute which gives to a third State the right to request permission to intervene in proceedings between other States when it considers that it has "an interest of a legal nature which may be affected by the decision in the case". But it noted that Albania had not submitted a request to the Court to be permitted to intervene. The Court concluded:

"In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania"<sup>175</sup>.

4.299 The Court faced a similar situation in the *East Timor* case. Portugal instituted proceedings against Australia arising out of the conclusion of a 1989 treaty between Australia and Indonesia delimiting the continental shelf between the two States. Portugal was, at the relevant time, the Administering Power in respect of East Timor, a territory which had been occupied by Indonesia and which was covered by the treaty. Portugal contended that, by concluding this treaty, Australia had violated a number of its international obligations, since Portugal, as the Administering Power in respect of East Timor, had the exclusive right to conclude treaties affecting the territory. Portugal had not sought to implead Indonesia, which itself had not applied for permission to intervene under Article 62 of the Statute. The Court eventually concluded, upholding a submission by Australia that the Portugal application was inadmissible:

"... the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct [in occupying East Timor] as a prerequisite for deciding on Portugal's

contention that Australia violated its obligation to respect Portugal's status as administering Power, East Timor's status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources"<sup>176</sup>.

These are the limits of what is sometimes referred to as the "indispensable parties" or "essential parties" principle. The key element is that the Court would, in order to rule upon a submission made by one or the other party to the proceedings before it, have to pronounce on the legal rights or interests of a third State not party to the proceedings without the consent of that third State, these legal rights and interests forming the very subject-matter of the Court's decision.

4.300 It need occasion no surprise that Bahrain fails even to mention those authorities which run counter to the argument that Britain is an essential party to the present proceedings. The first of these authorities is the Court's judgment of 26 November 1984 on jurisdiction and admissibility in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. In that case, the United States had argued that the application by Nicaragua was inadmissible as Nicaragua had failed to bring before the Court parties whose presence and participation in the proceedings was essential. The Court dismissed this contention:

"There is no doubt that in appropriate circumstances the Court will decline, [and here reference is made to the *Monetary Gold* case] to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings 'would not only be affected by a decision but would form the very subject-matter of the decision...'. *Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated... other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable party' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction...*"<sup>177</sup>.

The italicised passages in this extract demonstrate the limits of the Court's discretion to refuse to exercise its jurisdiction in cases where it is argued that the participation of a third State in the proceedings before the Court is essential.

4.301 Equally, the Court will hardly be surprised to note that no mention is made in Section 3.3 of the Bahrain Counter-Memorial of the Court's judgment in the case of the *Phosphate Lands in Nauru (Nauru v. Australia)*. Nauru filed an Application with the Court, instituting proceedings against Australia. In its Memorial, Nauru alleged that Australia was in breach of certain of its obligations by reason of its conduct as Administering Power in respect of Nauru under the Trusteeship Agreement of 1947, and claimed *inter alia* a declaration that Australia was under a duty to make reparation in respect of the loss caused to Nauru as a result of these breaches and its failure to recognise the interest of Nauru in the overseas assets of the British Phosphate Commissioners. Australia raised a number of preliminary objections to the jurisdiction of the Court and to the admissibility of the Nauru claims. The sixth preliminary objection was based on the absence from the proceedings of New Zealand and the United Kingdom, who, together with Australia, had been "jointly" designated as Administering Authority for Nauru under the 1947 Trusteeship Agreement. Australia contended that the claims of Nauru were in substance not claims against Australia itself but against the Administering Authority (*i.e.* the three

Governments) in relation to Nauru, and that the claims were therefore inadmissible and the Court lacked jurisdiction, as any judgment on the question of breach of the Trusteeship Agreement would involve the responsibility of third States which had not consented to the Court's jurisdiction in the case. The Court found that the Administering Authority of Nauru under the Trusteeship Agreement did not have an international legal personality distinct from the three States designated to constitute it; but that, of those three States, Australia played a very special role in the system of administration applied in Nauru. The Court also found that Australia's sixth preliminary objection had two branches. The first of these was Australia's contention that, insofar as Nauru's claims were based on the conduct of Australia as one of the three States constituting the Administering Authority, the nature of the responsibility in that respect was such that a claim might only be brought against the three States jointly and not against any one of them individually. The Court gave short shrift to this contention:

"The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia"<sup>178</sup>.

4.302 The second branch of the Australian contention was based upon the Court's jurisprudence in the *Monetary Gold* case, and in the jurisdiction and admissibility phase of the *Case concerning Military and Paramilitary Activities in and against Nicaragua*. The Court first of all drew attention to the right of a State which is not party to a case to apply for permission to intervene in the proceedings under Article 62 of the Statute. It then re-states the governing principle:

"But the absence of such a request in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute..."<sup>179</sup>.

The Court then proceeded to analyse the interests of New Zealand and the United Kingdom:

"In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim"<sup>180</sup>.

The Court accordingly rejected the sixth Australian preliminary objection.

4.303 How then do we apply these elements of the Court's jurisprudence to the circumstances of the present case? Qatar would submit that the following conclusions can be drawn:

1. The legal interests of the United Kingdom do not form the very subject-matter of the decision that Qatar has applied for in this context, namely that it has sovereignty over the Hawar islands. The United Kingdom maintains no claim of title to the Hawar islands in relation to which sovereignty is presently disputed only as between the two independent States of Qatar and Bahrain.

2. Qatar has not submitted that the United Kingdom bears international responsibility for the injury caused to Qatar by the decision of 11 July 1939 on the Hawar islands. Qatar has simply argued that a number of irregularities on the part of British officials in the Gulf occurred during the course of the "enquiry" initiated by the British authorities in 1938/39, and that these irregularities were of such a character as to invalidate the British decision of 11 July 1939.

3. Whether the British decision of 11 July 1939 constitutes an arbitral award binding upon Bahrain and Qatar is clearly not a matter where British legal interests form the very subject-matter of the decision applied for by Qatar as may have been the position in the *East Timor* case.

4.304 On the facts, the United Kingdom was content, even in the years 1965 and 1966 when it still retained responsibility for the conduct of the international relations of the two sheikhdoms of Qatar and Bahrain, that the issues at that time in dispute between Qatar and Bahrain (including the issue of sovereignty over the Hawar islands) should be referred to a process of arbitration.

#### **D. The significance in this context of the award of the arbitration tribunal in the *Dubai/Sharjah* case**

4.305 The United Kingdom was not a party to the arbitration between Dubai and Sharjah established as a result of an arbitration agreement concluded between the Rulers of Dubai and Sharjah on 30 November 1976. The dispute between the two Emirates of Dubai and Sharjah (now member States of the United Arab Emirates (UAE) but, before the formation of the UAE, two of the six individual Emirates collectively known as the "Trucial States") to be referred to arbitration was "the outstanding dispute... concerning the demarcation of the boundaries between them"<sup>181</sup>.

4.306 In 1954, the Rulers of the six Emirates constituting the Trucial States (including both Dubai and Sharjah) requested the Political Agent (Mr. Pirie Gordon) to determine their respective boundaries. Mr. Julian Walker (Assistant Political Agent) was deputed to conduct the necessary enquiries. On the basis of a report submitted by Mr. Walker to Mr. Peter Tripp (successor to Mr. Pirie Gordon as Political Agent) in March 1955, and having obtained the written consent of the Rulers of both Dubai and Sharjah, Mr. Tripp rendered three series of decisions on the boundary between the two Emirates, the first in April 1956, on the coastal terminus, the second in July 1956, on the coastal region, and the third in March 1957, on the interior. The arbitration tribunal in the *Dubai/Sharjah Border* case duly found that the Rulers of both Dubai and Sharjah had given their specific consent in writing to the delimitation of their boundaries by the British authorities. The tribunal rejected a plea by Dubai that the consent of its Ruler had been obtained under duress and was therefore invalidated<sup>182</sup>. The Court will note once again the terms of the written assurance given by the Ruler of Dubai on 18 March 1955, on his own behalf and on behalf of all his successors as Rulers of Dubai that they would not:

"... dispute or object to any decision that may be decided by the Political Agent regarding the question of the boundaries between our Emirate and the Emirate of Sharjah towards the Coast"<sup>183</sup>.

The Court will equally have noted that no such written assurances were sought or obtained from the Rulers of Qatar and Bahrain before the procedures leading up to the decision of 11 July 1939 were initiated. The Court will also have taken into consideration the following conclusion of the arbitration tribunal in the *Dubai/Sharjah Border* case:

"It is therefore clear that no treaty authorised the British authorities to delimit unilaterally the boundaries between the Emirates and that no British administration ever asserted that it had the right to do so. The Court has therefore come to the conclusion that the consent of the Rulers concerned was necessary before any such delimitation could have been undertaken"<sup>184</sup>.

4.307 Qatar submits that this conclusion applies *mutatis mutandis* to the British decision of 11 July 1939 purporting to attribute sovereignty over the Hawar islands to Bahrain, that decision having been given without the specific written consent of the Rulers of both Qatar and Bahrain to the rendering of such a decision by the British Government. Qatar also submits that the award in the *Dubai/Sharjah Border* arbitration, made in the absence of the United Kingdom as a party to the proceedings, supports the view that the legal interests of the United Kingdom do not form the very subject-matter of the decision that is applied for in the circumstances of the present dispute between Qatar and Bahrain (now independent States) as regards sovereignty over the Hawar islands.

4.308 Bahrain has of course argued that the implied consent of both sheikhdoms (Qatar and Bahrain) is sufficient in the sense that participation in the processes proposed by the British authorities in the Gulf in 1938 for the "enquiry" into the conflicting claims to the Hawar islands operated as a type of *forum prorogatum*<sup>185</sup>. But implied consent to what? Certainly not to the designation of the British Government as arbitrator in an agreed process of arbitration which would result in a binding award, as was the case in the Arbitral Award of the *King of Spain* case, an extract from the Court's judgment in which is cited at paragraph 393 of the Bahrain Counter-Memorial.

4.309 Bahrain also seeks to argue that Qatar had given its explicit consent to the taking by the British Government of a binding decision on this issue by virtue of the obligation undertaken by the then Ruler of Qatar in 1868 to refer to the Resident any difference of opinion with Bahrain<sup>186</sup>. It is sufficient to remind the Court yet again that in the *Dubai/Sharjah Border* case, the arbitration tribunal took note of the fact that both Emirates had given their explicit prior consent to the delimitation of the boundaries between Dubai and Sharjah by the Political Agent and that both Rulers specifically undertook not to dispute or object to any decision that might be forthcoming from the Political Agent. No such explicit prior consent by the Rulers of Bahrain and Qatar to the determination by the British Government of title to the Hawar islands in 1938/39 has been shown to exist, far less an undertaking by both Rulers not to object to any decision that might be forthcoming from the British Government.

4.310 So far as concerns the obligation undertaken by the then Ruler of Qatar in 1868 to refer to the Resident any difference of opinion with Bahrain, it need only be said that the Ruler of Qatar did make a serious protest to the Political Agent in February 1938 against Bahrain arising out of the unlawful Bahraini activities in 1937 in and in relation to Hawar. What happens? The Political Agent completely ignores this serious protest; he does not even inform the Political Resident, except possibly in the course of conversation. The Ruler of Qatar has to formulate in writing his protest against the unlawful Bahrain activities in and in relation to Hawar (in his two letters of 10 May and 27 May 1938)<sup>187</sup> before it is even accepted that he might have an interest in the islands. The Court will of course note from the terms of these two letters from the Ruler of Qatar to the Political Agent that the Ruler was confidently anticipating that his serious complaint against Bahrain would be investigated by the British authorities, who would thereupon take action to ensure that Bahrain withdrew its police and other officials from Hawar. Of course, no such action was taken, for the reasons developed in this Reply<sup>188</sup>.

#### **E. The significance of the British "provisional decision" of 1936 and its non-disclosure to the Ruler of Qatar**

4.311 This has already been analysed in detail in Qatar's written pleadings<sup>189</sup>. Qatar would only add the following. The Bahrain Counter-Memorial deals with the British "provisional decision" of 1936 in some detail, while referring to it as an "advisory opinion" given at the request of PCL<sup>190</sup>. There are two sentences in paragraph 245 of the Bahrain Counter-Memorial which merit further comment by Qatar:

"What is notable in the evidence offered by PCL is the fact that no mention is made of any views held by the Ruler of Qatar on the subject of the sovereignty over the Hawar Islands. It is inconceivable that PCL, the Qatar concessionaire, should not have consulted the Ruler of Qatar, who would have been the beneficiary of payments by PCL if the Islands belonged to him and contained oil".

4.312 Qatar does not dissent from the view expressed in the first sentence of this citation, at least so far as it relates to evidence offered by PCL in 1936<sup>191</sup>. But Qatar does not agree with the assumption made in the second sentence of this citation that PCL would have consulted with the Ruler of Qatar before Britain made its provisional decision in favour of Bahrain in July 1936. There is no evidence of any such consultation; and it is in fact much more likely that PCL decided not to consult the Ruler of Qatar even after it became aware that Bahrain was asserting a claim to the Hawar islands, and particularly after it became aware, in July 1936, that Britain had made a provisional decision in favour of the Bahraini claim to Hawar. PCL would not have wished to be the bearer of highly unwelcome news to the Ruler of Qatar, the more so as it was already in negotiation with the Ruler of Bahrain for a concession over the so-called "additional" (or unallotted) area which the Ruler of Bahrain had asserted, in April 1936, included the Hawar islands. Why should PCL have confessed to the Ruler of Qatar that it had learnt of this development in the course of negotiations with the Ruler of Bahrain? It would certainly have feared that if it revealed this information to the Ruler of Qatar, it would have been strongly urged by the latter, under threat of the suspension or even cancellation of its Qatar concession, to abandon its negotiations with the Ruler of Bahrain. The plain fact of the matter was that from the early summer of 1936 onwards it was not in the interest of the Political Agent or the Political Resident (the two senior British officials in the Gulf), nor was it in the interest of PCL or BAPCO, to inform the Ruler of Qatar of any of these significant developments bearing upon the status of the Hawar islands. From the point of view of the British authorities in the Gulf and of the oil companies directly concerned, it was preferable to keep the Ruler of Qatar in ignorance of what was going on.

4.313 One inevitable consequence of the British provisional decision of 1936 was that it created an atmosphere where British officials, both in the Gulf and in London, began to assume that a new oil concession covering the Hawar islands alone, or including the Hawar islands in Bahrain's "additional area", lay within the gift of the Ruler of Bahrain. It would clearly have been fairer to the parties (and Fowle in fact recommended something like this in 1938)<sup>192</sup> if the Ruler of Bahrain could have been persuaded not to re-open the negotiations in 1936 for the conclusion of an oil concession over the "additional area" pending a thorough and detailed investigation by an impartial authority into the issue of which of the two sheikhdoms had sovereignty over the Hawar islands. By not bringing this about, and by proceeding on the assumption that the Ruler of Bahrain was entitled to grant an oil concession over the entire additional area, including the Hawar islands, British officials themselves might be said to have given the impression of prejudging the key issue, notwithstanding the belated reminder contained in the express letter from the Secretary of State for India to the Political Resident of 1 March 1939<sup>193</sup>. In the circumstances, it is not altogether surprising that certain British officials, both in the Gulf and in London, forgot their lines in the period between 1936 and 1939 and acted as if the provisional decision in favour of the Bahrain claim to the Hawar islands had somehow become transformed into a final decision in Bahrain's favour.

#### **F. Other irregularities breaching the principle of equality of arms**

4.314 Apart from the evidence of bias and pre-judgment to which Qatar has already directed attention<sup>194</sup>, there was a difference in the treatment accorded to the two Rulers in the context of their dispute over title to the Hawar islands. Paragraphs 6.83 and 6.87 to 6.96 of the Qatar Memorial provide clear instances of the less favourable treatment accorded to the Ruler of Qatar than that accorded to the Ruler of Bahrain in this context. Qatar would recall, in the context of

paragraph 6.94 of the Qatar Memorial, that it now relies on other documentation (notably, Annex 292 to the Bahrain Memorial, put in evidence by Bahrain itself) to establish the worthlessness of the petition annexed to the Bahrain "counter-claim" of 22 December 1938/3 January 1939.

4.315 As regards comments made in the Bahrain Counter-Memorial about these other irregularities, Qatar would offer the following observations:

(a) It is a matter of some astonishment that Bahrain should urge in its defence to the charge of bias by Weightman that the Ruler of Qatar had spoken privately about the case with Weightman on several occasions<sup>195</sup>. One of these occasions was of course the meeting in Doha between the two protagonists in February 1938, when the Ruler of Qatar made a serious protest to Weightman about Bahraini activities on Hawar. Weightman did not even deign to report this protest in writing to the Political Resident, as his subsequent letter to Fowle of 15 May 1938 admits<sup>196</sup>. Furthermore, at this meeting, it was absolutely clear that the Ruler of Qatar was asserting his sovereignty over the Hawar islands; yet Weightman speciously denies this in his letter to Fowle of 15 May 1938.

(b) A further attempt is made in paragraphs 395 to 413 to refute the charge of bias brought by Qatar against Weightman. The attempt is unsuccessful. Qatar is however glad to note that Bahrain has now provided the full text of Belgrave's diary entry for 22 April 1939. Qatar had not deliberately omitted the sentence that "Abdulla bin Jasim has no argument except that the islands are close to his shore", because the extract from the Belgrave diaries covering 22 April 1939, available to Qatar at the time when it was preparing its Memorial, did not include that sentence. The fact that the sentence to which Bahrain has drawn attention does form part of Belgrave's diary entry for the day in question is in fact helpful from Qatar's point of view, since it goes a long way towards confirming that Belgrave was shown the whole of Weightman's report and not just selected passages.

(c) The most blatant instance of bias by Weightman against Qatar in general and members of its ruling family in particular is of course provided by his letter to Fowle of 5 December 1939, covering the Packer Report of the same date<sup>197</sup>. Paragraph 3 of that letter is highly revealing of Weightman's almost hysterical animus against the then heir-apparent to the Ruler of Qatar. It is in fact paralleled by another instance of Weightman's extraordinary and ferocious bitterness against the ruling family of Qatar which Qatar has recently uncovered. Weightman includes the following observations in his Intelligence Summary for the period 1 to 15 April 1938:

"On April 14<sup>th</sup> a rumour was circulating in Bahrain that Shaikh Abdullah bin Qasim al Thani of Qatar had died. It appears to have been a case of the wish being father to the thought, as an enquiry from Doha produced the reply that the Shaikh was in excellent health"<sup>198</sup>.

(d) The weakness of the arguments advanced in paragraphs 416 to 418 of the Bahrain Counter-Memorial is apparent. Qatar notes that, in paragraph 417, Bahrain refers to Britain's "protective obligations with respect to Bahrain" as a justification for its provisional decision of 1936 favouring the Bahraini claim to the Hawar islands. But Britain had equal protective obligations with respect to Qatar deriving from the British-Qatar Treaty of 1916. Why then did British officials consistently hide from the Ruler of Qatar the actions which they had taken in 1936 in relation to a group of islands the majority of which lay within the then three-mile belt of territorial waters appertaining to the mainland of Qatar? Bahrain has no answer, except to say that what was done in 1936 was not part of the 1939 procedure; but this is to substitute the appearance for the reality, since, as Bahrain well knows, there would almost certainly have been no participation by the Ruler of Qatar in the so-called "arbitration" if what was carefully being concealed from him had been revealed.

## Conclusion

4.316 In this Section of Chapter 4, Qatar has responded to a number of miscellaneous arguments developed by Bahrain in its Counter-Memorial. In particular, Qatar demonstrates how misleading and indeed dishonest is the chronology set out in Section 3.2 of Chapter III of the Bahrain Counter-Memorial; attention is drawn in particular to the developments in 1936 and 1937 which Bahrain passes over in silence. Qatar also shows how, in May 1938, the Ruler of Qatar invoked the British-Qatar Treaty of 1916 in an unsuccessful endeavour to persuade the British authorities to bring about Bahraini withdrawal from Hawar. The Ruler of Qatar's protests in February and May 1938 did not involve any express or implied consent to any process of "arbitration" by the British authorities in the Gulf, far less to any process involving a binding decision on the conflicting claims to the Hawar islands. Qatar also responds in detail to Bahrain's argument that criticisms of the conduct of Weightman, Fowle and other British officials in the Gulf or in London between 1936 and 1939 are inadmissible in the absence of Britain as a party to the present proceedings before the Court; Qatar shows that this Bahraini argument is manifestly ill-founded, both on the facts and on the law (including the award of the arbitration tribunal in the *Dubai/Sharjah Border* case). In addition, Qatar offers some further observations on the significance of the British provisional decision of 1936, in particular its effect on British officials in the Gulf and also in London, and responds to comments made in the Bahrain Counter-Memorial purporting to refute the charges made by Qatar about irregularities in the processes leading to the decision of 11 July 1939 on Hawar.

#### **Section 8. The Bahraini claim that Qatar acquiesced in the 1939 decision on the Hawar islands**

4.317 This Bahraini contention was dealt with in full in paragraphs 6.239 to 6.248 of the Qatar Memorial and paragraphs 3.172 to 3.179 of the Qatar Counter-Memorial. The only response which Bahrain can make is that Qatar did not protest enough! International law does not of course require from a State which is aggrieved by the unlawful "occupation" of a part of its territory a constant stream of protests against the State responsible for that unlawful "occupation". What it does require is that the aggrieved State should assert its grievance, since there is authority for the view that silence or lack of protest maintained over a significant period of time may justify a finding of acquiescence<sup>199</sup>. But Qatar immediately protested against the British decision of 11 July 1939, and reiterated that protest at regular intervals. The terms of the Ruler of Qatar's letter to the Political Resident (Prior) of 18 November 1939 embody a comprehensive reservation of the Ruler's rights to the Hawar islands; and that letter in itself, even apart from the other letters which Qatar has invoked in this context, sufficiently negatives any implication of acquiescence on the part of the Ruler of Qatar in the unlawful occupation of the Hawar islands by Bahrain. Here is what the Ruler of Qatar says in that letter:

"I therefore beg to inform Your Honour that I neither recognize nor submit that the Bahrain Government have the least lawful connection with the Hawar Islands, and that I view whatever measure which have been lately taken by the Bahrain Government as a challenge and an encroachment upon my rights against which I most strongly protest, and therefore... I reserve my rights to the Hawar Islands while not recognising any measure which may be taken in them..."<sup>200</sup>.

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#### **FOOTNOTES**

1 BM, para. 18.

2 BM, para. 19.

3 BM, para. 23.

4 BCM, para. 23; emphasis in original.

5 *See*, QM, Chapter V and QCM, Chapter III.

- 6 QM, paras. 5.39-5.40; QCM, paras. 3.40-3.42.
- 7 QM, paras 5.42-5.43; QCM, para. 3.42.
- 8 BCM, Annex 122, Vol. 2, p. 410.
- 9 QM, Annex III.296, Vol. 8, p. 483.
- 10 QM, Annex III.66, Vol. 6, p. 323, at p. 345.
- 11 QCM, Annex III.35, Vol. 3, p. 183.
- 12 *See*, para. 3.32, above and QR, Map Atlas, Maps Nos. 58 and 77.
- 13 QM, Annex II.10, Vol. 4, p. 276. This description was consistent with a British Memorandum of nearly 50 years earlier (in 1874) confining Bahrain's territories to only three islands (*see*, QM, para. 5.31), as well as with Lorimer's description of Bahrain in 1908 referred to above. None of these descriptions included the Hawar islands.
- 14 *See*, para. 3.31(f)(iii), above, and QM, Annex III.84, Vol. 6, p. 431.
- 15 QM, Annex III.88 and III.91, Vol. 6, pp. 449 and 461.
- 16 QM, Annex III.90, Vol. 6, p. 457.
- 17 QM, Annex III.94, Vol. 6, p. 479; QCM, Annex III.43, Vol. 3, p. 237. In attacking what Bahrain characterises as Qatar's "astonishing conclusion" that "the RAF was thus in no doubt at this time that Hawar island belonged to Qatar" (BCM, para. 24), Bahrain completely misses the point that the main purpose of the RAF's action was to survey Qatar's territories in connection with the 1935 British assurance of protection of these territories. As already pointed out, no permission was sought from the Ruler of Bahrain to overfly the Hawar islands, which would certainly have been the case if the British had considered that the Hawar islands appertained to Bahrain.
- 18 *See*, para. 4.220, below.
- 19 QM, para. 6.106 and Annex III.229, Vol. 8, p. 127.
- 20 QM, paras. 5.48, 6.18-6.27 and 6.100-6.107.
- 21 QCM, Chap. III.
- 22 *See*, QM, Map No. 5, Vol. 17.
- 23 QM, Annex III.195, Vol. 7, p. 497.
- 24 The Court will recall that Bahrain has accused Qatar of giving an "inaccurate and misleading" depiction, on Map No. 5, of the distance between the southern tip of the main Hawar island and the Qatari mainland, describing this as "one of Qatar's subtler distortions". Qatar confirms that its Map No. 5 is an accurate representation of what appears on Bahrain Chart 1:50,000 Series, Sheet 3, "The Hawar Islands", which is part of the Official Topographical Series published by the State of Bahrain in 1986. Unfortunately, because of a typographical error which was not picked up at the time, the distance at high tide between the southern tip of the main Hawar island and the Qatari mainland should have been shown as 1.2 km and not 1.0 km. The distance at low tide is correctly shown as 250m.
- 25 In this connection, Qatar has produced photographic evidence of the proximity of certain Hawar islands to the Qatar mainland, in QR, Appendix 5, Vol. 6.
- 26 *See*, Chap. II, Sect. 2, above.
- 27 QM, Annex II. 4, Vol. 3, p. 109, at p. 141.
- 28 QM, Annex II.4, Vol. 3, p. 109, fn. p. 112.

29 QM, Annex II.3, Vol. 3, p. 61, at p. 88. Lorimer does of course state that "The term Bahrain once embraced the promontory of Qatar and the Oases of Qatif and Hasa as well as the islands of the archipelago" (*ibid.*, p. 87), but this is self-evidently expressed in the past tense in 1907/08; and no mention whatever is made in any event of the Hawar islands as such.

30 QM, Annex III.195, Vol. 7, p. 497.

31 QR, Annex III.91, Vol. 3, p. 559.

32 *See*, QCM, Chap. III, Sects. 3 to 7; *see*, also Sect. 4.D of this Chapter below.

33 Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), between the Government of the State of Eritrea and the Government of the Republic of Yemen, dated 9 October 1998 (hereinafter referred to as the "*Eritrea/Yemen Award*"), para. 457. A full copy of this Award is being deposited with the Registry, pursuant to Article 50, paragraph 2 of the Rules of Court.

34 *Reports of International Arbitral Awards*, Vol. II, p. 829.

35 *Ibid.*, pp. 854-5; italics in original; underlining added.

36 BM, p. 165, fn. 420.

37 "The Law and Procedure of the International Court of Justice, 1951-4; Points of Substantive Law. Part II" in 32 *B.Y.I.L.* (1955-6) p. 72, fn. 2 (QR, Annex III.104, Vol. 3, p. 633, at p. 641).

38 *Ibid.*, at p. 641.

39 *Ibid.*, at pp. 642-643.

40 Sir H. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies", 25 *B.Y.I.L.*, (1948) p. 314, at p. 344 (QR, Annex III.115, Vol. 3, p. 707).

41 *I.C.J. Reports 1953*, p. 102.

42 G. Gidel, *Le droit international public de la mer*, Vol. iii (1934), p. 691.

43 *See*, paragraph 4.24, above.

44 *See*, QM, Annex IV.203, Vol. 11, p. 13, at p. 23, para. 15.

45 D.W. Bowett, *The Legal Regime of Islands in International Law* (1979), p. 50 (QR, Annex III.102, Vol. 3, p. 625).

46 BCM, para. 163, fn. 243.

47 Special considerations may of course apply to lake boundaries such as the one in Lake Malawi to which Bahrain draws attention.

48 *See*, QM, Map No. 5 facing p. 50 and Map No. 9 facing p. 145.

49 *See*, also, paras. 4.7, *et seq.*, above. It should be noted that under Article 5 of the 1982 Convention on the Law of the Sea, the normal baseline from which the breadth of the territorial sea is measured is the low-water mark along the coast as marked on large-scale charts officially recognised by the coastal State. In this part of the Gulf, however, it is notoriously difficult to identify the low-water mark because of the shallowness of the seas. Qatar has therefore hitherto drawn the three-mile limit from the high-water mark for the purpose of these proceedings.

50 For a full account of these events, *see*, QM, paras. 3.30, *et seq.*, and QCM, paras. 3.20, *et seq.*

51 QCM, Appendix 2, Vol. 5, p. 145.

52 *Ibid.*, at p. 147.

53 QCM, paras. 2.68-2.69. The Ruler of Bahrain was paid £1,000 in compensation for the waiver of his claim to Zakhnuniya by virtue of Article 11 of the Anglo-Ottoman Convention of 29 July 1913.

54 QR, Annex III.30, Vol. 3, p. 175.

55 QCM, paras. 2.72-2.74. For further detail, *see*, QCM, Appendix 2, Vol. 5, pp. 148, *et seq.*

56 QR, Annex III.55, Vol. 3, p. 339, at p. 348.

57 It was in the context of consideration of this question that Rendel (Foreign Office) expressed his regret about the decision of the India Office to allot the Hawar islands to Bahrain rather than to Qatar; *see*, para. 4.220, below.

58 QR, Annex III.102, Vol. 3, p. 635.

59 Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926) p. 7, where the author affirms: "An uninhabited island within territorial waters is under the dominion of the Sovereign of the adjoining mainland".

60 QR, Annex III.102, Vol. 3, p. 625.

61 *See*, paras. 1.42-1.44, above.

62 Moore, *Digest*, Vol. V, pp. 5037-40 (QR, Annex III.111, Vol. 3, p. 677). *See*, also, QR, Annex III.102, Vol. 3, p. 625.

63 Translation from the original Spanish, which reads as follows: "Considerando que si bien aparece comprobado el hecho de que los habitantes de San Eustaquio, posesión neerlandesa, van á pescar tortugas y recoger huevos á la isla de Aves, este hecho no puede servir de apoyo al derecho de soberania, porque solamente significa una ocupación temporal y precaria de la isla, no siendo la pesca en este caso un derecho exclusivo, sino la consecuencia del abandono de ella por parte de los habitantes de las comarcas inmediatas, ó por su legítimo dueño" (QR, Annex III.111, Vol. 3, p. 677).

64 *I.C.J. Reports 1951*, p. 157.

65 The significance of fishing activities by private individuals has also been considered recently in the *Eritrea/Yemen* arbitration; *see*, paras. 4.182-4.183, below.

66 Elihu Root in *Proceedings of the North Atlantic Fisheries Arbitration*, cited in Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 5 (QR, Annex III.110, Vol. 3, p. 673).

67 R.P. Anand, *Origin and Development of the Law of the Sea* (1982), p. 140 (QR, Annex III.101, Vol. 3, p. 621).

68 QM, para. 5.72.

69 QM, Annex III.289, Vol. 8, p. 447.

70 QM, para. 5.72, and QM, Annex III.291, Vol. 8, p. 455.

71 *Seem*, of territories under British sovereignty.

72 D.P. O'Connell, *The International Law of the Sea* (ed. Shearer), Vol. 2 (1982), pp. 185-6 (QR, Annex III.112, Vol. 3, p. 685).

73 *See*, H.A. Smith, *Great Britain and the Law of Nations*, Vol. II (1935), pp. 224-5 (QR, Annex III.114, Vol. 3, p. 701).

74 Cited in Smith, *op.cit.*, p. 240 (*ibid.*); also in M.M. Whiteman, *Digest of International Law*, Vol. 4 (1965), p. 274 (QR, Annex III.116, Vol. 3, p. 711).

75 Whiteman, *op. cit.*, *ibid.*

76 *Ibid.*

77 Jessup, *op. cit.*, p. 64, note 4 (QR, Annex III.110, Vol. 3, p. 673).

78 A. Hershey, *The Essentials of International Public Law*, (1912), p. 173 (QR, Annex III.107, Vol. 3, p. 657).

79 Oppenheim's *International Law*, 9th Edn. (eds. Jennings and Watts), Vol. 1, Parts 2 to 4 (1992), p. 600 (QR, Annex III.109, Vol. 3, p. 665).

80 *See*, para. 4.21, above.

81 Sir R. Jennings, *The Acquisition of Territory in International Law* (1963), pp. 74-5 (QM, Annex III.304, Vol. 8, p. 529; emphasis added).

82 *Ibid.*

83 *I.C.J. Reports 1969*, p. 22, para. 19.

84 *Ibid.*, p. 31, para. 43.

85 Except where the feature is located in an area where the territorial seas of two opposite States overlap which could not have been the case in 1936 when both Bahrain and Qatar claimed only a three mile belt of territorial sea.

86 Sir R. Jennings, *The Acquisition of Territory in International Law*, *op.cit.*, p. 23 (QR, Annex III.108, Vol. 3, p. 661).

87 QR, Annex III.104, Vol. 3, p. 633.

88 *See*, QCM, paras. 3.172, *et seq.*, and Sect. 8 of this Chapter.

89 QR, Annex III.39, Vol. 3, p. 225.

90 For the sake of completeness, it should be noted that, by Article 14 of the Treaty of Peace with Italy of 1947, Italy transferred to Greece sovereignty over the same 13 named Dodecanese islands and their "adjacent islets".

91 BCM, para. 496.

92 Award of 14 February 1985, hereinafter referred to as the "*Guinea/Guinea-Bissau Award*". The award was published in French and Portuguese, the two official languages of the arbitration; but an unofficial English translation of the authentic French text of the award is at 25 *International Legal Materials*, 1986, p. 251.

93 *Guinea/Guinea-Bissau Award*, para. 21.

94 *Ibid.*, para. 95.

95 *Eritrea/Yemen Award*, para. 90.

96 *Ibid.*, para. 93.

97 *See*, QM, Chap. VI, Sect. 3, and QCM, Chap. III, Sect. 6; *see*, also, paras. 4.173, *et seq.*, below.

98 *Eritrea/Yemen Award*, para. 93.

99 *Ibid.*, para. 124.

100 *See*, paras. 4.182-4.183, below.

101 *Eritrea/Yemen Award*, para. 458.

102 *Ibid.*, para. 463, citing the passage from O'Connell to which Qatar makes reference at para. 4.42; emphasis supplied. *See*, also, paras. 4.43-4.44, above for further discussion of the "portico doctrine".

103 *Ibid.*, para. 467.

104 *Ibid.*, para. 472.

- 105 *Ibid.*, para. 475.
- 106 *Ibid.*, para. 474; emphasis added.
- 107 *Ibid.*, para. 477; emphasis added.
- 108 QM, Annex III.195, Vol. 7, p. 501.
- 109 QM, Annex III.203, Vol. 8, p. 13.
- 110 Fowle and Weightman were also aware of this; *see*, QM, para. 5.73.
- 111 QM, Annex III.195, Vol. 7, p. 501.
- 112 Emphasis added.
- 113 Sir G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954: Points of Substantive Law", *B.Y.I.L.*, Vol. 32, (1955-1956), pp. 75-76 (QR, Annex III.104, Vol. 3, p. 633, footnote omitted).
- 114 *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 582, para. 54.
- 115 *Ibid.*, p. 583, para. 56.
- 116 *Beagle Channel Arbitration (Argentina v. Chile)*, *International Law Reports*, 1979, Vol. 52, p. 93, para. 139.
- 117 *Eritrea/Yemen Award*, para. 381.
- 118 *Ibid.*, p. 99, para. 388.
- 119 *Ibid.*, p. 130, para. 490.
- 120 *See*, para. 2.82, above.
- 121 QR, Map Atlas, Map No. 5.
- 122 QR, Map Atlas, Maps Nos. 11, 21 and 22.
- 123 *Ibid.*, Maps Nos. 10, 19 and 23.
- 124 *Ibid.*, Maps Nos. 18 and 25. *See*, also, the maps deposited separately with the Court from this period.
- 125 *Ibid.*, Maps Nos. 2 and 7.
- 126 *Ibid.*, Maps Nos. 24 and 29.
- 127 *Ibid.*, Map No. 14.
- 128 *See*, Chap. II, Sects. 4 and 5, above.
- 129 QR, Map Atlas, Maps Nos. 49, 50 and 51.
- 130 QR, Annex III.38, Vol. 3, p. 215.
- 131 *See, ibid.*, Appendix (A).
- 132 *Eritrea-Yemen Award*, para. 151.
- 133 QR, Map Atlas, Map No. 60.
- 134 *See*, for example, QR, Map Atlas, Maps Nos. 63-73.
- 135 QR, Map Atlas, Map No. 71.
- 136 QM, Annex III.66, Vol. 6, p. 323, at p. 345.
- 137 *See*, paras. 2.104, *et seq.*, above, *Map No. 5* facing p. 56 and QR, Map Atlas, Map No. 77.
- 138 QR, Annex III.41, Vol. 3, p. 243.
- 139 *See*, QR, Map Atlas, Maps Nos. 83 and 88.

140 See, QR, Map Atlas, Maps Nos. 74 and 79.

141 BM, para. 18.

142 *Ibid.*, paras. 412 and 438.

143 See, QM, para. 5.46, Maps Nos. 7 and 8 to the Memorial and the maps deposited with the Court referred to at para. 5.46, fn. 66 of the QM.

144 See, BM, para. 21, and the sketch map facing p. 7.

145 See, also, para. 3.30, above.

146 BM, para. 345.

147 BCM, para. 159.

148 See, para. 3.1, above.

149 BCM, Annex 1(b), Vol. 2, p. 2.

150 BCM, Annex 2(b), Vol. 2, p. 4. The Arabic text of this document is very difficult to read.

151 These errors are listed in Appendix 2, at the end of this Volume. Amongst other things, Qatar's translator is unable to find the words "resided in"; he states that what is translated as "occupied" is really "conquered", and wonders if it is conceivable that the Hawar islands that are at issue in these proceedings had to be "conquered" in the first century of the Hijri.

152 See, paras. 4.173, *et seq.*, below and the *Persian Gulf Pilot* extracts in Annex III.113, Vol. 3, p. 691.

153 BCM, Annex 3(b), Vol. 2, p. 6.

154 See, paras. 3.1, *et seq.*, above.

155 BCM, para. 69.

156 QM, Chap. III, Sect. 3.C and QCM, Chap. III, Sect. 2A to 2C.

157 See, for example, the British Administration Report of the Persian Gulf Political Residency for 1905-1906 (which preceded Lorimer's *Gazetteer*) which states that "The purview of this Agency includes (a) the Protected State of Bahrain, (b) the independent Peninsula of Katar, (c) the Turkish 'Sanjak of Najd'..." (QR, Annex III.28, Vol. 3, p. 159).

158 QR, Annex III.37, Vol. 3, p. 211.

159 See, QM, Annex III.297, Vol. 8, p. 490.

160 QR, Annex III.99, Vol. 3, p. 609, at p. 611.

161 BCM, para. 84.

162 See, QCM, paras. 3.34, *et seq.*

163 BCM, Annex 5, Vol. 2, p. 10.

164 QR, Annex III.2, Vol. 3, p. 19.

165 QR, Annex III.3, Vol. 3, p. 23.

166 QCM, Annex. III.9, Vol. 3, p. 65; emphasis added.

167 BCM, para. 76.

168 QM, paras. 5.3 and 5.4.

169 QM, para. 3.31 and QCM, paras. 3.20-3.28.

170 QCM, Annex III.7, Vol. 3, p. 53. Interestingly, it seems as though Britain might not have intervened against Bahrain if it had itself believed, as Bahrain would have the Court believe, that

Qatar was still part of the Ruler of Bahrain's territories. Thus, some years later, with regard to the 1916 Treaty between the British Government and the Sheikh of Qatar (QM, Annex II.47, Vol. 5, p. 181), Article 1 of which required the Sheikh of Qatar to maintain the maritime peace, the question arose of whether Britain would allow the Sheikh to "take action by boats against rebellious villages on the coast" (BCM, Annex 51, Vol. 2, p. 164). The response of the Political Resident was that "this strictly speaking is a breach of the Maritime Peace to the maintenance of which the Shaikh subscribed in Article (1) of his treaty with the Government of India, *but I do not think any notice would be taken in the case of a Shaikh using boats to preserve order in his own territory*" (*Ibid.*, p. 165; emphasis added).

171 *See*, also, QR, Annex III.99, Vol. 3, p. 609, at p. 612.

172 *See*, BCM, para. 81.

173 *See*, QM, para. 3.30.

174 *See*, QM, paras. 3.30-3.32.

175 BCM, para. 81.

176 QM, Annex II.5, Vol. 3, p. 300.

177 *Ibid.*

178 BCM, para. 81.

179 QM, para. 3.32; emphasis added.

180 BCM, para. 81.

181 *See*, QM, Annex II.5, Vol. 3, p. 300.

182 *See*, para. 4.134, above.

183 Under cover of its letter of 25 August 1998 to the Court, Bahrain deposited with the Registry what it described as "one full copy of the originals of those of Sir Charles' diaries in its possession" (*see*, in this regard, paras. 4.274-4.275, below). This is the copy which has now been examined by Qatar.

184 *See*, QM, Annex II.11, Vol. 4, p. 291.

185 *See*, para. 6.67, below.

186 *See*, para. 3.34, above.

187 QCM, Chap. III, Sect. 3.

188 QR, Annex III.59, Vol. 3, p. 361.

189 QCM, para. 3.53(6).

190 QR, Annex III.89, Vol. 3, p. 545.

191 *Ibid.*

192 QR, Annex III.54, Vol. 3, p. 331, at p. 338.

193 QR, Annex III.92, Vol. 3, p. 563.

194 *Ibid.*

195 QM, Chap. VI, Sect. 3 and QCM, Chap. III, Sect. 6.

196 BM, para. 36 and BCM, para. 159.

197 BM, para. 345; emphasis added.

198 BM, Annex 236, Vol. 5, p. 1042; emphasis added.

199 *See*, QM, Annex III.195, Vol. 7, p. 502.

200 QM, Annex II.7, Vol. 4, p. 61.

201 QCM, para. 3.11; BCM, para. 43.

202 BM, para. 120. Qatar has drawn attention to the significant fact that the Hawar islands are not mentioned as a location even for such use.

203 QCM, paras. 2.5-2.6 and 2.51.

204 QR, Annex II.62, Vol. 2, pp. 365-367.

205 *See*, para. 3.14, above.

206 *See*, the Opinion of Judge Wassel Alaa El Din Ahmed Ibrahim of 27 April 1999 (QR, Annex III.98, Vol. 3, p. 601).

207 *See*, C. Hamilton, *The Hedaya or Guide - A Commentary on the Musulman Laws*, Vol. II, New Delhi (QR, Annex III.105, Vol. 3, p. 647).

208 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 44, para. 95.

209 In the context of the Anglo-Saudi negotiations in the 1930s concerning the boundary between Qatar and Saudi Arabia, the British pointed out, in response to a Saudi claim based on tribal allegiances, that: "... the question of allegiance was not always one which could be settled decisively. According to the information in the possession of His Majesty's Government many of the tribes were of uncertain and changing allegiance. There were, of course, certain areas which were predominantly or exclusively frequented by certain tribes owing a definite and exclusive allegiance to a particular ruler. His Majesty's Government were prepared to take such considerations into full account in arriving at a settlement, and indeed had already done so in the formulation of their present proposals. But it seemed clear that *a settlement could not be based on tribal considerations alone and that there existed other factors which should also be taken into account*" (QR, Annex III.93, Vol. 3, p. 573; emphasis added).

210 *See*, *Map No. 9*, facing page 150.

211 BCM, para. 194.

212 BCM, para. 195.

213 QR, Annex III.42, Vol. 3, p. 270.

214 QCM, para. 3.86 and QCM, Annex III.34, Vol. 3, p. 179, at p. 182.

215 QM, Annex III.103, Vol. 7, p. 18; emphasis added.

216 QM, Annex III.174, Vol. 7, p. 378.

217 *See*, paras. 4.171-4.172, below.

218 QM, Annex III.195, Vol. 7, p. 506.

219 BCM, para. 159; emphasis added. In fact the Dowasir were still returning from Dammam to Budaiya as late as 1933 (*see*, para. 4.164, above, and QR, Annex III.42, Vol. 3, p. 270).

220 BM, Vol. 3, pp. 378-379; emphasis added.

221 BM, para. 419, emphasis added. *See*, also, BM, para. 52 where Bahrain states that "Many of the Bahraini Dowasir would spend the summer at Zellaq and Budaiya on the main island of Bahrain and the winter on the Hawar Islands". The statements of individuals filed by Bahrain with its Memorial also speak of spending a few months every year in the Hawar islands.

222 BM, para. 419.

223 BM, para. 419.

224 QR, Annex III.113, Vol. 3, p. 691; emphasis added.

225 *Ibid.*

226 QM, Annex II.4, Vol. 3, pp. 120-121.

227 QM, Annex III.51, Vol. 6, p. 233.

228 QM, Annex III.157, Vol. 7, p. 285.

229 QM, Annex III.192, Vol. 7, p. 453.

230 *Ibid.*, p. 466.

231 BCM, para. 159.

232 QCM, para. 3.56.

233 QM, Annex III.192, Vol. 7, p. 453, at p. 480.

234 *See*, QM, Annex III.195, Vol. 7, p. 503.

235 BCM, para. 185.

236 BCM, para. 187.

237 *Ibid.*

238 BCM, para. 188, fn. 292.

239 BCM, para. 184.

240 BM, Annex 7, Vol. 2, p. 101.

241 The only "evidence" offered by Bahrain in this regard is Belgrave's letter to Weightman of 22 December 1938 (BM, Annex 274, Vol. 2, p. 1129), which can hardly be considered as objective evidence.

242 QR, Annex III.94, Vol. 3, p. 575; emphasis added.

243 BCM, para. 183.

244 In this context, *see*, para. 4.164, above, which demonstrates that the Dowasir were still drifting back from Dammam to Bahrain in 1933.

245 Belgrave's Diary - Entry of Friday, 1st April 1938.

246 *I.C.J. Reports 1975*, p. 44, para. 95.

247 QR, Annex III.100, Vol. 3, p. 617; footnotes omitted; emphasis added. *See*, also, extract from 1949 Proclamations reproduced in para. 7.23, below, and the reservation regarding the protection of fishing rights in the British Government's letters of 23 December 1947, also referred to in para. 7.23.

248 *Eritrea/Yemen Award*, paras. 127-128; emphasis added.

249 *Ibid.*, para. 315; emphasis added.

250 *Ibid.*, paras. 353-356.

251 BM, para. 479, fn. 600.

252 *See*, para. 4.159, above.

253 QR, Annex III.89, Vol. 3, p. 545.

254 QM, Annex III.192, Vol. 7, p. 453, at p. 460.

255 QR, Annex III.91, Vol. 3, p. 559; emphasis added.

0 *See*, QM, Annex III.195, Vol. 7, p. 497.

1 *See*, paras. 4.145, *et seq.*, above.

- 2 BCM, paras. 280-281.
- 3 QM, paras. 6.132-6.140.
- 4 QM, Annex III.84, Vol. 6, p. 435.
- 5 *Ibid*, p. 433.
- 6 QM, Annex III.91, Vol. 6, pp. 466-467; emphasis in original.
- 7 QM, Chap. V, in particular para. 5.48, and Chap. VI.
- 8 *See*, para. 2.104, above and QR, Map Atlas, Map No. 77.
- 9 BCM, Annex 122, Vol. 2, p. 412.
- 10 QM, paras. 5.48, 5.56, 6.18-6.21 and 6.33-6.39.
- 11 BCM, para. 197.
- 12 BCM, para. 205.
- 13 BCM, para. 217.
- 14 BCM, Annex 61, Vol. 2, p. 208; in fact a telegram.
- 15 BCM, Annex 62, Vol. 2, pp. 209-210, also a telegram. The date of this letter is of course long before the Hawar islands were considered as part of the "unallotted area".
- 16 BCM, Annex 62, Vol. 2, pp. 209-210.
- 17 QM, Annexes III.88 and III.91, Vol. 6, pp. 449 and 461.
- 18 QR, Annex III.43, Vol. 3, p. 271.
- 19 QR, Annex III.44, Vol. 3, p. 277. The Court will recall that Qatar has shown that subsequent calculations of the Bahrain land area by the Petroleum Department in London established the total land area to be 144,768 acres and the additional area (after excluding BAPCO's entitlement under the first concession) of 44,768 acres obviously could not include the Hawar islands. QM, paras. 6.16-6.19.
- 20 QR, Annex III.45, Vol. 3, p. 285.
- 21 QR, Annex III.46, Vol. 3, p. 291.
- 22 QM, para. 6.23.
- 23 BCM, para. 224.
- 24 QM, Annex III.103, Vol. 7, pp. 17-18.
- 25 QCM, paras. 3.60, *et seq.*
- 26 QM, Annex III.104, Vol. 7, p. 21; emphasis added.
- 27 *Ibid*.
- 28 *Ibid*.
- 29 *See*, in this context, para. 4.143, above.
- 30 QM, Annex III.106, Vol. 7, p. 30, which letter has been more fully discussed in QM para. 6.35; *see*, also, paras. 4.251, *et seq.*, above.
- 31 QM, Annex III.107, Vol. 7, p. 35.
- 32 QR, Annex III.49, Vol. 3, p. 307.
- 33 BCM, Annex 75, Vol. 2, p. 239.
- 34 BCM, Annex 76, Vol. 2, p. 241.

35 *Ibid.*, pp. 241-242.

36 BCM, Annex 77, Vol. 2, p. 243.

37 BCM, para. 252; emphasis added.

38 BCM, para. 252, fn. 365.

39 It will be seen however that not every British official concerned regarded the "allotment" of the Hawar islands to Bahrain as a good idea. See the views of G.W. Rendel of the Foreign Office in para. 4.220, below.

40 QM, Annex III.111, Vol. 7, p. 51.

41 BCM, para. 255. *See*, letter from Belgrave to Hood, 18 July 1936 (BM, Annex 78, Vol. 2, pp. 246-247); letter from Walton to Starling, 30 July 1936 (QM Annex III.112, Vol. 7, p. 55); telegram from Fowle to Secretary of State for India, 12 February 1937 (BM, Annex 80, Vol. 2, pp. 249-250); all quoted by Bahrain in BCM, para. 255, fn. 368.

42 QM, Annex III.112, Vol. 7, p. 55.

43 QR, Annex III.50, Vol. 3, p. 311. This clearly suggests that the Ruler of Bahrain was himself anxious to ensure the British would not oppose his claim to ownership of Hawar and result in the loss of his anticipated revenues from any oil expected to be discovered on the islands.

44 *See*, QM, Annex III.114, Vol. 7, p. 63 and QR, Annex III.51, Vol. 3, p. 317.

45 QCM, Annex IV.1, Vol. 4, p. 1.

46 QM, Annex III.113, Vol. 7, p. 59.

47 QR, Annex III.56, Vol. 3, p. 349; emphasis added.

48 QR, Annex III.52, Vol. 3, p. 321.

49 QR, Annex III.57, Vol. 3, p. 353.

50 *Ibid.*

51 QM, Annex III.146, Vol. 7, p. 233.

52 *Ibid.*

53 *See*, QM, Annex III.157, Vol. 3, p. 285.

54 QM, Annex III.148, Vol. 7, p. 24.

55 QCM, paras. 3.64-3.66.

56 QM, Annex III.148, Vol. 7, p. 241.

57 QR, Annex III.58, Vol. 3, p. 357; emphasis added.

58 QR, Annexes III.62 and III.63, Vol. 3, pp. 381 and 385.

59 As Qatar has shown (QM, para. 6.76), on the same day, Weightman also wrote to Belgrave sending him a copy of his letter to the Ruler of Qatar and stating that he would address Belgrave again: "*Should it become necessary* to request the Bahrain Government to submit a counter-claim supported by evidence..." (QM, Annex III.154, Vol. 7, p. 271).

60 QR, Annexes III.61 and III.65-III.68, Vol. 3, pp. 377 and 397-411.

61 QR, Annex III.69, Vol. 3, p. 415.

62 QR, Annex III.64, Vol. 3, p. 391.

63 QR, Annexes III.70 and III.71, Vol. 3, pp. 419 and 427.

64 QR, Annex III.72, Vol. 3, p. 437; emphasis added.

65 QR, Annex III.73, Vol. 3, p. 441.

66 *Ibid.*

67 QR, Annex III.74, Vol. 3, p. 447; emphasis added.

68 *Ibid.*

69 *Ibid.*

70 QR, Annex III.75, Vol. 3, p. 459.

71 *See*, QM, para. 6.78.

72 However, on the basis of advice by Foreign Office Legal Advisers, this recommendation was not approved and it was agreed that Bahrain's "counter-claim" should be shown to the Ruler of Qatar.

73 *See*, QR, Annex III.77, Vol. 3, p. 469; emphasis added.

74 QR, Annex III.78, Vol. 3, p. 479.

75 QR, Annex III.79, Vol. 3, p. 487; emphasis added.

76 QR, Annex III.80, Vol. 3, p. 493; emphasis added.

77 *See*, para. 4.220, above.

78 QM, paras. 6.82-6.84.

79 QR, Annex III.81, Vol. 3, p. 499.

80 *See*, QR, Annex III.82, Vol. 3, p. 503.

81 QR, Annex III.84, Vol. 3, p. 515; emphasis added.

82 QR, Annex III.86, Vol. 3, p. 525.

83 *Ibid.*

84 QR, Annex III.70, Vol. 3, p. 419.

85 QR, Annex III.85, Vol. 3, p. 519.

86 *Ibid.*

87 *Ibid.*; emphasis added.

88 Presumably from Bahrain.

89 *Ibid.*; emphasis added.

90 *Ibid.*

91 QR, Annex III.87, Vol. 3, p. 529.

92 BCM, para. 281.

93 QCM, Annex III.47, Vol. 3, p. 265, at p. 272; BCM, para. 280. *See*, also, QCM, para. 3.161 containing an analysis of Weightman's letter.

94 QCM, Annex III.47, Vol. 3, p. 265, at p. 272; emphasis added.

95 *Ibid.*, at p. 273.

96 *Ibid.*, at p. 274.

97 QR, Annex III.88, Vol. 3, p. 539; emphasis added.

98 *Ibid.*; emphasis added.

99 *See*, also, QCM, paras. 3.161-3.162.

100 BCM, paras. 281-285.

- 101 QCM, Annex III.47, Vol. 3, p. 265, at p. 272.
- 102 QM, Annex III.195, Vol. 7, p. 497.
- 103 *See*, QM, paras. 6.84-6.85 and 6.139; and QCM, paras. 3.64-3.66 and 3.70-3.71.
- 104 The 1936 "provisional decision".
- 105 QM, Annex III.206, Vol. 8, p. 27.
- 106 *See*, QM, paras. 6.132, *et seq.*; and QCM, para. 3.142.
- 107 QCM, Annex III.48, Vol. 3, p. 275.
- 108 QM, Annex III. 107, Vol. 7, p. 31.
- 109 QM, Annex III.170, Vol. 7, p. 351. *See*, also, the discussion at paras. 4.237, *et seq.*, above.
- 110 QM, Annex III.170, Vol. 7, p. 351.
- 111 QM, Annex III.113, Vol. 7, p. 59.
- 112 QCM, Annex III.47, Vol. 3, p. 265. *See*, also, para. 4.245, above.
- 113 *See*, para. 4.219, above.
- 114 In the event, the negotiations were not formally postponed because of objections by PCL; *see*, paras. 4.235, *et seq.*, above.
- 115 QM, Annex III.166, Vol. 7, p. 333; emphasis added.
- 116 QM, Annex III. 164, Vol. 7, p. 323. This draft letter seems to have issued; *see*, the reply from Baxter (FO) to Peel (IO) of 12 July 1938, at QM, Annex III.165, Vol. 7, p. 327.
- 117 *See*, the Packer Report of 5 December 1939 (BM, Annex 292, Vol. 5, p. 1190 (especially Section 1)).
- 118 QM, Annex III.203, Vol. 8, p. 13.
- 119 QR, Annex III.54, Vol. 3, p. 331.
- 120 *Ibid.*
- 121 *Ibid.*
- 122 The entries in the Belgrave diaries for 14 February and 12 March 1927; 29 December 1929; 8, 13 and 21 December 1932; 11 September and 23 December 1933; 25 January and 7 February 1934; 14 February, 3, 27 and 28 March, 12 November and 15 December 1935 - all show Belgrave's impatience with these demands on him.
- 123 QM, para. 6.9, read in conjunction with paras. 6.4-6.8.
- 124 BM, Annex 292, Vol. 5, p. 1190 (wrongly stated to be Report by Weightman).
- 125 BM, Annex 292, Vol. 5, p. 1190, at p. 1194; emphasis added.
- 126 QM, Annex III.174, Vol. 7, p. 371, at p. 379.
- 127 BCM, paras. 377 and 378, together with references in fn. 499.
- 128 *See*, QCM, para. 3.161, and QCM, Annex III.47, Vol. 3, p. 265, and paras. 4.227, *et seq.*, above.
- 129 *See*, QM, paras. 6.72 and 6.73, together with the Annexes referred to therein. There is also evidence of Belgrave's close relationship with other British officials, such as Prior, Loch and Fowle. For Prior, see Belgrave's diary entries for 5 April 1929, 2 May 1929, 31 October 1932 and 29 November 1932; for Loch, see entries for 29 November 1932, 2 December 1932, 15 November 1933 and 7 February 1934; and for Fowle, see entries for 6 December 1932, 15 November 1933 and 24 November 1933.

130 A copy of the letter from Messrs. Frere Cholmeley of 15 December 1998, and of the reminder of 2 February 1999, is at QR, Annex III.97, Vol. 3, p. 597.

131 BCM, para. 289. This statement is incorrect. It was in fact Prior himself who concluded that it was not "practical politics to reverse it [the 1939 decision] now [in 1941]" (*see*, QM, para. 6.108 and Annex III.299, Vol. 8, p. 127).

132 The entry for 16 September 1926, in the Belgrave diaries includes the sentence: "Prior his [the PR's] secretary is ill and very sorry for himself".

133 QM, Annex III.229, Vol. 8, p. 127.

134 BCM, para. 299.

135 The entry for 19 April 1927 in the Belgrave diaries states *inter alia*: "[Barrett] has orders to go to Kuwait, by the next up boat, for 6 months certainly... His successor is to be one Alban, quite a young new man..."

136 *See*, QM, paras. 6.100-6.102, and QM, Annex III.212, Vol. 8, p. 53.

137 *See*, the Belgrave diary entry for 26 September 1939, cited at para. 4. above. Prior's manuscript minute where he expressed his view that "a grave miscarriage of justice has occurred" is dated 25 September 1939.

138 QM, Annex III.220, Vol. 8, p. 89. This is the telegram in which Prior expresses his disagreement with the notion that territory can be acquired by the erection of "national marks", and his grave doubts about the justice of the Hawar islands decision.

139 QM, Annex III.322, Vol. 8, p. 99.

140 In this respect, the BCM marks no advance on the BM which also ignored the crucial events of 1936; *see*, BM, para. 356.

141 Qatar cannot put a precise date on the Bahraini occupation of Hawar in 1937, simply because it was effected secretly; but *see*, QCM, paras. 3.50-3.59. The Court will in addition recall that there are no Belgrave diaries for the second half of 1936 or for any part of the year 1937, so that further direct evidence on this point is unlikely to be forthcoming.

142 QM, Annex III.152, Vol. 7, p. 261.

143 In his letter of that date to the Secretary of State for India where he states: "... I incline to the view that Hawar should be regarded as belonging to the Shaikh of Bahrain and that the burden of disproving his claim lies on the Shaikh of Qatar". *See*, QM, Annex III.107, Vol. 7, p. 31.

144 QR, Annex III.60, Vol. 3, p. 371; emphasis added.

145 QM, Annex III.152, Vol. 7, p. 261.

146 QM, Annex III.152, Vol. 7, p. 261; emphasis added.

147 For a full and accurate chronology of events, *see*, in addition to what has been said in this Section, QCM, para. 3.72; *see*, also, QCM, paras. 3.60-3.71 and 3.73-3.79 and the documentary annexes referred to therein.

148 *See*, QM, Annex III.156, Vol. 7, p. 279.

149 QR, Annexes III.62 and III.63, Vol. 3, pp. 381 and 385.

150 *See*, also, Sect. 5, particularly para. 4.227, above.

151 QM, Annex III.154, Vol. 7, p. 271.

152 *See*, QM, para. 6.189.

153 *See*, para. 4.282, above.

154 QM, Annex III.157, Vol. 7, p. 285.

155 As to which *see*, QCM, para. 3.72.

156 *See*, QM, para. 5.58.

157 QM, Annex III.150, Vol. 7, p. 253.

158 QM, Annex III.152, Vol. 7, p. 261.

159 *Ibid.*, at p. 263; emphasis added.

160 It is noteworthy that Weightman's interim response to the Ruler of Qatar on 20 May 1938 acknowledges that the Ruler of Qatar's letter of 10 May 1938 was indeed a "protest".

161 QM, Annex III.157, Vol. 7, p. 285, at p. 287.

162 *Ibid.*, at p. 289.

163 *See*, Sect. 5, above.

164 The reference to "your letter" is to Weightman's letter of 20 May 1938, at QM, Annex III.156, Vol. 7, p. 279.

165 As in paras. 290 to 299 of the BCM.

166 BCM, para. 289.

167 QM, Annex III.195 Vol. 7, p. 497.

168 QR, Annex III.94, Vol. 3, p. 575.

169 *See*, QM, paras. 6.244-6.248.

170 *See*, QM, *ibid.*, and also, at paras. 10.41 and 10.43. *See*, also, QMJA, Annexes I.56-I.61, and (particularly) I.62 and I.63, Vol. II, pp. 327-407.

171 QJMA, Annex I.60, Vol. II, p. 371.

172 This is the title given to Sect. 3.3 of Chap. 3 of the BCM.

173 BCM, para. 386.

174 *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19.

175 *Ibid.*, p. 32.

176 *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 104 para. 33.

177 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88; emphasis added.

178 *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 258-9, para. 48.

179 *Ibid.*, p. 261, para. 54.

180 *Ibid.*, para. 55.

181 Extracts from the award of the arbitration tribunal of 19 October 1981 in the *Dubai/Sharjah Border* case are at QM, Annex III.295, Vol. 8, p. 475.

182 Paragraphs 6.4 to 6.9 of the QM set out the key elements of the award in the *Dubai/Sharjah Border* arbitration in this respect.

183 Cited in paragraph 6.8 of the QM.

184 QM, Annex III.295, Vol. 8, p. 477; cited in paragraph 6.4 of the QM.

185 BCM, paras. 393-394.

186 BCM, paras. 390-392.

187 QM, Annexes III.150 and III.157, Vol. 7, pp. 253 and 285, respectively.

188 *See*, paras. 4.217, *et seq.*, 4.251, *et seq.*, and 4.289, above.

189 *See*, QM, paras. 6.34-6.39; QCM, paras. 3.60-3.63; and QR, paras. 4.217, *et seq.*, above.

190 BCM, paras. 237-259.

191 But note by way of contrast the formal letter of 30 June 1939, from the Managing Director of PCL to the Under-Secretary of State for India which refers at length to the views of the Ruler of Qatar; QM, Annex III. 206, Vol. 8, p. 27. *See*, also, para. 4.250, above.

192 *See*, para. 4. 224, above; *see*, also, QM, Annex III.146, Vol. 7, p. 233, para. 4(c).

193 QM, Annex III.183, Vol. 7, p. 417.

194 *See*, Sect. 6.A, above, and para. 4.313(c), below.

195 *See*, BCM, para. 410.

196 *See*, QM, Annex III.152, Vol. 7, p. 261.

197 The Packer Report is at BM, Annex 292, Vol. 5, pp. 1190-94; and Weightman's covering letter is at QCM, Annex III.48, Vol. 3, p. 275.

198 QR, Annex III.60, Vol. 3, p. 371.

199 In the *Norwegian Fisheries* case (*I.C.J. Reports 1951*, p. 116), successive United Kingdom Governments had failed to protest, over a period of some seventy years, against the application by Norway of a particular system for the delimitation of the outer limits of her territorial sea and this was found by the Court to amount to acquiescence by the United Kingdom in that system.

200 QM, Annex III.213, Vol. 8, p. 59.

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**  
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**CHAPTER V**  
**JANAN ISLAND**

**Section 1. The Basis of Qatar's Title to Janan Island**

5.1 In its Memorial, Qatar has shown that when the British Government began its consideration of proposals to delimit the maritime boundary between Qatar and Bahrain (eventually notified to both States by letters of 23 December 1947), it was recognised that the composition of the group referred to as the Hawar islands, which were regarded as belonging to Bahrain by the British decision of 11 July 1939, had never been carefully considered, far less determined<sup>1</sup>. As Qatar has already pointed out, the British authorities in July 1939 were ignorant of the area whose fate they

were deciding. This fact was recognised not only by the Political Agent in Bahrain, who considered that unspecified islands had been allotted to Bahrain simply because they were "assumed" to form a group which had been awarded to Bahrain<sup>2</sup> but even by the Secretary of State for India who himself recorded that the exact extent of the Hawar islands had never been accurately defined<sup>3</sup>.

5.2 By December 1946, however, the British Government had increasingly come to recognise the significance of evidence relating to Qatar's sovereignty over islands in its territorial waters, a factor wrongly ignored at the time of the 11 July 1939 decision. Thus, in making his recommendations on the delimitation of the maritime boundary, the Political Agent "after visiting the islands and examining the situation on the spot with the greatest care"<sup>4</sup> described Janan in the following terms:

"... The island is barren, but is used by Bahrain fishermen, and I dare say by Qataris on occasions. It has neither water nor habitation, and beyond the erection of a cairn by the Bahrain Government I know of no justification for their claim to ownership. The erection of a cairn should, in my opinion, be given but little consideration since it was not included in the Bahrain Government's 1938 list. Further the eastern half of the island *lies within Qatar territorial waters* and south of the deep water channel which runs close to Janan and not Hawar..."<sup>5</sup>

Accordingly, the Political Agent rightly took the view, later confirmed by the Political Resident and the Secretary of State for India, that Janan island formed part of the territory of Qatar.

5.3 Qatar has already submitted that the reasons given by it to show that the Hawar islands belong to Qatar, in particular the principles governing proximity and sovereignty over islands in territorial waters, fully set out and analysed in Chapter IV above, apply equally to Janan. It is Qatar's further submission that the reasons given by the British Political Agent in 1946 regarding the appurtenance of Janan to Qatar should also have been applied by the British with regard to the appurtenance of the Hawar islands to Qatar.

5.4 The Court will recall that in its Memorial, Bahrain devoted just two paragraphs to its purported claim to Janan, which name, Bahrain claims, refers to two islands, *i.e.*, Janan and Hadd Janan, that have a combined surface and merge into a single island at low tide. The only submission Bahrain makes in its Memorial is that "There is no reason to exclude Janan from the Hawar Islands" and that the island "was used by Hawar residents and other Bahraini fishermen"<sup>6</sup>. In support of this submission, Bahrain merely provides extracts from two statements of so-called Hawar islanders. There is no other evidence to corroborate these clearly self-serving statements. Qatar has already pointed out that apart from the question of whether Bahrain's claim to what it calls two islands (Janan and Hadd Janan) could even be regarded as admissible, given that the issue submitted to the Court in this respect was entitled "the island of Janan", the geographical facts simply do not provide a basis for Bahrain to claim a second island<sup>7</sup>.

5.5 With regard to Janan, Bahrain again indulges in its practice of ascribing a contention to Qatar which Qatar has not made and then proceeding to show that it is without any basis. Contrary to what Bahrain states in its Counter-Memorial<sup>8</sup>, Qatar has not claimed in its Memorial<sup>9</sup> that Britain decided in 1947 to "award" Janan island to Qatar. In fact, Qatar has merely pointed out that the thrust of Britain's decision was that Janan island did not form part of the Hawar islands and therefore belonged to Qatar; and that the reasons for which Britain decided Janan belonged to Qatar also apply to the Hawar islands<sup>10</sup>. Furthermore, Qatar reiterates that it has never accepted any part of the British decision of 11 July 1939 to the effect that the Hawar islands belonged to Bahrain and that it specifically protested the 1947 decision insofar as it relied upon the 1939 decision, and also insofar as it concluded that the Dibal and Qit'at Jaradah shoals appertained to Bahrain.

5.6 Bahrain then sets out the three reasons given by the Political Resident to the Secretary of State for India in his letter of 18 January 1947<sup>11</sup>, *i.e.*, that Janan is separated by a deep water channel, that it flanks Zekrit Bay, and that it is not included in the Bahrain Government's 1938 list submitted as part of its claim to ownership of the Hawar islands<sup>12</sup>. Bahrain seeks to challenge these grounds but fails to recognise, firstly, that each of these grounds is factually correct; or, secondly, that they supplement the reasons given by the Political Agent in support of his recommendation reproduced in paragraph 5.2 above which was accepted by the British authorities. Bahrain nevertheless attempts to discredit these grounds and simply brushes aside the principle that the coastal State has title to islands located within its territorial waters which the British applied to Janan in 1947 (and, as shown above, erroneously ignored in 1939 in regard to the Hawar islands).

5.7 In its attempt to show that the Political Agent (Galloway) was mistaken in excluding Janan island from the Hawar islands because of its omission from the list submitted by Belgrave in 1938, Bahrain asserts that the Political Agent only considered three lists but that in fact there was a fourth list. The reference of course is to the 1936 list attached to Belgrave's letter of 28 April 1936 containing Bahrain's first formal claim to the Hawar islands<sup>13</sup>.

5.8 Qatar has shown elsewhere that this list, which contained the names of only *seven* islands, in fact clearly shows that the Ruler of Bahrain was entirely unaware of the actual number and nature of the islands in the group that he purported to claim; and that this is demonstrated, firstly, by the fact that in Belgrave's letter it was claimed that "at least four of the larger islands are permanently occupied by His Excellency's subjects who live there in stone houses as well as barastis..."<sup>14</sup>, a wholly false claim never subsequently repeated by Bahrain itself after that date except in regard to the main Hawar island; and secondly, by the contents of the three subsequent lists submitted by Bahrain.

5.9 Bahrain's account<sup>15</sup> itself shows that having laid claim to *seven* named islands in 1936, a year later, in August 1937, it submitted a list containing the names of *nine* islands<sup>16</sup>; yet another list, of 29 May 1938 (which Galloway took into account and which did not mention Janan), named *sixteen* islands; and a fourth list, of 10 July 1946, contained the names of *eighteen* islands and islets. This account strongly supports Qatar's submission that there was no basis for Bahrain's claim in 1936 to the Hawar islands, of whose composition it had hardly any knowledge. Furthermore, it certainly does not support Bahrain's contention that, against this confused background, created entirely by Bahrain, it was the Political Agent who was mistaken in dealing with Bahrain's various lists and excluding Janan from the Hawar islands.

5.10 Bahrain further claims that the Political Agent relied on unverified geomorphological survey information about Janan<sup>17</sup>. Qatar has now shown the correct geographical position, which is that Janan island is separated by 17 nautical miles (or more than 30 kilometres) of relatively deep water from the nearest point of Bahrain and has no geomorphological connections with it at all, but that it is close to the Qatar mainland coast and is a component of the offshore topography and the nearshore dynamic system associated with the Qatar coast<sup>18</sup>.

5.11 Bahrain then contends that in the negotiations for the oil concession for Bahrain's "unallotted" area between 1937 and 1939, in regard to the offer of the concession area to PCL, Janan island was always regarded as part of the Hawar islands. Qatar was of course not represented in those oil concession negotiations, so that nothing discussed there is opposable to Qatar. In any event, as Qatar has already shown, during that period there had admittedly been no considered examination of the significant and highly relevant issues by the British authorities, particularly those relating to sovereignty over islands in territorial waters, as there was by the Political Agent in 1946; and if there had been such an examination, in the absence of other considerations described above<sup>19</sup>, the Hawar islands would necessarily have been regarded as belonging to Qatar. Furthermore, Bahrain's allegation that the Political Agent, in excluding Janan

from the Hawar islands, was influenced by extraneous considerations<sup>20</sup>, is neither substantiated nor relevant.

## **Section 2. Bahrain's Alleged Acts of Sovereignty over Janan Island**

5.12 Finally, there is no force in Bahrain's contention that its sovereignty over Janan island can be sustained by evidence "independently of the 1939 British Award"<sup>21</sup>. In addition to the reasons given by the Political Agent in his letter of 31 December 1946 and cited above, Qatar has already shown that Lorimer clearly lists Janan (as he does the Hawar islands) as part of Qatar in his geographical description of the territories constituting Qatar<sup>22</sup>. Furthermore, apart from the Political Agent's reference to the fact that fishermen from Qatar and Bahrain frequented Janan, Qatar has also shown that this was part of the custom prevailing in the Gulf region whereby fishermen from different countries were able freely to visit islands in the area, including Hawar and Janan, to undertake fishing. As to the Ruler of Bahrain's claim, made for the first time in his letter of 31 December 1947<sup>23</sup>, that Bahraini fishermen were "accustomed, with our permission, to erect huts on the island in the fishing season...", there is no evidence provided by Bahrain in support. In any event, considering that Janan island is known to be barren and waterless, this claim is also factually incorrect.

5.13 It will be seen therefore that, on the basis of all the evidence and established principles of international law relating to islands situated wholly or partially in a State's territorial waters, the conclusion must be that Janan, as well as the Hawar islands, appertains to Qatar and not to Bahrain.

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### FOOTNOTES

1 QM, paras. 7.5-7.11.

2 QM, Annex III.249, Vol. 8, p. 219, at p. 222.

3 QM, para 7.8; *see*, also, QM, Annex III.246, Vol. 8, p. 207.

4 QM, Annex III.250, Vol. 8, p. 233.

5 QM, Annex III.249, Vol. 8, p. 219, at p. 223; *emphasis added*.

6 BM, para. 405.

7 *See*, QCM, para. 4.2.

8 BCM, paras. 313-319.

9 Either in para. 7.5 or in para. 7.11, the two sources cited by Bahrain.

10 QM, para. 7.5.

11 QM, Annex III.250, Vol. 8, p. 233.

12 BCM, para. 318.

13 BM, Annex 246, Vol. 5, p. 1071; QM, Annex III.103, Vol. 7, p. 15.

14 *Ibid*.

15 BCM, paras. 320-330.

16 BCM, para. 324.

17 BCM, paras. 331-333.

18 QCM, para. 4.3.

19 *See*, Chap. IV, Sect. 5, above.

20 BCM, paras. 334-335.

21 BCM, paras. 363-364.

22 *See*, QM, para. 7.4.

23 *See*, BCM, para. 364.

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**  
**(QATAR V. BAHRAIN)**  
**REPLY OF THE STATE OF QATAR**

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**CHAPTER VI**

**ZUBARAH**

**Section 1. The Question of Zubarah Viewed in its Proper Perspective**

6.1 As the Court is aware, Bahrain has presented its claim to Zubarah as a claim of sovereignty. As Qatar has already pointed out, Bahrain never mentioned Zubarah as a subject of dispute between the Parties during the entire period of the Saudi mediation under the 1978 Framework and only brought it up for the first time in a draft document to be considered at the second meeting of the Tripartite Committee in April 1988<sup>1</sup>. Qatar thereafter immediately protested in this regard to King Fahd of Saudi Arabia in a letter in which the Amir of Qatar described the claim to Zubarah as "astounding"<sup>2</sup>.

6.2 Qatar has now seen Bahrain's own official Annual Report for the year 1376 H. (1937-1938). That report puts the whole of Bahrain's so-called claim to sovereignty over Zubarah in a proper perspective when it states:

"... Zubara, the subject of this quarrel, is a place of no apparent value. The town is entirely in ruins, the fort is rapidly crumbling to pieces, there is no water except a few wells which frequently become dry and the land is barren and salty. The few villages within the Zubara area are miserable groups of mud huts inhabited by almost starving Arabs. The Khalifah, and the Arabs of Bahrain, however, regard Zubara as their ancestral home, which in fact it is, they remember that their ancestors and the early Khalifah Shaikhs built Zubara and are buried there and they remember its ancient glories, although during recent years visits to Zubara by the Khalifah Shaikhs have been rare, yet they resent the claim of Qatar that Bahrain has no rights over Zubara. That the reason of the quarrel is a matter of principle and sentiment makes it all the more difficult to arrive at an understanding"<sup>3</sup>.

The Court will no doubt see that Bahrain's own views (objectively) expressed above, describing its interest in Zubarah as no more than of sentimental value, must defeat the wholly artificial claim to sovereignty over the "Zubarah region" that it now makes in these proceedings<sup>4</sup>.

6.3 While Qatar totally rejects Bahrain's claim to Zubarah - let alone any claim to the so-called "Zubarah Region" - out of deference to the Court and in order to dispose of this wholly fictitious claim once and for all, Qatar will briefly address Bahrain's contentions in the Sections that follow. Before doing so, it is appropriate to recapitulate the essential elements of Qatar's title to Zubarah.

## **Section 2. The Basis of Qatar's Title to Zubarah**

6.4 As Qatar has already shown, the integrity of the territories of Qatar consisting of the peninsula, its territorial waters, as well as the adjoining islands situated partly or wholly therein, including the Hawar islands, has been recognised for over a century. All of the historical and cartographical evidence referred to by Qatar to demonstrate the territorial integrity of Qatar must apply with equal force with regard to Zubarah as incontestably part of the territory of the State of Qatar<sup>5</sup>.

6.5 Qatar has shown that the Al-Thani established their power and influence on the Qatar peninsula by the middle of the 19<sup>th</sup> century and, in the period following the 1868 Agreements and after the arrival of the Ottomans in 1871, steadily expanded and consolidated their authority over the entire territory of Qatar. Between 1871 and 1913 (when they relinquished their rights in favour of the Al-Thani), the Ottomans regarded the entire peninsula of Qatar including Zubarah as part of Ottoman territory, with Sheikh Jassim bin Thani exercising authority over the whole territory as their *kaimakam*<sup>6</sup>.

6.6 Qatar has shown, by reference to the observations of J. C. Wilkinson (a writer greatly favoured by Bahrain) quoted in Qatar's Counter-Memorial, that the forebears of the Al-Thani family, the Ma'adhid, arrived in the Qatar peninsula in the 17<sup>th</sup> century (long before the Al-Khalifah) and established a presence in different parts of the peninsula including Zubarah; and that the Al-Thani had themselves had a connection with or presence in Zubarah over a long period, even before they came to establish and consolidate their rule over Qatar and exercise complete control in Zubarah<sup>7</sup>.

6.7 The Court will recall that it was with the most important Al-Thani Sheikh that the British chose to enter into the Agreement of 1868, and that the British thereafter recognised that the Al-Thani family was not only the effective power on the peninsula itself, but was also responsible for preventing piracies off the coast of Qatar<sup>8</sup>. Qatar has further shown how other historians including A.H. Cordesman<sup>9</sup> and A. de L. Rush<sup>10</sup> have stated that the 1868 Agreement between the British and Mohamed bin Thani signalled the ending of Britain's treatment of Qatar as a dependency of Bahrain and the first recognition of Qatar as a separate entity in its own right. The Court will recall that a similar view was recorded by Lorimer<sup>11</sup> as well as, more recently, by Dr. Al-Baharna of Bahrain<sup>12</sup>.

6.8 Qatar has described in its Counter-Memorial and in this Reply those events or reports demonstrating the establishment, consolidation and recognition of Al-Thani authority both over the interior of the peninsula and the coasts of Qatar, including Zubarah, after 1868<sup>13</sup>. Some of the more important of these, which are particularly relevant in demonstrating Qatar's incontestable title to Zubarah (and the lack of any basis for Bahrain's claim to Zubarah), are summarised below.

(a) In its Counter-Memorial, Qatar has described in detail the British investigation (by Major Grant) of Bahrain's supposed claim to Zubarah on the basis of its relationship with a section of the Naim tribe when the claim was first made in 1873, and the rejection of that claim by the British then and ever since<sup>14</sup>.

(b) Following the above-mentioned investigation, a formal declaration was made by the Governor-General in Council in 1874 that "the Chief of Bahrein had no possessions on the mainland of Katar..."<sup>15</sup>.

(c) Lorimer records that in September 1878, when a piracy was committed by the inhabitants of Zubarah upon a passing boat, Colonel Ross, the Political Resident, was directed by the Government of India to demand of the Turkish authorities that the place should be punished, and to offer British naval assistance for the purpose<sup>16</sup>. He immediately proceeded to Basrah to meet the Ottoman Wali who agreed to take appropriate action. In the meantime, however, Shaikh Jassim bin Thani himself took action against the Naim in Zubarah. Colonel Ross then visited Zubarah and the camp of Sheikh Jassim, pitched about half a mile from the square fort of Murair, in which the Naim, numbering about 500, were besieged. The force with Sheikh Jassim numbered some 2,000 armed men. The Naim besieged in Murair surrendered, on unfavourable terms, not long after Colonel Ross's departure, and Zubarah as a populated place ceased to exist; the inhabitants, between whom and Sheikh Jassim a peace seems to have been arranged by the commander of the Ottoman vessel *Iskanderia*, were mostly removed to Doha. Colonel Ross, who visited Sheikh Jassim in his camp at Zubarah but did not interfere in any way with his action to discipline the Naim, clearly acted in conformity with the British recognition of his authority in Zubarah. Writing about these events of 1878, K. Ferdinand, an author much relied upon by Bahrain, notes:

"... in 1878 Zubarah was finally destroyed by the Al-Thani Shaykh of Dohah, who thereby confirmed his control over the whole of the Qatar peninsula"<sup>17</sup>.

It is Qatar's submission that this incident, together with the almost identical incident some sixty years later (in 1937) described below when Sheikh Abdullah Al-Thani similarly disciplined a recalcitrant section of the Naim tribe in Zubarah, clearly demonstrates the effective exercise of Al-Thani authority in Zubarah. The 1878 Al-Thani assertion of authority was approved and recognised as legitimate by the British as well as the Ottomans. The legitimacy of the 1937 Al-Thani action was also never questioned by the British authorities.

(d) The British Political Resident issued warnings to Sheikh Jassim bin Thani in 1881, treating him as being in effective control of the coasts of Qatar and as "having the power to prevent such movements [by Nasir bin Mubarak] from the Katar Coast" to attack Bahrain from Zubarah as well as pointing out Sheikh Jassim's "duty to exercise vigilance and prevent any warlike movements by sea"<sup>18</sup>.

(e) In 1889, an official Ottoman document reported that prior to the creation of a *nahiye* at Zubarah, Mohammed bin Abdulwahab, a follower of the Al-Khalifah, had, with the consent of Sheikh Jassim bin Thani, settled at the Murair fort outside Zubarah. However, when a dispute arose between them later in the same year, Sheikh Jassim evicted him<sup>19</sup>.

(f) As is also apparent from another Ottoman report of 25 September 1892, Sheikh Jassim levied taxes on those engaged in pearl fishing and other activities from Zubarah. The report states:

"As can be seen from the attached table the yearly revenues from all the pearl boats in Qatar come to two million five hundred and forty *kran*. This includes the tax collected under the name *kallata* by Jassim Al-Thani from all divers and crews, and the tax called *rakabiya*. The tax collected as *zakat* on sheep and slaughtering fees amounts to seventy five thousand four hundred and three *kran*. This total represents the income from the dependent villages of the *kaza* and the *nahiyes* of Zubarah and Udeid..."<sup>20</sup>.

(g) The Court will recollect that as part of the 1874 British declaration by the Governor-General in Council that the Chief of Bahrain "had no possessions on the mainland", the latter was also asked to "rely for support on the assistance of the British Government, which will, if necessary, be given him either to repel attacks by sea or to frustrate a threatening movement from the mainland"<sup>21</sup>. This was exactly the support that was given to Bahrain in 1895 when it was threatened with an attack from Zubarah by a seaborne force (with the backing of Sheikh Jassim and the Ottomans), and British warships destroyed the threatening fleet in Zubarah harbour<sup>22</sup>. This is clear from the report made by the Political Resident, Colonel Wilson, on 15 September 1895 to the Government of India in which he stated, *inter alia*:

"... I have the honour to report, for the information of His Excellency the Viceroy and Governor-General in Council, that on the 6th instant, Commander Pelly, Senior Naval Officer, Persian Gulf Station, having in his judgment, after careful consideration of the facts immediately before him, determined that prompt action was the only means of averting the plunder of Bahrein with its attendant excesses, attacked and destroyed some 44 out of a fleet of native craft assembled off Zobara, armed and ready for an instant descent on that place"<sup>23</sup>.

The British position in this regard was also explained in the British Parliament (as reported in *The Times* of 22 February 1896) in the following terms:

"THE PERSIAN GULF

SIR C. DILKE (Gloucester, Forest of Dean) asked the Secretary of State for India if he could state to the House the reason for the operations conducted during the last year in the Persian Gulf by her Majesty's ships Sphinx and Pigeon.

LORD G. HAMILTON (Middlesex, Ealing) - In consequence of quarrels between the Sheikh of Bahrein, who is under the suzerainty of her Majesty, and other local sheikhs, the chief of the Ali-bin-Ali, apparently supported by the Turks, established himself on the mainland at Zobara, opposite Bahrein, and about 200 dhows assembled there to attack Bahrein. In order to maintain the maritime peace to which the tribes are pledged Commander Pelly, of the Sphinx, was authorized to resist this demonstration provided he was satisfied that the dhows were assembled with a hostile purpose, and to liberate the Bahrein boats which had been forcibly detained. As the dhows after due warning refused to disperse they were attacked on September 6, and 44 were destroyed. On the following day terms were arranged and the peace of the Gulf re-established"<sup>24</sup>.

It is important to note that after the 1895 incident, and consistent with the British position established since 1873 that the Ruler of Bahrain had no rights in Zubarah, the British made no attempt (nor allowed the Ruler of Bahrain) to occupy Zubarah or to displace Sheikh Jassim.

(h) The international reaction to the above incident, which also reflects the Turkish connection with Zubarah at the time, is also apparent from a number of German reports of that period<sup>25</sup>.

(i) In an Ottoman document of 11 February 1896 relating to the events of 1895, Zubarah is presented as very much a part of Qatar:

"Zubarah on the Gulf coast, a subdivision of Qatar, an integral part of the territory of the Ottoman State, was held under gun-fire by the British fleet"<sup>26</sup>.

(j) An Ottoman report of 1896 concerns a proposal for payment of a pension to the relatives of a Sheikh, an Ottoman loyalist (allegedly killed upon his return to Bahrain after the 1895 incident). Those relatives were living in Zubarah, which was clearly regarded as part of Ottoman territory. The report states:

"Sheikh Sultan bin Selame's family of fifty is in a destitute state at the Zubarah ruins. In order to avoid them being exposed to utter destitution, they must be sheltered under the wings of the beneficent Ottoman Sultan; so it is deemed advisable to pay a monthly pension of 750 Kurushes to Ali bin Sultan Selame, son of the Sheikh Sultan, to secure their livelihood. The said amount will barely cover their daily expenses. To secure the livelihood of the progeniture and family of the Sheikh Sultan who, on more than one occasion, fought for the Ottoman State by opposing the seditious activities and provocations by foreigners and made proof of his loyalty to the Ottoman Sultan and Khalife, is but a consequence of the endless mercy of our Sultan. Under the circumstances, I humbly beg that the said pension of 750 Kurushes be granted to the person in question"<sup>27</sup>.

(k) Qatar has already referred to other Ottoman documents describing the peninsula as the *kaza* (district) of Qatar which included the *nahiye* (sub-district) of Zubarah<sup>28</sup>. Two annexes to Bahrain's Memorial<sup>29</sup> clearly support this position, as do a large number of other Ottoman documents referred to in Chapter II of this Reply, and Map No. 15 in the Map Atlas<sup>30</sup>.

(l) An Ottoman letter of 8 April 1903 notes that Zubarah is located "to the north-east of the centre of the *kaza*"<sup>31</sup>.

(m) That Zubarah is an integral part of the territory of Qatar is also apparent from the recognition of the territories of Qatar by the Anglo-Ottoman Convention of 1913, incorporating a provision that the Qatar peninsula would be "governed, as in the past", by Sheikh Jassim bin Thani and his successors<sup>32</sup>.

(n) The British-Qatar Treaty of 1916 and the British Resident's confirmation (reproduced above) to the Ruler of Qatar that "... you are the Ruler of all Qatar and the Treaty extends to the whole of Qatar" must clearly cover Zubarah as part of Qatar<sup>33</sup>.

(o) During the discussions relating to the granting and then to the extension of Bahrain's oil concession in the 1920s and 1930s, Bahrain did not at any time contend that Zubarah was part of its territory to be covered by any concession. Qatar has shown that in fact Bahrain later acknowledged explicitly in 1944 that Zubarah was covered by Qatar's oil concession<sup>34</sup>.

(p) When the Qatar oil concession was finally signed in 1935 with the approval of the British Government, it clearly included the whole of the Qatar peninsula, including Zubarah, as is also confirmed by the map attached to the concession<sup>35</sup>.

(q) As Qatar has shown, in the 1930s Qatar was increasingly concerned to protect the security of its borders and control imports through the imposition of customs duties<sup>36</sup>. When the Ruler of Qatar took steps to impose such controls in the Zubarah area, these efforts were obstructed by a section of the Naim tribe in 1937. While the details of this incident are fully described in Qatar's Memorial and Counter-Memorial<sup>37</sup>, the Court is respectfully referred to certain additional documents which shed more light on the event<sup>38</sup>. For present purposes, it is only necessary to point out that in view of the Naim obstruction, the Ruler of Qatar decided in July 1937 to impose his authority over the dissenting Naim by force and put an end himself to the smuggling and other activities occurring. When the Ruler of Bahrain requested the British to intervene to stop the Ruler of Qatar, the British refused on the basis that Zubarah was very much part of the Ruler of Qatar's territories and the Secretary of State for India concurred with this view<sup>39</sup>. Furthermore, by 5 July 1937, the dissenting Naim had surrendered and their leader, Rashid bin Jabor, agreed with the Ruler of Qatar to obey the laws of Qatar while he resided in Qatar<sup>40</sup>.

6.9 As submitted above, this Al-Thani action in disciplining a section of the Naim tribe in Zubarah was the second such action in 60 years (the first one being in 1878). These two assertions of Al-Thani authority in Zubarah are a clear expression of Qatari sovereignty over Zubarah. The events and facts described above, the consistent British refusals over nearly a century to acknowledge any sovereign rights of Bahrain in Zubarah, as well as Bahrain's numerous disclaimers of sovereignty over Zubarah, establish Qatar's incontestable title to Zubarah. That title was, over the years, recognised by the British, the Ottomans and other European powers. As also shown below, Bahrain's only interest was, firstly, concern for the individuals comprising a section of the Naim tribe and not for any territory in which they may have been present at different times and, secondly, keeping the Naim in good humour to ensure that they helped protect Bahrain against any attacks on its territories from Zubarah. The British shared Bahrain's concern about this last point, and took steps from time to time to prevent threats to the security of Bahrain from Zubarah.

### **Section 3. The Map Evidence**

6.10 The map evidence discussed earlier in this Reply and included in Qatar's Map Atlas confirms the fact that Zubarah has consistently been recognized as forming part of Qatar and as therefore falling under its sovereignty. Since many of the relevant maps have been addressed in connection with the description of the territorial integrity of Qatar (Chapter II) and Qatar's title to the Hawar islands (Chapter IV), the present discussion can be kept brief. Not surprisingly, the maps demonstrate that the territorial integrity of Qatar extended over the entire peninsula including the Hawar islands. They thus necessarily confirm Qatar's sovereignty over Zubarah. In contrast, Bahrain has failed to present any cartographic evidence which even remotely supports its extravagant claim either to Zubarah itself or to an artificially defined area called the "Zubarah Region".

6.11 To give a taste of the extensive cartographic evidence which supports Qatar's position, reference may be made to the following maps in the Map Atlas:

- Maps Nos. 5, 6, 8, 9, 11, 21, 22, 31, 39, 45 and 53, prepared under the auspices of the Justus Perthes Institute between 1875 and 1917, all of which specifically label Zubarah (Sabara) on the maps and show it as part of Qatar by colour coding;
- Map No. 15, prepared by the Ottoman authorities in 1890, depicting the *kaza* of Qatar as extending over the entire peninsula, and identifying Zubarah as a town within that *kaza*;
- Maps Nos. 24 and 29 published in *The Times Atlas*, London, in 1895 and 1900, respectively, which also label Zubarah and show it within Qatari territory;
- Map No. 30, a 1901 map produced by the British War Office, Intelligence Division, which shows Zubarah as part of "El Katr";
- Map No. 20, prepared by the Russian General Staff in 1894, and map No. 88, published by the Central Administration of Geodetics and Cartography of the U.S.S.R. in 1939/40, on both of which Zubarah can be seen to fall within Qatar's territory.
- Map No. 33, published in 1904 by G.S. Hammond and Co. of New York, on which Zubarah is also identified as situated within Qatar;
- Map No. 34, an official French map prepared in 1905 by the Geographic Service of the Ministry of Foreign Affairs, which also labels Zubarah and shows it as falling within Qatar's territory;
- Map No. 43, a further French map published in 1911 by Hachette & Cie., Paris, which depicts the same situation; and

· Maps Nos. 48 (1914) and 57 (1917) published by George Philip & Son, and Maps Nos. 59 (1917), 80 (1935) and 81 (1935), published by John Bartholomew and Son, all of which clearly show Zubarah as part of Qatar.

6.12 As the Court will appreciate, the maps referred to above, which constitute only a sample of the relevant cartography, span a considerable period and come from a variety of official sources and highly respected cartographic houses located in a number of different countries. When considered together with the historical evidence discussed in the previous section, the map evidence leaves no doubt whatsoever as to Qatar's sovereignty over Zubarah.

#### **Section 4. Bahrain's Claim to Sovereignty over Zubarah is Manifestly Ill-Founded**

6.13 Qatar has already shown in its Memorial and Counter-Memorial that the Al-Khalifah - one section of the Al-Utub tribe - along with another section of the same tribe, the Al-Jalahma, settled close to the town of Zubarah in 1766<sup>41</sup>. Qatar has also shown that the Al-Utub and various Qatari tribes took control of Bahrain from the Persians in 1783, less than twenty years later, and that thereafter the Al-Khalifah section of the Al-Utub moved their headquarters from Qatar to Bahrain<sup>42</sup>. After that date, there is no evidence of any control or authority exercised by the Al-Khalifah in or over Zubarah.

6.14 Qatar has also demonstrated that when, in 1868, the British recognised Qatar and Bahrain as separate entities, Zubarah was considered as part of Qatar and not as part of Bahrain<sup>43</sup>, and that during the period of the Ottoman presence in Qatar Zubarah continued to be considered as part of the political entity of Qatar, by both the British and the Ottomans.

6.15 Against this background, Bahrain makes the curious assertion that it has invoked "the most cogent evidence of State activity, as well as continuous and peaceful display of territorial sovereignty, over a period of two centuries", over what it refers to as the "Zubarah Region"<sup>44</sup>. However, both Bahrain's Memorial and its Counter-Memorial are striking for the lack of any evidence, cogent or otherwise, of such sovereignty.

6.16 The present section will in the first place address Bahrain's claim to have exercised sovereignty directly over the so-called "Zubarah Region". Qatar will then deal with Bahrain's claim to have exercised sovereignty over the so-called "Zubarah Region" indirectly through the Naim tribe.

#### **A. The claim of direct exercise of sovereignty by Bahrain over Zubarah**

6.17 It will be noted at the outset that, even before the British recognition in 1868 of the separation between Qatar and Bahrain, there is a dearth of evidence with regard to any exercise of sovereignty by the Al-Khalifah over Zubarah. Bahrain's claim appears to be based, at least in part, upon the assertion that it was the Al-Khalifah who founded Zubarah. There is, however, no basis for this assertion. First, Bahrain seems to have forgotten that it was not only the Al-Khalifah section of the Al-Utub who settled at Zubarah in 1766, but also the Al-Jalahma section which, although it participated in the conquest of Bahrain from the Persians in 1783, subsequently left Bahrain, returned to Qatar, and no longer had any connection with Bahrain<sup>45</sup>.

6.18 Second, in any event, as Qatar has already shown in its Memorial, Zubarah existed before the arrival of the Al-Utub<sup>46</sup>.

6.19 With regard to the period between the time of the Al-Khalifah's departure to Bahrain in 1783 and the 1868 Agreements, Bahrain has produced no evidence of any exercise of authority by the Al-Khalifah in Zubarah. Indeed, as has been seen above, at this time the Al-Khalifah were hardly able to exercise authority in Bahrain itself<sup>47</sup>.

6.20 As for the period following the 1868 Agreements, Bahrain contends that "Ottoman and Al-Thani authority never extended beyond the enclave comprising Doha and its immediate hinterland, despite no less than six attempts to extend their authority to the Zubarah Region"<sup>48</sup>,

and that "Britain and Bahrain rebuffed the Ottoman Empire and the Doha confederation in their attempts to exercise authority over the Zubarah Region from 1874 to 1903"<sup>49</sup>.

6.21 Qatar has already shown in its Counter-Memorial that Bahrain's account of the six events referred to is grossly inaccurate and distorted<sup>50</sup>. A few words should however be added with regard to the incident which occurred in 1903. According to Bahrain, Britain invoked Bahrain's sovereignty over Zubarah on that occasion<sup>51</sup>. In fact, this is just one more example of Bahrain's distortion of the evidence: the sources relied upon by Bahrain in this regard refer only to Bahrain's security; there is not one word about its alleged "sovereignty".

6.22 Thus, Bahrain reproduces a truncated extract from a letter written by the Political Resident in 1903, according to which:

"the occupation of Zobara [by the Ottoman Empire] would be viewed with the greatest concern by the Chief of Bahrein, who considers the place to be an appanage of his, *and whose rights we are bound to maintain...*"<sup>52</sup>.

The whole passage from which this citation has been extracted by Bahrain in fact reads as follows:

"It is, in my opinion, absolutely essential *for the security of the Bahrein islands* that Zobara should not be occupied by the Turks. Apart from the fact that the occupation of Zobara would be viewed with the greatest concern by the Chief of Bahrein, who considers the place to be an appanage of his, and whose rights we are bound to maintain, the prestige which the Turks would gain throughout the countryside by the occupation of this place, in opposition to the well-known views of the British Government, would be so great that an *attack on Bahrein from Katr* could at any time be organized, and the continual presence of a ship of war in Bahrein waters, and perhaps even a military occupation of the islands, would be required"<sup>53</sup>.

In fact, the only concerns of the British here were once more to limit Ottoman influence and to ensure the security of Bahrain, but this did not constitute an invocation or recognition of Bahrain's sovereignty over Zubarah.

6.23 As for the Ottomans, Bahrain contends that they never exercised authority over Zubarah<sup>54</sup>. Qatar does not dispute the fact that there was no permanent official Turkish presence in Zubarah between 1871 and 1915, but this is not the important point. The fact is that the Ottomans always considered Zubarah as an integral part of Qatar and the Ottoman Empire, as indeed did third parties<sup>55</sup>. What is important in the context of sovereignty over Zubarah is that at this time the Al-Thani were exercising authority in the area. As has been shown in the preceding Section, there are numerous examples of the exercise of Al-Thani authority. Bahrain is quite unable either to provide evidence to the contrary or to assert a single comparable example of an act of sovereignty accomplished by itself or on its behalf in or over Zubarah during the period of the Ottoman presence or later.

6.24 A further word should be said about the British request made in 1911 to Sheikh Jassim to allow Bahrainis to settle in Zubarah, in exchange for payment of an annual rent - a request which was refused by Sheikh Jassim. This event has been relied upon in Qatar's Memorial as evidence of the British understanding that Qatar had full and effective control over Zubarah<sup>56</sup>. Bahrain advances a twisted interpretation of the same event, however, characterising it as an attempt by Britain "to entice Jasim bin Thani into agreeing to the *de jure* recognition of the *de facto* situation in the peninsula" in the context of "concerted action by Britain to follow a policy that was described by British officials as: 'devoted to contracting this Chiefship [Sheikh Jasim] to its narrowest possible limits'"<sup>57</sup>.

6.25 The idea that the request was made in the context of such a "concerted action" by the British is once more a complete misreading by Bahrain of the documentary evidence. First, the request

was made by Britain in 1911, while the document which allegedly sets out a concerted British policy dates from 1905. Second, the suggestion made in 1905 that Sheikh Jassim's authority should be contracted to the narrowest possible limits was a personal suggestion by the Political Agent, linked to the British desire to restrict the concomitant Ottoman authority, and was quickly dismissed<sup>58</sup>.

6.26 Furthermore, Bahrain's suggestion that Sheikh Jassim was somehow being bribed to recognise "the *de facto* situation in the peninsula" cannot be reconciled with the fact that the British made the request to Sheikh Jassim, offered payment of an annual rent, and took no measures to contest Sheikh Jassim's refusal. In Qatar's submission, these are all clear indications that the British considered that Sheikh Jassim was sovereign over the territory concerned.

6.27 Qatar has already demonstrated the fallacy of Bahrain's contention that after the 1913 Convention, the Al-Thani were losing their control over Doha and the Ruler of Bahrain "remained in possession of the northern part of the Qatar peninsula"<sup>59</sup>. In this regard it will be recalled that in 1919, the Ruler of Bahrain tried to re-open the Zubarah issue by asking the British to be allowed to occupy that place. He was however coolly received by the Political Agent, who wrote on 6 December 1919 that the ruling family of Bahrain were "rather unnecessarily filled with ideas of their own importance" and that:

"... the suggestion of Shaikh Isa's that he be allowed to revive a ten year-old controversy should be nipped in the bud. The new move is obviously an attempt to extend his power territorially and financially at the expense of Ibn Saud and Abdullah bin Jassim [Al-Thani] and will only end in trouble"<sup>60</sup>.

The sketch map attached by the Political Agent to his letter clearly shows that Zubarah was an integral part of the territory of Qatar<sup>61</sup>.

6.28 Finally, Bahrain contends that its "sovereignty over Zubarah could not have been lost by Qatar's armed attack in 1937"<sup>62</sup> and that it made "24 officially recorded protests and claims in relation to the Zubarah Region... to Britain and Qatar between 1937 and 1961"<sup>63</sup>. Qatar will not review all these alleged protests and claims, which are listed but not discussed in the Bahrain Counter-Memorial. However, it may be noted that in general they are related less to sovereignty than to personal jurisdiction, private property rights or simply questions of prestige<sup>64</sup>. Moreover, as has already been noted and as will be further discussed below, the British Government never recognised any Bahraini claim to sovereignty in or over Zubarah, and Bahrain has on numerous occasions expressly disclaimed sovereignty over Zubarah<sup>65</sup>.

6.29 Having reviewed Bahrain's contentions above, it is striking that Bahrain has presented absolutely no evidence whatsoever of the exercise by Bahrain of any direct sovereignty over Zubarah at any time during the last 200 years.

#### **B. The claim of indirect exercise of sovereignty by Bahrain over Zubarah, that is to say, through the Naim tribe**

6.30 As there is no evidence to support any direct exercise of authority by the Al-Khalifah in Zubarah, Bahrain lays great stress upon the alleged relationship of the Naim tribe with the Ruler of Bahrain in a further attempt to prove its sovereignty<sup>66</sup>.

6.31 Qatar has already shown in its Counter-Memorial that the supposed allegiance of the Naim towards the Ruler of Bahrain cannot serve as a basis for Bahrain's claim to Zubarah since:

- the links of allegiance of the Naim towards the Ruler of Bahrain have not been proven<sup>67</sup>;
- the territory claimed by Bahrain was not occupied permanently or even regularly by the Naim<sup>68</sup>;

- the territory claimed by Bahrain was frequented - on the rare occasions when there was settlement in that region - not only by sections of the Naim tribe other than the Al-Jabr (the

single section on which Bahrain relies to establish its title to Zubarah)<sup>69</sup>, but also by other tribes<sup>70</sup>;

- even if there had been some link between the Al-Jabr section of the Naim tribe and the Ruler of Bahrain, this could not serve as a basis for any claim of title to Zubarah by Bahrain in the absence of any evidence of the exercise of acts of political or public authority by Bahrain in Zubarah<sup>71</sup>.

6.32 Nevertheless, Bahrain has continued to argue that it exercised its sovereignty continuously over the so-called "Zubarah region", from the 1760s until 1937, by means of the presence of the Naim tribe which, according to Bahrain, was at all times loyal to the Al-Khalifah. In the following sub-sections, Qatar will examine the various assertions made by Bahrain in its Counter-Memorial in this respect. More particularly, Qatar will show that Bahrain has made numerous misstatements with regard to the Naim; and that the alleged relationship between Bahrain and the Naim has no significance with regard to sovereignty over Zubarah.

### **1. Bahrain's misstatements with regard to the Naim**

6.33 Bahrain's pleadings contain a number of contentions regarding the role of the Naim which are simply not supported by the evidence upon which Bahrain relies.

6.34 A critical element of Bahrain's claim is that the Naim maintained a permanent presence in the "Zubarah Region" throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries until 1937<sup>72</sup>. Bahrain has produced no contemporary evidence which proves the existence of an identifiable "Zubarah Region" distinct from the town of Zubarah. Moreover, not only Qatar but also Bahrain has produced evidence that Zubarah was completely deserted for long periods during the 19<sup>th</sup> and 20<sup>th</sup> centuries. For example, Lorimer records the destruction of Zubarah by fire in 1811<sup>73</sup> and the re-occupation of "the deserted site of Zubarah" some thirty years later, and for a period of only a few months, by Sheikh Abdullah and Sheikh Mohamed Al-Khalifah<sup>74</sup>. Although the Naim returned to Zubarah at some time thereafter, it should be recalled that they left again in 1878 and were mostly removed to Doha<sup>75</sup>. This information is confirmed by an appendix to the 1879-1880 Report of the Political Resident, which states that Zubarah, like Khor Hassan and Robeyjah, was "uninhabited"<sup>76</sup>. Some years later, in a letter addressed to the Turkish Ministry of the Interior in 1903, the Governor of Basrah wrote:

"As Udeid and Zubarah *had no population and settlements*, the Mudirs formerly appointed in Katar were on the regular payroll without having discharged their functions... The Zubarah and Udeid nahiyehs are dens of robbers forming an *uninhabited area* devoid of all shelter where the supply of food and other necessaries is beyond possibility"<sup>77</sup>.

While Qatar does not dispute that Zubarah may have been frequented from time to time - indeed, as was usual in the Gulf region, a number of tribes had a nomadic way of life which led them to move from one place to another - the above evidence cannot be construed as supporting the idea of a permanent settlement in Zubarah or its vicinity in the 19<sup>th</sup> century and the earlier part of the 20<sup>th</sup> century.

6.35 Bahrain also contends that "an 1893 report by the Ottomans confirmed that the Naim tribe was living in the Qatar peninsula, that its tribal *dirah* included Zubarah and that it was a Bahraini tribe"<sup>78</sup>. What Bahrain neglects to point out with regard to this report is that the Naim are listed as one of the three principal tribes "in the territory of Qatar" - a description which immediately rules out any idea of their somehow conferring Bahraini sovereignty over the areas within which they moved. Furthermore, there is no mention in the report of a Naim *dirah*.

6.36 It will be recalled that in its Counter-Memorial Bahrain put forward the idea that until 1937 the Qatar peninsula was shared out among three "confederations", one of which was the "Naim-led tribal confederation in the north (whose allegiance lay with the Al-Khalifah dynasty)" which, along with Saudi tribes, "dominated" what Bahrain refers to as "the pearl merchant enclave in

Doha (the tiny Al-Thani-led Doha confederation...)"<sup>79</sup>. The idea of a "Naim-led tribal confederation" which somehow exercised the authority of the Ruler of Bahrain in the Qatar peninsula is just as far-fetched as the idea of the Al-Thani being no more than the leaders of a tiny and insignificant group of merchants in Doha<sup>80</sup>. This "Naim-led tribal confederation" is again something which has appeared for the first time in Bahrain's Counter-Memorial.

6.37 In order to support its contentions in this regard, Bahrain has regrettably engaged again in mis-citation of the evidence. For example, we read in the body of the Bahrain Counter-Memorial that "the Naim-led northern tribal confederation participated in Muhammed bin Khalifa's 1848 victory over a challenger to his throne"<sup>81</sup>; yet the document cited in support of that statement says no more than that Sheikh Mohamed "was received by the Al-Naim tribe who were ready to fight"<sup>82</sup>. There is no mention of a "Naim-led tribal confederation". Bahrain further relies upon a 1906 report in support of its statement that "the loyalty to Bahrain of the Naim-led tribal confederacy in the north of the Qatar peninsula remained undisputed"<sup>83</sup>. Reference to that report shows, however, that there is no mention of the Naim at all, and that the author judged, with respect to the tribe concerned, that "the Chief of Bahrein is quite incapable of imposing his will upon them for any practical purpose"<sup>84</sup>. A final example of Bahrain's exaggeration in this regard concerns the alleged integration of "the Naim-led confederation" into "the political economy of Bahrain"<sup>85</sup>; again, the source upon which Bahrain relies refers only to the Naim themselves, without mentioning any other tribes that might have formed such a confederation<sup>86</sup>. As to the supposed unswerving allegiance of the "Naim-led confederation" to the Al-Khalifah, Qatar has already shown, and will show further below, that this notion is quite unfounded<sup>87</sup>.

## **2. Bahrain's relations with the Naim are of no significance with regard to sovereignty over Zubarah**

6.38 Bahrain argues that the loyalty of the Naim to the Al-Khalifah remained undisputed until 1937 and that this provided at least one basis for its claim of sovereignty<sup>88</sup>. The evidence that Bahrain relies upon simply does not support this contention.

6.39 First, it must be recalled that the immediate precursor to the 1868 Agreements was an incident which occurred in October 1867 between the Naim and the Ruler of Bahrain. That incident was reported by the Assistant Political Resident as follows:

"One Ali bin Thamir al Naemiee of the Bedouins of Guttar having been seized and sent to Bahrain by Shaikh Ahmed bin Mohamed bin Sulman the representative of the Chief of Bahrain on the Guttar Coast for going to his tribe, the naimes of Wakra, the naimes and the people of Biddah, Doha and Dougha combined and demanded his release. This demand was refused, and they then determined to turn Shaikh Ahmed out of Wakra"<sup>89</sup>.

As Qatar has already shown in its Memorial, this eventually led to the sack of the eastern towns of Qatar by the united forces of Bahrain and Abu Dhabi, the scattering of the members of the Qatar tribes (including the Naim) throughout the region, the retaliation led in June 1868 by the united tribes of Qatar against Bahrain, and finally the conclusion of the 1868 Agreements<sup>90</sup>.

6.40 In the light of these events, it is easy to understand why the British were sceptical when in 1873 the Ruler of Bahrain asserted that the Naim were his subjects. As Qatar has noted, the British observed at that time that the rights claimed by the Ruler of Bahrain over the Naim were, at best, purely nominal<sup>91</sup>. In addition, they observed that the Ruler of Bahrain "has not the power if he wished to protect tribes residing in Guttur". Writing to the Political Resident, the First Assistant Political Resident stated that:

"From what I have heard whilst living in Bahrein, I should say that some years ago the Naim, together with many other of the Guttur tribes, were in certain ways dependencies of Bahrein; but the amount of authority exercised by the rulers of Bahrein over Guttur seems to have

varied in proportion to the power of coercion those rulers possessed; if the Chief of Bahrein was strong the tribes acknowledged his supremacy; if he was weak they denied it"<sup>92</sup>.

These remarks can hardly support Bahrain's argument that there existed a special and unwavering relationship between the Ruler of Bahrain and the Naim.

6.41 However, Bahrain mentions certain British documents dating from the 1870s and 1880s, which reported that the Naim "maintain intimate friendly relations with the Chief of Bahrain"<sup>93</sup> and that the latter "makes yearly presents of considerable value" to the Naim<sup>94</sup>. But this is not indicative of strong ties of allegiance between the Naim and the Ruler of Bahrain, especially when, as one of the same sources recorded, "a large portion of the revenues of Bahrain are dissipated in this manner without any ostensible compensating advantage"<sup>95</sup>. This is certainly not sufficient to establish a relation of overlord to subordinate, with the former exercising sovereignty over the territory occupied by the latter.

6.42 Bahrain similarly observes that in 1875 the Ruler of Bahrain was said to spend:

"... three to four thousand krans every month on the people of Zobarah, and gives Nasir bin Jabor [the Naim headman] 300 krans per mensem"<sup>96</sup>.

Beside the fact that this is not significant in terms of allegiance<sup>97</sup>, Bahrain has failed to reproduce the whole extract, which continues as follows:

"This salary to Nasir bin Jabor has been disbursed since the siege of Zobarah last year"<sup>98</sup>.

In other words, even assuming, *arguendo*, that such payments could imply ties of allegiance, they are certainly not proof of the longstanding links of allegiance that are alleged by Bahrain<sup>99</sup>.

6.43 Bahrain also contends that the so-called "Naim-led confederation" was integrated into the political economy of Bahrain. However, Lorimer recalled, writing in 1908, that in the summer:

"most of them [the Naim] remove to Bahrain and form camps in the northern part of the main island, but some take up their summer quarters near Dohah in the Qatar peninsula"<sup>100</sup>.

In other words, it cannot seriously be contended that the Naim had special and exclusive links with Bahrain.

6.44 Qatar does not dispute that some of the Naim may have migrated between Qatar and Bahrain. However, Bahrain seems to imply that the territory of one country frequented by private persons of another country and even nomads can become the territory of the latter. In Qatar's submission, such a criterion cannot be a basis for any title of sovereignty. As Sir Gerald Fitzmaurice stated:

"It has long been well settled that the hunting, whaling, guano collecting, exploring and other similar activities of private individuals acting on their own, however numerous and extensive, do not *per se* confer on their State a title to sovereignty over the areas concerned"<sup>101</sup>.

Reference may also be made to the recent Award in the *Eritrea-Yemen* case, where the Arbitral Tribunal noted that fishing activities by private persons do "not constitute evidence of *effectivités* for the simple reason that none of these functions are acts *à titre de souverain*"<sup>102</sup>. This was of course particularly true in the Gulf where, from time immemorial, people moved from one territory to another in pursuit of their economic activities.

6.45 In any event, after the incident of 1937, which Bahrain characterises as a Qatari invasion of the territory of Bahrain's "Naim-led tribal confederation in the north"<sup>103</sup>, and after the Naim had agreed to obey the laws of Qatar, an Intelligence Report of the Political Agent of August 1937 recorded that:

"The Shaikh [of Bahrain] asked for written permission to allow the Naim to come to Bahrain if they so desired which was granted, but the Naim did not appear to desire to leave Qatar

where they had sufficient grazing for their flocks which probably they would not have been able to obtain in Bahrain"<sup>104</sup>.

Accordingly, even if the Naim were to be regarded as a Bahraini tribe, their presence in parts of Qatar was determined by whether there was better grazing there or in Bahrain, and can clearly provide no support to any Bahraini claim to have exercised authority over any part of Qatar.

6.46 Moreover, there was no special and exclusive relationship between the Rulers of Bahrain and the Naim. In this regard Bahrain refers to Lorimer's observation that the Naim had "immigrated from Oman several generations ago at the invitation of the Utub, then in Qatar, for the purpose of expelling the Al Mussalam"<sup>105</sup>, inferring from this that:

"The Naim tribe and the Al-Khalifa quickly entered into a mutually advantageous relationship of Ruler/benefactor and dependent/beneficiary"<sup>106</sup>.

There is no basis for such an inference. As Qatar has already recalled in its Counter-Memorial<sup>107</sup>, Lorimer stated in the same extract that:

"The Bedouins of the northern Na'im are retained as *mercenaries* both by the Shaikh of Bahrain and by the Al Thani Shaikhs of Dohah, and the protection of those Shaikhdoms is considered to devolve principally upon them during the absence from home of the pearl fleets"<sup>108</sup>.

Lorimer added:

"Their efficiency and trustworthiness are not however beyond doubt, and their presence in Bahrain in summer is a source of annoyance to the peaceable agriculturists of other tribes"<sup>109</sup>.

Consequently, the picture painted by Bahrain of a loyal tribe owing exclusive allegiance to the Al-Khalifah does not square with the historical facts as reported by Lorimer.

6.47 Some years later, in 1926, Prideaux, the Political Resident, noted that it was necessary for the Sheikh of Qatar:

"to arm contingents from the Bedouin tribes - Bani Hajir, *Naim* and Manasir - who, although they do not reside all the year round in his territory but spend periods in the interior of Trucial Oman, yet *admit themselves to be feudatory to him* and must be controlled by periodical gifts of arms and ammunition"<sup>110</sup>.

The implication of this is that the Naim owed their allegiance to the Ruler of Qatar.

6.48 Bahrain however stresses the fact that "members of the Al-Jabr branch of the Naim tribe - including their Chief" appear on the Bahrain Civil Lists and Pension Lists dating from the 1920s<sup>111</sup>. Qatar would simply comment as follows. Even if, *arguendo*, the presence of members of the Al-Jabr section of the Naim tribe on such lists could have had some significance, it was limited to a few members of a single section of the tribe and to their chief, and had no significance for the rest of the Naim tribe.

6.49 Bahrain further contends that in return for financial support received from the Ruler of Bahrain:

"... the Naim tribe paid taxes to the Ruler of Bahrain, acted as his guards, and performed a variety of services for him"<sup>112</sup>.

These three assertions are disputable and/or irrelevant. As a general point, it should be noted that Bahrain makes these assertions almost immediately after having referred to the report stating that "a large portion of the revenues of Bahrain are dissipated in this manner *without any ostensible compensating advantage*"<sup>113</sup>.

6.50 Bahrain has produced no evidence whatsoever of the payment of tax by the Naim to the Ruler of Bahrain. The authority that it relies upon in this regard is in fact referring to the

payment not of tax, but of tribute or *zakat*. Moreover, it is interesting to note that the authority cited by Bahrain wrote as follows:

"Le traité de 1868 stipule en outre le paiement d'un tribut par les communautés tribales au dirigeant de Bahrain (en 'krans'): al-muhandat 1700; al bu ainain et Naim, 1500; al bu kuwarah, 500; keleb, 500; Sudan, 1500; Muhammad bin Thani pour les Maadhid et Musallam, 2500; Amamarah, 800; soit 9000 'krans' au total ou 400 livres sterling par an (IOR/5/15/2/30, file E 7). De ce montant, 4000 krans devaient être délivrés par Muhammed ibn Thani au principal *shaykh* des al-naim, le reste étant envoyé à Bahrain pour être transmis à Riyadh. Dans son rapport, le Résident politique Pelly explique:

'this payment of tribute does not affect the independence of Guttur [Qatar] in relation to Bahrein. But it is to be considered as a fixed contribution by Guttur [Qatar] toward a total sum payable by Bahrein and Guttur combined, in view to securing their frontiers from molestation by the Naim and Wahabee bedouins, more particularly during the pearl diving season, when the tribes of Guttur and Bahrein, occupied at sea leave their homesteads comparatively unprotected' (Kelly, 1968: 675).

Ce tribut - que les al-na'im nomment *jazi'ah* - fut acquitté deux années seulement. On sait que l'attribution d'une part de la *zakat*, à laquelle on réfère plus communément, ni ne confirmait ni n'infirmit un pouvoir réel de ceux qui la percevait. Elle symbolisait une soumission religieuse et la pacification. Ainsi délivrée aux al-na'im il semble pourtant qu'une responsabilité dans le respect et le maintien de l'ordre leur était dès lors dévolue. Une idée que l'on voit confirmée par des écrits plus tardifs les qualifiant de mercenaires engagés aux services des *shuyukh* de Bahrain et de Qatar et pour la 'protection of those shaikhdoms' (Lorimer, 1970, II: 1302)<sup>114</sup>

6.51 As for the Naim acting as guards of the Ruler of Bahrain, Bahrain has mentioned only one isolated example, dating from 1869, when Colonel Pelly wrote to Mohamed bin Thani that he had invited-

"Esau bin Alee to visit me here (Bahrein) with an armed escort of the Naeem tribe, and I desire that he may not be interfered with in any way"<sup>115</sup>.

As has been noted above, the Naim tribe acted as mercenaries for both the Al-Thani and the Al-Khalifah, and there is moreover nothing to suggest that the Naim referred to in this context were Naim from Qatar, and not Naim normally resident in Bahrain.

6.52 Finally, as to the "variety of services" allegedly performed by the Naim for the Ruler of Bahrain, Bahrain refers only to Section 2.1 of its Memorial and Section 2.2 of its Counter-Memorial, where very few examples of such alleged services are to be found.

6.53 One such example which, according to Bahrain, proves "the loyalty to Bahrain of the Naim-led tribal confederacy in the north of the Qatar peninsula" related to a shipwreck that occurred off the north of Qatar in 1906<sup>116</sup>. Captain Prideaux, the British official who investigated the case, was told by a local sheikh that he was a subject of the Ruler of Bahrain and that Captain Prideaux should address himself to that Ruler<sup>117</sup>. This incident not only does not confirm what Bahrain alleges, however, but it also confirms the total lack of power of Bahrain in Qatar.

6.54 First, the document quoted by Bahrain does not say anything about any "Naim-led tribal confederacy" or indeed Zubarah; the document only mentions the sheikh of a village, "Abu Dhaluf, at the north-west end of the Katr peninsula". Second, Bahrain does not mention the fact that in 1902 the British had decided that the Ruler of Qatar "should continue to be held responsible for the behaviour of the Bedouins of Qatar"<sup>118</sup>. Finally, it may be noted that Captain Prideaux stated that:

"It was a considerable surprise to me to find that the people of this part of Katr should still ostensibly call themselves Bahrein subjects, but, as the Chief of Bahrein is *quite incapable of*

*imposing his will upon them for any practical purpose*, I submit that this fact should not debar us from dealing with the tribes of the Katr mainland, and especially those who do not acknowledge the sovereignty of the Bin Thani family direct, in virtue of our claim to maintain the maritime peace"<sup>119</sup>.

6.55 Contrary to what Bahrain asserts, there is no evidence of the Naim dealing with "rebels"<sup>120</sup> (this being apparently a reference to the Al-Thani) on behalf of the Ruler of Bahrain, either in Zubarah or anywhere else in Qatar. Bahrain refers to British documents of 1887 and 1888 which, according to Bahrain, record "the Naim Sheikhs' visits to the Ruler of Bahrain to request assistance in their tribal struggles and in their struggles against the Doha confederation"<sup>121</sup>. In fact, the documents referred to by Bahrain allude to only one visit of one member of the Naim "on behalf of Jasim bin Thani"<sup>122</sup>. Furthermore, the Ruler of Bahrain is reported as having replied that if the Naim wanted "to side with Jasim they were free to do so, but if they wanted Sheikh Eesa they will be welcome on their island (of Bahrain), which is of extensive dimensions"<sup>123</sup>. Leaving aside the fact that the ties of allegiance of the Naim with the Ruler of Bahrain can clearly not have been very strong if the Ruler of Bahrain was happy to allow them "to side with Jasim", the fact that the Naim were also stated to be welcome on the island of Bahrain if they did not want to do so confirms once more that the Ruler of Bahrain himself considered that the authority and territory of Bahrain did not extend to any part of Qatar.

6.56 The 1937 events have already been dealt with above and in Qatar's previous written pleadings<sup>124</sup>. These events, which culminated in the submission of the dissenting Naim to the Ruler of Qatar, again confirmed the sovereignty of Qatar over Zubarah<sup>125</sup>. They also demonstrated that the alleged unswerving loyalty of the Naim to the Ruler of Bahrain simply did not exist. Thus, the Political Resident wrote that:

"Attitude of Naim is reported to be that, if they do not receive support from the Shaikh of Bahrein against the Shaikh of Qatar, they will 'adhere to Ibn Saud'. They are stated to have complained to Saud bin Jiluwi, Governor of Hasa, against the Shaikh of Qatar... Naim numbering about 1000 (the men being (? armed)) with camels and flocks are concentrated at Zubarah. This appears to me to indicate a possible migration of Naim to Hasa"<sup>126</sup>.

The fact that the Naim were prepared to adhere to Ibn Saud and possibly to migrate to Hasa demonstrates the weakness of any attempt to found territorial sovereignty upon links of allegiance. The Court will of course recall that the same considerations apply, in the context of the dispute over Hawar, to the relationship between the Ruler of Bahrain and the Dowasir in the 1920s, the Dowasir in fact carrying out their threat of adhering to Ibn Saud in 1923<sup>127</sup>.

6.57 The document relied upon by Bahrain is also revealing of British views as to Bahrain's alleged sovereignty over Zubarah. The Political Resident wrote:

"I do not feel we should interfere if Naim emigrates to Saudi Arabia. Nor am I of the opinion that we should take any forcible measure against either side in the event of a clash between Naim and Shaikh of Qatar... Political Agent, Bahrein, however, should of course continue his efforts at persuading all parties concerned to keep peace. In particular Shaikh of Bahrein should be prevented from sending reinforcements to the Naim at Zubarah, which, apart from other considerations, would be against his *treaty of 1861* as it would involve a *breach* of (? maritime) peace"<sup>128</sup>.

This appears to show that the obligation of the Ruler of Bahrain not to interfere on the territory of Qatar had, in the view of the British authorities, been binding upon successive Rulers of Bahrain since 1861.

6.58 In sum, the evidence shows that even if there might at times have been weak or transitory links between the Ruler of Bahrain and some of the Naim, the Ruler of Bahrain was unable to exercise any authority over them. On the contrary, Qatar has drawn attention to the fact that the

Chief of Bahrain himself admitted to Major Grant in 1877 the real basis of his relationship with the Naim. He stated that he had dealings with them, made presents to them and received them in Bahrain because he had no choice, for fear of the tribe joining with his enemies (at the time, Nasir bin Mubarak) and attacking the Bahrain islands from Zubarah<sup>129</sup>. The evidence also shows that from at least 1867 onwards, the Naim from time to time sided with the Al-Thani against the Al-Khalifah, and that the tribe's relationship with both Qatar and Bahrain was essentially a mercenary relationship. In these circumstances, there can be no question of the Ruler of Bahrain exercising his authority over the Naim or of any durable links of allegiance between the Naim and the Rulers of Bahrain. It necessarily follows that Bahrain's contention that it exercised sovereignty over Zubarah indirectly through the Naim cannot be sustained, and it is therefore unsurprising that Bahrain has produced no evidence of any acts of authority performed by the Naim in Zubarah or any other part of Qatar on behalf of the Rulers of Bahrain.

**Section 5. Bahrain's Claim to Zubarah was never recognised by the British; it was not supported in Bahrain itself; and it was repeatedly disclaimed by the Ruler of Bahrain**

**A. Britain's refusal to recognise the Bahraini claim to Zubarah**

6.59 The nature of the Ruler of Bahrain's relationship with the Naim and its consequences is discussed more fully above. For the present purposes, it is only necessary to point out that the British never recognised that such a relationship was in the nature of allegiance that entitled Bahrain to exercise any territorial sovereignty in or over Zubarah or the so-called "Zubarah Region". The Court will recall that Qatar has dealt in detail with the British response to Bahrain's claim relating to Zubarah when it was first made in 1873<sup>130</sup>. Qatar has shown that the British rejected the claim as a result of investigations made by local British officials at the time<sup>131</sup>. This was followed by a decision by the Governor General in Council of the Government of India in 1874 that the Ruler of Bahrain had no possessions on the mainland of Qatar<sup>132</sup>. This decision was duly communicated to the Ruler by the Political Resident in December 1874<sup>133</sup>.

6.60 Bahrain claims in a sub-heading in its Counter-Memorial that its "claim to rights in Zubarah was recognised by Britain"<sup>134</sup>. However, an examination of what follows under this sub-heading contains no reference to any evidence that supports such a claim. Bahrain in fact proceeds to provide reasons why the British *did not* recognise Bahrain's claims in Zubarah, and in effect tries to argue that those reasons did not affect its claim to rights in Zubarah. The main explanation that Bahrain offers is that Britain, in its own interest, "did not want to be dragged into a war - even a proxy war - with the Ottomans"<sup>135</sup>, suggesting that this could have resulted from allowing Bahrain to interfere, in any way, in Zubarah. Bahrain admits that the British authorities advised its Ruler that if protection under the 1861 Treaty was to be accorded to him, "he must not be the aggressor or undertake measures... considered inadvisable by the British Government"<sup>136</sup>. Bahrain fails to recognise that the British were therefore warning him not to commit a breach of the 1861 Treaty by any aggression across the sea if he desired the benefit of protection under that Treaty. Bahrain clearly accepted the warning so as to avail itself of the benefits under the Treaty and, as shown below, the British thereafter acted repeatedly in discharge of their obligations under the 1861 Treaty in protecting Bahrain and ensuring its security. Having obtained the full advantage of British protection under the Treaty for over a century, Bahrain surely cannot now blame the British for not supporting its claim to rights in Zubarah which the British had in any case rejected after Major Grant's investigation in 1873.

6.61 Bahrain then claims that Britain prevented the Ottomans from exercising any authority in Zubarah specifically because of Bahrain's rights there<sup>137</sup>. While it has been shown to be part of British policy in the late 19<sup>th</sup> century to refrain from according formal recognition of Ottoman claims to territory in the region, Bahrain fails to realise that this had nothing to do with "Bahrain's rights" in Zubarah. Thus the British did not similarly prevent any exercise of Al-Thani authority in Zubarah. As shown above, when the Al-Thani disciplined the Naim in Zubarah in

1878 and again in 1937, the British acquiesced in such action and took no steps to protect any alleged claim of Bahraini rights in Zubarah, having rejected that claim in 1873<sup>138</sup>. Similarly, when in 1895 the British destroyed a fleet in Zubarah harbour which posed a threat to Bahrain's security, there was never any question of allowing any Al-Khalifah presence or exercise of authority in Zubarah.

6.62 What is particularly important is that even Bahrain's so-called excuse, namely, that due to the Ottoman presence in Qatar, Bahrain was prohibited by the British from asserting any rights in Zubarah, disappeared from 1913. In that year, under the Anglo-Turkish Convention, the British, far from recognising any Bahraini rights in Zubarah, not only acknowledged the Al-Thani rights to the entire peninsula but also expressly undertook not to allow Bahrain to interfere on the Qatar peninsula even after the Ottomans had left Qatar.

6.63 Bahrain then seeks to rely on the views of individual British officials who might from time to time have expressed support or sympathy for Bahrain's claims relating to Zubarah<sup>139</sup>. Bahrain fails to recognise that such views never became part of official British policy, which continued to be a refusal to accept any Bahraini claims in Zubarah from 1873 onwards. The most striking examples of the individual views on which Bahrain seeks to rely are those expressed in 1937 by the then Political Agent, Colonel Loch, in his telegram of 30 March 1937 and a Note of 12 April 1937 to the Political Resident (Fowle)<sup>140</sup> as well as a letter of his successor, Capt. Hickinbotham, of 22 September 1937<sup>141</sup>, also addressed to Fowle. However, Bahrain fails to draw attention to the fact that Fowle's first response to Loch was a telegram stating "Personally I am of the opinion that Zubara definitely belongs to Qatar but I am writing to His Majesty's Government"<sup>142</sup>. Thereafter, and having conducted a fuller investigation, Fowle, in his considered report and recommendations of 5 May 1937 to the Secretary of State for India, concluded that in spite of his friendly feelings about Britain his view was that "juridically, Bahrain's claim to Zubarah must fail"<sup>143</sup>.

6.64 Further evidence of this continuing British position that Qatar has recently unearthed is an Intelligence Report of the Political Agency in Bahrain for July 1945 which records:

"For an hour and a half, after sitting with him in the Joint Court, the Political Agent listened to His Highness the Sheikh on the subject of his claims, rights, wrongs and grievances in and concerning Qatar. Since the implication of most of the Sheikh's arguments was, as usual, that he had sovereign rights in part of Qatar territory (Zubarah) - rights which His Majesty's Government have never admitted - the conversations resulted in little else but the exhaustion of the Political Agent"<sup>144</sup>.

6.65 Qatar has already shown that when the Ruler unilaterally requested the British for a final decision in regard to his claim of rights in Zubarah and after the issue was considered by the British Foreign Secretary, Mr. Selwyn Lloyd, the Ruler of Bahrain was expressly informed by the Political Resident in his letter of 10 August 1957 that "Her Majesty's Government have never supported any claim by Bahrain to sovereignty in Zubarah"<sup>145</sup>. He was further informed that various arrangements for special facilities (even the rights of Bahraini visits etc. to Zubarah) negotiated in the past with the Ruler of Qatar could no longer be continued, as considerations of Qatar's security required strict entry arrangements<sup>146</sup>. A further attempt by the Ruler of Bahrain to revive his complaints concerning Zubarah in 1961 was similarly rejected, his attention being drawn to the above-mentioned letter of 10 August 1957 from the Political Resident<sup>147</sup>.

### **B. Bahrain's disclaimers of sovereignty**

6.66 Qatar has set out in its Memorial details of various occasions when the Ruler of Bahrain expressly or by implication disclaimed sovereignty over Zubarah and once even stated that any such claim was more a matter of prestige than of anything else<sup>148</sup>. Qatar has given further instances of such specific disclaimers of sovereignty by the Ruler of Bahrain in its Counter-

Memorial<sup>149</sup>. It is of particular importance to note that Bahrain has made no attempt to deny Qatar's allegations of Bahraini disclaimers of sovereignty in Zubarah.

### C. Lack of any support in Bahrain for the Ruler's claim

6.67 It is also of interest to note that Belgrave, as well as members of the Bahraini ruling family other than the Ruler himself, were aware the British Government had never recognised Bahrain's claim to Zubarah; nor did they believe there was any merit in the claim. This is apparent from the following entries in Belgrave's personal diaries:

(a) "Saturday May 1 1954

Rode, went up to Jufair with HH & from 9-30 till 1-30 talked mostly about Zubara. B told him that he had been over to Qatar, seen Z & studied all the files & papers & made up his mind & was now reporting to HMG & recommending an arrangement which included allowing Qatar patrols to patrol Zubara, but not to interfere with Bahrain people - HH of course very angry and upset and said he could never agree of his own accord. He claims what amounts to sovereignty & *the BG never has & never will admit this*. At 1 o'clock we had been invited to luncheon with the Burrows to meet Hafiz Wahaba & Yusuf Yaseen & at half past we were still discussing Zubara, however the meeting finally ended & HH, very angry with almost no voice - he has been having a cold - left. He was not as unreasonable as usual but insisted that he spoke for the family & the people of Bn, *whereas none of them care a bit, all are sick of the Qatar quarrel & Zubara*"<sup>150</sup>.

(b) "Thursday February 21 1957

Busy morning & very late coming up, a lot of people in & out. Sh Abdulla came in & we discussed *HH's attitude about Zubara, which, all agree, is unreasonable*. It seems the sons met Sh Ali of Qatar when hunting & he was very friendly & had them to dinner at his camp. HH however never varies in his detestation of the Qatar people & his claim, *which he himself, & only he, really believes. Days & weeks & months of time have been wasted talking about it - or rather listening to HH on the subject*"<sup>151</sup>.

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### FOOTNOTES

1 See, QMJA, para. 3.37.

2 *Ibid.*, Annex II.23, Vol. III, p. 145.

3 QR, Annex III.59, Vol. 3, p. 361.

4 In this context, the Court will recall the observations of Sheikh Hamad bin Abdullah of Qatar to the effect that "[the] graves... belonged to the dead and would continue to do so and that no one would interfere with them. There are Al Thani buried under the Petroleum Concessions Limited tennis court at Jufair but that does not give the living Al Thani any right to play tennis on the P.C.L. court!" (QM, Annex III.244, Vol. 8, p. 199; and *see*, QM, para. 8.48, fn. 67).

5 See, QM, Chaps. V and VIII; QCM, Chaps. III and V; and Chaps. II and III, above.

6 See, QCM, para. 3.45 and Chap. II, above.

7 QCM, para. 2.24, and fn. 34.

8 See, para. 6.8(d), below.

9 See, QCM, para. 2.53.

10 See, QCM, para. 2.26.

11 *See*, QCM, para. 3.30 and Lorimer's further observation that the Sheikh of Bahrain's "suzerainty" over Qatar by the middle of the 19<sup>th</sup> century was "more apparent than real" (QM, Annex. II.4, Vol. 3, p. 109, at p. 141).

12 *See*, para. 4.129, above.

13 QCM, Chap. II, Sect. 1.C, and Chap. II, above.

14 QCM, paras. 5.9-5.16. *See*, also, paras. 6.59, *et seq.*, below.

15 QM, Annex II.7, Vol. 4, p. 61.

16 QM, Annex II.5, Vol. 3, pp. 224-225.

17 QM, para. 2.58.

18 *See*, Chap. II, Sect. 3, above, and the historical documents there referred to.

19 QR, Annex III.22, Vol. 3, p. 119; *see*, also, QR, Annex III.25, Vol. 3, p. 137.

20 QR, Annex III.8, Vol. 3, p. 47.

21 QM, Annex II.7, Vol. 4, p. 61.

22 *See*, QCM, paras. 5.17(6) and 5.19(7).

23 BM, Annex 62, Vol. 2, p. 268.

24 *See*, QR, Annex III.14, Vol. 3, p. 81.

25 *See*, QR, Annexes III.11 and III.15, Vol. 3, pp. 67 and 85.

26 QR, Annex III.13, Vol. 3, p. 77.

27 QR, Annex III.12, Vol. 3, p. 73.

28 *See*, QCM, para. 5.22, and BM, para. 65; *see*, also, para. 2.42, above.

29 BM, Annexes 49(a) and 66(a), Vol. 2, pp. 245 and 279.

30 *See*, paras 2.42, *et seq.*, above.

31 QR, Annex III.24, Vol. 3, p. 131.

32 *See*, QM, paras. 3.55, *et seq.*, and Chap. II, Sect. 4, above.

33 BCM, Annex 122, Vol. 2, p. 412. *See*, Chap. II, Sect. 5, above. It is important to note that in March 1934, the Resident did not exclude the Hawar islands from "the whole of Qatar" or its coasts.

34 *See*, also, QM, paras. 8.45-8.46.

35 QM, Annex III.99, Vol. 6, p. 507; *See*, also, QM, para. 6.26.

36 QM, para. 8.32.

37 QM, paras. 8.31-8.43, and QCM, paras. 5.35-5.37.

38 *See*, QR, Annex III.53, Vol. 3, p. 325, where it was reported that "Without much difficulty the Shaikh of Qatar's Forces succeeded in reducing the Fort and in taking possession of the garrison. It appears that some five or six persons were killed on either side during this engagement... The Shaikh of Qatar obtained a document from Shaikh Rashid bin Mohammad of the Naim to the effect that they would [abide by the] laws of Qatar while they remained in the State and that in the event of their desiring to leave the State of Qatar they were in full liberty to do so". The Court will recall another later British Report of 5 December 1939 referred to by Qatar (QCM, para. 5.36) annexed by Bahrain to its Memorial (BM, Annex 292, Vol. 5, p. 1190, at p. 1191) which describes the 1937 Zubarah incident by stating: "Naim tribesman, financed and armed largely from Bahrain were defeated by the Shaikh of Qatar in a bloodless battle in which the

casualties were two on each side". On the other hand, Bahrain's account of the same incident in the Government of Bahrain's own official Annual Report for the year 1356H (March 1937 to February 1938) states: "In the fighting which ensued there were about a dozen casualties on each side, among the Naim Arabs who were killed were several of the personal retainers of the Ruler of Bahrain who belonged to the Naim tribe and had their families in Qatar and lived sometimes in Bahrain and sometimes in Qatar. Eventually the Naim surrendered and handed over a number of their rifles. As soon as the Qatar forces had withdrawn, the whole Naim tribe with their tents, families and flocks, moved over to Bahrain where they were generously received" (QR, Annex III.59, Vol. 3, p. 361). This is contradicted by the Political Agent's Report mentioned above, which further states however: "The Shaikh [of Bahrain] asked for written permission to allow the Naim to come to Bahrain if they so desired which was granted, but the Naim did not appear to desire to leave Qatar where they had sufficient grazing for their flocks which probably they would not have been able to obtain in Bahrain" (QR, Annex III.53, Vol. 3, p. 325).

39 QM, para. 8.42.

40 QM, para. 8.43.

41 *See*, QM, para. 8.8 and QCM, para. 5.7.

42 *See*, QM, para. 8.10 and QCM, para. 5.7.

43 *See*, QM, paras. 3.35, *et seq.* and para. 8.12; QCM, paras. 3.25, *et seq.* and 5.8, *et seq.*; and paras. 6.7-6.8, above.

44 BCM, para. 2.

45 *See*, QM, para. 3.18.

46 QM, para. 8.3; *see*, also, para. 6.6, above and QCM, para. 2.24. As regards Bahrain's reliance upon the book by Bibby, *see*, Appendix 1 at the end of this Volume, para. 4.

47 *See*, paras. 3.9, *et seq.*, above.

48 BCM, para. 89.

49 *Ibid.*, para. 104.

50 QCM, paras. 5.17-5.18.

51 BCM, para. 117, referring to BM, paras. 183-186.

52 BM, para. 183; emphasis by Bahrain.

53 BM, Annex 67, Vol. 2, p. 281; emphasis added.

54 *See*, BCM, para. 94.

55 *See*, para. 6.8, above.

56 QM, para. 8.26.

57 BCM, para. 121.

58 *See*, BM, Annex 71, Vol. 3, p. 357. It may be noted that the document made no reference to any Bahraini sovereignty in Zubarah, which it described as uninhabited.

59 *See*, paras. 2.53, *et seq.*, above, referring to BCM, para. 127.

60 BM, Annex 86, Vol. 3, p. 518; *see*, also, BM, Annex 87, Vol. 3, p. 524.

61 *Ibid.*, p. 521.

62 BCM, para. 454.

63 BCM, para. 451.

64 *See*, QCM, paras. 5.38, *et seq.*

65 *See*, QM, paras. 8.49-8.50; QCM, para. 5.38; and para. 6.66, below.

66 BCM, paras. 42, *et seq.*

67 QCM, paras. 5.45, *et seq.*

68 *Ibid.*, paras. 5.48, *et seq.*

69 *Ibid.*, paras. 5.53, *et seq.*

70 *Ibid.*, para. 5.11.

71 *Ibid.*, paras. 5.58, *et seq.*

72 BCM, para. 44.

73 BM, Annex 83, Vol. 3, p. 444 and QM, Annex II.5, Vol. 3, p. 198.

74 BM, Annex 83, Vol. 3, p. 452; and QM, Annex II.5, Vol. 3, p. 206.

75 *See*, para. 6.8(c), above; BM, Annex 83, Vol. 3, pp. 470-471; QM, Annex II.5, Vol. 3, pp. 224-225.

76 QR, Annex III.5, Vol. 3, p. 31.

77 QR, Annex III.25, Vol. 3, p. 137; *see*, also, QR, Annexes III.22 and III.23, Vol. 3, pp. 119 and 125.

78 BCM, para. 45, referring to BCM, Annex 25, Vol. 2, at p. 76.

79 BCM, para. 40.

80 Qatar has already dealt, in Chap. II, Sect. 2, above, with Bahrain's unfounded assertions as to the so-called "Doha confederation".

81 BCM, para. 43.

82 QM, Annex II.69, Vol. 5, p. 353.

83 BCM, para. 54.

84 BCM, Annex 32, Vol. 2, p. 106.

85 *See*, BCM, para. 56. The idea that the Naim were "integrated into the political economy of Bahrain" is based upon the allegation that they migrated seasonally from Zubarah to Bahrain, and had homes "both in Zubarah and the islands". Bahrain overlooks the fact that this could equally well signify that they were "integrated into the political economy" of Qatar.

86 BM, Annex 232, Vol. 4, p. 1013.

87 *See*, QCM, paras. 5.44, *et seq.*; and paras. 6.38, *et seq.*, below.

88 *See*, BCM, paras. 54-55.

89 QR, Annex III.1, Vol. 3, p. 1.

90 *See*, QM, paras. 3.30, *et seq.*; and QM, Annex II.7, Vol. 4, pp. 31-36.

91 *See*, QCM, para. 5.13.

92 QR, Annex III.4, Vol. 3, p. 27.

93 BCM, para. 45.

94 *Ibid.*, para. 51.

95 *Ibid.*

96 *Ibid.*, para. 50.

97 *See*, para. 6.50, below.

98 BCM, Annex 13, Vol. 2, p. 35.

99 BCM, para. 42.

100 BM, Annex 74, Vol. 3, p. 396.

101 "The Law and Procedure of the International Court of Justice - General Principles and Sources of Law", *B.Y.I.L.*, 1953, p. 48 (QR, Annex III.103, Vol. 3, p. 629; footnote omitted). *See*, also, Sir Gerald's article in the 1955-1956 edition of *B.Y.I.L.* at p. 55 (QR, Annex III.104, Vol. 3, p. 693) and the *Aves Islands* Award of 30 June 1865, *Moore's Digest*, Vol. V (QR, Annex III.111, Vol. 3, p. 677).

102 *Eritrea/Yemen* Award, para. 315.

103 BCM, para. 40.

104 QR, Annex III.53, Vol. 3, p. 329.

105 BM, Annex 74, Vol. 3, p. 397.

106 BCM, para. 42.

107 QCM, para. 5.47.

108 BM, Annex 74, Vol. 3, p. 397; emphasis added.

109 *Ibid.*

110 QR, Annex III.40, Vol. 3, p. 237; emphasis added.

111 BCM, para. 51.

112 *Ibid.*, para. 52.

113 *Ibid.*, para. 51; emphasis added.

114 BCM, Annex 119, Vol. 2, p. 380.

115 BCM, Annex 6, Vol. 2, p. 13.

116 BCM, para. 54.

117 *Ibid.*

118 BM, Annex 83, Vol. 3, p. 485.

119 BCM, Annex 32, Vol. 2, p. 107; emphasis added.

120 BCM, para. 84, fn. 135.

121 BCM, para. 49.

122 BCM, Annex 21, Vol. 2, p. 47.

123 *Ibid.*

124 *See*, para. 6.8(q), above; QM, paras. 8.31, *et seq.*, and QCM, paras. 5.35, *et seq.*

125 *See*, QM, paras. 8.39, *et seq.*

126 BCM, Annex 82, Vol. 2, pp. 259-259a.

127 *See*, para. 4.161, above.

128 BCM, Annex 82, Vol. 2, p. 259a; emphasis added.

129 QCM, para. 5.19(3); and BM, Annex 35, Vol. 2, p. 204 (text crossed out by Bahrain).

130 QCM, paras. 5.10, *et seq.*

131 *Ibid.*

132 QM, paras. 8.19-8.20.

133 QM, Annex III.30, Vol. 6, p. 145.

134 BCM, Section 2.2(H) (iii), p. 46.

135 BCM, para. 98.

136 BCM, para. 99.

137 BCM, para. 102.

138 *See*, in this regard, para. 6.57, above.

139 BCM, para. 100.

140 BM, Annexes 113 and 114, Vol. 3, pp. 633 and 634.

141 BM, Annex 160, Vol. 4, p. 733.

142 BM, Annex 112, Vol. 3, p. 632.

143 QCM, paras. 5.31, *et seq.*

144 QR, Annex III.95, Vol. 3, p. 581.

145 QM, para. 8.53.

146 *Ibid.*

147 *Ibid.*, para. 8.54.

148 *Ibid.*, paras. 8.47, *et seq.*

149 QCM, para. 5.38. Another similar instance, which Qatar has recently noted, is a Report of the British Political Residency of 12 May 1953 which records: "... a map published last year with an Annual Report of the Bahrain Government's Education Department in which a considerable slice of the north-western coast of Qatar is included in an area shown as 'Bahrein Islands and Dependencies'. In fairness to the Ruler of Bahrein it should be stated that this map appears to have been published without his knowledge and that he was considerably embarrassed when he was shown it" (QR, Annex III.96, Vol. 3, p. 587).

150 Extract from Belgrave diary dated 1 May 1954; emphasis added.

151 Extract from Belgrave diary dated 21 February 1957; emphasis added.

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

**REPLY OF THE STATE OF QATAR**

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## CHAPTER VI ZUBARAH

### Section 1. The Question of Zubarah Viewed in its Proper Perspective

6.1 As the Court is aware, Bahrain has presented its claim to Zubarah as a claim of sovereignty. As Qatar has already pointed out, Bahrain never mentioned Zubarah as a subject of dispute between the Parties during the entire period of the Saudi mediation under the 1978 Framework and only brought it up for the first time in a draft document to be considered at the second meeting of the Tripartite Committee in April 1988<sup>1</sup>. Qatar thereafter immediately protested in this regard to King Fahd of Saudi Arabia in a letter in which the Amir of Qatar described the claim to Zubarah as "astounding"<sup>2</sup>.

6.2 Qatar has now seen Bahrain's own official Annual Report for the year 1376 H. (1937-1938). That report puts the whole of Bahrain's so-called claim to sovereignty over Zubarah in a proper perspective when it states:

"... Zubara, the subject of this quarrel, is a place of no apparent value. The town is entirely in ruins, the fort is rapidly crumbling to pieces, there is no water except a few wells which frequently become dry and the land is barren and salty. The few villages within the Zubara area are miserable groups of mud huts inhabited by almost starving Arabs. The Khalifah, and the Arabs of Bahrain, however, regard Zubara as their ancestral home, which in fact it is, they remember that their ancestors and the early Khalifah Shaikhs built Zubara and are buried there and they remember its ancient glories, although during recent years visits to Zubara by the Khalifah Shaikhs have been rare, yet they resent the claim of Qatar that Bahrain has no rights over Zubara. That the reason of the quarrel is a matter of principle and sentiment makes it all the more difficult to arrive at an understanding"<sup>3</sup>.

The Court will no doubt see that Bahrain's own views (objectively) expressed above, describing its interest in Zubarah as no more than of sentimental value, must defeat the wholly artificial claim to sovereignty over the "Zubarah region" that it now makes in these proceedings<sup>4</sup>.

6.3 While Qatar totally rejects Bahrain's claim to Zubarah - let alone any claim to the so-called "Zubarah Region" - out of deference to the Court and in order to dispose of this wholly fictitious claim once and for all, Qatar will briefly address Bahrain's contentions in the Sections that follow. Before doing so, it is appropriate to recapitulate the essential elements of Qatar's title to Zubarah.

### Section 2. The Basis of Qatar's Title to Zubarah

6.4 As Qatar has already shown, the integrity of the territories of Qatar consisting of the peninsula, its territorial waters, as well as the adjoining islands situated partly or wholly therein, including the Hawar islands, has been recognised for over a century. All of the historical and cartographical evidence referred to by Qatar to demonstrate the territorial integrity of Qatar must

apply with equal force with regard to Zubarah as incontestably part of the territory of the State of Qatar<sup>5</sup>.

6.5 Qatar has shown that the Al-Thani established their power and influence on the Qatar peninsula by the middle of the 19<sup>th</sup> century and, in the period following the 1868 Agreements and after the arrival of the Ottomans in 1871, steadily expanded and consolidated their authority over the entire territory of Qatar. Between 1871 and 1913 (when they relinquished their rights in favour of the Al-Thani), the Ottomans regarded the entire peninsula of Qatar including Zubarah as part of Ottoman territory, with Sheikh Jassim bin Thani exercising authority over the whole territory as their *kaimakam*<sup>6</sup>.

6.6 Qatar has shown, by reference to the observations of J. C. Wilkinson (a writer greatly favoured by Bahrain) quoted in Qatar's Counter-Memorial, that the forebears of the Al-Thani family, the Ma'adhid, arrived in the Qatar peninsula in the 17<sup>th</sup> century (long before the Al-Khalifah) and established a presence in different parts of the peninsula including Zubarah; and that the Al-Thani had themselves had a connection with or presence in Zubarah over a long period, even before they came to establish and consolidate their rule over Qatar and exercise complete control in Zubarah<sup>7</sup>.

6.7 The Court will recall that it was with the most important Al-Thani Sheikh that the British chose to enter into the Agreement of 1868, and that the British thereafter recognised that the Al-Thani family was not only the effective power on the peninsula itself, but was also responsible for preventing piracies off the coast of Qatar<sup>8</sup>. Qatar has further shown how other historians including A.H. Cordesman<sup>9</sup> and A. de L. Rush<sup>10</sup> have stated that the 1868 Agreement between the British and Mohamed bin Thani signalled the ending of Britain's treatment of Qatar as a dependency of Bahrain and the first recognition of Qatar as a separate entity in its own right. The Court will recall that a similar view was recorded by Lorimer<sup>11</sup> as well as, more recently, by Dr. Al-Baharna of Bahrain<sup>12</sup>.

6.8 Qatar has described in its Counter-Memorial and in this Reply those events or reports demonstrating the establishment, consolidation and recognition of Al-Thani authority both over the interior of the peninsula and the coasts of Qatar, including Zubarah, after 1868<sup>13</sup>. Some of the more important of these, which are particularly relevant in demonstrating Qatar's incontestable title to Zubarah (and the lack of any basis for Bahrain's claim to Zubarah), are summarised below.

(a) In its Counter-Memorial, Qatar has described in detail the British investigation (by Major Grant) of Bahrain's supposed claim to Zubarah on the basis of its relationship with a section of the Naim tribe when the claim was first made in 1873, and the rejection of that claim by the British then and ever since<sup>14</sup>.

(b) Following the above-mentioned investigation, a formal declaration was made by the Governor-General in Council in 1874 that "the Chief of Bahrein had no possessions on the mainland of Katar..."<sup>15</sup>.

(c) Lorimer records that in September 1878, when a piracy was committed by the inhabitants of Zubarah upon a passing boat, Colonel Ross, the Political Resident, was directed by the Government of India to demand of the Turkish authorities that the place should be punished, and to offer British naval assistance for the purpose<sup>16</sup>. He immediately proceeded to Basrah to meet the Ottoman Wali who agreed to take appropriate action. In the meantime, however, Shaikh Jassim bin Thani himself took action against the Naim in Zubarah. Colonel Ross then visited Zubarah and the camp of Sheikh Jassim, pitched about half a mile from the square fort of Murair, in which the Naim, numbering about 500, were besieged. The force with Sheikh Jassim numbered some 2,000 armed men. The Naim besieged in Murair surrendered, on unfavourable terms, not long after Colonel Ross's departure, and Zubarah as a populated place ceased to exist; the inhabitants, between whom and Sheikh Jassim a peace seems to have been arranged by the

commander of the Ottoman vessel *Iskanderia*, were mostly removed to Doha. Colonel Ross, who visited Sheikh Jassim in his camp at Zubarah but did not interfere in any way with his action to discipline the Naim, clearly acted in conformity with the British recognition of his authority in Zubarah. Writing about these events of 1878, K. Ferdinand, an author much relied upon by Bahrain, notes:

"... in 1878 Zubarah was finally destroyed by the Al-Thani Shaykh of Dohah, who thereby confirmed his control over the whole of the Qatar peninsula"<sup>17</sup>.

It is Qatar's submission that this incident, together with the almost identical incident some sixty years later (in 1937) described below when Sheikh Abdullah Al-Thani similarly disciplined a recalcitrant section of the Naim tribe in Zubarah, clearly demonstrates the effective exercise of Al-Thani authority in Zubarah. The 1878 Al-Thani assertion of authority was approved and recognised as legitimate by the British as well as the Ottomans. The legitimacy of the 1937 Al-Thani action was also never questioned by the British authorities.

(d) The British Political Resident issued warnings to Sheikh Jassim bin Thani in 1881, treating him as being in effective control of the coasts of Qatar and as "having the power to prevent such movements [by Nasir bin Mubarak] from the Katar Coast" to attack Bahrain from Zubarah as well as pointing out Sheikh Jassim's "duty to exercise vigilance and prevent any warlike movements by sea"<sup>18</sup>.

(e) In 1889, an official Ottoman document reported that prior to the creation of a *nahiye* at Zubarah, Mohammed bin Abdulwahab, a follower of the Al-Khalifah, had, with the consent of Sheikh Jassim bin Thani, settled at the Murair fort outside Zubarah. However, when a dispute arose between them later in the same year, Sheikh Jassim evicted him<sup>19</sup>.

(f) As is also apparent from another Ottoman report of 25 September 1892, Sheikh Jassim levied taxes on those engaged in pearl fishing and other activities from Zubarah. The report states:

"As can be seen from the attached table the yearly revenues from all the pearl boats in Qatar come to two million five hundred and forty *kran*. This includes the tax collected under the name *kallata* by Jassim Al-Thani from all divers and crews, and the tax called *rakabiya*. The tax collected as *zakat* on sheep and slaughtering fees amounts to seventy five thousand four hundred and three *kran*. This total represents the income from the dependent villages of the *kaza* and the *nahiyes* of Zubarah and Udeid..."<sup>20</sup>.

(g) The Court will recollect that as part of the 1874 British declaration by the Governor-General in Council that the Chief of Bahrain "had no possessions on the mainland", the latter was also asked to "rely for support on the assistance of the British Government, which will, if necessary, be given him either to repel attacks by sea or to frustrate a threatening movement from the mainland"<sup>21</sup>. This was exactly the support that was given to Bahrain in 1895 when it was threatened with an attack from Zubarah by a seaborne force (with the backing of Sheikh Jassim and the Ottomans), and British warships destroyed the threatening fleet in Zubarah harbour<sup>22</sup>. This is clear from the report made by the Political Resident, Colonel Wilson, on 15 September 1895 to the Government of India in which he stated, *inter alia*:

"... I have the honour to report, for the information of His Excellency the Viceroy and Governor-General in Council, that on the 6th instant, Commander Pelly, Senior Naval Officer, Persian Gulf Station, having in his judgment, after careful consideration of the facts immediately before him, determined that prompt action was the only means of averting the plunder of Bahrein with its attendant excesses, attacked and destroyed some 44 out of a fleet of native craft assembled off Zobara, armed and ready for an instant descent on that place"<sup>23</sup>.

The British position in this regard was also explained in the British Parliament (as reported in *The Times* of 22 February 1896) in the following terms:

"THE PERSIAN GULF

SIR C. DILKE (Gloucester, Forest of Dean) asked the Secretary of State for India if he could state to the House the reason for the operations conducted during the last year in the Persian Gulf by her Majesty's ships Sphinx and Pigeon.

LORD G. HAMILTON (Middlesex, Ealing) - In consequence of quarrels between the Sheikh of Bahrein, who is under the suzerainty of her Majesty, and other local sheikhs, the chief of the Ali-bin-Ali, apparently supported by the Turks, established himself on the mainland at Zobara, opposite Bahrein, and about 200 dhows assembled there to attack Bahrein. In order to maintain the maritime peace to which the tribes are pledged Commander Pelly, of the Sphinx, was authorized to resist this demonstration provided he was satisfied that the dhows were assembled with a hostile purpose, and to liberate the Bahrein boats which had been forcibly detained. As the dhows after due warning refused to disperse they were attacked on September 6, and 44 were destroyed. On the following day terms were arranged and the peace of the Gulf re-established"<sup>24</sup>.

It is important to note that after the 1895 incident, and consistent with the British position established since 1873 that the Ruler of Bahrain had no rights in Zubarah, the British made no attempt (nor allowed the Ruler of Bahrain) to occupy Zubarah or to displace Sheikh Jassim.

(h) The international reaction to the above incident, which also reflects the Turkish connection with Zubarah at the time, is also apparent from a number of German reports of that period<sup>25</sup>.

(i) In an Ottoman document of 11 February 1896 relating to the events of 1895, Zubarah is presented as very much a part of Qatar:

"Zubarah on the Gulf coast, a subdivision of Qatar, an integral part of the territory of the Ottoman State, was held under gun-fire by the British fleet"<sup>26</sup>.

(j) An Ottoman report of 1896 concerns a proposal for payment of a pension to the relatives of a Sheikh, an Ottoman loyalist (allegedly killed upon his return to Bahrain after the 1895 incident). Those relatives were living in Zubarah, which was clearly regarded as part of Ottoman territory. The report states:

"Sheikh Sultan bin Selame's family of fifty is in a destitute state at the Zubarah ruins. In order to avoid them being exposed to utter destitution, they must be sheltered under the wings of the beneficent Ottoman Sultan; so it is deemed advisable to pay a monthly pension of 750 Kurushes to Ali bin Sultan Selame, son of the Sheikh Sultan, to secure their livelihood. The said amount will barely cover their daily expenses. To secure the livelihood of the progeniture and family of the Sheikh Sultan who, on more than one occasion, fought for the Ottoman State by opposing the seditious activities and provocations by foreigners and made proof of his loyalty to the Ottoman Sultan and Khalife, is but a consequence of the endless mercy of our Sultan. Under the circumstances, I humbly beg that the said pension of 750 Kurushes be granted to the person in question"<sup>27</sup>.

(k) Qatar has already referred to other Ottoman documents describing the peninsula as the *kaza* (district) of Qatar which included the *nahiye* (sub-district) of Zubarah<sup>28</sup>. Two annexes to Bahrain's Memorial<sup>29</sup> clearly support this position, as do a large number of other Ottoman documents referred to in Chapter II of this Reply, and Map No. 15 in the Map Atlas<sup>30</sup>.

(l) An Ottoman letter of 8 April 1903 notes that Zubarah is located "to the north-east of the centre of the *kaza*"<sup>31</sup>.

(m) That Zubarah is an integral part of the territory of Qatar is also apparent from the recognition of the territories of Qatar by the Anglo-Ottoman Convention of 1913, incorporating a provision that the Qatar peninsula would be "governed, as in the past", by Sheikh Jassim bin Thani and his successors<sup>32</sup>.

(n) The British-Qatar Treaty of 1916 and the British Resident's confirmation (reproduced above) to the Ruler of Qatar that "... you are the Ruler of all Qatar and the Treaty extends to the whole of Qatar" must clearly cover Zubarah as part of Qatar<sup>33</sup>.

(o) During the discussions relating to the granting and then to the extension of Bahrain's oil concession in the 1920s and 1930s, Bahrain did not at any time contend that Zubarah was part of its territory to be covered by any concession. Qatar has shown that in fact Bahrain later acknowledged explicitly in 1944 that Zubarah was covered by Qatar's oil concession<sup>34</sup>.

(p) When the Qatar oil concession was finally signed in 1935 with the approval of the British Government, it clearly included the whole of the Qatar peninsula, including Zubarah, as is also confirmed by the map attached to the concession<sup>35</sup>.

(q) As Qatar has shown, in the 1930s Qatar was increasingly concerned to protect the security of its borders and control imports through the imposition of customs duties<sup>36</sup>. When the Ruler of Qatar took steps to impose such controls in the Zubarah area, these efforts were obstructed by a section of the Naim tribe in 1937. While the details of this incident are fully described in Qatar's Memorial and Counter-Memorial<sup>37</sup>, the Court is respectfully referred to certain additional documents which shed more light on the event<sup>38</sup>. For present purposes, it is only necessary to point out that in view of the Naim obstruction, the Ruler of Qatar decided in July 1937 to impose his authority over the dissenting Naim by force and put an end himself to the smuggling and other activities occurring. When the Ruler of Bahrain requested the British to intervene to stop the Ruler of Qatar, the British refused on the basis that Zubarah was very much part of the Ruler of Qatar's territories and the Secretary of State for India concurred with this view<sup>39</sup>. Furthermore, by 5 July 1937, the dissenting Naim had surrendered and their leader, Rashid bin Jabor, agreed with the Ruler of Qatar to obey the laws of Qatar while he resided in Qatar<sup>40</sup>.

6.9 As submitted above, this Al-Thani action in disciplining a section of the Naim tribe in Zubarah was the second such action in 60 years (the first one being in 1878). These two assertions of Al-Thani authority in Zubarah are a clear expression of Qatari sovereignty over Zubarah. The events and facts described above, the consistent British refusals over nearly a century to acknowledge any sovereign rights of Bahrain in Zubarah, as well as Bahrain's numerous disclaimers of sovereignty over Zubarah, establish Qatar's incontestable title to Zubarah. That title was, over the years, recognised by the British, the Ottomans and other European powers. As also shown below, Bahrain's only interest was, firstly, concern for the individuals comprising a section of the Naim tribe and not for any territory in which they may have been present at different times and, secondly, keeping the Naim in good humour to ensure that they helped protect Bahrain against any attacks on its territories from Zubarah. The British shared Bahrain's concern about this last point, and took steps from time to time to prevent threats to the security of Bahrain from Zubarah.

### **Section 3. The Map Evidence**

6.10 The map evidence discussed earlier in this Reply and included in Qatar's Map Atlas confirms the fact that Zubarah has consistently been recognized as forming part of Qatar and as therefore falling under its sovereignty. Since many of the relevant maps have been addressed in connection with the description of the territorial integrity of Qatar (Chapter II) and Qatar's title to the Hawar islands (Chapter IV), the present discussion can be kept brief. Not surprisingly, the maps demonstrate that the territorial integrity of Qatar extended over the entire peninsula including the Hawar islands. They thus necessarily confirm Qatar's sovereignty over Zubarah. In contrast, Bahrain has failed to present any cartographic evidence which even remotely supports its extravagant claim either to Zubarah itself or to an artificially defined area called the "Zubarah Region".

6.11 To give a taste of the extensive cartographic evidence which supports Qatar's position, reference may be made to the following maps in the Map Atlas:

- Maps Nos. 5, 6, 8, 9, 11, 21, 22, 31, 39, 45 and 53, prepared under the auspices of the Justus Perthes Institute between 1875 and 1917, all of which specifically label Zubarah (Sabara) on the maps and show it as part of Qatar by colour coding;
- Map No. 15, prepared by the Ottoman authorities in 1890, depicting the *kaza* of Qatar as extending over the entire peninsula, and identifying Zubarah as a town within that *kaza*;
- Maps Nos. 24 and 29 published in *The Times Atlas*, London, in 1895 and 1900, respectively, which also label Zubarah and show it within Qatari territory;
- Map No. 30, a 1901 map produced by the British War Office, Intelligence Division, which shows Zubarah as part of "El Katr";
- Map No. 20, prepared by the Russian General Staff in 1894, and map No. 88, published by the Central Administration of Geodetics and Cartography of the U.S.S.R. in 1939/40, on both of which Zubarah can be seen to fall within Qatar's territory.
- Map No. 33, published in 1904 by G.S. Hammond and Co. of New York, on which Zubarah is also identified as situated within Qatar;
- Map No. 34, an official French map prepared in 1905 by the Geographic Service of the Ministry of Foreign Affairs, which also labels Zubarah and shows it as falling within Qatar's territory;
- Map No. 43, a further French map published in 1911 by Hachette & Cie., Paris, which depicts the same situation; and
- Maps Nos. 48 (1914) and 57 (1917) published by George Philip & Son, and Maps Nos. 59 (1917), 80 (1935) and 81 (1935), published by John Bartholomew and Son, all of which clearly show Zubarah as part of Qatar.

6.12 As the Court will appreciate, the maps referred to above, which constitute only a sample of the relevant cartography, span a considerable period and come from a variety of official sources and highly respected cartographic houses located in a number of different countries. When considered together with the historical evidence discussed in the previous section, the map evidence leaves no doubt whatsoever as to Qatar's sovereignty over Zubarah.

#### **Section 4. Bahrain's Claim to Sovereignty over Zubarah is Manifestly Ill-Founded**

6.13 Qatar has already shown in its Memorial and Counter-Memorial that the Al-Khalifah - one section of the Al-Utub tribe - along with another section of the same tribe, the Al-Jalahma, settled close to the town of Zubarah in 1766<sup>41</sup>. Qatar has also shown that the Al-Utub and various Qatari tribes took control of Bahrain from the Persians in 1783, less than twenty years later, and that thereafter the Al-Khalifah section of the Al-Utub moved their headquarters from Qatar to Bahrain<sup>42</sup>. After that date, there is no evidence of any control or authority exercised by the Al-Khalifah in or over Zubarah.

6.14 Qatar has also demonstrated that when, in 1868, the British recognised Qatar and Bahrain as separate entities, Zubarah was considered as part of Qatar and not as part of Bahrain<sup>43</sup>, and that during the period of the Ottoman presence in Qatar Zubarah continued to be considered as part of the political entity of Qatar, by both the British and the Ottomans.

6.15 Against this background, Bahrain makes the curious assertion that it has invoked "the most cogent evidence of State activity, as well as continuous and peaceful display of territorial sovereignty, over a period of two centuries", over what it refers to as the "Zubarah Region"<sup>44</sup>. However, both Bahrain's Memorial and its Counter-Memorial are striking for the lack of any evidence, cogent or otherwise, of such sovereignty.

6.16 The present section will in the first place address Bahrain's claim to have exercised sovereignty directly over the so-called "Zubarah Region". Qatar will then deal with Bahrain's

claim to have exercised sovereignty over the so-called "Zubarah Region" indirectly through the Naim tribe.

#### **A. The claim of direct exercise of sovereignty by Bahrain over Zubarah**

6.17 It will be noted at the outset that, even before the British recognition in 1868 of the separation between Qatar and Bahrain, there is a dearth of evidence with regard to any exercise of sovereignty by the Al-Khalifah over Zubarah. Bahrain's claim appears to be based, at least in part, upon the assertion that it was the Al-Khalifah who founded Zubarah. There is, however, no basis for this assertion. First, Bahrain seems to have forgotten that it was not only the Al-Khalifah section of the Al-Utub who settled at Zubarah in 1766, but also the Al-Jalahma section which, although it participated in the conquest of Bahrain from the Persians in 1783, subsequently left Bahrain, returned to Qatar, and no longer had any connection with Bahrain<sup>45</sup>.

6.18 Second, in any event, as Qatar has already shown in its Memorial, Zubarah existed before the arrival of the Al-Utub<sup>46</sup>.

6.19 With regard to the period between the time of the Al-Khalifah's departure to Bahrain in 1783 and the 1868 Agreements, Bahrain has produced no evidence of any exercise of authority by the Al-Khalifah in Zubarah. Indeed, as has been seen above, at this time the Al-Khalifah were hardly able to exercise authority in Bahrain itself<sup>47</sup>.

6.20 As for the period following the 1868 Agreements, Bahrain contends that "Ottoman and Al-Thani authority never extended beyond the enclave comprising Doha and its immediate hinterland, despite no less than six attempts to extend their authority to the Zubarah Region"<sup>48</sup>, and that "Britain and Bahrain rebuffed the Ottoman Empire and the Doha confederation in their attempts to exercise authority over the Zubarah Region from 1874 to 1903"<sup>49</sup>.

6.21 Qatar has already shown in its Counter-Memorial that Bahrain's account of the six events referred to is grossly inaccurate and distorted<sup>50</sup>. A few words should however be added with regard to the incident which occurred in 1903. According to Bahrain, Britain invoked Bahrain's sovereignty over Zubarah on that occasion<sup>51</sup>. In fact, this is just one more example of Bahrain's distortion of the evidence: the sources relied upon by Bahrain in this regard refer only to Bahrain's security; there is not one word about its alleged "sovereignty".

6.22 Thus, Bahrain reproduces a truncated extract from a letter written by the Political Resident in 1903, according to which:

"the occupation of Zobara [by the Ottoman Empire] would be viewed with the greatest concern by the Chief of Bahrein, who considers the place to be an appanage of his, *and whose rights we are bound to maintain...*"<sup>52</sup>.

The whole passage from which this citation has been extracted by Bahrain in fact reads as follows:

"It is, in my opinion, absolutely essential *for the security of the Bahrein islands* that Zobara should not be occupied by the Turks. Apart from the fact that the occupation of Zobara would be viewed with the greatest concern by the Chief of Bahrein, who considers the place to be an appanage of his, and whose rights we are bound to maintain, the prestige which the Turks would gain throughout the countryside by the occupation of this place, in opposition to the well-known views of the British Government, would be so great that an *attack on Bahrein from Katr* could at any time be organized, and the continual presence of a ship of war in Bahrein waters, and perhaps even a military occupation of the islands, would be required"<sup>53</sup>.

In fact, the only concerns of the British here were once more to limit Ottoman influence and to ensure the security of Bahrain, but this did not constitute an invocation or recognition of Bahrain's sovereignty over Zubarah.

6.23 As for the Ottomans, Bahrain contends that they never exercised authority over Zubarah<sup>54</sup>. Qatar does not dispute the fact that there was no permanent official Turkish presence in Zubarah between 1871 and 1915, but this is not the important point. The fact is that the Ottomans always considered Zubarah as an integral part of Qatar and the Ottoman Empire, as indeed did third parties<sup>55</sup>. What is important in the context of sovereignty over Zubarah is that at this time the Al-Thani were exercising authority in the area. As has been shown in the preceding Section, there are numerous examples of the exercise of Al-Thani authority. Bahrain is quite unable either to provide evidence to the contrary or to assert a single comparable example of an act of sovereignty accomplished by itself or on its behalf in or over Zubarah during the period of the Ottoman presence or later.

6.24 A further word should be said about the British request made in 1911 to Sheikh Jassim to allow Bahrainis to settle in Zubarah, in exchange for payment of an annual rent - a request which was refused by Sheikh Jassim. This event has been relied upon in Qatar's Memorial as evidence of the British understanding that Qatar had full and effective control over Zubarah<sup>56</sup>. Bahrain advances a twisted interpretation of the same event, however, characterising it as an attempt by Britain "to entice Jasim bin Thani into agreeing to the *de jure* recognition of the *de facto* situation in the peninsula" in the context of "concerted action by Britain to follow a policy that was described by British officials as: 'devoted to contracting this Chiefship [Sheikh Jasim] to its narrowest possible limits'"<sup>57</sup>.

6.25 The idea that the request was made in the context of such a "concerted action" by the British is once more a complete misreading by Bahrain of the documentary evidence. First, the request was made by Britain in 1911, while the document which allegedly sets out a concerted British policy dates from 1905. Second, the suggestion made in 1905 that Sheikh Jassim's authority should be contracted to the narrowest possible limits was a personal suggestion by the Political Agent, linked to the British desire to restrict the concomitant Ottoman authority, and was quickly dismissed<sup>58</sup>.

6.26 Furthermore, Bahrain's suggestion that Sheikh Jassim was somehow being bribed to recognise "the *de facto* situation in the peninsula" cannot be reconciled with the fact that the British made the request to Sheikh Jassim, offered payment of an annual rent, and took no measures to contest Sheikh Jassim's refusal. In Qatar's submission, these are all clear indications that the British considered that Sheikh Jassim was sovereign over the territory concerned.

6.27 Qatar has already demonstrated the fallacy of Bahrain's contention that after the 1913 Convention, the Al-Thani were losing their control over Doha and the Ruler of Bahrain "remained in possession of the northern part of the Qatar peninsula"<sup>59</sup>. In this regard it will be recalled that in 1919, the Ruler of Bahrain tried to re-open the Zubarah issue by asking the British to be allowed to occupy that place. He was however coolly received by the Political Agent, who wrote on 6 December 1919 that the ruling family of Bahrain were "rather unnecessarily filled with ideas of their own importance" and that:

"... the suggestion of Shaikh Isa's that he be allowed to revive a ten year-old controversy should be nipped in the bud. The new move is obviously an attempt to extend his power territorially and financially at the expense of Ibn Saud and Abdullah bin Jassim [Al-Thani] and will only end in trouble"<sup>60</sup>.

The sketch map attached by the Political Agent to his letter clearly shows that Zubarah was an integral part of the territory of Qatar<sup>61</sup>.

6.28 Finally, Bahrain contends that its "sovereignty over Zubarah could not have been lost by Qatar's armed attack in 1937"<sup>62</sup> and that it made "24 officially recorded protests and claims in relation to the Zubarah Region... to Britain and Qatar between 1937 and 1961"<sup>63</sup>. Qatar will not review all these alleged protests and claims, which are listed but not discussed in the Bahrain Counter-Memorial. However, it may be noted that in general they are related less to sovereignty

than to personal jurisdiction, private property rights or simply questions of prestige<sup>64</sup>. Moreover, as has already been noted and as will be further discussed below, the British Government never recognised any Bahraini claim to sovereignty in or over Zubarah, and Bahrain has on numerous occasions expressly disclaimed sovereignty over Zubarah<sup>65</sup>.

6.29 Having reviewed Bahrain's contentions above, it is striking that Bahrain has presented absolutely no evidence whatsoever of the exercise by Bahrain of any direct sovereignty over Zubarah at any time during the last 200 years.

**B. The claim of indirect exercise of sovereignty by Bahrain over Zubarah, that is to say, through the Naim tribe**

6.30 As there is no evidence to support any direct exercise of authority by the Al-Khalifah in Zubarah, Bahrain lays great stress upon the alleged relationship of the Naim tribe with the Ruler of Bahrain in a further attempt to prove its sovereignty<sup>66</sup>.

6.31 Qatar has already shown in its Counter-Memorial that the supposed allegiance of the Naim towards the Ruler of Bahrain cannot serve as a basis for Bahrain's claim to Zubarah since:

- the links of allegiance of the Naim towards the Ruler of Bahrain have not been proven<sup>67</sup>;
- the territory claimed by Bahrain was not occupied permanently or even regularly by the Naim<sup>68</sup>;
- the territory claimed by Bahrain was frequented - on the rare occasions when there was settlement in that region - not only by sections of the Naim tribe other than the Al-Jabr (the single section on which Bahrain relies to establish its title to Zubarah)<sup>69</sup>, but also by other tribes<sup>70</sup>;
- even if there had been some link between the Al-Jabr section of the Naim tribe and the Ruler of Bahrain, this could not serve as a basis for any claim of title to Zubarah by Bahrain in the absence of any evidence of the exercise of acts of political or public authority by Bahrain in Zubarah<sup>71</sup>.

6.32 Nevertheless, Bahrain has continued to argue that it exercised its sovereignty continuously over the so-called "Zubarah region", from the 1760s until 1937, by means of the presence of the Naim tribe which, according to Bahrain, was at all times loyal to the Al-Khalifah. In the following sub-sections, Qatar will examine the various assertions made by Bahrain in its Counter-Memorial in this respect. More particularly, Qatar will show that Bahrain has made numerous misstatements with regard to the Naim; and that the alleged relationship between Bahrain and the Naim has no significance with regard to sovereignty over Zubarah.

**1. Bahrain's misstatements with regard to the Naim**

6.33 Bahrain's pleadings contain a number of contentions regarding the role of the Naim which are simply not supported by the evidence upon which Bahrain relies.

6.34 A critical element of Bahrain's claim is that the Naim maintained a permanent presence in the "Zubarah Region" throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries until 1937<sup>72</sup>. Bahrain has produced no contemporary evidence which proves the existence of an identifiable "Zubarah Region" distinct from the town of Zubarah. Moreover, not only Qatar but also Bahrain has produced evidence that Zubarah was completely deserted for long periods during the 19<sup>th</sup> and 20<sup>th</sup> centuries. For example, Lorimer records the destruction of Zubarah by fire in 1811<sup>73</sup> and the re-occupation of "the deserted site of Zubarah" some thirty years later, and for a period of only a few months, by Sheikh Abdullah and Sheikh Mohamed Al-Khalifah<sup>74</sup>. Although the Naim returned to Zubarah at some time thereafter, it should be recalled that they left again in 1878 and were mostly removed to Doha<sup>75</sup>. This information is confirmed by an appendix to the 1879-1880 Report of the Political Resident, which states that Zubarah, like Khor Hassan and Robeyjah, was

"uninhabited"<sup>76</sup>. Some years later, in a letter addressed to the Turkish Ministry of the Interior in 1903, the Governor of Basrah wrote:

"As Udeid and Zubarah *had no population and settlements*, the Mudirs formerly appointed in Katar were on the regular payroll without having discharged their functions... The Zubarah and Udeid nahiyehs are dens of robbers forming an *uninhabited area* devoid of all shelter where the supply of food and other necessaries is beyond possibility"<sup>77</sup>.

While Qatar does not dispute that Zubarah may have been frequented from time to time - indeed, as was usual in the Gulf region, a number of tribes had a nomadic way of life which led them to move from one place to another - the above evidence cannot be construed as supporting the idea of a permanent settlement in Zubarah or its vicinity in the 19<sup>th</sup> century and the earlier part of the 20<sup>th</sup> century.

6.35 Bahrain also contends that "an 1893 report by the Ottomans confirmed that the Naim tribe was living in the Qatar peninsula, that its tribal *dirah* included Zubarah and that it was a Bahraini tribe"<sup>78</sup>. What Bahrain neglects to point out with regard to this report is that the Naim are listed as one of the three principal tribes "in the territory of Qatar" - a description which immediately rules out any idea of their somehow conferring Bahraini sovereignty over the areas within which they moved. Furthermore, there is no mention in the report of a Naim *dirah*.

6.36 It will be recalled that in its Counter-Memorial Bahrain put forward the idea that until 1937 the Qatar peninsula was shared out among three "confederations", one of which was the "Naim-led tribal confederation in the north (whose allegiance lay with the Al-Khalifah dynasty)" which, along with Saudi tribes, "dominated" what Bahrain refers to as "the pearl merchant enclave in Doha (the tiny Al-Thani-led Doha confederation...)"<sup>79</sup>. The idea of a "Naim-led tribal confederation" which somehow exercised the authority of the Ruler of Bahrain in the Qatar peninsula is just as far-fetched as the idea of the Al-Thani being no more than the leaders of a tiny and insignificant group of merchants in Doha<sup>80</sup>. This "Naim-led tribal confederation" is again something which has appeared for the first time in Bahrain's Counter-Memorial.

6.37 In order to support its contentions in this regard, Bahrain has regrettably engaged again in mis-citation of the evidence. For example, we read in the body of the Bahrain Counter-Memorial that "the Naim-led northern tribal confederation participated in Muhammed bin Khalifa's 1848 victory over a challenger to his throne"<sup>81</sup>; yet the document cited in support of that statement says no more than that Sheikh Mohamed "was received by the Al-Naim tribe who were ready to fight"<sup>82</sup>. There is no mention of a "Naim-led tribal confederation". Bahrain further relies upon a 1906 report in support of its statement that "the loyalty to Bahrain of the Naim-led tribal confederacy in the north of the Qatar peninsula remained undisputed"<sup>83</sup>. Reference to that report shows, however, that there is no mention of the Naim at all, and that the author judged, with respect to the tribe concerned, that "the Chief of Bahrein is quite incapable of imposing his will upon them for any practical purpose"<sup>84</sup>. A final example of Bahrain's exaggeration in this regard concerns the alleged integration of "the Naim-led confederation" into "the political economy of Bahrain"<sup>85</sup>; again, the source upon which Bahrain relies refers only to the Naim themselves, without mentioning any other tribes that might have formed such a confederation<sup>86</sup>. As to the supposed unswerving allegiance of the "Naim-led confederation" to the Al-Khalifah, Qatar has already shown, and will show further below, that this notion is quite unfounded<sup>87</sup>.

## **2. Bahrain's relations with the Naim are of no significance with regard to sovereignty over Zubarah**

6.38 Bahrain argues that the loyalty of the Naim to the Al-Khalifah remained undisputed until 1937 and that this provided at least one basis for its claim of sovereignty<sup>88</sup>. The evidence that Bahrain relies upon simply does not support this contention.

6.39 First, it must be recalled that the immediate precursor to the 1868 Agreements was an incident which occurred in October 1867 between the Naim and the Ruler of Bahrain. That incident was reported by the Assistant Political Resident as follows:

"One Ali bin Thamir al Naemiee of the Bedouins of Guttar having been seized and sent to Bahrain by Shaikh Ahmed bin Mohamed bin Sulman the representative of the Chief of Bahrain on the Guttar Coast for going to his tribe, the naimes of Wakra, the naimes and the people of Biddah, Doha and Dougha combined and demanded his release. This demand was refused, and they then determined to turn Shaikh Ahmed out of Wakra"<sup>89</sup>.

As Qatar has already shown in its Memorial, this eventually led to the sack of the eastern towns of Qatar by the united forces of Bahrain and Abu Dhabi, the scattering of the members of the Qatar tribes (including the Naim) throughout the region, the retaliation led in June 1868 by the united tribes of Qatar against Bahrain, and finally the conclusion of the 1868 Agreements<sup>90</sup>.

6.40 In the light of these events, it is easy to understand why the British were sceptical when in 1873 the Ruler of Bahrain asserted that the Naim were his subjects. As Qatar has noted, the British observed at that time that the rights claimed by the Ruler of Bahrain over the Naim were, at best, purely nominal<sup>91</sup>. In addition, they observed that the Ruler of Bahrain "has not the power if he wished to protect tribes residing in Guttur". Writing to the Political Resident, the First Assistant Political Resident stated that:

"From what I have heard whilst living in Bahrein, I should say that some years ago the Naim, together with many other of the Guttur tribes, were in certain ways dependencies of Bahrein; but the amount of authority exercised by the rulers of Bahrein over Guttur seems to have varied in proportion to the power of coercion those rulers possessed; if the Chief of Bahrein was strong the tribes acknowledged his supremacy; if he was weak they denied it"<sup>92</sup>.

These remarks can hardly support Bahrain's argument that there existed a special and unwavering relationship between the Ruler of Bahrain and the Naim.

6.41 However, Bahrain mentions certain British documents dating from the 1870s and 1880s, which reported that the Naim "maintain intimate friendly relations with the Chief of Bahrain"<sup>93</sup> and that the latter "makes yearly presents of considerable value" to the Naim<sup>94</sup>. But this is not indicative of strong ties of allegiance between the Naim and the Ruler of Bahrain, especially when, as one of the same sources recorded, "a large portion of the revenues of Bahrain are dissipated in this manner without any ostensible compensating advantage"<sup>95</sup>. This is certainly not sufficient to establish a relation of overlord to subordinate, with the former exercising sovereignty over the territory occupied by the latter.

6.42 Bahrain similarly observes that in 1875 the Ruler of Bahrain was said to spend:

"... three to four thousand krans every month on the people of Zobarah, and gives Nasir bin Jabor [the Naim headman] 300 krans per mensem"<sup>96</sup>.

Beside the fact that this is not significant in terms of allegiance<sup>97</sup>, Bahrain has failed to reproduce the whole extract, which continues as follows:

"This salary to Nasir bin Jabor has been disbursed since the siege of Zobarah last year"<sup>98</sup>.

In other words, even assuming, *arguendo*, that such payments could imply ties of allegiance, they are certainly not proof of the longstanding links of allegiance that are alleged by Bahrain<sup>99</sup>.

6.43 Bahrain also contends that the so-called "Naim-led confederation" was integrated into the political economy of Bahrain. However, Lorimer recalled, writing in 1908, that in the summer:

"most of them [the Naim] remove to Bahrain and form camps in the northern part of the main island, but some take up their summer quarters near Dohah in the Qatar peninsula"<sup>100</sup>.

In other words, it cannot seriously be contended that the Naim had special and exclusive links with Bahrain.

6.44 Qatar does not dispute that some of the Naim may have migrated between Qatar and Bahrain. However, Bahrain seems to imply that the territory of one country frequented by private persons of another country and even nomads can become the territory of the latter. In Qatar's submission, such a criterion cannot be a basis for any title of sovereignty. As Sir Gerald Fitzmaurice stated:

"It has long been well settled that the hunting, whaling, guano collecting, exploring and other similar activities of private individuals acting on their own, however numerous and extensive, do not *per se* confer on their State a title to sovereignty over the areas concerned"<sup>101</sup>.

Reference may also be made to the recent Award in the *Eritrea-Yemen* case, where the Arbitral Tribunal noted that fishing activities by private persons do "not constitute evidence of *effectivités* for the simple reason that none of these functions are acts *à titre de souverain*"<sup>102</sup>. This was of course particularly true in the Gulf where, from time immemorial, people moved from one territory to another in pursuit of their economic activities.

6.45 In any event, after the incident of 1937, which Bahrain characterises as a Qatari invasion of the territory of Bahrain's "Naim-led tribal confederation in the north"<sup>103</sup>, and after the Naim had agreed to obey the laws of Qatar, an Intelligence Report of the Political Agent of August 1937 recorded that:

"The Shaikh [of Bahrain] asked for written permission to allow the Naim to come to Bahrain if they so desired which was granted, but the Naim did not appear to desire to leave Qatar where they had sufficient grazing for their flocks which probably they would not have been able to obtain in Bahrain"<sup>104</sup>.

Accordingly, even if the Naim were to be regarded as a Bahraini tribe, their presence in parts of Qatar was determined by whether there was better grazing there or in Bahrain, and can clearly provide no support to any Bahraini claim to have exercised authority over any part of Qatar.

6.46 Moreover, there was no special and exclusive relationship between the Rulers of Bahrain and the Naim. In this regard Bahrain refers to Lorimer's observation that the Naim had "immigrated from Oman several generations ago at the invitation of the Utub, then in Qatar, for the purpose of expelling the Al Mussalam"<sup>105</sup>, inferring from this that:

"The Naim tribe and the Al-Khalifa quickly entered into a mutually advantageous relationship of Ruler/benefactor and dependent/beneficiary"<sup>106</sup>.

There is no basis for such an inference. As Qatar has already recalled in its Counter-Memorial<sup>107</sup>, Lorimer stated in the same extract that:

"The Bedouins of the northern Na'im are retained as *mercenaries* both by the Shaikh of Bahrain and by the Al Thani Shaikhs of Dohah, and the protection of those Shaikhdoms is considered to devolve principally upon them during the absence from home of the pearl fleets"<sup>108</sup>.

Lorimer added:

"Their efficiency and trustworthiness are not however beyond doubt, and their presence in Bahrain in summer is a source of annoyance to the peaceable agriculturists of other tribes"<sup>109</sup>.

Consequently, the picture painted by Bahrain of a loyal tribe owing exclusive allegiance to the Al-Khalifah does not square with the historical facts as reported by Lorimer.

6.47 Some years later, in 1926, Prideaux, the Political Resident, noted that it was necessary for the Sheikh of Qatar:

"to arm contingents from the Bedouin tribes - Bani Hajir, *Naim* and Manasir - who, although they do not reside all the year round in his territory but spend periods in the interior of Trucial Oman, yet *admit themselves to be feudatory to him* and must be controlled by periodical gifts of arms and ammunition"<sup>110</sup>.

The implication of this is that the Naim owed their allegiance to the Ruler of Qatar.

6.48 Bahrain however stresses the fact that "members of the Al-Jabr branch of the Naim tribe - including their Chief" appear on the Bahrain Civil Lists and Pension Lists dating from the 1920s<sup>111</sup>. Qatar would simply comment as follows. Even if, *arguendo*, the presence of members of the Al-Jabr section of the Naim tribe on such lists could have had some significance, it was limited to a few members of a single section of the tribe and to their chief, and had no significance for the rest of the Naim tribe.

6.49 Bahrain further contends that in return for financial support received from the Ruler of Bahrain:

"... the Naim tribe paid taxes to the Ruler of Bahrain, acted as his guards, and performed a variety of services for him"<sup>112</sup>.

These three assertions are disputable and/or irrelevant. As a general point, it should be noted that Bahrain makes these assertions almost immediately after having referred to the report stating that "a large portion of the revenues of Bahrain are dissipated in this manner *without any ostensible compensating advantage*"<sup>113</sup>.

6.50 Bahrain has produced no evidence whatsoever of the payment of tax by the Naim to the Ruler of Bahrain. The authority that it relies upon in this regard is in fact referring to the payment not of tax, but of tribute or *zakat*. Moreover, it is interesting to note that the authority cited by Bahrain wrote as follows:

"Le traité de 1868 stipule en outre le paiement d'un tribut par les communautés tribales au dirigeant de Bahrain (en 'krans'): al-muhandat 1700; al bu ainain et Naim, 1500; al bu kuwarah, 500; keleb, 500; Sudan, 1500; Muhammad bin Thani pour les Maadhid et Musallam, 2500; Amamarah, 800; soit 9000 'krans' au total ou 400 livres sterling par an (IOR/5/15/2/30, file E 7). De ce montant, 4000 krans devaient être délivrés par Muhammed ibn Thani au principal *shaykh* des al-naim, le reste étant envoyé à Bahrain pour être transmis à Riyadh. Dans son rapport, le Résident politique Pelly explique:

'this payment of tribute does not affect the independence of Guttur [Qatar] in relation to Bahrein. But it is to be considered as a fixed contribution by Guttur [Qatar] toward a total sum payable by Bahrein and Guttur combined, in view to securing their frontiers from molestation by the Naim and Wahabee bedouins, more particularly during the pearl diving season, when the tribes of Guttur and Bahrein, occupied at sea leave their homesteads comparatively unprotected' (Kelly, 1968: 675).

Ce tribut - que les al-na'im nomment *jazi'ah* - fut acquitté deux années seulement. On sait que l'attribution d'une part de la *zakat*, à laquelle on réfère plus communément, ni ne confirmait ni n'infirmait un pouvoir réel de ceux qui la percevait. Elle symbolisait une soumission religieuse et la pacification. Ainsi délivrée aux al-na'im il semble pourtant qu'une responsabilité dans le respect et le maintien de l'ordre leur était dès lors dévolue. Une idée que l'on voit confirmée par des écrits plus tardifs les qualifiant de mercenaires engagés aux services des *shuyukh* de Bahrain et de Qatar et pour la 'protection of those shaikhdoms' (Lorimer, 1970, II: 1302)"<sup>114</sup>

6.51 As for the Naim acting as guards of the Ruler of Bahrain, Bahrain has mentioned only one isolated example, dating from 1869, when Colonel Pelly wrote to Mohamed bin Thani that he had invited-

"Esau bin Alee to visit me here (Bahrein) with an armed escort of the Naeem tribe, and I desire that he may not be interfered with in any way"<sup>115</sup>.

As has been noted above, the Naim tribe acted as mercenaries for both the Al-Thani and the Al-Khalifah, and there is moreover nothing to suggest that the Naim referred to in this context were Naim from Qatar, and not Naim normally resident in Bahrain.

6.52 Finally, as to the "variety of services" allegedly performed by the Naim for the Ruler of Bahrain, Bahrain refers only to Section 2.1 of its Memorial and Section 2.2 of its Counter-Memorial, where very few examples of such alleged services are to be found.

6.53 One such example which, according to Bahrain, proves "the loyalty to Bahrain of the Naim-led tribal confederacy in the north of the Qatar peninsula" related to a shipwreck that occurred off the north of Qatar in 1906<sup>116</sup>. Captain Prideaux, the British official who investigated the case, was told by a local sheikh that he was a subject of the Ruler of Bahrain and that Captain Prideaux should address himself to that Ruler<sup>117</sup>. This incident not only does not confirm what Bahrain alleges, however, but it also confirms the total lack of power of Bahrain in Qatar.

6.54 First, the document quoted by Bahrain does not say anything about any "Naim-led tribal confederacy" or indeed Zubarah; the document only mentions the sheikh of a village, "Abu Dhaluf, at the north-west end of the Katr peninsula". Second, Bahrain does not mention the fact that in 1902 the British had decided that the Ruler of Qatar "should continue to be held responsible for the behaviour of the Bedouins of Qatar"<sup>118</sup>. Finally, it may be noted that Captain Prideaux stated that:

"It was a considerable surprise to me to find that the people of this part of Katr should still ostensibly call themselves Bahrein subjects, but, as the Chief of Bahrein is *quite incapable of imposing his will upon them for any practical purpose*, I submit that this fact should not debar us from dealing with the tribes of the Katr mainland, and especially those who do not acknowledge the sovereignty of the Bin Thani family direct, in virtue of our claim to maintain the maritime peace"<sup>119</sup>.

6.55 Contrary to what Bahrain asserts, there is no evidence of the Naim dealing with "rebels"<sup>120</sup> (this being apparently a reference to the Al-Thani) on behalf of the Ruler of Bahrain, either in Zubarah or anywhere else in Qatar. Bahrain refers to British documents of 1887 and 1888 which, according to Bahrain, record "the Naim Sheikhs' visits to the Ruler of Bahrain to request assistance in their tribal struggles and in their struggles against the Doha confederation"<sup>121</sup>. In fact, the documents referred to by Bahrain allude to only one visit of one member of the Naim "on behalf of Jasim bin Thani"<sup>122</sup>. Furthermore, the Ruler of Bahrain is reported as having replied that if the Naim wanted "to side with Jasim they were free to do so, but if they wanted Sheikh Eesa they will be welcome on their island (of Bahrain), which is of extensive dimensions"<sup>123</sup>. Leaving aside the fact that the ties of allegiance of the Naim with the Ruler of Bahrain can clearly not have been very strong if the Ruler of Bahrain was happy to allow them "to side with Jasim", the fact that the Naim were also stated to be welcome on the island of Bahrain if they did not want to do so confirms once more that the Ruler of Bahrain himself considered that the authority and territory of Bahrain did not extend to any part of Qatar.

6.56 The 1937 events have already been dealt with above and in Qatar's previous written pleadings<sup>124</sup>. These events, which culminated in the submission of the dissenting Naim to the Ruler of Qatar, again confirmed the sovereignty of Qatar over Zubarah<sup>125</sup>. They also demonstrated that the alleged unswerving loyalty of the Naim to the Ruler of Bahrain simply did not exist. Thus, the Political Resident wrote that:

"Attitude of Naim is reported to be that, if they do not receive support from the Shaikh of Bahrein against the Shaikh of Qatar, they will 'adhere to Ibn Saud'. They are stated to have complained to Saud bin Jiluwi, Governor of Hasa, against the Shaikh of Qatar... Naim

numbering about 1000 (the men being (? armed)) with camels and flocks are concentrated at Zubarah. This appears to me to indicate a possible migration of Naim to Hasa"<sup>126</sup>.

The fact that the Naim were prepared to adhere to Ibn Saud and possibly to migrate to Hasa demonstrates the weakness of any attempt to found territorial sovereignty upon links of allegiance. The Court will of course recall that the same considerations apply, in the context of the dispute over Hawar, to the relationship between the Ruler of Bahrain and the Dowasir in the 1920s, the Dowasir in fact carrying out their threat of adhering to Ibn Saud in 1923<sup>127</sup>.

6.57 The document relied upon by Bahrain is also revealing of British views as to Bahrain's alleged sovereignty over Zubarah. The Political Resident wrote:

"I do not feel we should interfere if Naim emigrates to Saudi Arabia. Nor am I of the opinion that we should take any forcible measure against either side in the event of a clash between Naim and Shaikh of Qatar... Political Agent, Bahrein, however, should of course continue his efforts at persuading all parties concerned to keep peace. In particular Shaikh of Bahrein should be prevented from sending reinforcements to the Naim at Zubarah, which, apart from other considerations, would be against his *treaty of 1861* as it would involve a *breach* of (? maritime) peace"<sup>128</sup>.

This appears to show that the obligation of the Ruler of Bahrain not to interfere on the territory of Qatar had, in the view of the British authorities, been binding upon successive Rulers of Bahrain since 1861.

6.58 In sum, the evidence shows that even if there might at times have been weak or transitory links between the Ruler of Bahrain and some of the Naim, the Ruler of Bahrain was unable to exercise any authority over them. On the contrary, Qatar has drawn attention to the fact that the Chief of Bahrain himself admitted to Major Grant in 1877 the real basis of his relationship with the Naim. He stated that he had dealings with them, made presents to them and received them in Bahrain because he had no choice, for fear of the tribe joining with his enemies (at the time, Nasir bin Mubarak) and attacking the Bahrain islands from Zubarah<sup>129</sup>. The evidence also shows that from at least 1867 onwards, the Naim from time to time sided with the Al-Thani against the Al-Khalifah, and that the tribe's relationship with both Qatar and Bahrain was essentially a mercenary relationship. In these circumstances, there can be no question of the Ruler of Bahrain exercising his authority over the Naim or of any durable links of allegiance between the Naim and the Rulers of Bahrain. It necessarily follows that Bahrain's contention that it exercised sovereignty over Zubarah indirectly through the Naim cannot be sustained, and it is therefore unsurprising that Bahrain has produced no evidence of any acts of authority performed by the Naim in Zubarah or any other part of Qatar on behalf of the Rulers of Bahrain.

## **Section 5. Bahrain's Claim to Zubarah was never recognised by the British; it was not supported in Bahrain itself; and it was repeatedly disclaimed by the Ruler of Bahrain**

### **A. Britain's refusal to recognise the Bahraini claim to Zubarah**

6.59 The nature of the Ruler of Bahrain's relationship with the Naim and its consequences is discussed more fully above. For the present purposes, it is only necessary to point out that the British never recognised that such a relationship was in the nature of allegiance that entitled Bahrain to exercise any territorial sovereignty in or over Zubarah or the so-called "Zubarah Region". The Court will recall that Qatar has dealt in detail with the British response to Bahrain's claim relating to Zubarah when it was first made in 1873<sup>130</sup>. Qatar has shown that the British rejected the claim as a result of investigations made by local British officials at the time<sup>131</sup>. This was followed by a decision by the Governor General in Council of the Government of India in 1874 that the Ruler of Bahrain had no possessions on the mainland of Qatar<sup>132</sup>. This decision was duly communicated to the Ruler by the Political Resident in December 1874<sup>133</sup>.

6.60 Bahrain claims in a sub-heading in its Counter-Memorial that its "claim to rights in Zubarah was recognised by Britain"<sup>134</sup>. However, an examination of what follows under this sub-heading contains no reference to any evidence that supports such a claim. Bahrain in fact proceeds to provide reasons why the British *did not* recognise Bahrain's claims in Zubarah, and in effect tries to argue that those reasons did not affect its claim to rights in Zubarah. The main explanation that Bahrain offers is that Britain, in its own interest, "did not want to be dragged into a war - even a proxy war - with the Ottomans"<sup>135</sup>, suggesting that this could have resulted from allowing Bahrain to interfere, in any way, in Zubarah. Bahrain admits that the British authorities advised its Ruler that if protection under the 1861 Treaty was to be accorded to him, "he must not be the aggressor or undertake measures... considered inadvisable by the British Government"<sup>136</sup>. Bahrain fails to recognise that the British were therefore warning him not to commit a breach of the 1861 Treaty by any aggression across the sea if he desired the benefit of protection under that Treaty. Bahrain clearly accepted the warning so as to avail itself of the benefits under the Treaty and, as shown below, the British thereafter acted repeatedly in discharge of their obligations under the 1861 Treaty in protecting Bahrain and ensuring its security. Having obtained the full advantage of British protection under the Treaty for over a century, Bahrain surely cannot now blame the British for not supporting its claim to rights in Zubarah which the British had in any case rejected after Major Grant's investigation in 1873.

6.61 Bahrain then claims that Britain prevented the Ottomans from exercising any authority in Zubarah specifically because of Bahrain's rights there<sup>137</sup>. While it has been shown to be part of British policy in the late 19<sup>th</sup> century to refrain from according formal recognition of Ottoman claims to territory in the region, Bahrain fails to realise that this had nothing to do with "Bahrain's rights" in Zubarah. Thus the British did not similarly prevent any exercise of Al-Thani authority in Zubarah. As shown above, when the Al-Thani disciplined the Naim in Zubarah in 1878 and again in 1937, the British acquiesced in such action and took no steps to protect any alleged claim of Bahraini rights in Zubarah, having rejected that claim in 1873<sup>138</sup>. Similarly, when in 1895 the British destroyed a fleet in Zubarah harbour which posed a threat to Bahrain's security, there was never any question of allowing any Al-Khalifah presence or exercise of authority in Zubarah.

6.62 What is particularly important is that even Bahrain's so-called excuse, namely, that due to the Ottoman presence in Qatar, Bahrain was prohibited by the British from asserting any rights in Zubarah, disappeared from 1913. In that year, under the Anglo-Turkish Convention, the British, far from recognising any Bahraini rights in Zubarah, not only acknowledged the Al-Thani rights to the entire peninsula but also expressly undertook not to allow Bahrain to interfere on the Qatar peninsula even after the Ottomans had left Qatar.

6.63 Bahrain then seeks to rely on the views of individual British officials who might from time to time have expressed support or sympathy for Bahrain's claims relating to Zubarah<sup>139</sup>. Bahrain fails to recognise that such views never became part of official British policy, which continued to be a refusal to accept any Bahraini claims in Zubarah from 1873 onwards. The most striking examples of the individual views on which Bahrain seeks to rely are those expressed in 1937 by the then Political Agent, Colonel Loch, in his telegram of 30 March 1937 and a Note of 12 April 1937 to the Political Resident (Fowle)<sup>140</sup> as well as a letter of his successor, Capt. Hickinbotham, of 22 September 1937<sup>141</sup>, also addressed to Fowle. However, Bahrain fails to draw attention to the fact that Fowle's first response to Loch was a telegram stating "Personally I am of the opinion that Zubara definitely belongs to Qatar but I am writing to His Majesty's Government"<sup>142</sup>. Thereafter, and having conducted a fuller investigation, Fowle, in his considered report and recommendations of 5 May 1937 to the Secretary of State for India, concluded that in spite of his friendly feelings about Britain his view was that "juridically, Bahrain's claim to Zubarah must fail"<sup>143</sup>.

6.64 Further evidence of this continuing British position that Qatar has recently unearthed is an Intelligence Report of the Political Agency in Bahrain for July 1945 which records:

"For an hour and a half, after sitting with him in the Joint Court, the Political Agent listened to His Highness the Sheikh on the subject of his claims, rights, wrongs and grievances in and concerning Qatar. Since the implication of most of the Sheikh's arguments was, as usual, that he had sovereign rights in part of Qatar territory (Zubarah) - rights which His Majesty's Government have never admitted - the conversations resulted in little else but the exhaustion of the Political Agent"<sup>144</sup>.

6.65 Qatar has already shown that when the Ruler unilaterally requested the British for a final decision in regard to his claim of rights in Zubarah and after the issue was considered by the British Foreign Secretary, Mr. Selwyn Lloyd, the Ruler of Bahrain was expressly informed by the Political Resident in his letter of 10 August 1957 that "Her Majesty's Government have never supported any claim by Bahrain to sovereignty in Zubarah"<sup>145</sup>. He was further informed that various arrangements for special facilities (even the rights of Bahraini visits etc. to Zubarah) negotiated in the past with the Ruler of Qatar could no longer be continued, as considerations of Qatar's security required strict entry arrangements<sup>146</sup>. A further attempt by the Ruler of Bahrain to revive his complaints concerning Zubarah in 1961 was similarly rejected, his attention being drawn to the above-mentioned letter of 10 August 1957 from the Political Resident<sup>147</sup>.

### **B. Bahrain's disclaimers of sovereignty**

6.66 Qatar has set out in its Memorial details of various occasions when the Ruler of Bahrain expressly or by implication disclaimed sovereignty over Zubarah and once even stated that any such claim was more a matter of prestige than of anything else<sup>148</sup>. Qatar has given further instances of such specific disclaimers of sovereignty by the Ruler of Bahrain in its Counter-Memorial<sup>149</sup>. It is of particular importance to note that Bahrain has made no attempt to deny Qatar's allegations of Bahraini disclaimers of sovereignty in Zubarah.

### **C. Lack of any support in Bahrain for the Ruler's claim**

6.67 It is also of interest to note that Belgrave, as well as members of the Bahraini ruling family other than the Ruler himself, were aware the British Government had never recognised Bahrain's claim to Zubarah; nor did they believe there was any merit in the claim. This is apparent from the following entries in Belgrave's personal diaries:

(a) "Saturday May 1 1954

Rode, went up to Jufair with HH & from 9-30 till 1-30 talked mostly about Zubara. B told him that he had been over to Qatar, seen Z & studied all the files & papers & made up his mind & was now reporting to HMG & recommending an arrangement which included allowing Qatar patrols to patrol Zubara, but not to interfere with Bahrain people - HH of course very angry and upset and said he could never agree of his own accord. He claims what amounts to sovereignty & *the BG never has & never will admit this*. At 1 o'clock we had been invited to luncheon with the Burrows to meet Hafiz Wahaba & Yusuf Yaseen & at half past we were still discussing Zubara, however the meeting finally ended & HH, very angry with almost no voice - he has been having a cold - left. He was not as unreasonable as usual but insisted that he spoke for the family & the people of Bn, *whereas none of them care a bit, all are sick of the Qatar quarrel & Zubara*"<sup>150</sup>.

(b) "Thursday February 21 1957

Busy morning & very late coming up, a lot of people in & out. Sh Abdulla came in & we discussed *HH's attitude about Zubara, which, all agree, is unreasonable*. It seems the sons met Sh Ali of Qatar when hunting & he was very friendly & had them to dinner at his camp. HH however never varies in his detestation of the Qatar people & his claim, *which he*

*himself, & only he, really believes. Days & weeks & months of time have been wasted talking about it - or rather listening to HH on the subject"<sup>151</sup>.*

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#### FOOTNOTES

1 *See*, QMJA, para. 3.37.

2 *Ibid.*, Annex II.23, Vol. III, p. 145.

3 QR, Annex III.59, Vol. 3, p. 361.

4 In this context, the Court will recall the observations of Sheikh Hamad bin Abdullah of Qatar to the effect that "[the] graves... belonged to the dead and would continue to do so and that no one would interfere with them. There are Al Thani buried under the Petroleum Concessions Limited tennis court at Jufair but that does not give the living Al Thani any right to play tennis on the P.C.L. court!" (QM, Annex III.244, Vol. 8, p. 199; and *see*, QM, para. 8.48, fn. 67).

5 *See*, QM, Chaps. V and VIII; QCM, Chaps. III and V; and Chaps. II and III, above.

6 *See*, QCM, para. 3.45 and Chap. II, above.

7 QCM, para. 2.24, and fn. 34.

8 *See*, para. 6.8(d), below.

9 *See*, QCM, para. 2.53.

10 *See*, QCM, para. 2.26.

11 *See*, QCM, para. 3.30 and Lorimer's further observation that the Sheikh of Bahrain's "suzerainty" over Qatar by the middle of the 19<sup>th</sup> century was "more apparent than real" (QM, Annex. II.4, Vol. 3, p. 109, at p. 141).

12 *See*, para. 4.129, above.

13 QCM, Chap. II, Sect. 1.C, and Chap. II, above.

14 QCM, paras. 5.9-5.16. *See*, also, paras. 6.59, *et seq.*, below.

15 QM, Annex II.7, Vol. 4, p. 61.

16 QM, Annex II.5, Vol. 3, pp. 224-225.

17 QM, para. 2.58.

18 *See*, Chap. II, Sect. 3, above, and the historical documents there referred to.

19 QR, Annex III.22, Vol. 3, p. 119; *see*, also, QR, Annex III.25, Vol. 3, p. 137.

20 QR, Annex III.8, Vol. 3, p. 47.

21 QM, Annex II.7, Vol. 4, p. 61.

22 *See*, QCM, paras. 5.17(6) and 5.19(7).

23 BM, Annex 62, Vol. 2, p. 268.

24 *See*, QR, Annex III.14, Vol. 3, p. 81.

25 *See*, QR, Annexes III.11 and III.15, Vol. 3, pp. 67 and 85.

26 QR, Annex III.13, Vol. 3, p. 77.

27 QR, Annex III.12, Vol. 3, p. 73.

28 *See*, QCM, para. 5.22, and BM, para. 65; *see*, also, para. 2.42, above.

29 BM, Annexes 49(a) and 66(a), Vol. 2, pp. 245 and 279.

30 *See*, paras 2.42, *et seq.*, above.

31 QR, Annex III.24, Vol. 3, p. 131.

32 *See*, QM, paras. 3.55, *et seq.*, and Chap. II, Sect. 4, above.

33 BCM, Annex 122, Vol. 2, p. 412. *See*, Chap. II, Sect. 5, above. It is important to note that in March 1934, the Resident did not exclude the Hawar islands from "the whole of Qatar" or its coasts.

34 *See*, also, QM, paras. 8.45-8.46.

35 QM, Annex III.99, Vol. 6, p. 507; *See*, also, QM, para. 6.26.

36 QM, para. 8.32.

37 QM, paras. 8.31-8.43, and QCM, paras. 5.35-5.37.

38 *See*, QR, Annex III.53, Vol. 3, p. 325, where it was reported that "Without much difficulty the Shaikh of Qatar's Forces succeeded in reducing the Fort and in taking possession of the garrison. It appears that some five or six persons were killed on either side during this engagement... The Shaikh of Qatar obtained a document from Shaikh Rashid bin Mohammad of the Naim to the effect that they would [abide by the] laws of Qatar while they remained in the State and that in the event of their desiring to leave the State of Qatar they were in full liberty to do so". The Court will recall another later British Report of 5 December 1939 referred to by Qatar (QCM, para. 5.36) annexed by Bahrain to its Memorial (BM, Annex 292, Vol. 5, p. 1190, at p. 1191) which describes the 1937 Zubarah incident by stating: "Naim tribesman, financed and armed largely from Bahrain were defeated by the Shaikh of Qatar in a bloodless battle in which the casualties were two on each side". On the other hand, Bahrain's account of the same incident in the Government of Bahrain's own official Annual Report for the year 1356H (March 1937 to February 1938) states: "In the fighting which ensued there were about a dozen casualties on each side, among the Naim Arabs who were killed were several of the personal retainers of the Ruler of Bahrain who belonged to the Naim tribe and had their families in Qatar and lived sometimes in Bahrain and sometimes in Qatar. Eventually the Naim surrendered and handed over a number of their rifles. As soon as the Qatar forces had withdrawn, the whole Naim tribe with their tents, families and flocks, moved over to Bahrain where they were generously received" (QR, Annex III.59, Vol. 3, p. 361). This is contradicted by the Political Agent's Report mentioned above, which further states however: "The Shaikh [of Bahrain] asked for written permission to allow the Naim to come to Bahrain if they so desired which was granted, but the Naim did not appear to desire to leave Qatar where they had sufficient grazing for their flocks which probably they would not have been able to obtain in Bahrain" (QR, Annex III.53, Vol. 3, p. 325).

39 QM, para. 8.42.

40 QM, para. 8.43.

41 *See*, QM, para. 8.8 and QCM, para. 5.7.

42 *See*, QM, para. 8.10 and QCM, para. 5.7.

43 *See*, QM, paras. 3.35, *et seq.* and para. 8.12; QCM, paras. 3.25, *et seq.* and 5.8, *et seq.*; and paras. 6.7-6.8, above.

44 BCM, para. 2.

45 *See*, QM, para. 3.18.

46 QM, para. 8.3; *see*, also, para. 6.6, above and QCM, para. 2.24. As regards Bahrain's reliance upon the book by Bibby, *see*, Appendix 1 at the end of this Volume, para. 4.

47 *See*, paras. 3.9, *et seq.*, above.

48 BCM, para. 89.

49 *Ibid.*, para. 104.

50 QCM, paras. 5.17-5.18.

51 BCM, para. 117, referring to BM, paras. 183-186.

52 BM, para. 183; emphasis by Bahrain.

53 BM, Annex 67, Vol. 2, p. 281; emphasis added.

54 *See*, BCM, para. 94.

55 *See*, para. 6.8, above.

56 QM, para. 8.26.

57 BCM, para. 121.

58 *See*, BM, Annex 71, Vol. 3, p. 357. It may be noted that the document made no reference to any Bahraini sovereignty in Zubarah, which it described as uninhabited.

59 *See*, paras. 2.53, *et seq.*, above, referring to BCM, para. 127.

60 BM, Annex 86, Vol. 3, p. 518; *see*, also, BM, Annex 87, Vol. 3, p. 524.

61 *Ibid.*, p. 521.

62 BCM, para. 454.

63 BCM, para. 451.

64 *See*, QCM, paras. 5.38, *et seq.*

65 *See*, QM, paras. 8.49-8.50; QCM, para. 5.38; and para. 6.66, below.

66 BCM, paras. 42, *et seq.*

67 QCM, paras. 5.45, *et seq.*

68 *Ibid.*, paras. 5.48, *et seq.*

69 *Ibid.*, paras. 5.53, *et seq.*

70 *Ibid.*, para. 5.11.

71 *Ibid.*, paras. 5.58, *et seq.*

72 BCM, para. 44.

73 BM, Annex 83, Vol. 3, p. 444 and QM, Annex II.5, Vol. 3, p. 198.

74 BM, Annex 83, Vol. 3, p. 452; and QM, Annex II.5, Vol. 3, p. 206.

75 *See*, para. 6.8(c), above; BM, Annex 83, Vol. 3, pp. 470-471; QM, Annex II.5, Vol. 3, pp. 224-225.

76 QR, Annex III.5, Vol. 3, p. 31.

77 QR, Annex III.25, Vol. 3, p. 137; *see*, also, QR, Annexes III.22 and III.23, Vol. 3, pp. 119 and 125.

78 BCM, para. 45, referring to BCM, Annex 25, Vol. 2, at p. 76.

79 BCM, para. 40.

80 Qatar has already dealt, in Chap. II, Sect. 2, above, with Bahrain's unfounded assertions as to the so-called "Doha confederation".

81 BCM, para. 43.

82 QM, Annex II.69, Vol. 5, p. 353.

83 BCM, para. 54.

84 BCM, Annex 32, Vol. 2, p. 106.

85 *See*, BCM, para. 56. The idea that the Naim were "integrated into the political economy of Bahrain" is based upon the allegation that they migrated seasonally from Zubarah to Bahrain, and had homes "both in Zubarah and the islands". Bahrain overlooks the fact that this could equally well signify that they were "integrated into the political economy" of Qatar.

86 BM, Annex 232, Vol. 4, p. 1013.

87 *See*, QCM, paras. 5.44, *et seq.*; and paras. 6.38, *et seq.*, below.

88 *See*, BCM, paras. 54-55.

89 QR, Annex III.1, Vol. 3, p. 1.

90 *See*, QM, paras. 3.30, *et seq.*; and QM, Annex II.7, Vol. 4, pp. 31-36.

91 *See*, QCM, para. 5.13.

92 QR, Annex III.4, Vol. 3, p. 27.

93 BCM, para. 45.

94 *Ibid.*, para. 51.

95 *Ibid.*

96 *Ibid.*, para. 50.

97 *See*, para. 6.50, below.

98 BCM, Annex 13, Vol. 2, p. 35.

99 BCM, para. 42.

100 BM, Annex 74, Vol. 3, p. 396.

101 "The Law and Procedure of the International Court of Justice - General Principles and Sources of Law", *B.Y.I.L.*, 1953, p. 48 (QR, Annex III.103, Vol. 3, p. 629; footnote omitted). *See*, also, Sir Gerald's article in the 1955-1956 edition of *B.Y.I.L.* at p. 55 (QR, Annex III.104, Vol. 3, p. 693) and the *Aves Islands* Award of 30 June 1865, *Moore's Digest*, Vol. V (QR, Annex III.111, Vol. 3, p. 677).

102 *Eritrea/Yemen* Award, para. 315.

103 BCM, para. 40.

104 QR, Annex III.53, Vol. 3, p. 329.

105 BM, Annex 74, Vol. 3, p. 397.

106 BCM, para. 42.

107 QCM, para. 5.47.

108 BM, Annex 74, Vol. 3, p. 397; emphasis added.

109 *Ibid.*

110 QR, Annex III.40, Vol. 3, p. 237; emphasis added.

111 BCM, para. 51.

112 *Ibid.*, para. 52.

113 *Ibid.*, para. 51; emphasis added.

114 BCM, Annex 119, Vol. 2, p. 380.

115 BCM, Annex 6, Vol. 2, p. 13.

116 BCM, para. 54.

117 *Ibid.*

- 118 BM, Annex 83, Vol. 3, p. 485.
- 119 BCM, Annex 32, Vol. 2, p. 107; emphasis added.
- 120 BCM, para. 84, fn. 135.
- 121 BCM, para. 49.
- 122 BCM, Annex 21, Vol. 2, p. 47.
- 123 *Ibid.*
- 124 *See*, para. 6.8(q), above; QM, paras. 8.31, *et seq.*, and QCM, paras. 5.35, *et seq.*
- 125 *See*, QM, paras. 8.39, *et seq.*
- 126 BCM, Annex 82, Vol. 2, pp. 259-259a.
- 127 *See*, para. 4.161, above.
- 128 BCM, Annex 82, Vol. 2, p. 259a; emphasis added.
- 129 QCM, para. 5.19(3); and BM, Annex 35, Vol. 2, p. 204 (text crossed out by Bahrain).
- 130 QCM, paras. 5.10, *et seq.*
- 131 *Ibid.*
- 132 QM, paras. 8.19-8.20.
- 133 QM, Annex III.30, Vol. 6, p. 145.
- 134 BCM, Section 2.2(H) (iii), p. 46.
- 135 BCM, para. 98.
- 136 BCM, para. 99.
- 137 BCM, para. 102.
- 138 *See*, in this regard, para. 6.57, above.
- 139 BCM, para. 100.
- 140 BM, Annexes 113 and 114, Vol. 3, pp. 633 and 634.
- 141 BM, Annex 160, Vol. 4, p. 733.
- 142 BM, Annex 112, Vol. 3, p. 632.
- 143 QCM, paras. 5.31, *et seq.*
- 144 QR, Annex III.95, Vol. 3, p. 581.
- 145 QM, para. 8.53.
- 146 *Ibid.*
- 147 *Ibid.*, para. 8.54.
- 148 *Ibid.*, paras. 8.47, *et seq.*
- 149 QCM, para. 5.38. Another similar instance, which Qatar has recently noted, is a Report of the British Political Residency of 12 May 1953 which records: "... a map published last year with an Annual Report of the Bahrain Government's Education Department in which a considerable slice of the north-western coast of Qatar is included in an area shown as 'Bahrein Islands and Dependencies'. In fairness to the Ruler of Bahrein it should be stated that this map appears to have been published without his knowledge and that he was considerably embarrassed when he was shown it" (QR, Annex III.96, Vol. 3, p. 587).
- 150 Extract from Belgrave diary dated 1 May 1954; emphasis added.

151 Extract from Belgrave diary dated 21 February 1957; emphasis added.

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

**REPLY OF THE STATE OF QATAR**

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**PART IV**

**MARITIME DELIMITATION**

**Introduction**

(i) In its Counter-Memorial, Bahrain is content simply to reiterate the principal claim put forward in its Memorial concerning the maritime delimitation<sup>1</sup>. It no longer refers to the two alternative claims which appeared in Part Two of its Memorial<sup>2</sup>. Qatar can only note this development, and will not speculate here on Bahrain's apparent change of position<sup>3</sup>. Qatar is nonetheless obliged to emphasise yet again the extraordinary nature of the claim which Bahrain has reiterated in its Counter-Memorial, and which is altogether extravagant and manifestly inequitable. What follows, therefore, is directed to bringing out the issues that still divide the Parties.

(ii) Unfortunately, as will be seen, the few specific points on which there is apparent agreement between the Parties are far outnumbered by the large number of issues on which the Parties hold significantly differing views. To give just one important example, it is clear that, while there might appear to be a measure of agreement concerning the applicable law, the Parties disagree entirely as to the application of the rules governing maritime delimitation. Similarly, while the two Parties accept the need to divide the maritime delimitation into two sectors, they differ profoundly as to how that division should be effected.

(iii) The basic disagreement between the Parties turns essentially on two main issues which lie at the root of the maritime delimitation process in this particular case. Those issues relate to the identification of the relevant coasts to be taken into consideration, and to the role assigned to the 1947 sea-bed delimitation line. In addition, Qatar submits that Bahrain has obscured these issues due to the false impression that it has tried to create of itself as a "sea-oriented archipelagic State" - an impression which appears constantly throughout its Counter-Memorial.

(iv) In this Part of the Reply, Qatar will expose the defects in Bahrain's approach to maritime delimitation, and will demonstrate how Qatar's method, in contrast, leads to an equitable result. To this end, Chapter VII will examine Bahrain's imaginary views of itself. Chapter VIII will then respond to Bahrain's false allegations that Qatar has misrepresented the nature of the Bahraini "coast" and has given "undue weight" to the 1947 line. Chapter IX, which is devoted to the method of delimitation of the single maritime boundary claimed, will demonstrate that, contrary to Bahrain's assertion, there is no contradiction in the Qatari approach and that, unlike Bahrain's extraordinary claim, that approach, which takes into consideration all relevant circumstances, produces an equitable solution.

## CHAPTER VII

### BAHRAIN'S IMAGINARY VIEWS OF ITSELF

#### Introduction

7.1 In the context of the maritime delimitation, the Bahrain Counter-Memorial seeks to impress upon the mind of the reader some simple and self-serving ideas. Principal among these is the image of Bahrain as a maritime State whose power, influence and geographical extent stretch as far as the shores and even the mainland of Qatar. This is pure fantasy. Conversely, Bahrain seeks to present an image of Qatar as a tribal and nomadic community confined to the east coast of the Qatar peninsula. As part of this process, Bahrain misrepresents Qatar's position on several important points and then purports to rebut these misrepresented views. Although such rhetorical techniques are scarcely novel, they cannot be left unanswered.

#### **Section 1. The Fantasy of Bahrain as a Maritime State whose Power, Influence and Geographical Extent stretches as far as the Shores and even the Mainland of Qatar**

7.2 Bahrain tries to convey an image of itself as a powerful maritime State by characterizing itself in typically expansive, convoluted and, in the final analysis, meaningless language as a "system of spatially proximate and economically interrelated islands and other relevant features" and by alleging that the Sheikhdome extends up to the shores and even to the mainland of Qatar. This is another imaginary Bahraini construct of a maritime Sheikhdome ruling the waves. These artificial characterisations serve as a springboard to advance a wholly artificial and hugely extravagant delimitation line.

#### **A. Bahrain's notion of "a system of spatially proximate and economically interrelated islands and other relevant features"**

7.3 In its Counter-Memorial Bahrain tries to give meaning to this often repeated, if somewhat pompous, litany of "a system of spatially proximate and economically interrelated islands and other relevant features". The meaning of this jargon is not immediately apparent, and its mere

repetition - which can be illustrated by a few excerpts from the text itself - is of no assistance to the reader:

"The human geography of the region has traditionally reflected an integrated socio-economic unit in the Gulf of Bahrain and its littoral including the main island of Bahrain, the Hawar group of islands, the other Bahraini maritime features and the Zubarah Region..."<sup>4</sup>.

"Bahrain does not consist simply of its main island, but is geographically and politically, in addition to the Zubarah Region, an archipelago, a system of spatially proximate and economically interrelated islands and other relevant features"<sup>5</sup>.

"The State of Bahrain consists of a system of inter-related maritime features, which includes, in addition to the main island of Bahrain and the islands of Muharraq and Sitrah, the Hawar archipelago and all the islands and other features scattered throughout the sea between the main island of Bahrain and the Qatar peninsula, together with the Zubarah Region"<sup>6</sup>.

Elsewhere, Bahrain insists on "the essentially insular and archipelagic character of the State of Bahrain"<sup>7</sup>.

7.4 One fails to see how "spatially proximate" the main island of Bahrain could be to Hawar or Zubarah. If these words have a meaning, one would have ventured to assume that, rather than being "spatially proximate" to Bahrain, Hawar and Zubarah were "spatially" an integral part of Qatar. The "economic interrelation" between Zubarah and Bahrain also comes as a surprise. Finally, how the archaeological site of Zubarah - which has never up to now been construed by anyone as an island - can be part of an archipelagic State, is also a great mystery. In contrast to Bahrain's exaggerated view of itself, Bahrain seeks to confine Qatar to "Doha an isolated enclave on the east coast of the Qatar peninsula"<sup>8</sup>. The false nature of these allegations insofar as they concern Qatar's sovereignty over the whole peninsula including Hawar and Zubarah has already been demonstrated previously in this Reply. In this Part of the Reply, Qatar will deal with the implications of Bahrain's assertions with respect to the question of maritime delimitation.

7.5 Qatar's position - which is in conformity with the history and international law - is threefold:

- 1) the sole recognised historical "Bahrain archipelago" comprises the five main islands of Bahrain and a number of lesser islets and rocks forming part of the same compact geographical group. It does not extend to any other scattered "features" lying between the shores of the two States;
- 2) Bahrain has not presented evidence, item by item, to establish that each and every one of the so-called maritime "features" between the historically recognised Bahrain archipelago and Qatar falls under its sovereignty;
- 3) the so-called economic and political unity of these "features" (low-tide elevations, rocks and small islets) is pure assertion, without any proof whatsoever.

### **1. The historically recognised "Bahrain archipelago"**

7.6 The Bahrain archipelago has historically been described and depicted as being limited to a compact group of islands and a number of islets and rocks in its immediate vicinity<sup>9</sup>. The following examples may be cited:

- 1874: Confidential memorandum of 25 March 1874, printed for the use of the Foreign Office, on the separate claims of Turkey and Persia to sovereignty over the island of Bahrein:

"The Bahrein Islands are a small group of islands, three in number, on the south-west side of the Persian Gulf, in the centre of Bahrein Bay, the principal of which is Bahrein (or Aval), lying about ten miles off the Coast of Arabia"<sup>10</sup>.

- 1890: J. Theodore Bent, of the Royal Geographical Society, describes Bahrain as follows:

"The group of islands known as the Bahrein... lies in a bay of the same name about 20 miles off the coast of El Hasa, in Arabia, in the Persian Gulf. Bahrein, the largest is 27 miles long by 10 wide... The second island in point of size is Moharek, north of Bahrein, and separated from it by a strait one mile broad... and is about five miles in length. The rest of the group are mere rocks: Sitrah, four miles long, with a village on it of the same name; Nebbi-Saleh; Sayeh, and Khaseifah, and to the east of Moharek, Arad, three-quarters of a mile in length... (either an island or a peninsula at low tide)"<sup>11</sup>.

- 1908: Lorimer (*see*, paragraphs 7.7-7.8, below)

- 1916: *A Handbook of Arabia*, Vol. I, General :

"The present Sheikdom of Bahrein consists of the archipelago formed by the islands of *Bahrein, Muharraq, Umm Na'asan, Sitrah* and *Nebi Salih*, with a number of lesser islets and rocks. The whole forms a compact group almost in the middle of the gulf which separates the promontory of El-Qatar and the coast of Qatif..."<sup>12</sup>.

- 1928: India Office confidential memorandum of 27 August 1928 signed J.G.L. (Laithwaite) and entitled "Status of certain Groups of Islands in the Persian Gulf":

"The Bahrein Archipelago

The archipelago consists of the islands of Bahrein, Muharraq, Umm Na'assan, Sitrah and Nabi Salih, and a number of lesser islets and rocks forming part of the same compact geographical group"<sup>13</sup>.

- 1934: India Office memorandum from Laithwaite of 14 July 1934 which repeats the same description<sup>14</sup>.

- 1939: *The Military Report and Route Book for the Arabian States of the Persian Gulf 1939*, gives a similar description:

"The Sheikdom of Bahrein consists of the archipelago formed by the islands of Manama, Muharraq, Umm-Na'san, Sitrah and Nebi Sala, with a number of lesser islets and rocks. The whole forms a compact group almost in the middle of the bight which separates the promontory of Qatar and the mainland of Hasa"<sup>15</sup>.

7.7 Given that Bahrain relies so heavily on Lorimer's description, it may be useful to reproduce it here:

"The present Shaikdom of Bahrain consists of the archipelago formed by the Bahrain, Muharraq, Umm Na'asan, Sitrah and Nabi Salih islands and by a number of lesser islets and rocks *which are enumerated in the articles upon the islands: taken all together these form a compact group almost in the middle of the gulf* which divides the promontory of Qatar from the coast of Qatif and which, as it has no recognised name, may appropriately be styled the Gulf of Bahrain"<sup>16</sup>.

7.8 The fact that the only recognised historical "Bahrain archipelago" is limited essentially to the five main islands of Bahrain - Lorimer's description of the Sheikdom speaks of a "compact group almost in the middle of the Gulf" - is confirmed by the list of islets and rocks given by Lorimer as appertaining to the Sheikdom. These are limited to those lying very close to the main islands<sup>17</sup>, *i.e.*:

For Bahrain main island, formerly called "Awal"<sup>18</sup>

- Jidi (Jazirat): 3 miles west-south-west of Budaiya: islet

- Libainat-al-Aliyah: 8 miles west-north-west of Budaiya: islet

- Libainat-as-Safiliyah: 8 miles west-south-west of Budaiya: islet

- Na'aija: 2 miles west-north-west of Budaiya: rocks, rising 2 feet above high water mark

- Raqah (Jazirat-ar): 1 ¼ miles south-west of Budaiya: islet, rocky and about 5 feet above high water, covered with low scrub. Also known as Umm-as-Subban
- Sahailah (Jazirat): 1 ½ miles north west of Budaiya: islet, sandy, said to be increasing in elevation, but is still covered at high tide<sup>19</sup>
- Ya'suf (Jazirat): 2 ½ miles west of Aqariyah: islet, small and barren.

All these "islets" are in the close vicinity of the west coast of Bahrain island except the two Libainat islands. But, as is well known, these were ultimately shared with Saudi Arabia, on the basis of the proximity principle, by the agreement of 22 February 1958, Libainat-al-Aliyah being recognised as appertaining to Saudi Arabia<sup>20</sup>.

For Muharraq<sup>21</sup>:

- Jurdi (Jazirat): 1 mile north-east of Qalali: an islet 2 feet above sea level, situated on the shore reef, with the remains of a building<sup>22</sup>
- Khasaifah (Jazirat): ½ mile north of Dair: a small rocky islet on the shore reef
- Sajah (Jazirat-as-): 1 mile west of Busaitin: a small islet on the shore reef
- Shahin (Jazirat Abu): 1 mile south-east of Hadd: an islet on the shore reef

It will be noted that all these islets are on the shore reef of Muharraq.

For Nabi Salih:

This small island, part of the Bahrain group (enclaved between Mina Sulman on the main Bahrain island and Sitrah), is not listed as a main entry by Lorimer.

For Sitrah<sup>23</sup>:

- Qassarain: 500 yards from the north side of Sitrah island: 2 rocky islets
- Tarif (Qassar Bin-): 250 yards from the north-west corner of the island: a rocky islet.

For Umm Na'asan:

This small island, part of the Bahrain group, is not listed as a main entry by Lorimer. The surrounding islets were mentioned above under Bahrain island.

7.9 The same position is taken by Lorimer with regard to Qatar. Only the islands and islets close to the shores of Qatar are mentioned, among them the Hawar islands and Janan. Consequently, nothing in the sources reviewed above supports Bahrain's contention:

"... that the maritime features situated between Bahrain's main island and Qatar form an integral part of the State of Bahrain, indeed, *are* the State of Bahrain"<sup>24</sup>.

7.10 As it appears from the Map Atlas appended to the present Reply, maps published between 1868 and 1937 consistently depict the Bahrain islands and Qatar (including Hawar and Zubarah) in different colours. Significantly, large-scale maps such as Bent's map of 1890 and Tivener's map of 1898 which depict the Islands of Bahrain do not show the "features" relied upon by Bahrain as part of the State of Bahrain<sup>25</sup>.

**2. Bahrain has not presented evidence, item by item, to establish that each and every one of the so-called maritime "features" between the historically recognised Bahrain archipelago and Qatar falls under its sovereignty**

7.11 The first question to clarify in this context is the correct usage of the legal concepts to be applied in the circumstances. The Bahrain Counter-Memorial constantly uses the word "features". In spite of the fact that this word is mentioned 93 times in the Bahrain Counter-Memorial<sup>26</sup>, the concept of "feature" is alien to international law. The use of a meaningless concept in such a deliberate manner can only be designed to obscure the legal situation in a number of respects. *First*, it encompasses in a single word four different concepts used in the law

of the sea, *i.e.*, island, rock, reef, and low-tide elevation, thereby confusing their legal characteristics; *second*, it begs the question as to the right of a coastal State to appropriate islands, rocks, reefs, and low-tide elevations; and *third*, it confuses the potential legal entitlements of such "features" to a territorial sea or other maritime zones with their possible use in a delimitation process.

7.12 The law of the sea knows several concepts to characterise pieces of land emerging from the sea, *i.e.*, islands, rocks, reefs, and low-tide elevations.

### 7.13 Islands

"An island is a naturally formed area of land, surrounded by water, which is above water at high tide"<sup>27</sup>.

By way of distinction from artificial islands or "installations", an island must have been natural in origin and, therefore, cannot be the product of human action. Every island has a territorial sea, a contiguous zone, and, provided it is not a mere rock, an exclusive economic zone and a continental shelf. These zones are determined in accordance with the provisions of the 1982 Convention applicable to other land territory<sup>28</sup>. As will be seen below, the role of islands in a matter of delimitation varies considerably in practice according to their size and location. Consequently, Bahrain's contention that "islets" is "a term devoid of legal meaning, since an island is an island in international law regardless of its size"<sup>29</sup> misses the point. The fact is that the International Court of Justice has not hesitated in some circumstances to speak of islands as "islets" and in some cases for the purposes of delimitation to draw consequences from their small size<sup>30</sup>. Indeed, when one comes to a delimitation process, islands are treated in a number of different ways. As clearly evidenced by State practice and case law, small islands are often disregarded and even large islands are, on occasion, given only a partial effect or no effect at all<sup>31</sup>.

### 7.14 Rocks

Rocks as such are not defined by the 1982 Convention on the Law of the Sea. However, there is no dispute about the fact that:

- rocks are a sub-category of islands;
- as islands they must be uncovered at high tide;
- even if it is not provided as such in the Convention, rocks are islands of small dimension.

Moreover, the Convention contains a provision of great practical importance:

"Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf"<sup>32</sup>.

### 7.15 Reefs

Reefs are not defined by the 1982 Convention on the Law of the Sea but the usual description is the following:

"A mass of rock or coral which either reaches close to the sea surface or is exposed at low tide, posing a hazard to navigation"<sup>33</sup>.

Except for the words "posing a hazard to navigation", the same definition appears in the *Consolidated glossary of technical terms used in the United Nations Convention on the Law of the Sea*<sup>34</sup>. This source adds the following distinction:

"Drying reef. That part of a reef which is above water at low tide but submerged at high tide.

Fringing reef. A reef attached directly to the shore or continental land mass, or located in their immediate vicinity".

### 7.16 Low-tide elevations

As defined by Article 13, paragraph 1 of the 1982 Convention on the Law of the Sea:

"A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide".

An identical definition was given by Article 11, paragraph 1 of the Convention on the Territorial Sea and the Contiguous Zone of 1958. The difference between a low-tide elevation and an island lies in the fact that the latter remains permanently uncovered at high tide. By way of contrast to islands, low-tide elevations are not susceptible to appropriation<sup>35</sup>.

7.17 The second question to clarify is the physical and legal nature of the so-called "features" situated between Bahrain's main island and the Qatar peninsula, i.e. south of the closing line between Muharraq and Ras Rakan. While the legal concepts are clear, their actual application to the situation in the area is not always easy. In the gulf between Qatar and Bahrain, the waters are traditionally described as shallow and dangerous for maritime navigation; in view of the scarcity of maritime surveys, the difference in the choice of mean sea level datum and the variations in tidal heights, it is not always easy to distinguish, in actual fact, between low-tide elevations, rocks and reefs. The situation from south to north, excluding the Hawar islands, is as follows<sup>36</sup>:

(a) *Unnamed rock southeastwards of Halat Nun* (25°45'00" N, 50°38'40" E)

2 ¼ miles southeastwards of Halat Nun there is an unnamed rock (drying coral reef); on Bahrain chart 5005 shown with a high water line 0.5 metres above LAT Datum.

(b) *Al Hul*: (25°44'40" N, 50°33'65" E)

On British chart 2886 published in 1972: indicated as a small islet with a cairn.

On Bahrain chart 5005 no islet is visible but a drying coral spit extending from Ras al Barr.

(c) *Halat Noon or Nun*: (25°46'50" N, 50°33'95" E)

An island according to BCM (paragraph 484), lying 1 mile east of Ras al Barr.

Bahrain chart 5005: islet 0.3 metres high.

(d) *Qassar Nun or Sabkha Noon*: (25°47'30" N, 50°36'15" E)

Not mentioned in BCM.

On British chart 2886: "Sabkha Noon, cairn".

Bahrain chart 5005: drying reef with cairn 1.8 metres high.

(e) *Al'Mutarid*: (27°47'05" N, 50°42'65" E)

An island according to BCM (paragraphs 484 and 510).

On Bahrain chart 5005, it is not an island but a reef about 1 ½ miles long with a cairn 2 metres high. There is no high water line on it.

(f) *Mashtan*: (27°48'35" N, 50°40'95" E)

An island according to BCM (paragraphs 484 and 510).

On Bahrain chart 5005: reef with a "V" form, 500 metres long, 100 metres wide. Beacon

2 metres high. Northeastern arm: neither drying height indicated nor any indication that it is an island. Northwestern arm: awash at low water. At the southern end small island indicated called "Jazirat Mashtan".

(g) *Fasht Bu Thur*:

A low-tide elevation according to BCM (paragraph 484).

Shown for the first time on Bahrain chart 5005. Northern part a drying reef about 1 mile long; southern part about the same size but it is a reef with less than 2 metres of water over it with a drying part.

(h) *Jabbari*: (25°53'02" N, 50°38'70" E)

An island according to BCM (paragraph 484).

Referred to as Yabberi rock on British chart 2886.

A mere reef on Bahrain chart 5001 ("Jabberi") with a cairn 2 metres high. No high water line indicated.

(i) *Qita'a el Erge*:

A low-tide elevation according to BCM (paragraph 484).

On Bahrain chart 5001, three small separate coral reefs. A beacon at 25°52'95" N, 50°47'76" E.

(j) *Thalib or Tighaylib*:

A low-tide elevation according to BCM (paragraph 484).

On Bahrain chart 5001 coral reef dry at LAT, cairn 2.1 metres at 25°54'60" N, 50°41'95" E.

Some drying coral reefs close off its south western edge.

Beacon at 25°53'10" N, 50°43'35" E.

(k) *Umm Jalid (Fasht Adham)*:

An island according to BCM (paragraphs 484 and 510).

On Bahrain chart 2501: an islet about 260 metres long and 50 metres wide and 0.3 metres high above MHW parallel to a drying reef. Centre at 26°01'50" N, 50°43'30" E.

(l) *Island North of Ras abu Jarjur*: (26°04'75" N, 50°37'35" E)

On Bahrain chart 2501: Close to the shore and about 360 metres by 60 metres. No height is given.

(m) *Jazirat ash Shaykh*: (26°03'00" N, 50°37'95" E)

On Bahrain chart 2501, just north of and close to Ras Hayyan: 180 x 40 metres. No indication of height. Symbol of mosque on it. Two small islets are situated southward 1.2 and 1 metres high.

(n) *Fasht Al Azm*:

The Bahrain Counter-Memorial asserts that Fasht Al Azm is a low tide elevation (paragraph 484). There are a few inconsistencies in the Bahrain mapping with regard to this "feature". Bahrain chart 5001 labels it "drying reefs and sandbanks" and chart 2501 "numerous drying reefs and sand banks"; both represent the fasht as a continuous line drying completely at low tide and being attached to Sitrah island.

Chart 1502 describes the fasht in different terms - "numerous shoals, dries in patches" - a description which is more consistent with former mapping (*e.g.* British chart 2886), and depicts more accurately several interruptions in the continuance of the shoal eastward at high tide.

What is important to emphasize in the circumstances is the fact that former mapping of the area shows that there was a separation between the low water line of Fasht Al Azm and the low water line of the mainland. The fasht was not joined naturally to Sitrah. There was already a water passage before reclamation was made in 1981-1982. This has already been explained in the Qatar Counter-Memorial<sup>37</sup>, and further proof is to be found in Landsat Satellite photography dating from 25 January 1973, a copy of which is being deposited with the Registry. Fasht Al Azm is thus a series of low tide elevations, naturally unconnected with Sitrah island<sup>38</sup>.

(o) *Qit'at ash Shajarah (Um Mais)*:

A low-tide elevation, east of Fasht Al Azm but not connected to it.

As already noted in the Qatar Counter-Memorial<sup>39</sup>, contrary to the maps given in the Bahrain Memorial, Qit'at ash Shajarah is clearly separated from Fasht Al Azm as evidenced, for example, by British chart 2886 and by Bahrain chart 5001.

(p) *Qit'at Jaradah*:

This shoal is described by the Bahrain Counter-Memorial as a low-tide elevation (paragraph 468)<sup>40</sup> and as an island (paras. 511-520). This latter characterization is contested by Qatar which has brought ample evidence in Appendix 5 to its Memorial that it is a low-tide elevation<sup>41</sup>. With regard to Qit'at Jaradah the Bahrain Counter-Memorial uses only the passages from that Appendix that are in favour of its thesis and carefully conceals the fact that the British authorities were never convinced that Qit'at Jaradah was anything other than an artificial island<sup>42</sup>. This fact is proven today by photographs taken on the spot which have been appended to the Qatar Memorial<sup>43</sup>. The allegation by Bahrain that this statement of fact is the result of a removal of the land by Qatar during the incidents in 1986 is disproved by the fact that the return to the *status quo ante* was implemented by an outside contractor under international GCC supervision<sup>44</sup>. Furthermore a Landsat satellite image taken on 30 December 1984 shows that the shoal was covered at high tide<sup>45</sup>.

(q) *Fasht Dibal*:

Bahrain admits now that Fasht Dibal is a low-tide elevation<sup>46</sup>. It is not mentioned in the list of "Bahraini islands"<sup>47</sup> and is not treated elsewhere as an island.

7.18 The third question is to determine whether these "features" are susceptible of appropriation, and if so, by whom and by which process.

7.19 There are two methods by which islets, low-tide elevations, rocks and reefs may fall under the sovereignty of a State.

7.20 First, in some instances they may be susceptible to appropriation by the usual means whereby land territory may be acquired. It is Qatar's position that low-tide elevations and reefs - as distinct from islets and rocks - may not be appropriated in that way. As to the *islets* and *rocks* lying between Bahrain and Qatar - when both States had a territorial sea of only 3 miles width - they were certainly not recognised at the time as belonging to either State.

7.21 The second method is based on the rules governing the extension of a State's sovereignty over its territorial sea. It is not disputed that the sovereignty of a coastal State extends, beyond its land territory and internal waters, to an adjacent belt of sea, described as the territorial sea. Consequently all the islands, rocks, low-tide elevations and reefs located in its territorial sea belong in principle to the coastal State. Such jurisdiction does not extend to such "features" located in the open sea. It follows, therefore, that low-tide elevations and reefs located in the open sea are not subject to appropriation<sup>48</sup>. The situation is altered now only to the extent that both States have established a 12 mile territorial sea. Both States may claim sovereignty over the islets, as well as over all the low-tide elevations, rocks and reefs lying within their respective territorial waters. Consequently, contrary to what is alleged by Bahrain, Qatar does not contend that there is a "physical and legal vacuum"<sup>49</sup> between the two mainlands. A problem arises only when the two territorial seas overlap, in which case, instead of a vacuum, two conflicting claims may cover part of the area to be delimited.

### **3. The so-called economic and political unity of these low-tide elevations, rocks and small islets is completely unfounded**

7.22 The extended description which has been given above speaks for itself. In Lorimer's time, only four of the main islands constituting the Bahrain group were inhabited, and there is no evidence of habitation of Umm Na'asan and any other islets, low-tide elevations, rocks or reefs

claimed by Bahrain between the two States. If by the expression "economic unity" Bahrain is referring to the use of islands, reefs, rocks and low-tide elevations by Bahraini fishermen, this overlooks the well-known fact that until very recent times, fishing has traditionally been common to all tribes in the Arabian-Persian Gulf. This was as true for swimming fish as it was for pearl fisheries<sup>50</sup>.

7.23 It will be recalled in this regard that the British decision of 23 December 1947 stated that it did not:

"affect any fishing or other rights in the waters on either side of the line, nor is it intended to deprive Qatar [Bahrain] nationals of rights in private property such as fish-traps which may lie in the waters on the Bahrain [Qatar] side of the line nor Bahrain [Qatar] nationals of similar rights in the waters on the Qatar [Bahrain] side of the line"<sup>51</sup>.

Similarly, the 1949 proclamations by both States on their rights over the seabed reserved the traditional fishing rights of all fishermen:

"Nothing in this Proclamation shall be considered to affect the character as high seas of the waters of the Persian Gulf above the seabed and outside the limits of the territorial waters or the status of the air space above the waters of the Persian Gulf outside the territorial waters or *the fishing and traditional pearling rights* in such waters"<sup>52</sup>.

7.24 The same argument presented by Bahrain in the context of its claim to the Bu Saafa banks was rejected firmly by Saudi Arabia. *See*, for instance the following statement:

"It was made clear... that the Saudis could not consider fishing and pearling as evidence. It was a historical and acknowledged fact as well as common practice that all nationals of any state could use any fishing or pearling area and this did not give rights of ownership"<sup>53</sup>.

7.25 The same applied to the *fashts* used as shelters such as Dibal and Qit'at Jaradah<sup>54</sup>. As will be recalled in this regard, the Political Resident's telegram to the Secretary of State for India dated 7 June 1940 stated that:

"*Fasht Dibal*. ... In point of fact it is almost entirely submerged and belongs to neither [Bahrain nor Qatar] and is resorted to by all fishermen under stress of weather"<sup>55</sup>.

Similarly, Prior's letter of 18 October 1941 to Peel of the India Office concerning Dibal stated that:

"*Fasht al Dibal* is not in any sense peculiarly a Bahrain anchorage and is freely utilised by all pearlery in this neighbourhood"<sup>56</sup>.

The other reefs, rocks and islets, including Meshtan and Al-Hool, are without economic value. Qassar (west of Ras al Barr) and Al Hool were not taken into account in the Saudi Arabia/Bahrain delimitation.

7.26 It is also important to note that the so-called "features" lying between the two States south of the closing line Muharraq - Ras Rakan have never played any role as pearling banks, a fact which is not in dispute between the two Parties<sup>57</sup>.

7.27 As to swimming fish, there is obviously no connection between these and the "features" *per se*. In any event, although Bahrain gives information about its fishing activities, such information is of a general nature and is not specifically related to the maritime areas between the two countries.

7.28 Finally there is no oil exploitation by either State in this area.

7.29 In these circumstances, to speak of an "integrated socio-economic unit" consisting of uninhabited Lilliputian islets, low-tide elevations, rocks or reefs is a gross misrepresentation of reality.

## **B. Bahrain's image of itself: a maritime Sheikhdom ruling the waves**

7.30 Bahrain has shown a certain sensitivity with regard to the characterization made in Qatar's previous pleadings<sup>58</sup> of Bahrain seeking to impose the idea of itself as a maritime Sheikhdom "ruling the waves"<sup>59</sup>. But the constantly repeated Bahraini claims render vain any denial. As shown in Qatar's previous pleadings, for many years Bahrain has claimed sovereignty over all the sea between the two countries. This fanciful claim was transformed in 1960-1961 into a claim to the continental shelf<sup>60</sup>. In spite of its disclaimer, the present position of Bahrain remains the same as evidenced by:

- the very fact that Bahrain claims "that the maritime features situated between Bahrain's main island and Qatar form an integral part of the State of Bahrain, indeed, *are* the State of Bahrain"<sup>61</sup>;
- the map of Bahrain's claim<sup>62</sup>. With the Bahraini claims on the Qatar peninsula we are back to the old claims of the Ruler of Bahrain to the whole of the sea between the two countries except for some small enclaves;
- the vacillations between the concept of "archipelagic State"<sup>63</sup> or that of "sea-oriented State" exercising sovereignty over the sea north of the Qatar peninsula and part of the land territory of Qatar.

In this context, the Bahraini claim to sovereignty over the sea to the north of Qatar on the basis of pearling activities which were never an exclusive right of Bahraini fishermen, but were on the contrary a prerogative of every tribe in the Gulf, is extraordinary. Considering that pearling has been defunct for at least half a century and has no prospect of revival, this is another Bahraini fantasy.

7.31 The other Bahraini attempt is to try to give an image of Qatar as a "continental land-oriented State"<sup>64</sup>. This is a purely ideological vision. Italy or Spain (also, like Qatar, peninsulas) are no less sea-oriented than Malta or Cyprus. Consideration of the coastal length of a State is probably a better and more objective test to determine whether such a State is "sea-oriented". This criterion is clearly in favour of Qatar.

### **Section 2. Bahrain's Misrepresentation of Qatar's Position**

7.32 The other rhetorical device employed by Bahrain consists in misrepresenting Qatar's position on several important points and then purporting to rebut these misrepresented views. This can be shown by a few examples.

#### **A. Qatar reduces Bahrain to a single main island**

7.33 Contrary to what is alleged in the Bahrain Counter-Memorial<sup>65</sup>, Qatar nowhere reduces Bahrain to its main island alone; Bahrain is consistently treated as a compact group of islands. For instance, the closing line between the northern and southern sectors is based on one of Bahrain's main islands, Muharraq, and Sitrah island is also taken into account as part of Bahrain's coast for drawing a provisional equidistance line. By way of contrast, Qatar has not taken into account all the small islets, rocks, reefs and low-tide elevations in the sea between the two States, as it is Qatar's firm conviction that these elements cannot have any effect on the delimitation of the single maritime boundary. In any event, some of the "features" listed by Bahrain are closer to Qatar than to Bahrain.

#### **B. Qatar admits that low-tide elevations are susceptible to appropriation**

7.34 Contrary to Bahrain's allegations, Qatar cannot accept the following statements:

"The Parties also seem to agree that the low-tide elevations in the disputed area are susceptible to appropriation and are subject to the sovereignty of one or the other"<sup>66</sup>.

or

"This brings to an end the old controversy as to whether low-tide elevations are capable of appropriation in sovereignty: it is accepted today that they are. Indeed, the Parties concur on this proposition, for Qatar itself requests the Court 'to adjudge and declare... that Fasht ad Dibal and Qit'at Jaradah shoals are low-tide elevations which are under Qatar's sovereignty"<sup>67</sup>.

This betrays a complete confusion of mind. Qatar has constantly made clear its position on the subject and maintained that low-tide elevations are not subject to appropriation as land territory<sup>68</sup>. It is true, but this is a different matter, that "sovereign rights" can be acquired over them as a consequence of the jurisdiction over the continental shelf, exercisable by the coastal State, if the low tide elevation is situated on the continental shelf. And it is also true that "sovereignty" can be exercised over them when they are situated within territorial waters as a consequence of the sovereignty exercisable by a coastal State over its territorial waters. Consequently, Qatar did in the past claim "sovereign rights" over Dibal and Qit'at Jaradah because they were part of its continental shelf, and now claims "sovereignty" over these two low-tide elevations, not because they are susceptible to acquisition as land territory, but because they fall within Qatari territorial waters as now extended to twelve miles.

7.35 The rule according to which only islands (or for that matter islets) and rocks are capable of appropriation has been evoked by the International Court of Justice in the *Minquiers and Ecrehos* case:

"... the Court is requested to determine the sovereignty over the islets and rocks in so far as they are capable of appropriation. These words must be considered as relating to islets and rocks which are physically capable of appropriation"<sup>69</sup>.

This statement echoed what had been Britain's position in its pleadings, interpreting Article I of the special agreement<sup>70</sup>:

"... these words, considered according to their natural and ordinary meaning in the context, simply have in view the fact that certain islets or rocks in or round the groups may, by reason of their physical nature and position, be incapable of appropriation by any State at all: that is... there might be rocks or banks which are only uncovered at low water, and are situated outside the territorial waters of any appropriated land"<sup>71</sup>.

Expressing his view as a scholar, Sir Gerald Fitzmaurice wrote a few years later:

"It is a well-established rule of international law that territory, in order to be capable of appropriation in sovereignty, must be situated permanently above high-water mark, and not consist e.g. of a drying-rock, only uncovered at low tide, unless it is already within the territorial waters of appropriable territory"<sup>72</sup>.

After reciting the above extract from the Court's judgment in the *Minquiers and Ecrehos* case, Sir Gerald added:

"By this finding, the Court also implicitly endorsed the rule that certain kinds of territory are not capable of appropriation in sovereignty at all. The usual case is that of the island, rock, bank or shoal only uncovered at low tide"<sup>73</sup>.

This was also the position taken by Sir Hersch Lauterpacht in the eighth edition of *Oppenheim's International Law* (which he edited):

"Since the open sea is free, no part of it can be the object of occupation, nor can rocks or banks in the open sea, although lighthouses may be built on them"<sup>74</sup>.

This statement has remained basically unchanged by the learned editors of the ninth edition:

"Since the high seas are free, no part of it can be the object of acquisition of sovereignty by occupation nor can mere rocks or banks in the open sea, although lighthouses may be built on them"<sup>75</sup>.

7.36 Reference may also be made in this respect to a treaty signed on 8 September 1972 at Bogotá, between the United States and Colombia, whereby the United States renounced all claims of sovereignty to three groups of small reefs in the Caribbean, Quita Sueño Bank and the cays on Roncador and Serrana Banks. In the press release of 11 September 1972 issued about this event the United States stated:

"Quita Sueño is submerged at high tide and thus, according to the U.S. view, is a part of the high seas and not subject to a claim of sovereignty by any government"<sup>76</sup>.

7.37 Contrary to the allegations of Bahrain, these authoritative statements are in no way obsolete or, as termed by Bahrain, "an old controversy"<sup>77</sup>.

**C. The fact that Qatar does not claim any other "feature" in the sea between the two States except the Hawar islands, Fasht Dibal and Qit'at Jaradah implies that Bahrain has sovereignty over all the other "features"**

7.38 Another distortion is made by the Bahrain Counter-Memorial about the position of Qatar concerning the shoals situated in its territorial sea. Bahrain affects to believe that Qatar does not claim any shoals other than Dibal and Qit'at Jaradah:

"Since, other than the Hawar Islands, Fasht ad Dibal and Qit'at Jaradah, Qatar does not claim sovereignty over any of the maritime features situated between the eastern coast of Bahrain's main island and the western coast of Qatar, all of these maritime features, islands and low-tide elevations alike, must be deemed, by the common agreement of the two Parties, to be under Bahrain's sovereignty"<sup>78</sup>.

7.39 This is a complete distortion of Qatar's position<sup>79</sup>. The reason why Qatar has so far insisted on Dibal and Qit'at Jaradah is because these two shoals were wrongly attributed by Britain to Bahrain on the analogy of land territory acquisition. Qatar's position being that the shoals are not capable of appropriation like land territory but fall under the jurisdiction of the State in whose territorial sea they are located, all the shoals situated in its present territorial sea are subject to its territorial jurisdiction. This includes, for example, part of Fasht Al Azm, Fasht Bu Thur, Qit'at ash Shajarah and Qita'a al Erge.

7.40 The position of Qatar on this conforms to international law. The law of the sea governs the use of low-tide elevations with respect to the limits of the territorial sea, and it governs the acquisition of title over them by way of necessary implication. As a matter of fact, the possibility for a coastal State to use the low-water mark on a low-tide elevation as the baseline for measuring the breadth of the territorial sea is strictly dependent on the distance of that low-tide elevation from the mainland or an island, that distance being determined by reference to the breadth of the territorial sea as adopted by the coastal State concerned in conformity with international law. In other words, in order to decide whether a low-tide elevation lying off the coast is under the sovereignty of the coastal State and may thus be used as a basepoint for the calculation of the external limits of the territorial sea, it is first necessary to make a projection of the territorial sea from the coast. And it is when, and only when, the low-tide elevation is situated wholly or partly within the projection of the territorial sea from the main coast that the coastal State has a title over that low-tide elevation and can use it as a basepoint for purposes of determining the outer limits of the territorial sea.

7.41 Consequently Qatar, contrary to Bahrain, does not claim sovereignty over low-tide elevations as such. It claims sovereignty over all the islands, islets, reefs and low-tide elevations, including Dibal, Qit'at Jaradah, part of Fasht al Azm, Fasht bu Thur, Qit'at ash Shajarah, Qita'a al Erge, which are situated to the east of the line delimiting the respective territorial seas between the two States. If they fall under the sovereignty of Qatar it is not because they provide a *justification* for the maritime delimitation, but because they *appertain* to Qatar *as a consequence* of the maritime delimitation effected on other grounds.

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## FOOTNOTES

1 *See*, BCM, paras. 3 and 455.

2 *See*, BM, paras. 657, *et seq.*

3 This is not the first time that Bahrain has changed its position on the maritime delimitation. *See*, QM, paras. 10.34-10.35.

4 BCM, para. 164.

5 BCM, para. 613.

6 BCM, para. 495.

7 BCM, paras. 476 and 537.

8 BCM, para. 164.

9 *See*, in general, Chap. III, above.

10 QM, Annex III.28, Vol. 6, p. 137.

11 J. T. Bent, "The Bahrein Islands in the Persian Gulf", *Proceedings of the Royal Geographical Society*, Vol. XII, January 1890 (QR, Annex II.82, Vol. 2, p. 577). *See*, also, para. 3.31(c), above.

12 QR, Annex IV.1, Vol. 4, p. 1.

13 QR, Annex IV.2, Vol. 4, p. 5.

14 *See*, text quoted in para. 3.31(f) (v), above.

15 QR, Annex IV.3, Vol. 4, p. 11. The same document lists Hawar as a possible landing ground on the coastline of Qatar.

16 QM, Annex II.3, Vol. 3, p. 61, at p. 88.

17 The *Persian Gulf Pilot*, also invoked by Bahrain to support the myth of a greater Bahrain, depicts the situation merely as "small islands and islets lying *close* to its shores". (Compare text of *Persian Gulf Pilot* (1982-1994) quoted by BCM, para. 481 and Bahrain's tendentious interpretation of that text in the same paragraph).

18 QM, Annex II.3, Vol. 3, p. 61, at pp. 64, *et seq.*

19 Consequently Sahailah is not an islet but a low-tide elevation.

20 QCM, Appendix 2, Vol. 5, paras. 13-14.

21 QR, Annex IV.41, Vol. 4, p. 245.

22 Named "Qassar Jurdi" on Bahrain Chart No. 5004 "Approaches to Bahrain".

23 QR, Annex IV.42, Vol. 4, p. 249.

24 BCM, para. 538.

25 QR, Map Atlas, Maps Nos. 12 and 28. *See*, also, Map No. 77.

26 BCM, pp. 2, 72, 81, 138, 139 (three times), 202 (twice), 204, 206 (twice), 209, 210 (twice), 211 (three times), 212, 213 (twice), 214 (three times), 215, 217 (twice), 220 (four times), 221 (twice), 225 (three times), 227 (four times), 228 (twice), 232, 233 (eight times), 234 (three times), 235 (three times), 236 (twice), 237 (five times), 238 (eleven times), 246, 266, 272, 273 (six times), 276 (twice), 277, 278, 298, 299, 301, 302.

27 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Art. 10, para. 1 and, in identical terms, 1982 United Nations Convention on the Law of the Sea, Art. 121, para. 1.

28 1982 Convention on the Law of the Sea, Art. 121, para. 1.

29 BCM, para. 484.

30 See, for instance, *Fisheries* case, *I.C.J. Reports 1951*, p. 127; *Minquiers and Ecrehos* case, *I.C.J. Reports 1953*, *passim*; *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 36, para. 57; *Continental Shelf (Tunisia/Libya)* case, *I.C.J. Reports 1982*, p. 62, para. 76 and p. 88, para. 128; *Continental Shelf (Libya/Malta)* case, *I.C.J. Reports 1985*, pp. 50-51, paras. 68 and 70; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case, *I.C.J. Reports 1992*, p. 588, para. 383.

31 See, paras. 9.39, *et seq.*, below.

32 Art. 121, para. 3.

33 See, QR, Annex IV.39, Vol. 4, p. 237.

34 QR, Annex IV.33, Vol. 4, p. 199.

35 See, paras. 7.18, *et seq.*, below.

36 For the convenience of the Court, Qatar has included references to the BCM in order to permit comparison of what Bahrain writes with what is shown on the charts.

37 QCM, paras. 8.47, *et seq.*; and QCM, Map No. 9, facing p. 270.

38 It is interesting to note that neither in the 1982 *Persian Gulf Pilot*, nor in its Supplements up to 1994, is any mention made of Fasht al Azm.

39 QCM, para. 8.46.

40 See, also, BCMJA, Vol. I, map inside cover.

41 QM, Appendix 5, Vol. 15.

42 BCM, paras. 511, *et seq.*

43 QM, facing p. 238.

44 See, QCM, para. 6.91.

45 See, QR, Annex IV.31, Vol. 4, p. 187, which includes a report by Professor T.D. Rabenhorst, who concludes that the shoals of Dibal and Qit'at Jaradah "were completely submerged when these images were taken".

46 BCM, para. 468.

47 *Ibid.*, paras. 484 and 510.

48 An exception was made by the United Kingdom with regard to Dibal and Qit'at Jaradah but Qatar has always made known that it considered this was a legally wrong decision.

49 BCM, para. 476.

50 As to pearl fisheries, *see*, QM, Appendix 4, Vol. 15.

51 See, QCM, Annexes IV.2 and IV.3, Vol. 4, pp. 9 and 13.

52 See, QM, Annexes II.55 and II.56, Vol. 5, pp. 219 and 223; emphasis added.

53 See, QCM, Annex II.55, Vol. 2, p. 303. See, also, QCM, Annexes II.54, II.56 and II.57, Vol. 2, pp. 297, 311 and 317.

54 It is significant that Bahrain admits that Dibal was also used by Qatari fishermen (BCM, para. 503).

55 See, QM, Annex IV.63, Vol. 9, p. 309.

56 See, QM, Annex IV.69, Vol. 9, p. 335; *see*, also, QCM, para. 6.32.

57 See, QCM, para. 6.42.

58 QM, paras. 10.27, *et seq.*

59 According to BCM, para. 538, this image "is pure fantasy".

60 QM, paras. 10.34-10.35.

61 BCM, para. 538.

62 BCM, Map 1.

63 As explained elsewhere in the QM and QCM Bahrain does not meet the conditions to be considered an archipelagic State in contemporary international law. *See*, QM, paras. 11.43, *et seq.*, and QCM, para. 6.72.

64 BCM, para. 496.

65 BCM, paras. 483, 485, 495 and 496.

66 BCM, para. 468.

67 BCM, para. 524.

68 *See*, QM, paras. 10.59, *et seq.*, QCM, paras. 6.15, *et seq.*, and paras. 7.18, *et seq.*, above.

69 *I.C.J. Reports 1953*, p. 53.

70 Which read as follows: "The Court is requested to determine whether the sovereignty over the islets and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecrehos groups respectively belongs to the United Kingdom or the French Republic" (*ibid.*, p. 49).

71 *Minquiers and Ecrehos, I.C.J. Pleadings*, Reply of the United Kingdom, Vol. I, p. 432.

72 Sir G. Fitzmaurice, "The law and procedure of the International Court of Justice, 1951-4: Points of substantive law", Part II, *B.Y.I.L.*, 1955-6, (QR, Annex IV.38, Vol. 4, p. 229).

73 *Ibid.*

74 Oppenheim's International Law, 8<sup>th</sup> Ed., Vol. I, p. 556, para. 221 (QR, Annex IV.40, Vol. 4, p. 241).

75 QM, Annex III.307, Vol. 8, p. 543.

76 QR, Annex IV.20, Vol. 4, p. 133. *See*, also, the observation of the Chamber of the Court in its judgment of 11 September 1992 in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras : Nicaragua intervening)*: "That Meanguerita is 'capable of appropriation' to use the wording of the *dispositif* of the *Minquiers and Ecrehos* case is undoubted; it is not a low-tide elevation, and is covered by vegetation, although it lacks fresh water". (*I.C.J. Reports 1992*, p. 570, para. 356; emphasis added).

77 BCM, para. 524.

78 *Ibid.* The same false statement is repeated in paras. 525, 536 and 545.

79 Qatar's position was made perfectly clear in QM, paras. 10.62, *et seq.*, and 10.73, but "Il n'est pire sourd que celui qui ne veut pas entendre".

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

**REPLY OF THE STATE OF QATAR**

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## CHAPTER VIII - THE FALSE ALLEGATIONS MADE BY BAHRAIN 297

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## CHAPTER VIII

### THE FALSE ALLEGATIONS MADE BY BAHRAIN

#### Section 1. Qatar's Alleged Misrepresentation of what is meant by the Bahraini Coast

##### A. The confusion created by Bahrain

8.1 According to Bahrain, Qatar is mistaken in asking the Court to effect a maritime delimitation between the two mainland coasts because this does not take account of the fact that "[t]he State of Bahrain consists of a system of inter-related maritime features"<sup>1</sup>. Thus, in Bahrain's view, Qatar has "misrepresent[ed] geographical and, even more important, political and economic reality"<sup>2</sup>. On the basis of this premise, Bahrain affects to believe that Qatar has attempted to resuscitate the distinction that has sometimes been made between "primary" and "secondary" coasts, and that it has done so in order to introduce some kind of hierarchy between the coasts<sup>3</sup>. This assertion cannot stand, for the three following reasons.

8.2 First of all, nowhere in Qatar's previous pleadings is there any mention of, or reference to, such a distinction. On the contrary, Qatar has made it perfectly clear that it is necessary, in drawing the maritime boundary, to start by taking into account what it called in its Counter-Memorial "the actual coast of the two States"<sup>4</sup>. If any distinction has been made by Qatar, it is between what is the actual Bahraini coast and what cannot be regarded as a coastline at all, since there is no "coast" properly speaking on maritime "features" such as low-tide elevations<sup>5</sup>. And it must be remembered here, as already noted in Qatar's Counter-Memorial, that Bahrain has deliberately chosen to ignore entirely the coast of any of its islands, and to rely only on a series of low-tide elevations which are quite clearly separated from the eastern coast of the main Bahrain island<sup>6</sup>.

8.3 Secondly, Qatar notes that, when criticising the term "main coasts", Bahrain has omitted to indicate that this term was used in Qatar's Memorial in a Section dealing with the circumstances in which the 1947 line was drawn by the British Government, and more particularly with the criteria adopted by the British Government to give effect to the equitable principles referred to in the 1945 Truman Proclamation on the continental shelf<sup>7</sup>. The reasons which induced the British authorities at that time to draw a dividing line based on the configuration of the main coastlines, without taking minor reefs or other "maritime features" into account<sup>8</sup>, are equally compelling today<sup>9</sup>.

8.4 Thirdly, Bahrain has tried to introduce into the discussion about the respective coasts of the Parties that are relevant to the present case a confusion between the questions of entitlement and of delimitation<sup>10</sup>, two questions which, although complementary, are nevertheless entirely distinct<sup>11</sup>.

8.5 Bahrain rightly states that "[t]here is no hierarchy between the coasts"<sup>12</sup>, and Qatar agrees, at least with respect to the question of title generated by those coasts; for the notion of the equal value of coasts invoked by Bahrain<sup>13</sup> applies first of all to the question of entitlement, in that a coast *per se* generates a potential title over adjacent maritime areas, and the legal titles generated by any coast are indeed equal. But the same statement is not necessarily true when applied to the delimitation of a maritime boundary effected by an international tribunal. As a matter of fact, in a maritime delimitation process, one of the first questions which arises is that of the identification and limits of the relevant coasts to be taken into consideration for that delimitation. This implies that a selection has to be made among the various coasts in order to determine those which may be recognised as relevant. In fact, when defining the relevant coasts in this respect, the Court and other international tribunals have always considered that not all the coasts of the States concerned are to be taken into account. Thus, as the Court said in its *Continental Shelf (Tunisia/Libya)* judgment, "for the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account"<sup>14</sup>. It is evident that coasts which are not deemed relevant in the context of the delimitation are regarded as having no value for that purpose.

8.6 Moreover, even among the relevant coasts, there might sometimes be a distinction between certain stretches of coast insofar as, in some particular aspects, one part of the relevant coast may be of greater importance than another part for the purposes of the delimitation to be carried out, as was acknowledged by the Chamber of the Court in the *Gulf of Maine* case when it rejected the idea of "primary" and "secondary" coasts<sup>15</sup>. It suffices to recall that in maritime delimitation cases different weights have often been attributed to different coasts, as is clearly demonstrated by "[t]he frequent references in the case-law to the idea of proportionality - or disproportion - [which] confirm the importance of the proposition that an equitable delimitation must, in such circumstances, take into account the disparity between the respective coastal lengths of the relevant area"<sup>16</sup>. In the same way, the equal value of coasts has no bearing on the matter of delimitation when one portion of the relevant coast is given either no effect or only a partial effect, a situation which has occurred on different occasions in the jurisprudence since the 1977 Anglo-French Arbitration<sup>17</sup>.

### **B. The fiction of Bahrain's "true coasts"**

8.7 There is undoubtedly something curious in the allegation in Bahrain's Counter-Memorial that Qatar's claim rests on a "fiction" as to the Bahraini coasts. In fact, it is Bahrain itself which founds its own claim on a fiction of lines drawn between maritime "features" which qualify at most as low-tide elevations and equates that fiction with its relevant coasts for purposes of delimitation<sup>18</sup>. Thus, Bahrain has defined its coast as an "aggregate coast" which "is a complex construct of lines"<sup>19</sup>, trying to create what would appear to be a totally new concept in the rules governing maritime delimitation. And it requires a considerable amount of audacity for Bahrain then to refer to that "aggregate coast", elsewhere in its Counter-Memorial, as being "the true coasts" of the State of Bahrain<sup>20</sup>.

8.8 Bahrain even goes so far as to compare the so-called complexity of its eastern maritime façade to the coastal façade of Norway as it was considered in the *Fisheries* case<sup>21</sup>. There is certainly not only a high degree of exaggeration, but also a large dose of imagination in such a comparison. Bahrain has in fact omitted to quote what the Court said in that case concerning "the realities which must be borne in mind"<sup>22</sup> in order to characterize the Norwegian coastal zone known by the name of "Skjaergaard":

"The coast of the mainland... is of a very distinctive configuration... To the west, the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs... are in truth but an extension of the Norwegian mainland... The coast of the mainland does not constitute, as it does in practically all other countries, a clear

dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the 'skjaergaard'<sup>23</sup>.

In no way can the geographical situation off the Bahraini eastern coast, with detached islets, rocks and low-tide elevations, which appear as isolated features both in terms of size and distance from the mainland and which in any event do not all appertain to Bahrain, be compared to that of the Skjaergaard.

8.9 It is not Qatar which "postulates a fictitious and artificial coastal façade for Bahrain"<sup>24</sup>; on the contrary, it is Bahrain who relies on a wholly artificial construct by claiming that its eastern coastline facing the Qatari peninsula is "a complex construct of lines" joining minor rocks and low-tide elevations. The artificiality of Bahrain's approach becomes self-evident, particularly when Bahrain places on the same level the coasts of the Hawar islands and "the coasts of Fasht ad Dibal, Qit'at Jaradah and all of the other legally relevant features"<sup>25</sup>. Bahrain's assertions are based on a mere assumption which has already been dealt with in the previous Chapter<sup>26</sup>. In fact, Bahrain simply repeats, *ad nauseam* and parrot-fashion, that its territory "does not consist simply of its main island, but is geographically and politically, in addition to the Zubarah Region, an archipelago, a system of spatially proximate and economically interrelated islands and other relevant features"<sup>27</sup>.

8.10 There is no need to repeat here what Qatar has said previously on the question of the so-called archipelagic character of Bahrain<sup>28</sup>. Nor is it necessary to develop at length Qatar's rebuttal of Bahrain's assimilation of coasts to baselines, since Qatar has already done so in its Counter-Memorial<sup>29</sup>. A few words will suffice in response to Bahrain's argument on that point in its Counter-Memorial.

8.11 When Bahrain argues that the coasts of the Parties to be taken into consideration for the drawing of a maritime boundary are their respective "international legal baselines"<sup>30</sup>, it seeks to invoke a principle which has been rejected in the law of international maritime delimitation, *i.e.*, "the principle that every maritime delimitation must start from the parties' coasts as they are represented by the baselines from which the breadth of their territorial seas is measured"<sup>31</sup>. No such principle exists in the law of maritime delimitation between States as applied by the Court and other international tribunals. In the *Tunisia/Libya Continental Shelf* case, for example, the Court ignored the Tunisian baselines both for the method of delimitation to be followed<sup>32</sup> and for the test of proportionality to be applied<sup>33</sup>. According to numerous international judicial and arbitral decisions, the basepoints used for maritime delimitation purposes are generally chosen as appropriate points that are independent of the basepoints used by the coastal States concerned for the drawing of the baselines from which they measure their territorial sea and other maritime zones. As the Court stated in the *Libya/Malta Continental Shelf* case:

"in any event the baselines as determined by coastal States are not *per se* identical with the points chosen on a coast to make it possible to calculate the area of continental shelf appertaining to that State"<sup>34</sup>.

8.12 It thus appears that Qatar's position in asking the Court to draw the single maritime boundary from appropriate basepoints on the respective main coasts of the two States is legally justified, unlike the artificial construction of lines that is supposed to represent Bahrain's so-called "aggregate coast". Moreover, Bahrain's attitude towards the definition of its coasts is inequitable on the face of it, since its consequence is to make minor geographical features, such as tiny islets, uninhabited rocks and shoals or low-tide elevations, not all of which appertain to Bahrain, the basis for determining the course of the boundary line. This is a consequence which has consistently been rejected by the international jurisprudence. For instance, in the *Gulf of Maine* case the Chamber of the Court pointed out "the potential disadvantages inherent in any method which takes tiny islands, uninhabited rocks or low-tide elevations, sometimes lying at a

considerable distance from terra firma, as basepoint for the drawing of a line intended to effect an equal division of a given area"<sup>35</sup>. And the Chamber went on to say:

"If any of these geographical features possess some degree of importance, there is nothing to prevent their subsequently being assigned whatever limited corrective effect may equitably be ascribed to them, but that is an altogether different operation from *making a series of such minor features the very basis for the determination of the dividing line*, or from *transforming them into a succession of basepoints* for the geometrical construction of the entire line"<sup>36</sup>.

8.13 Therefore, Qatar submits that, for the purposes of the present delimitation, Bahrain has invented a purely fictitious coast based on a series of interconnecting lines between artificial basepoints located on minor features that are clearly detached from the mainland. Moreover, this construct of lines cannot be regarded as being the real Bahraini coastline, if only because its end result is a particularly exorbitant and extravagant claim, as may be seen immediately from Map 1, facing page 196 of Bahrain's Counter-Memorial. On the contrary, the most appropriate way, in Qatar's submission, of accurately reflecting the realities of this case, and especially the relevant geographical facts, as clearly shown on Maps Nos. 5 and 6 of Qatar's Counter-Memorial, is to take into account, for the purposes of the delimitation of the single maritime boundary, only the two main coasts of the Parties.

## **Section 2. The So-Called "Undue Weight" given to the 1947 Line**

### **A. Bahrain's position as to the alleged irrelevance of the 1947 line**

8.14 In its Counter-Memorial, Bahrain has devoted a great deal of effort to its attempt to downgrade the value or weight to be attributed to the 1947 line, and to demonstrate that it is irrelevant<sup>37</sup>. Bahrain has advanced a number of separate arguments in this context<sup>38</sup>. It would hardly have been necessary for Bahrain to have advanced so many arguments if the 1947 line were not to be regarded as an important factor in the present case. In any event, none of Bahrain's arguments really addresses what Qatar has previously said with respect to the 1947 line, either because of Bahrain's misrepresentation of Qatar's actual position, or because of Bahrain's refusal or inability to appreciate the nature of that line in its proper perspective.

#### **1. Misrepresentation of Qatar's position**

8.15 When Bahrain alleges that Qatar's Memorial is self-contradictory in arguing in effect that "(i) it cannot be said that historic title derives from the British 1947 letters, but (ii) historic title derives from the British 1947 letters"<sup>39</sup>, this is just a misrepresentation of what Qatar actually stated. In fact, Qatar has never contended that any historic title derives from the 1947 British letters. It has simply pointed out that, in part of the southern sector of the delimitation area, the situation created by the drawing of the 1947 line is to be regarded as the kind of circumstance which could be covered by the reference to "historic title or other special circumstances" contained in Article 15 of the 1982 Convention on the Law of the Sea<sup>40</sup>. Subsequently, in Qatar's Counter-Memorial, it has been made perfectly clear that the division of the sea-bed by the 1947 line is an important historical aspect of the question of maritime delimitation in the present case<sup>41</sup>, and that the line "constitutes a historical circumstance which is to be combined with the geographical circumstance of the disparity between coastal lengths"<sup>42</sup>. Therefore Bahrain's allegation that "[t]he 1947 line has no relevance as a source of 'historic title'"<sup>43</sup> completely misses the point.

8.16 In the same manner, Bahrain seems to have distorted Qatar's conception of the 1947 British decision, when it states: "To the extent that Qatar thereby [*i.e.*, through the use of the word *decision*] intends to imply that the letters of 23 December 1947... had made a definitive decision... Qatar's characterisation of [those] letters is manifestly inaccurate"<sup>44</sup>. On the basis of this supposition, Bahrain embarks on a lengthy attempt to demonstrate that "The letters of 23 December 1947, unlike Britain's arbitral award [*sic*] of 1939 in relation to the Hawar Islands, did

not constitute a 'decision' purporting to bind Bahrain and Qatar, nor was it regarded by the Parties as such<sup>45</sup>. Apart from what will be said in the next paragraph below, Qatar is obliged to underline that there is a degree of inconsistency in the contrast thus made by Bahrain between the two British "decisions" of 1939 and 1947.

8.17 The chief objection to Bahrain's dogmatic assertion is that Qatar has never argued that the 1947 decision is a binding decision. On the contrary, in Qatar's Memorial it was clearly explained that the British Government's position as regards the 1947 decision "was equivocal for many years, maintaining in some statements that the line was final and admitting in others that it could be revised"<sup>46</sup>. Thus, in response to protests from both Rulers, the British considered in 1949 that their 1947 decision was "final"<sup>47</sup>; in 1950, they recalled that the 1947 line was "previously announced as final"<sup>48</sup>, and later on in 1962 that it was "a decision often declared to be final"<sup>49</sup>. In the same vein, on several occasions, they referred to that decision as "the 1947 award"<sup>50</sup> or "the 1947 seabed award"<sup>51</sup>, and sometimes as "the 1947 settlement"<sup>52</sup>; and a legal adviser in the Foreign Office expressed the view that this "award" was "a unilateral statement by H.M.G. on the delimitation of the Bahrain-Qatar sea-bed boundary"<sup>53</sup>. However, on some other occasions, the British authorities departed from their strong position and declared that the 1947 line or the sea-bed boundary between Qatar and Bahrain had simply been "indicated"<sup>54</sup> or "announced"<sup>55</sup> to the Rulers, and even that "the decision reached in 1947... has not yet been finally confirmed"<sup>56</sup>. Indeed, in 1965/66, Britain was prepared to allow both the 1939 and 1947 "decisions" to be referred to arbitration<sup>57</sup>.

8.18 The Court is well aware that, in the first round of written pleadings in this case, Qatar drew attention to the "serious legal doubts which had been raised as to the validity and binding character of the 1947 decision"<sup>58</sup>. Unfortunately, it appears that Bahrain has not paid sufficient attention to this, and all the discussion in its Counter-Memorial devoted to the non-binding character of the 1947 British decision is therefore entirely beside the point<sup>59</sup>.

8.19 Whatever may be the legal definition and significance of the 1947 British decision, the fact remains that a sea-bed dividing line was laid down at that time, and that afterwards any discussion, reflection, or suggestion dealing with the Qatar-Bahrain boundary focussed on that line, with a view either to transforming it into an agreed line, or to altering its course<sup>60</sup>. And in Qatar's submission, it is the existence of that simple fact which is to be taken into account in the delimitation of the single maritime boundary between the two States: nothing more, nothing less.

## **2. The refusal or inability of Bahrain to view the 1947 line in its proper perspective**

8.20 Obsessed with the idea that the 1947 line ought to have been drawn at the time by application of precise rules of maritime delimitation, if it were to be regarded as having some impact now on the determination of a single maritime boundary, Bahrain has tried to lessen the value and significance of that line by asserting that "the principal British preoccupation was that of good management, rather than the rule of law"<sup>61</sup>. This is indisputable. But does this really matter in seeking to assess the relevance of the 1947 line? Are there no other sea-bed boundaries which have been drawn up so as to satisfy *inter alia* the requirement of "good management", including among those sea-bed boundaries some of those more recently established? Even if in 1947 the aim of the British Government was not to carry out a delimitation on the basis of well-established legal principles, but rather to settle practically, on an *ad hoc* basis<sup>62</sup>, a problem with which the oil companies and the Rulers were faced from the outset of the second world war<sup>63</sup>, the result was a line dividing the sea-bed between the two Sheikhdoms. And the British Government considered that it was an equitable line at a time when it was urgent to effect a delimitation in this part of the Gulf to enable oil exploration and exploitation to continue<sup>64</sup>. This was akin to the division of the sea-bed in the Gulf of Paria in 1942, which was effected in order to meet urgent requirements, being "linked to oil shortages during the war period"<sup>65</sup>. Whatever might have been the preoccupation of the British Government in constructing such a dividing line, the resulting

line has to be regarded as an established fact which, as such, has some significance for any further delimitation process.

8.21 Moreover, when they drew the 1947 line on an *ad hoc* basis, as mentioned above, the British authorities considered that it was "in accordance with equitable principles"<sup>66</sup>. According to Bahrain:

"This was a general reference to an essentially subjective kind of equity, whereas the contemporary law of the sea refers to equitable principles of an objective character... More importantly still, the 'equitable principles' to which the 1947 line purported to conform are impossible to identify"<sup>67</sup>.

Qatar does not dispute the rather flexible nature of the terms "equity"<sup>68</sup> and "equitable principles", even under the present-day legal rules governing maritime delimitation law. As Qatar's Memorial underlined, at the time of the 1947 British decision, there were no helpful precedents or established rules of delimitation, and no specific rule or method could yet be regarded as being already part of the emerging legal doctrine of the continental shelf<sup>69</sup>. Nonetheless, as Qatar has already pointed out, the British decision did take into account certain objective criteria, such as basing the decision on the main coasts of the Parties<sup>70</sup>.

8.22 It should also be recalled that the only sea-bed delimitation between States which had taken place before that date was that resulting from the 1942 Treaty of the Gulf of Paria<sup>71</sup>. As noted by one commentator, the approach followed by the Governments of the United Kingdom and Venezuela for that delimitation was also "essentially pragmatic":

"Lacking precedents of its own, the methods applied in the Paria Treaty, as deduced from the characteristics of the line may be qualified as *sui generis*"<sup>72</sup>.

No doubt the same appraisal may be made concerning the 1947 line dividing the sea-bed between Qatar and Bahrain.

### **B. The relevance of the 1947 line under the current law of maritime delimitation**

8.23 In its Counter-Memorial Bahrain asserts that:

"In the contemporary law of maritime delimitation, the purpose of considering relevant circumstances is to verify whether the provisional equidistance line will lead to an equitable result and, if necessary, to adjust or shift it"<sup>73</sup>.

Qatar cannot entirely subscribe to this view. In fact, the role played by the relevant circumstances in a particular case is not limited to verifying the equitable nature of a provisional equidistance line. The role assigned to them is much broader: it consists also in the choice of the method or methods of delimitation, for such circumstances are inherent in that choice. As was stated by the Court of Arbitration in the *Anglo-French Continental Shelf Delimitation*, "the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case... has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles"<sup>74</sup>.

8.24 As already noted, when the 1947 line is put in its true perspective<sup>75</sup>, that line appears as a historical circumstance which is highly relevant for the delimitation of the single maritime boundary between the Parties<sup>76</sup>, rather than, as Bahrain contends, as "part of a historical context which is now superseded"<sup>77</sup>. There are at least two main reasons that support this proposition.

8.25 The first reason may be found in a comparison with the precedent constituted by the almost contemporaneous sea-bed delimitation in the Gulf of Paria established by a treaty signed on 26 February 1942 between the United Kingdom and Venezuela, the conclusion of which "was linked to the devolution of Patos island to Venezuela"<sup>78</sup>. Despite the fact that the 1942 dividing

line related exclusively to the submarine areas of the Gulf of Paria<sup>79</sup>, and notwithstanding the further extension of the territorial seas of Venezuela and Trinidad and Tobago up to 12 nautical miles<sup>80</sup>, a new delimitation agreement concluded in 1990 between those two States established an all-purpose maritime boundary which, in the Gulf of Paria, more or less follows the sea-bed dividing line that had been established in the famous 1942 Treaty, with the exception of some minor rectifications<sup>81</sup>. This precedent clearly shows that a sea-bed boundary line drawn half a century ago on a purely *ad hoc* basis, through *sui generis* methods of delimitation, may have great significance for the establishment of an all-purpose maritime boundary line according to the contemporary law of maritime delimitation. In particular, it demonstrates how the latter has been drawn with due regard to the former.

8.26 The second reason derives from the conduct of the Parties with regard to the 1947 line in the matter of oil concessions and offshore exploration and exploitation. It is a fact that in previous maritime delimitation cases, the Court has examined the conduct of the Parties, as a particular factor among other circumstances, to determine whether that conduct is relevant in the choice of the appropriate method of delimitation<sup>82</sup>. The Court will be aware that in some instances the conduct of the Parties has not constituted an element influencing the course of the delimitation line. For example, in the *Libya/Malta* case the Court noted that neither party had suggested that their conduct in the grant of petroleum concessions had given rise to a *de facto* line dividing concession areas. Based on the circumstances of the case, the Court therefore concluded that it was "unable to discern any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court"<sup>83</sup>. In the *Libya/Tunisia* case, on the other hand, the Court expressly relied on the conduct of the Parties in their granting of petroleum concessions as one of the relevant factors, albeit a highly relevant one<sup>84</sup>, providing "indicia... of the line or lines which the Parties themselves may have considered equitable or acted upon as such - if only as an interim solution affecting part only of the area to be delimited"<sup>85</sup>. Bearing these considerations in mind, Qatar submits that, in the present case, the conduct of the Parties relating to the limits of their respective oil concessions reinforces, to some extent, the value of the 1947 line as a relevant factor in the present case.

8.27 It is not necessary to enter into a detailed examination of the practice followed by Bahrain and Qatar relating to oil concessions in the relevant maritime area to appreciate its relevance with respect to the 1947 line. Suffice it to note that the 1947 line has from time to time been relied upon by the Parties and the British for the operating limits of the Parties' offshore petroleum licences.

8.28 To take one example, in 1965 the Foreign Office expressed the desire to make clear the operating limits of a concession proposed to be granted by Bahrain to the Continental Oil Company. In an internal note from the Foreign Office dated 12 November 1965, the British authorities observed as follows:

"3. We shall... have to impose a more restrictive operating limit in the Bahrain/Qatar sector, and we propose that this should start five miles to the west of the intersection of the Gulf median line and the Bahrain/Qatar median line (low-water mark of mainland only, counting Muharraq Island and Ras Umm al-Karam as mainland), and run in a straight line to the most northerly point of the 1947 line which is (fortunately) still 2 ½ miles short of the median line..."<sup>86</sup>.

8.29 This view was further reflected in a letter from Parsons, the Political Agent Bahrain, dated 20 February 1966. In relevant part, the letter stated:

"The Bahrain Government were prepared to accept, without prejudice, the 1947 line as the division between Bahrain and Qatar for operating purposes provided that both sides agreed to

hold off exploitation of any structure which straddled the line : in the north they would be guided by Her Majesty's Government 'within reasonable limits'<sup>87</sup>".

8.30 Bahrain's position with respect to the 1947 line as an operating limit to petroleum activities was also confirmed during the course of a meeting on 12 April 1966 between the Political Resident, Luce, the Ruler of Bahrain and Sayyid Mahmood in the following terms:

"I urged them once again to try to reach agreement with Qatar about Continental's operating limits, and Shaikh Khalifa said he would be ready to discuss this with the Deputy Ruler of Qatar when they meet to prepare for the Gulf Rulers' meeting... They indicated again that they were ready to accept the 1947 line as the operating limit, without prejudice to an eventual settlement of the boundary, and again made the point that if any oil structure were found which straddled that line operations should be suspended until the two Governments agreed on how it should be dealt with"<sup>88</sup>.

8.31 From these exchanges, it can be seen that the conduct of the two Parties in the matter of oil concessions suggests that, while they were under pressure at the outset from the British authorities, they both considered that the 1947 line was a circumstance to be taken into account - whatever might have been their respective perceptions of its nature<sup>89</sup>. Consequently, owing to the role that has been historically assigned to that line in the conduct of both States, there can be no doubt as to the relevance of the 1947 line in the light of the contemporary law of maritime delimitation.

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#### FOOTNOTES

1 BCM, para. 495.

2 *Ibid.*

3 *See*, BCM, para. 490.

4 QCM, p. 216.

5 *See*, QCM, para. 6.95.

6 *See*, QCM, paras. 6.76, 6.79, 6.82 and 6.84.

7 Footnote 624 of the BCM refers purely and simply to "QM, Chapter X, Section 2.C.1". The wording "main coasts" was otherwise used once in Qatar's Memorial (para. 11.37). Qatar's Counter-Memorial used the wording "mainland coasts" on p. 228 and in paras. 7.24, 7.26, 7.27, 7.31, 7.41, 7.42, 7.45 and 7.50, while the expression "main coasts" appeared twice, in paras. 6.6 and 7.28 of that Counter-Memorial. On the concept of the "mainland", *see*, para. 9.37, below.

8 *See*, the questions put in a letter dated 13 February 1947 from F.A.K. Harrison, India Office, to G.C.B. Dodds, Admiralty, reproduced as BCM, Annex 109, Vol. 2, p. 335, at p. 338.

9 *See*, QCM, para. 7.24, paras. 9.39, *et seq.*, below.

10 *See*, BCM, paras. 492-493.

11 *See*, the Judgment of the Court in the *Continental Shelf (Libya/Malta)* case, *I.C.J. Reports 1985*, p. 30, para. 27.

12 BCM, p. 212.

13 BCM, para. 490.

14 *I.C.J. Reports 1982*, p. 61, para. 75.

15 *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 271, para. 36, where it was stated that "there is nothing to preclude the possibility of the

so-called 'secondary' coasts being of equal if not of even greater importance than the 'primary' coasts".

16 *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 67, para. 65.

17 In the *Tunisia/Libya Continental Shelf* case, where Tunisia had specified as a relevant circumstance the presence of islands, islets and low-tide elevations forming part of its eastern coastal front, the Court made a distinction between different coasts by giving half-effect to the coasts of the Kerkennah Islands while totally disregarding the coast of the island of Jerba in the circumstances of that particular case. *See, I.C.J. Reports 1982*, p. 64, para. 79; p. 85, para. 120; p. 89, paras. 128-129. *See, also*, the dissenting opinion of Judge *ad hoc* Evensen, who wrote: "The enormous low-tide elevations surrounding both the Kerkennah Islands and Jerba are disregarded so completely that no mention of them has been made at all" (*ibid.*, p. 299, para. 17).

18 After having expressly recognized that Dibal and Qit'at Jaradah are both low-tide elevations, when it speaks of "sovereignty over two low-tide elevations, Fasht ad Dibal and Qit'at Jaradah" (BCM, para. 468), later on Bahrain nevertheless contends that Qit'at Jaradah "qualifies as an island under international law" (BCM, para. 511), or that it "is an island within the meaning of Article 121" (BCM, para. 525, fn. 670).

19 BCM, para. 613.

20 *Ibid.*, para. 652.

21 *Ibid.*, para. 613.

22 *I.C.J. Reports 1951*, p. 128.

23 *Ibid.*, p. 127.

24 BCM, para. 614.

25 BCM, para. 655.

26 *See*, Chap. VII, above. In a study devoted to the concept of baselines, published a few years ago, two distinguished scholars made an assessment of "defining the 'coast' as a series of interconnecting lines between points far from the actual interface of the *terra firma* and the hydrosphere". In their opinion: "If the coastline is understood as extending beyond the *terra firma*, baselines and all subsequent seaward boundaries will themselves extend proportionately farther out to sea. In view of the fact that this determination must have deprivatory effects on nearby states in specific maritime boundary claims..., we submit that the word 'coastline' must be understood restrictively to mean the mean low-water mark of the most landward interface of the hydrosphere and *terra firma*. Coast should, in short, mean coast in an empirically referential sense and not in the sense of some intellectual or juridical construct of coast". *See*, W.M. Reisman and G.S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation*, London, 1992, p. 78 (QR, Annex IV.49, Vol. 4, p. 279).

27 BCM, para. 613.

28 *See*, QCM, paras. 6.57, *et seq.*, and Chap. VII, above.

29 *See*, QCM, paras. 7.33, *et seq.*

30 BCM, paras. 593 and 610.

31 BCM, para. 607.

32 *See, I.C.J. Reports 1982*, pp. 61-62, para. 75, and p. 89, para. 128.

33 *Ibid.*, p. 76, para. 104, and p. 91, para. 131.

34 *I.C.J. Reports 1985*, p. 48, para. 64; already quoted in QCM, para. 7.36.

35 *I.C.J. Reports 1984*, pp. 329-330, para. 201.

36 *Ibid.*, p. 330; emphasis added.

37 BCM, pp. 240-264.

38 *See*, BCM, paras. 552 to 586.

39 BCM, para. 586.

40 QM, para. 11.39.

41 QCM, para. 7.11.

42 QCM, para. 7.48.

43 BCM, p. 263.

44 BCM, para. 552.

45 BCM, p. 244.

46 QM, para. 10.41

47 QM, Annexes IV.131 and IV.133, Vol. 10, pp. 169 and 179.

48 QM, Annex IV.173, Vol. 10, p. 365.

49 QM, Annex IV.241, Vol. 11, p. 387.

50 QM, Annexes IV.228 and IV.239, Vol. 11, pp. 329 and 377.

51 QM, Annexes IV.225 and IV.241, Vol. 11, pp. 315 and 387.

52 QM, Annexes IV.211 and IV.224, Vol. 11, pp. 211 and 305.

53 QM, Annex IV.221, Vol. 11, p. 277.

54 QM, Annex IV.147, Vol. 10, p. 241.

55 QM, Annexes IV.152 and IV.153, Vol. 10, pp. 263 and 269; QM, Annex IV.204, Vol. 11, p. 53.

56 QM, Annex IV.163, Vol. 10, p. 317.

57 *See*, para. 4.295, above.

58 QM, para. 10.42.

59 BCM, paras. 552-562.

60 If the British were reluctant to reopen the existing line, this was essentially because of two main considerations: they did not see how the Ruler of Qatar could "be expected to agree to the matter being reexamined without it being possible for the sovereignty over Hawar Island to be looked at simultaneously"; on the other hand, they had no illusions as to the possibility of achieving "a compromise solution which left the existing line where it is, but extended it northwards to the median line of the Gulf, with some consequential advantage to Bahrain over Qatar". *See*, QM, Annex IV.243, Vol. 11, p. 399. As stated in the phase of this case relating to Questions of Jurisdiction and Admissibility (QMJA, paras. 3.02, *et seq.*) and in Qatar's Memorial in the present phase on the merits (QM, paras. 3.87 and 10.43), the British Government finally agreed in the 1960s to an international arbitration process where both questions would be dealt with, *i.e.* sovereignty over the Hawar islands and the 1947 line.

61 BCM, para. 563.

62 *See*, QM, Annex IV.152, Vol. 10, p. 263.

63 *See*, QM, paras. 10.8, *et seq.*

64 The letters sent on 23 December 1947 to the two Rulers stated explicitly: "Apart from any other considerations the operations of the Oil Companies... make such a delimitation necessary" (QM, Annexes IV.115 and IV.116, Vol. 10, pp. 71 and 75).

65 See, K.G. Nweihed, in L. Alexander & J. Charney, *International Maritime Boundaries*, Nijhoff, 1993, Vol. I, p. 683 (QR, Annex IV.45, Vol. 4, p. 263).

66 QM, Annexes IV.115 and IV.116, Vol. 10, pp. 71 and 75.

67 BCM, para. 580.

68 As stated by Professor Reuter, "peu de termes sont aussi plaisants à l'esprit et au c\_ur, peu touchent aussi profondément une attente inscrite au tréfonds de la nature humaine, mais en revanche peu restent aussi mystérieux". See, "Quelques réflexions sur l'équité en droit international", *Revue belge de droit international*, Vol. 15, 1980, p. 165 (QR, Annex IV.50, Vol. 4, p. 283).

69 See, QM, para. 10.15.

70 See, QM, para. 10.16.

71 See, QM, Annex IV.72, Vol. 9, p. 349.

72 K.G. Nweihed, *op. cit.* (QR, Annex IV.44, Vol. 4, p. 259).

73 BCM, para. 653.

74 Decision dated 30 June 1977, para. 97, *U.N.R.I.A.A.*, Vol. XVIII, pp. 59-60.

75 See, paras. 8.15, *et seq.*, above.

76 See, QCM, paras. 7.11, *et seq.*

77 BCM, para. 474.

78 K.G. Nweihed, *op. cit.* (QR, Annex IV.44, Vol. 4, p. 259). See, also, QM, para. 10.5, fn. 11.

79 According to Article 6 of the 1942 Treaty: "Nothing in this Treaty shall be held to affect in any way the status of the waters of the Gulf of Paria" (QR, Annex IV.72, Vol. 4, p. 349).

80 See, United Nations, *Law of the Sea Bulletin*, No. 30, 1996, pp. 77 and 78 (QR, Annex IV.30, Vol. 4, p. 181).

81 See, K.G. Nweihed, *op. cit.* (QR, Annex IV.45, Vol. 4, p. 263).

82 See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 75, para. 82.

83 See, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, pp. 28-29, paras. 24 and 25. See, also, in this connection, *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, *I.C.J. Reports, 1993*, p. 77, para. 86.

84 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 83, para. 117.

85 *Ibid.*, p. 84, para. 118.

86 QR, Annex IV.14, Vol. 4, p. 75.

87 QR, Annex IV.16, Vol. 4, p. 87.

88 QR, Annex IV.18, Vol. 4, p. 95.

89 For further details regarding oil concessions, see, QR, Annexes IV.4-IV.8, IV.10, IV.13-IV.14, IV.16-IV.19 and IV.21-IV.27, Vol. 4, pp. 17-33, 47, 67-75, 87-99 and 137-163.

**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

**REPLY OF THE STATE OF QATAR**

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## CHAPTER IX

### THE SINGLE MARITIME BOUNDARY

#### Introduction

##### 1. Bahrain is ill at ease with its extravagant maritime claim

9.1 The discussion in the Bahrain Counter-Memorial of the maritime delimitation between Qatar and Bahrain cannot fail to surprise the reader. The Bahrain Counter-Memorial says not one word in justification of the line submitted by Bahrain in its Memorial. The cartography in the Bahrain Counter-Memorial<sup>1</sup> is as poor as it was in the Bahrain Memorial; and there is still lacking any indication as to the precise geographical coordinates of the turning points that are essential for the definition of the maritime boundary claimed by Bahrain, or of the base points from which Bahrain's line has been constructed. The impression given is that Bahrain is ill at ease with the extravagance of the line that it is claiming, that it dare not take the risk of comparing it with Qatar's line, as has been done on *Map No. 10* facing page 314, and that it no longer ventures to defend its own claim<sup>2</sup>.

##### 2. Bahrain's distortion of Qatar's position with respect to the provisional equidistance line

9.2 On the other hand, while the Bahrain Counter-Memorial acknowledges the Parties' agreement as to the content of the law applicable to the maritime delimitation<sup>3</sup>, it objects to Qatar's application of that law and embarks upon a curious criticism of Qatar's line - a criticism which is all the more surprising in that it is devoid of any legal basis<sup>4</sup>. In particular, in Bahrain's view, Qatar's claim does not comply with the principles of the law of maritime delimitation, *inter*

*alia* because it does not use the equidistance method as the starting point for drawing the line or, in other words, because Qatar has not made reference to the provisional equidistance line. According to Bahrain:

"At no point, either in the southern or in the northern sector, does Qatar contemplate the equidistance line as a provisional boundary. In the southern sector and as far north as the point BLV, Qatar takes as its provisional boundary the 1947 line, before deciding to 'disregard' this line southwards of point L. In the northern sector, Qatar takes this same 1947 line as its provisional - and final - boundary as far north as the point BLV; northwards of the point BLV, Qatar takes as its provisional boundary a perpendicular passing through the point BLV to a so-called closing line, and then rotates this perpendicular about the point BLV. In the contemporary law of maritime delimitation, the purpose of considering relevant circumstances is to verify whether the provisional equidistance line will lead to an equitable result and, if necessary, to adjust or shift it. Qatar's proposed method is completely different: Qatar takes as its provisional line the British 1947 line as far north as the point BLV... It is this provisional line which Qatar modifies in the light of selected relevant circumstances. The legally required process of delimitation is thereby completely distorted"<sup>5</sup>.

9.3 In so arguing, Bahrain has distorted Qatar's position. With regard to the maritime delimitation in the southern sector, Qatar expressly took the "provisional median line" as the starting point for its construction<sup>6</sup>, and then adjusted it westwards because of the circumstances of the case, in particular historic circumstances such as the 1947 British line<sup>7</sup>. As regards the maritime delimitation in the northern sector, while Qatar did not formally construct a provisional equidistance line, it was careful to point out that the method it had adopted, which was the adjusted perpendicularity method, was "derived from the same rationale as the equidistance method"<sup>8</sup>. Qatar also stressed that it "does not dispute that it might be possible to have recourse to the equidistance method in order to achieve a reasonable and equitable delimitation in the northern sector, just as in the southern sector"<sup>9</sup>. In any event, taking Bahrain's criticism at its face value<sup>10</sup>, Qatar will show below that the maritime boundary that it claims is based, in both the northern sector and the southern sector, on the provisional equidistance line, duly adjusted in order to take into account the historical and geographical circumstances of the case. Qatar considers that the single maritime boundary that it claims in this case leads to an equitable result, creating an objective and verifiable link between the rules that are applicable to maritime delimitation and the actual geographical situation. The method proposed by Qatar results from the 1947 line, the practice of the Parties and "the actual geographical relation of the coasts of the two States", to borrow the words used in the Arbitral Award of 30 June 1977, in the case concerning the Delimitation of the Continental Shelf between the United Kingdom and the French Republic<sup>11</sup>.

9.4 In this Chapter Qatar will first recapitulate, in Section 1, the reasons why the maritime boundary claimed by Bahrain is a distorted equidistance line. Qatar will then show, in Section 2, that its own provisional equidistance line is based on reasonable constructions of an equidistance line and, in Section 3, that the adjustments it makes to that line flow from the particular historical and geographical circumstances, allowing an equitable delimitation to be achieved.

### **Section 1. Bahrain's Line is a Distorted Equidistance Line**

#### **A. Bahrain's line infringes the principle of non-encroachment**

9.5 In a standard work on maritime delimitation, it has rightly been noted that:

"The equidistance method, besides reflecting the coastal geography, incorporates to a remarkable degree the double parameter of coast and distance which lies at the very heart of the legal concept that States are entitled to maritime areas adjacent to their shores. It takes account of the concept of maritime delimitation as presently provided for by the law. It respects the principle of non-encroachment both in its negative aspect - not to cut off one of

the States from 'areas situated directly before [its coastal] front' - and its positive aspects - to give each State a boundary line which is sufficiently far from its coasts"<sup>12</sup>.

9.6 Bahrain acknowledges the importance of the non-encroachment principle, citing the *Jan Mayen* case where the Court recognised that with regard to the maritime boundary claims there was an "overlap between the areas which each State would have been able to claim had it not been for the presence of the other State"<sup>13</sup>. Bahrain adds that:

"The delimitation process consists of reducing the entitlement of each of the parties by a method which will, by taking account of the relevant circumstances, lead to an equitable result. The reduction must be mutual and must affect the two parties equitably; otherwise, by definition, the process has not led to an equitable result"<sup>14</sup>.

Bahrain then goes on to assert that:

"The boundary claimed by Qatar does not divide the 'area of overlapping potential entitlement' which is the essence of maritime delimitation. Even on the assumption that the Hawar Islands and the Zubarah Region belong to Qatar and that the features to the east of Bahrain's main island are to be ignored, for a major part of its extent Qatar's proposed boundary encroaches upon Bahrain's 12-mile entitlement only, while leaving Qatar's 12-mile entitlement intact"<sup>15</sup>.

9.7 By so reasoning, Bahrain disregards the arguments put forward by Qatar to justify the fact that the line it claims coincides, between points L and BLV, with the 1947 line. The 1947 British decision is indisputably a relevant circumstance in effecting a maritime delimitation between Qatar and Bahrain. This is particularly the case, given that it has been confirmed by the practice of both Parties in regard to petroleum activities, as noted in Chapter VIII above<sup>16</sup>. It will also be noted that in its written pleadings Bahrain has remained silent with respect to the history of petroleum licences granted in the northern sector. That history is however particularly interesting in the present case. As pointed out in Qatar's Counter-Memorial, Bahrain's petroleum activities in the northern sector have always been to the west of the line joining points N, NSLB, BLV and 2(2B) as claimed by Qatar, with the exception of the Athari I well, which is adjacent to the BLV-2(2B) segment, on the eastern side of the line. Moreover, the western limit of the licences granted by Qatar in the northern sector undermines Bahrain's claim, which is based on its alleged "historic rights to the pearling banks", and from another point of view underlines the lack of any foundation for that claim<sup>17</sup>. Furthermore, Bahrain forgets that when the 1947 decision was made, the breadth of the territorial waters was three nautical miles and that the line that it laid down therefore did not encroach upon Bahrain's territorial sea. It also forgets that contrary to Bahrain's allegations, the maritime boundary claimed by Qatar, practically from point NSLB and, *a fortiori*, from point BLV<sup>18</sup>, in no way encroaches, "for a major part of its extent", "upon Bahrain's 12-mile entitlement"<sup>19</sup>. In fact, by reason of the general north-north-easterly direction of the line, it takes full account of Bahrain's maritime projection<sup>20</sup>.

9.8 On the other hand, it should be recalled that along the whole of its course, Bahrain's line takes no account whatsoever of Qatar's maritime projection<sup>21</sup>. Thus, in the southern sector, the whole of Bahrain's line encroaches upon Qatar's 12-mile territorial waters, and only upon those waters. Thus, too, in the northern sector, Bahrain's line encroaches upon Qatar's 12-mile territorial waters up to point Q and, beyond that point, from point Q up to point 2(2Q) located on the continental shelf boundary laid down by the 1969 Qatar/Iran agreement, upon Qatar's continental shelf and superjacent fishing zones. *Maps Nos. 10 and 11*, facing pages 314 and 318, are a clear illustration of each Party's treatment of the principle of non-encroachment. This is a major principle of the law of maritime delimitation which, it bears repeating, is one of the most significant advantages of using the equidistance method that Bahrain is ostensibly applying. It is immediately apparent from these two maps that Qatar's line is reasonable and that Bahrain's line

is grossly extravagant, the latter showing not the slightest trace of any equitable balance in the sacrifices demanded by Bahrain of Qatar<sup>22</sup>.

### **B. Bahrain's line runs counter to the jurisprudence concerning the determination of basepoints for the equidistance line**

9.9 It is claimed in the Bahrain Counter-Memorial that Qatar's line is based on "the fiction of a geographical and legal vacuum between the coast of Bahrain's main island and the Qatari peninsula"<sup>23</sup>. There is no legal basis for this criticism since, as has been shown above, it ascribes a purely arbitrary and artificial content to the notions of the "coasts" and "baselines" from which the course of any equidistance line must be determined<sup>24</sup>. It is untrue to say that in matters of maritime delimitation, international law somehow automatically and *ipso jure* gives full effect (1) to any "maritime feature", of whatever size, which remains permanently uncovered at high tide, be it an island, an islet, a rock or a reef and also (2) to any "maritime feature" which is uncovered at low tide but covered at high tide, *i.e.* a low-tide elevation. Bahrain's statement that in matters of maritime delimitation "an island is an island"<sup>25</sup> runs counter to both the international jurisprudence and State practice. Equally unfounded is Bahrain's assertion that low-tide elevations "form part of the territory of the State in question and... are subject to its territorial sovereignty"<sup>26</sup> and that in any event they serve as basepoints for the drawing of any equidistance line<sup>27</sup>. It is sheer fantasy to claim that such "maritime features" should, in the construction of the maritime boundary, be attributed the same weight as the Qatar peninsula itself, or indeed any weight at all. Not only does Bahrain refashion nature and geography; it also refashions the law.

9.10 Indeed, it has been definitively demonstrated that, according to the jurisprudence that has never wavered, (1) an island, islet, rock or reef that can generate its own territorial sea does not necessarily serve as a basepoint for the construction of a line of delimitation, in particular when such line is an equidistance line; and (2) *a fortiori*, a low-tide elevation that does not have its own territorial sea when it lies in its entirety at a distance from the mainland or from an island exceeding the breadth of the territorial sea, cannot be adopted as a basepoint for determining the course of a dividing line<sup>28</sup>. It is thus in contradiction of this consistent jurisprudence for the whole of the maritime boundary claimed by Bahrain, in both the southern sector and the northern sector, to be constructed from basepoints from which the breadth of the territorial sea is to be measured<sup>29</sup>. The equidistance line claimed by Bahrain, which is a final equidistance line in the southern sector and for the first section in the northern sector, and a provisional equidistance line for the second section in the northern sector<sup>30</sup>, is thus devoid of any legal basis<sup>31</sup>. The case of Fasht Dibal should be recalled here, since it plays a pivotal role in the construction of Bahrain's line: international law neither allows it to be used as a basepoint for the drawing of an equidistance line nor, contrary to what is alleged by Bahrain, does it allow it to have its own territorial sea; far less does it permit such a "feature" to be appropriated<sup>32</sup>. There is not a shred of justification for the solution proposed by Bahrain, which is nothing less than a perversion of the equidistance method.

### **Section 2. Qatar's Provisional Equidistance Line is Based on Reasonable Constructions**

9.11 Contrary to Bahrain's assertions, Qatar has never disputed the fact that the equidistance method may be used, in one way or another, in effecting the maritime delimitation in the present case<sup>33</sup>. Qatar considers it appropriate, first of all, to draw a provisional equidistance line which can then be adjusted to take the relevant circumstances into account. The course of the provisional equidistance line put forward by Qatar is based upon the assumption, as previously shown, that Bahrain's claims with respect to the "Zubarah region" will be rejected and that Qatar will be recognised as having territorial sovereignty over the Hawar islands. As will be demonstrated below, in sub-section C, this provisional equidistance line must be constructed by means of the mainland-to-mainland method, it being understood that this type of construction has

been frequently used in maritime delimitations in this part of the Arabian/Persian Gulf. Indeed, it will be seen in sub-section A that this was the method proposed in 1948 in the Boggs-Kennedy report and, in sub-section B, significantly, that it has been adopted by the Parties themselves in the delimitation agreements that they have entered into.

#### **A. A precedent that cannot be ignored: the Boggs-Kennedy line of 16 December 1948**

9.12 The first illustration of a reasonable construction of the equidistance method in the maritime areas concerned in the present dispute is to be found in what is usually referred to as the Boggs-Kennedy line. That line is described in a document that cannot be ignored when dealing with any problem of maritime delimitation anywhere in the Arabian/Persian Gulf, and in particular in the present case. This is why Qatar has referred to it on several occasions in its written pleadings: it mentioned it in its Memorial<sup>34</sup>, annexing the full text of the experts' report<sup>35</sup>, and it also referred to it in its Counter-Memorial<sup>36</sup>. In contrast, Bahrain's silence with regard to this document must be noted. Bahrain's discretion is undoubtedly due to the fact that the dividing line between Qatar and Bahrain that is proposed in this document is strikingly similar, along the greater part of its course and with the exception of the effect of the question of sovereignty over the Hawar islands, to the single maritime boundary claimed by Qatar. *Map No. 12*, facing this page, which shows the lines claimed by the two Parties together with the Boggs-Kennedy line, is a striking illustration - if such were needed - of the extravagant nature of Bahrain's claims with respect to the delimitation of the maritime areas.

9.13 At the request of their respective Governments, Commander R.H. Kennedy, of the Hydrographic Department of the British Admiralty, and Mr. S. Whittemore Boggs, the State Department's Special Adviser on Geography, prepared a "Joint Report Regarding an Orderly and Equitable Longitudinal Line and Lateral Jurisdictional Lines in the Persian Gulf", dated 16 December 1948 and illustrated by a line drawn on British Chart No. 2837b, entitled "Persian Gulf Western Sheet"<sup>37</sup>, which was dated and signed by both experts<sup>38</sup>. After a long working session held in London from 23 November to 16 December 1948, Kennedy and Boggs recommended to their Governments "the basis of a geographical division of the Persian Gulf... - for the exploitation of the natural resources of the seabed and subsoil of that area - which they may wish to propose to some or all of the several states concerned"<sup>39</sup>.

#### **1. The principles adopted by Boggs-Kennedy**

9.14 The Boggs-Kennedy report, which was prepared in agreement between the two experts, is based exclusively upon considerations of a geographical and technical nature, leaving aside any political or legal considerations<sup>40</sup>, with a view to making what they called "an orderly and equitable delimitation of the entire area of the Persian Gulf"<sup>41</sup> or, even more precisely, "a fair and equitable division of the seabed and subsoil areas of the Persian Gulf on scientific principles"<sup>42</sup>. Annexed to the Report are two Appendices: Appendix A, entitled "Description of the Suggested Median Line and Lateral Lines", and Appendix B, entitled "Definition of Terms and Explanation of Techniques". It is therefore a technical report, drawn up by experts whose authority was unanimously acknowledged at the time<sup>43</sup>, which did not fail to have an influence on the many maritime delimitations that were later carried out in the Arabian/Persian Gulf in general, and in particular in the sector concerning Saudi Arabia, the two Parties to this case, and Iran.

9.15 In this Report, Kennedy and Boggs made no attempt to conceal the numerous difficulties that they had encountered in performing their task. In particular, they mentioned the inadequacy of the cartographical and hydrographical surveys in the area, the insufficient knowledge of the tides and thus the difficulty in making a precise determination of the low-water coastline, and the various problems related to the presence of numerous geographical features such as islands<sup>44</sup>, islets, rocks, reefs, and the very frequently occurring shoal areas. However, they systematised the principles that they used, in the following terms: "We have undertaken to apply in the entire Persian Gulf area the technical principles and procedures for laying down a longitudinal median

line, and lateral lines between contiguous states"<sup>45</sup>, it being understood that these various dividing lines were "derived from the shores as we find them represented on hydrographic charts at the present time"<sup>46</sup>.

9.16 More precisely, in order to achieve a "fair and just delimitation" of the continental shelf in the Gulf, the two experts applied the following three principles. *First*, they used the equidistance method both for the longitudinal delimitation in the central part of the Gulf and for the lateral delimitations, notably in what the report calls the "Bahrein area". *Second*, they constructed the equidistance line, as a general rule, from the coastline "of the mainland", "disregarding practically all islands"<sup>47</sup>, and thus all the islets, rocks and reefs and, *a fortiori*, all the low-tide elevations detached from the coastline. *Third*, and finally, the two experts also constructed the equidistance line by relying upon either the low-water line, to which they gave preference, or upon the high-water line, depending upon the sector concerned and their degree of knowledge of such sector.

## **2. Application of the principles adopted by Kennedy and Boggs**

9.17 It will be sufficient here to recall the position taken by the two experts with respect to the two maritime sectors that are most particularly concerned by the present dispute. These are, first, the central part of the Arabian/Persian Gulf and, second, the "Bahrein area", with particular reference to the "Bahrein-Qatar lateral line".

### **(a) Equidistance and longitudinal delimitation in the central part of the Gulf**

9.18 In the view of the two experts the "longitudinal line in the middle of the Persian Gulf" had to be the "median line", defined as follows:

"The median line, serving as the outer limit of the seabed and subsoil under the jurisdiction of each coastal state to the south of 29°00'N. latitude (except where modified by mutual agreement) is the line every point of which is equidistant from the nearest point or points on opposite shores of the Persian Gulf, measured from the mean low-water coast line of the 'mainland' - disregarding all islands except as noted below"<sup>48</sup>.

### **(b) Equidistance and delimitation in the "Bahrain area"**

9.19 In the present case, particular attention should be paid to the recommendations of the Boggs-Kennedy report with respect to the delimitations in the sector of the Arabian/Persian Gulf that the two experts referred to as the "Bahrein area" - *i.e.* for drawing the "jurisdictional lines surrounding 'Bahrein'"<sup>49</sup> - although the experts took into consideration, without entering into the substance of the issue (because they were not lawyers), the British decision of 1939 relating to the Hawar islands. With this important exception, they rightly emphasised the peculiar characteristics of maritime delimitation in this sector.

9.20 First, they were careful to note the fact - which is probably less true now, though still true to a certain extent, when one looks at present-day cartography - that "The hydrographic charting in the entire 'Bahrein area' is inadequate for the purpose of laying down precise water boundaries". They added immediately thereafter the observation - which still remains pertinent today - that "The hydrography is exceptionally complicated and difficult because of the numerous reefs and shoals"<sup>50</sup>. Kennedy and Boggs then drew the consequences from this situation in determining the basepoints for the equidistance line. While they had decided to give preference for this construction to "the low-water line of the mainland"<sup>51</sup>, they considered that a different approach had to be taken in the "Bahrain area". In that area, it was sometimes necessary to construct the equidistance line from the "high water line of the mainland", taking account of practically no islands. The Report explains that: "Except in the vicinity of Bahrein Island it has been found feasible to use exactly the same baseline for both"<sup>52</sup>, namely the low-water coastline of the mainland, where charted, disregarding practically all islands"<sup>53</sup>. On the basis of these particular facts, Kennedy and Boggs put forward three separate delimitations for this "Bahrein area".

### **(i) The Saudi Arabia - Qatar lateral line**

9.21 The first delimitation that was dealt with by the two experts in the "Bahrein area" was the "Saudi Arabia-Qatar Lateral Line". They suggested, in accordance with the previously identified general principles, that the lateral line between Saudi Arabia and Qatar should "constitute a median line in the Duhat as Salwa which is equidistant from the nearest points on the low-water coastlines of Qatar and Saudi Arabia"<sup>54</sup>. The line that they proposed appeared satisfactory, insofar as "There seems to be less uncertainty with regard to the Duhat as Salwa than farther to the north however, and possibly the Saudi Arabia-Qatar line developed on the chart is fairly accurate"<sup>55</sup>. This was due to the fact that there were practically no reefs or shoals in the area, in contrast with the maritime areas lying between Saudi Arabia and Bahrain and between Qatar and Bahrain. Nevertheless, the Boggs-Kennedy line, like the line laid down in the delimitation agreement between Qatar and Saudi Arabia<sup>56</sup>, was ultimately constructed from the high water line because, as the two experts stated, "As the low water line is not marked on any of the above charts, the high water line has been used in drawing this median line"<sup>57</sup>.

### **(ii) The Saudi-Arabia - Bahrain lateral line**

9.22 The second delimitation in the Boggs-Kennedy report concerning the "Bahrein area" is the "Saudi Arabia-Bahrein' Lateral Line". The two experts suggested "that the lateral line between Saudi Arabia and the Bahrein group be the median line which is equidistant from the islands belonging to Bahrein on the east and from the Saudi Arabian mainland and islands on the west", it being understood that beyond 26°23'N, "the line continues by connecting successively the respective intersections of the envelopes of arcs of circles of 12, 15, 18, etc., miles radius drawn from all points on the low-water coastlines of the two states until it meets the median line in the Gulf, in approximately 27°07' N. latitude, 50°57' E. longitude"<sup>58</sup>. It is quite clear that the description of the equidistance line between Saudi Arabia and Bahrain and the determination of the basepoints for this line are less precise than those of the Saudi Arabia-Qatar lateral line. Indeed, as the two experts stated:

"Because of the numerous reefs and coral heads, and the lack of clear indication of the low-water coastlines of the islands and mainland, together with the uncertainty as to the sovereignty of some of the islands, it is exceptionally difficult to lay down this boundary or jurisdictional line"<sup>59</sup>.

Thus, the line proposed in the Boggs-Kennedy report between Saudi Arabia and Bahrain was only provisional, in the experts' view, the "definite boundary" being subject to fuller hydrographical surveys.

### **(iii) The Bahrain-Qatar lateral line**

9.23 The last delimitation examined by Kennedy and Boggs in the "Bahrein area" was the "'Bahrein'-Qatar Lateral Line". As with the other two delimitations that had already been proposed in this part of the Gulf, the Report recommends using the equidistance method, allowing "an orderly and equitable delimitation" to be achieved<sup>60</sup>. It suggests as follows:

"that the lateral line between the Bahrein group (including the Hawar Islands) and Qatar be the median line which is equidistant from the mainland of Qatar on the east and the islands belonging to Bahrein on the north and west, beginning at the 'triple point' (with Saudi Arabia) which is approximately sixteen miles south of Ras al Bar on Bahrein island, and extending northward to a point in approximately 26°00' N. latitude (which is approximately 10 miles from Bahrein island and Qatar); continuing thence as a straight line to the point of intersection of the envelopes of arcs of circles of 12 miles radius from the low-water coastlines of the Bahrein island group and Qatar, in approximately 26°15' N. latitude, 50°55' E. longitude; thence the line continues by connecting successively the intersections of the respective envelopes of arcs of circles of 15, 18, 21, etc. miles radius from the low-water

coastline of the two states until it meets the median line in the Gulf, in approximately 27°04' N. latitude, 51°07' E. longitude"<sup>61</sup>.

9.24 After giving this general description of the proposed line of delimitation between Bahrain and Qatar, the experts indicated, in the Confidential Note that followed, the basepoints that they had adopted for the construction of the equidistance line. They noted that:

"On no available chart or map is the low-water line shown southward of latitude 26°07' N.; the high-water line was therefore used for the development of the lateral line as far north as latitude 26° N., whence it is suggested that a straight line be drawn to the point in 26°15' N. latitude, 50°55' E. longitude (approximate), where the envelopes of arcs of 12 miles radius from the respective *low-water* lines of Bahrein Island and Qatar intersect"<sup>62</sup>.

This means that the line proposed by Kennedy and Boggs between Qatar and Bahrain consists of three segments. The *first* segment links the "triple point" with Saudi Arabia to a point located on the 26°00'N line of latitude. It is a median line constructed from the high water line on the respective coasts of Qatar and Bahrain. The *second* segment links by a straight line the point located on the 26°00'N line of latitude to a point located approximately at the intersection of the 26°15'N line of latitude with the 50°55'E line of longitude. It will be noted that this straight-line segment clearly cuts across Fasht al-Azm. Finally, the *third* and longest segment links the latter point to a point located on "the longitudinal line in the middle of the Persian Gulf" at 27°04'N, 51°07'E. This portion of the dividing line proposed by the two experts is an equidistance line constructed "from the low-water coastline of the two states", *i.e.*, on Qatar's side, from the low-water line on Ras Rakan and, on Bahrain's side, from the low-water line on Muharraq.

9.25 The Boggs-Kennedy Report concludes its discussion of the Bahrain-Qatar lateral line by stating that: "As in the case of the Saudi Arabia-Bahrain line, and for the same reasons, it is suggested that the verbal description given above be adopted as the basis for negotiations". The two experts therefore considered that it was just as difficult to draw a dividing line between Qatar and Bahrain as between Saudi Arabia and Bahrain, "for the same reasons", which were the presence "of the numerous reefs and coral heads", "the lack of clear indication of the low-water coastlines of the islands and mainland" and "the uncertainty as to the sovereignty of some of the islands"<sup>63</sup>.

9.26 The dividing line that was thus proposed on 16 December 1948 in the Boggs-Kennedy Report as "the basis for negotiations" for the delimitation of the continental shelf between Qatar and Bahrain was based, as was stressed by the authors themselves, on exclusively geographical and technical considerations, disregarding any political or legal factors<sup>64</sup>. It was of course drawn by the two experts on the basis of the cartographical and hydrographical knowledge available to them at the time. But it must be emphasised, as its authors did strongly on several occasions, in language that is strikingly similar to the language used in the present-day law of maritime delimitation, that the line was drawn with a view to making "an orderly and equitable delimitation", "a fair and equitable division"<sup>65</sup>. It is noteworthy that the common-sense principles identified by Kennedy and Boggs on the basis of a purely objective analysis, are to a great extent to be found in the maritime delimitation agreements that have been entered into by the States in the region. The Boggs-Kennedy Report, which shows both the lasting difficulties that have to be faced in delimiting the maritime areas lying between Qatar and Bahrain, and the reasonableness of the lines that were drawn by Kennedy and Boggs, cannot be ignored.

#### **B. A significant practice: the maritime delimitation agreements entered into by the Parties to the present case**

9.27 Although not applied as such in the seabed delimitation agreements entered into with their neighbours by the Parties to the present case, the Boggs-Kennedy principles were obviously an element taken into consideration since the principle of the equidistance based on the mainland-to-mainland method has been followed in the region on several occasions.

### **1. Bahrain - Saudi Arabia, seabed boundary agreement dated 22 February 1958**

9.28 A map illustrating the Bahrain-Saudi Arabia agreement may be found as Map No. 2 in the Qatar Counter-Memorial, facing page 38<sup>66</sup>. In the southern part of the delimitation line the mainland-to-mainland method was used for the selection of basepoints namely for turning points 1, 3, 4, 5 and 6. In particular the Bahraini islets of Al-Hool and Qassar were both disregarded. On the other hand, the islands of Zakhuniya and Umm Al-Nas'san, both of which are of some importance and lie close to the respective mainland coasts of the two Parties, were selected as basepoints for turning points 2 and 7, respectively. Further north, other circumstances were taken into consideration: the allocation of the Lubainah islands in the middle area, the presence of shoals on both sides of the line and the Bu Saafa hexagon for which a joint revenue arrangement was established.

### **2. The Qatar-Saudi Arabia Agreement on determination of land and sea boundaries dated 4 December 1965**

9.29 The text of the agreement dated 4 December 1965 between Qatar and Saudi Arabia is annexed hereto<sup>67</sup>. According to that agreement:

"Article (1) Dohat Salwa shall be divided equally between the two countries by the method of equidistance points from both shores. As regards the curves a median line, as much straight as possible, shall be taken".

"Article (3) It shall be entrusted to an internationally known surveying company to carry out the survey and demarcate the points and boundary lines between the two countries physically on ground in compliance with the contents of this agreement and to prepare a map showing the land and sea boundaries between the two countries as well as any other relevant descriptions".

In accordance with Article 1 of the Agreement the islet of Unaibir on the Saudi side has not been taken into account.

### **3. The Abu Dhabi-Qatar Agreement on the settlement of seabed boundary and ownership of islands dated 20 March 1969**

9.30 The course of this boundary is illustrated on Map No. 13, facing page 330<sup>68</sup>. The boundary consists of three segments joining four turning points. Point A is very close to a mainland-to-mainland equidistance tripoint between Qatar, Abu Dhabi and Iran. It was first selected between Qatar and Abu Dhabi and adopted a few months later as point 6 in the Qatar-Iran agreement<sup>69</sup>. Contrary to the Boggs-Kennedy approach, the important coastal island of Sir Bani Yas on the Abu Dhabi side was ignored, and contrary to the assumptions of the U.S. Department of State Geographer<sup>70</sup>, the shoals on the Abu Dhabi side were not taken into account for the determination of that tripoint. At the southern extremity of the delimitation, point D can also be considered to be equidistant from the two mainland coasts.

9.31 The two intermediary points were selected on other grounds: point B was located on the Al Bunduq oil field in order to share its resources. Point C however is marginally closer to the mainland of Qatar (38.2 miles from Ras al-Alaj) than to that of Abu Dhabi (41 miles from Jabal Dhanna). As to the relevant segments, when one compares segment B-C to the Boggs-Kennedy line, the former is slightly more favourable to Qatar, placing C a few miles south of the Boggs-Kennedy line. But one has to remember that the Boggs-Kennedy line was influenced by the Abu Dhabi off-lying island of Sir Bani Yas, which has been ignored in the delimitation agreement. As a matter of fact, segment B-C roughly coincides with an equidistance line drawn between the mainlands of the two countries. But segment C-D is slightly less favourable to Qatar than the mainland-to-mainland equidistance line. In any event, the two segments B-C and C-D do not take into account the islands and low tide elevations along the respective coasts.

### **4. The Iran-Qatar boundary line dividing the continental shelf dated 20 September 1969**

9.32 *Map No. 13*, illustrating the Iran-Qatar delimitation agreement dated 20 September 1969, is to be found facing this page<sup>71</sup>.

9.33 It is generally accepted that the Iran-Qatar continental shelf boundary is based on the mainland-to-mainland equidistance principle. All islands, rocks, reefs, and low-tide elevations were ignored in the delimitation. The boundary was established so as to be equidistant from the nearest points on the coasts of the mainland territories of the parties. In particular large islands were ignored: on the Iranian side Jazirat Shaikh Shuaib, Hinderabi and Qeys, and on the Qatari side Halul.

### **5. The Bahrain-Iran continental shelf agreement dated 17 June 1971**

9.34 *Map No. 13*, illustrating the Bahrain-Iran continental shelf agreement dated 17 June 1971, is to be found facing page 330<sup>72</sup>.

9.35 It would appear that in this case the mainland-to-mainland equidistance method may not have been fully applied. Although the equidistance method seems to be generally considered to be the method adopted in this case, it is clear that point 4 is not equidistant, being closer to Iran than to Bahrain. However, this point was not chosen because of its own merits but rather because it coincided with the terminal point of the previous Bahrain-Saudi Arabia agreement. As for point 1, it was left undefined, pending determination of the Qatar-Bahrain-Iran tripoint, which necessarily depends upon the outcome of the present case. Point 2 is almost equidistant and point 3 is equidistant on British chart 2847, if the basepoints are the island of Muharraq on the Bahraini side and the island of Jabrin (or Nakhilu whichever is the closest) on the Iranian side<sup>73</sup>.

9.36 Qatar takes the view however that islands such as Muharraq can reasonably be considered as part of the mainland of Bahrain. Hence the same approach is in equity to be applied to the island of Jabrin on the Iranian side. In any event, low-tide elevations (such as Fasht al Jarim on the Bahraini side) were clearly not used as basepoints.

### **C. The provisional equidistance line, constructed on the basis of the mainland-to-mainland method: a claim that is well-suited to the geographical circumstances of the present case**

#### **1. The mainland-to-mainland method**

9.37 At the very heart of this method of delimiting maritime areas lies, by definition, the concept of a "mainland", *i.e.* a large piece of land, or continental mass<sup>74</sup>. This idea has always been accepted by those who, from a technical or a legal point of view, have dealt with these issues in the relevant area<sup>75</sup>. It is quite clear that the concept of "mainland" applies to the Qatar peninsula, which should also be understood as embracing the main Hawar island<sup>76</sup>. That island is a natural extension of the landmass of Qatar<sup>77</sup>. The concept of "mainland" may also be applied to Bahrain, although its application is more difficult, given the exclusively insular nature of Bahrain. This is why, in a desire that both Parties to the present case should be treated equally, Qatar considers that for purposes of this maritime delimitation, Bahrain should be taken into account as a continental mass consisting not only of the main Bahrain island, but also of the islands that are relevant for the present delimitation, which lie off the north-eastern and eastern coasts of the main Bahrain island, *i.e.*, the islands of Muharraq and Sitrah<sup>78</sup>.

9.38 The concept of "mainland" being defined in this way, the application of the mainland-to-mainland method in the construction of the provisional equidistance line between Qatar and Bahrain, in both the southern sector<sup>79</sup> and the northern sector, has two main characteristics. *First*, it takes no account of the islands (except for Hawar on the Qatari side and Muharraq and Sitrah on the Bahraini side, as mentioned above), islets, rocks, reefs or low-tide elevations lying in the relevant area<sup>80</sup>. *Second*, the concept of "mainland" and the implementation of the mainland-to-mainland method result in the provisional equidistance line being constructed from the high water line. Both aspects of this method must be analysed separately, as follows.

**(a) The mainland-to-mainland method disregards islands, islets, rocks, reefs and low-tide elevations**

9.39 In its Counter-Memorial, Qatar has already demonstrated the appropriateness of this method for drawing the provisional median line in the southern sector, but the demonstration is equally valid for the northern sector, since the basepoints used for the construction of the line are, at least in some cases, the same for both sectors. The mainland-to-mainland method is quite naturally applicable when, as in the present case, the maritime areas to be delimited are "dotted with a great number of small islands, islets, rocks, reefs and shoals"<sup>81</sup>. First of all, from a strictly technical point of view, a line taking these numerous maritime features into account would be difficult to construct, and in this regard Bahrain's inability to define the exact basepoints for the dividing line that it claims is extremely telling. Moreover, a line constructed in the manner proposed by Bahrain would inevitably lead to a clearly unreasonable and inequitable result since it would lie alongside Qatar's coast in violation of the principle of non-encroachment and would not respect the security interests of Qatar<sup>82</sup>.

9.40 In such circumstances, as has been shown by both consistent jurisprudence and State practice, when an equidistance line is being drawn, be it provisional or final, adjudicated or negotiated, no reliance can be placed upon such maritime "features", which clearly have a "disproportionally distorting effect"<sup>83</sup>. It is sufficient to recall that in its Judgment of 12 October 1984 in the *Gulf of Maine* case, the Chamber spoke out against a "method which takes tiny islands, uninhabited rocks or low-tide elevations, sometimes lying at a considerable distance from terra firma, as basepoints for the drawing of a line intended to effect an equal division of a given area"<sup>84</sup>. It will also be recalled that in the practice followed by the States in the region, and notably by the Parties to the present case, maritime "features" of this kind have not normally been taken into consideration<sup>85</sup>. Thus, it has been noted that "the Iran-Qatar agreement of 1969 is a case in point, using a mainland-to-mainland equidistant line and ignoring islands, rocks, reefs, and low-tide elevations"<sup>86</sup>. It is well established in international law that maritime "features" falling within the above categories, which may serve as basepoints for determining the course of the outer limit of territorial waters are not appropriate basepoints for the construction of a dividing line, in particular when the line is an equidistance line<sup>87</sup>.

9.41 This demonstration, which has been made by Qatar for the southern sector, may, as already noted, be transposed to the northern sector<sup>88</sup>. Indeed, the equidistance line claimed by Bahrain in the southern sector relies, on Bahrain's side, on a collection of islands, islets, rocks, reefs and low-tide elevations<sup>89</sup>. In drawing its line to the south of the "Zubarah Region", Bahrain takes into account "Hadd Janan" (if that "feature" exists separately from Janan), Janan, the Hawar islands and various low-tide elevations such as Fasht Bu Thur and Qita'a el Erge. In drawing its line to the north of the "Zubarah Region", Bahrain relies - at least if the very rudimentary construction that it produced in its Memorial is to be believed - on Qit'at Jaradah and Fasht Dibal. As for the equidistance line claimed by Bahrain in the northern sector, it has been drawn exclusively, on the Bahraini side, from Fasht Dibal<sup>90</sup>. This is true both of the definitive first segment of the line, linking points O and R, and of the provisional equidistance line which is the second segment of the same line, linking point R to the point of intersection of that line with the median line established in the central part of the Arabian/Persian Gulf by the continental shelf delimitation agreement concluded on 20 September 1969 between Qatar and Iran.

9.42 It should be emphasised that the above analysis by Qatar - according to which the islands, islets, rocks, reefs and low-tide elevations that might be used as basepoints for determining the outer limit of the territorial sea are not necessarily basepoints to be used for constructing a dividing line - is perfectly consistent with Qatar's general position. *First*, it corroborates the demonstration in Qatar's Counter-Memorial which established that Fasht Dibal (even if it could be appropriated, which Qatar has shown is not the case), cannot possibly be a relevant basepoint for effecting an equitable delimitation in the northern sector. Similarly, Bahrain cannot rely on

Fasht al-Azm, which is at most a low-tide elevation that does not naturally form an integral part of Sitrah island<sup>91</sup>. *Second*, the above analysis is in perfect harmony with the determination of the basepoints for the provisional equidistance line proposed by Qatar in the northern sector<sup>92</sup>: on Qatar's side, this line ignores the islet of Ras Rakan, which would inevitably give Qatar an advantage at the expense of Bahrain, but which is clearly no more than a "minor geographical feature"; on Bahrain's side, the provisional equidistance line proposed by Qatar relies on the relevant points on the island of Muharraq that Qatar considers as part of the Bahrain "mainland"<sup>93</sup>.

#### **(b) The mainland-to-mainland method is based on the high-water line**

9.43 According to a well-established customary rule that has been codified by both Article 3 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 5 of the 1982 United Nations Convention on the Law of the Sea, "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State"<sup>94</sup>. The *ratio legis* of this rule was clearly identified by the International Court of Justice in its Judgment of 18 December 1951 in the *Norwegian Fisheries* case, in a *dictum* that is often cited:

"... for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory"<sup>95</sup>.

The fact that the low-water line is "the normal baseline" for determining the outer limit of the territorial waters and thus the various maritime areas under national jurisdiction does not necessarily mean that the same low-water line is the baseline from which an equidistance line must be constructed. Even if it is true that equidistance lines are frequently drawn from the low-water line, this is because the geographical circumstances of the delimitation in question have allowed an equitable result to be achieved. In Qatar's view, this is not a rule of general application, and the use of the high-water line is justified on both technical and legal grounds, precisely in order to achieve an equitable delimitation.

#### **(i) Technical arguments in favour of the high-water line**

9.44 Technical considerations necessarily intervene in the choice between the low-water line and the high-water line as a baseline for the construction of the equidistance line. While the determination of the low-water line is a question of hydrography, the determination of the high-water line is a question of topography. Whereas the low-water line is by definition precarious, subjective, or even arbitrary, insofar as it may vary with time, the high water line can be drawn in a sure and objective way, insofar as it is relatively invariable. As A.L. Shalowitz has put it:

"Both to the hydrographer and the topographer, the low-water line is one of the most uncertain and difficult features to delineate. Unlike the high-water line, it is actually visible but momentarily to the topographer. If located by the hydrographer it must generally be accomplished when the height of the tide is well above low water, making it difficult to develop readily its many irregularities"<sup>96</sup>.

In these circumstances, an expert has systematised the problem in the following terms:

"Although it is general practice in many countries to depict on official nautical charts the low water line (equivalent to the low-water mark), which often corresponds to the local chart reference datum, this is far from being the case worldwide. Often the scale is too small to allow for both the normal coastline (mean high water line) and the low-water line to be depicted separately, but most frequently the data available on local tides are insufficient or inadequate to form the basis for the tracing of separate lines. In these cases, the 'coastline' on

the chart is often directly transferred from corresponding large scale landmass, which today in most cases is based on photogrammetry. Hence, on the chart the low-water line and the geodetic and hydrographic coastline coincide, although they may be different in actual fact"<sup>97</sup>.

9.45 With respect to the maritime areas lying between Qatar and Bahrain, there is every reason to believe that even the most recent surveys are not absolutely reliable. *First*, this is an area which is of only marginal interest for maritime navigation, which therefore does not require systematic surveys to be made. *Second*, the nature of the seabed and the presence of low-tide elevations make the hydrographer's task particularly difficult. Using only the British marine charts, which are the most reliable, several different situations may be seen to exist. In some sectors, the low-water line and the high-water line may more or less coincide, being the same line on the chart even if not in actual fact. In other sectors - which is the most frequent case - there is a difference between the low-water line and the high-water line, to the degree of accuracy of the chart in question, since the tide, which is in the region of 1-1.4 metres, is great enough to have significant effects, at least locally.

9.46 It therefore appears that in these circumstances, with a view to both accuracy and simplicity, and given the particular situation of the maritime area to be delimited in the present case, it is safer to rely on the high-water line rather than on the low-water line in order to determine the course of the provisional equidistance line, not only in the southern sector, as Qatar has already shown<sup>98</sup>, but also in the northern sector<sup>99</sup>. In other words, the observation of Kennedy and Boggs in 1948 that "In large areas of the Persian Gulf it is impossible to chart the low water line until more detailed surveys are made"<sup>100</sup> to a great extent remains true today with regard to the maritime areas lying between the Parties to the present case.

#### (ii) Legal arguments in favour of the high-water line

9.47 As a preliminary remark, it should first be noted that the subjectivity inherent in the determination of the low-water line is acknowledged by the Conventions codifying the law of the sea. Article 3 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and Article 5 of the 1982 Convention on the Law of the Sea<sup>101</sup>, when they provide that the "normal baseline" used for measuring the breadth of the territorial sea must be the "low-water line along the coast", point out that this is the low-water line "as marked on large scale charts officially recognized by the coastal State"<sup>102</sup>. This expression is significant, since it underlines the uncertainties of the low-water line. Such a well-informed expert as Mr. P.B. Beazley has mentioned three of such uncertainties<sup>103</sup>. *First*, in the absence of adequate marine charts, "a hydrographic survey will almost certainly be necessary"<sup>104</sup>, which means a long and expensive operation; *second*, "There is no internationally agreed specific level for universal use, chiefly because there is no single formula that will produce a satisfactory definition applicable to all tidal regimes. As a result, the low-water line used by one country will not necessarily be the same as that chosen by others..."<sup>105</sup>; and *third*, "Differences between levels of chart datum... may... be very significant where dealing with overlapping claims. Where a coastline is formed by a gently sloping shore, or where there are rocks or banks close offshore which may just cover or just uncover at low-water, a small change in choice of level may result in a considerable change in the position of the territorial sea baseline"<sup>106</sup>. The difficulties which arise in the determination of the low-water line are obvious in shallow maritime areas in which maritime "features" are scattered, such as the areas lying between Qatar and Bahrain. Moreover, they are particularly serious since, as noted by Mr. Beazley "it is essentially a delimitation, rather than a baseline, problem"<sup>107</sup>.

9.48 Authors who have analysed the question of the baselines from which maritime boundaries are constructed, and in particular equidistance lines in State practice and the jurisprudence, have often noted that, as one author has put it, "Although the low-water line is considered as 'normal', there are numerous instances in which other kinds of basepoints have been used"<sup>108</sup>. These

authors are thus referring, more often than not, to straight baselines drawn along a deeply indented coast or one where there is a fringe of islands in its immediate vicinity and where, in a manner of speaking, such baselines are projected forward from the coastline of the mainland. But it must be borne in mind that the opposite hypothesis is also possible and that, for reasons of equity, it has been accepted by the jurisprudence. The baseline from which the dividing line and, more particularly, the equidistance line is constructed may indeed be brought inwards from the coastline of the mainland, *i.e.* from the low-water line. In its first Judgment on the subject, in the *North Sea Continental Shelf* cases, the International Court of Justice held that, in order to determine the course of a maritime boundary, it was not only islets or rocks and, *a fortiori*, reefs or low-tide elevations that could be disregarded, but also "the presence of... minor coastal projections" in order to avoid their "disproportionally distorting effect"<sup>109</sup>. Since the Court thus recognises that, in order to achieve an equitable delimitation, it is entitled not to take into consideration a slight projection on the coast of the mainland and to make a simplification of the coastline by a kind of smoothing or planing, it is *a fortiori* entitled to ignore the low-water line. This would be a means for the Court to effect an objective delimitation that would be technically suited to the geographical and hydrographical circumstances of the area in question. As the Chamber stressed in the *Gulf of Maine* case, "the choice of method to be used is essentially dependent upon geography"<sup>110</sup>. Moreover, it bears repeating that the problem in the present case is a problem of delimitation, governed by considerations of equity, and not a problem of baselines for territorial waters, where there is no role for the application of equitable principles. Thus, all the distorting effects of the coastline are disregarded, and both Parties are treated on a strictly equal footing.

9.49 These arguments, both technical and legal, in favour of application of the high-water line in the present case, are confirmed by the conduct of the Parties. As far as Qatar is concerned, its position with regard to the high-water line is consistent not only with its prevailing conventional practice<sup>111</sup>, but also with the closing line that it has proposed in the present case for separating the northern and southern sectors, which links point RK, located on the high-water line of the northern tip of the Qatar peninsula, to point MQ, located on the high-water line on the north of Muharraq. As far as Bahrain is concerned, the identification of the basepoints used for the construction of the equidistance line that it claims (which in any event is devoid of any legal basis<sup>112</sup>) has remained extremely vague. Moreover, Bahrain has sometimes used the high-water line in the maritime delimitation agreements that it has concluded with neighbouring States<sup>113</sup>, at least for certain segments of the dividing lines established by such agreements. Finally, it should be added that use of the high-water line in selecting the basepoints used for constructing the dividing line is not unknown in the practice followed by other States bordering on the Arabian/Persian Gulf, notably Iran<sup>114</sup>.

## **2. Description of the provisional equidistance line, constructed on the basis of the mainland-to-mainland method**

9.50 As has been noted above, the provisional equidistance line proposed by Qatar is based on the mainland-to-mainland method<sup>115</sup>. It bears repeating that this method is based on two criteria: *first*, it does not take into account any islands (with the exception of the main Hawar island on Qatar's side and Muharraq and Sitrah on Bahrain's side), islets, rocks, reefs or low-tide elevations; *second*, it is applied from the high-water line. This line is shown on *Map No. 14*, facing this page, and has been constructed on the basis of the nautical charts of the British Admiralty that are in current use (notably No. 2886) and on American nautical charts (notably Nos. 62420, 62530 and 62550). These charts are of course of a far higher quality than the cartographic documents that were available immediately after the Second World War, when the British decision of 23 December 1947 was taken, or when the Boggs-Kennedy Report of 16 December 1948 was written. However, it must be borne in mind that these charts may still

contain a few residual uncertainties as to the geodetic connection of the various national systems in the region.

9.51 In the southernmost part of the southern sector, the provisional equidistance line does not lie very far from the S1-L section of the maritime boundary claimed by Qatar (*see, Map No. 14*, facing this page). The starting point of the line of delimitation of the continental shelf between Saudi Arabia and Bahrain, resulting from the agreement of 22 February 1958, must, when it is constructed, be quite close to this provisional equidistance line. This is indeed the case, allowing for the uncertainties arising out of the earlier topography. Then, in the central and northern parts of the southern sector, the provisional equidistance line turns towards the north, to meet the closing line from RK to MQ at point V. Point V, the coordinates of which are 50°55'10"E and 26°13'38"N, is located approximately 29,500 metres (to be precise, 29,504 metres) from point MQ and 34,000 metres (to be precise, 34,011 metres) from point RK, *i.e.* 11,350 metres (to be precise, 11,356 metres) to the west of point N, which is the point of intersection of the line claimed by Qatar: S1, L, NSLB, BLV, 2(2B).

9.52 At low tide the provisional equidistance line cuts through Fasht al-Azm, around 4,000 metres from its eastern extremity, and crosses the low-tide elevation of Qit'at Jaradah slightly to the south of point V. To the south of Fasht al-Azm, this line leaves on Qatar's side only shoals that are awash, all the rocks and islets that are uncovered at low-tide being on Bahrain's side. It should also be noted that to the south of Fasht al-Azm, the choice of the low-water line on the mainland (excluding the islets, reefs and low-tide elevations), rather than the high-water line, would have had only a very negligible effect on the course of the line. The situation would be quite different to the north of Fasht al-Azm. Both in the northern part of the southern sector, in the neighbourhood of point V on the RK-MQ closing line, and in the whole of the northern sector up to the intersection of the provisional equidistance line with the maritime boundary between Bahrain and Iran, at point W, the choice of the low-water line would have had significant consequences on the course of the line. It would have shifted the line westwards, and thus in a direction unfavourable to Bahrain, by only about 50 metres at the level of the RK-MQ closing line but by about 4,000 metres at the level of the maritime boundary between point W and a point close to point 2(2B), the total surface area involved being 96.78 square miles or 331.94 square kilometres. This shifting of the line is explained by the presence of a line of reefs lying at a distance off the coast of Qatar, between Ras Ushairiq and Ras Rakan.

9.53 In the northern sector, the provisional equidistance line appears as a sequence of segments in almost a straight line between point V on the RK-MQ closing line and point W on the maritime boundary with Iran, located between points 2(2B) and 2(2Q). Point W, the geographical coordinates of which are 51°09'05"E and 27°02'22"N, lies approximately 5,328 metres to the east of point 2(2B), the geographical coordinates of which are 51°05'54"E and 27°02'47"N<sup>116</sup>. It should moreover be noted that this provisional equidistance line in the northern sector touches the western edge of the low-tide elevation of Fasht Dibal.

### **Section 3. The Adjustments made by Qatar to its Provisional Equidistance Line**

#### **A. The adjustments made to the provisional equidistance line in the southern sector**

9.54 In its Counter-Memorial, Qatar has already shown that in the southern sector the provisional median line had to be adjusted westwards in order to take into account the special or relevant geographical and historical circumstances pertaining to the maritime areas to be delimited between Qatar and Bahrain<sup>117</sup>. The following discussion will be limited to the main points of that demonstration.

##### **1. The special or relevant geographical circumstances**

9.55 The provisional median line must first be modified and shifted westwards, in favour of Qatar, for geographical reasons. In its written pleadings, Qatar has always argued that there is a

"disparity or disproportion between the respective lengths of the coasts of Qatar and Bahrain" and that this fact cannot be ignored in the maritime delimitation before the Court<sup>118</sup>. Bahrain, on the other hand, contends that "there is no significant disparity between Bahrain's and Qatar's respective coastal lengths", concluding that "there is therefore no justification for adjusting the equidistance line to be drawn in the southern sector"<sup>119</sup>.

9.56 This is a strange contention, that can be rejected immediately on the face of the maps. It is hardly necessary to recall that the eastern coast of Bahrain, measured in accordance with its general direction and without taking into account the islands, islets, rocks, reefs, and low-tide elevations<sup>120</sup>, is, roughly speaking, a straight line linking Ras al Barr in the south to the northern end of Muharraq, its length being approximately 29.9 nautical miles or 55.5 kilometres. The western coast of Qatar, measured in accordance with the same parameters, is a straight coastline linking Ras al-Uwaynat in the south to the northern tip of the Qatar peninsula (disregarding Ras Rakan), its length being approximately 47.6 nautical miles or 88.2 kilometres. The ratio between the respective lengths of the Parties' coastlines is thus 1.59 to 1 in favour of Qatar. In this regard it is possible to transpose word for word to the present case the Chamber's analysis in the *Gulf of Maine* case in its Judgment of 12 October 1984, according to which:

"... it is in the Chamber's view impossible to disregard the circumstance, which is of undeniable importance in the present case, that there is a difference in length between the respective coastlines of the two neighbouring States which border on the delimitation area. *Not to recognize this fact would be a denial of the obvious*"<sup>121</sup>.

This statement by the Chamber is all the more significant in that, in the *Gulf of Maine* case, the ratio of the coastal lengths of 1.38 to 1 in favour of the United States, in which the Chamber saw "a substantial disproportion", constituted "a valid ground for correction, more pressing even than others"<sup>122</sup>. The ratio in that case was thus much smaller than the ratio in the present case in favour of Qatar. In refusing to acknowledge this fact, Bahrain is simply denying the obvious.

## **2. The special or relevant historical circumstances**

9.57 Throughout the present dispute, Qatar has always argued that the 1947 line is a factor that cannot be disregarded in determining the maritime boundary between Qatar and Bahrain<sup>123</sup>. Bahrain, here again denying the obvious, has gone to considerable lengths to try to demonstrate that "The British 1947 line is irrelevant to the delimitation which the Court is requested to effect"<sup>124</sup>, and it concludes its argument by stating that "Qatar in fact asks the Court to hold that modern international law requires a single maritime boundary which, by a miraculous and unexplained coincidence, is supposed to be identical to a seabed division proposed by Britain fifty years ago upon bases, and for reasons, which no one can articulate"<sup>125</sup>.

9.58 Qatar has already responded in detail to Bahrain's argument in this regard<sup>126</sup>. There is no need to go over this ground again, but it should simply be pointed out just how inconsistent Bahrain's position is. On the one hand, Bahrain argues that a line that was to delimit the sea-bed in 1947 could not be based on the "concepts and rules of contemporary international law"<sup>127</sup>, while on the other hand it adjusts the course of the equidistance line that it claims in the northern sector by shifting it far to the east, relying on pearl fisheries that, for the most part, have been defunct for over half a century<sup>128</sup>. In fact the reason why Bahrain wants to ignore the 1947 British line lies in the fact that, along the greater part of its course, that line categorically disqualifies the line submitted by Bahrain to the Court. As will be recalled, the British line was determined "in accordance with equitable principles", and its construction was that of "a median line based generally on the configuration of the coast-line of the Bahrain main island and the peninsula of Qatar"<sup>129</sup>. This means that, in accordance with Qatar's position, the 1947 line, just like the Boggs-Kennedy line, takes no account of the islands, islets, rocks, reefs or low-tide elevations, and is based on the high-water line of the main Bahrain island<sup>130</sup>.

9.59 Qatar must recall that it is only that part of the 1947 line that links points L and BLV that is relevant in the present case<sup>131</sup>. First, the segment of the line which links points L and Q, forming a semi-enclave around the Hawar islands, is not to be taken into consideration, because of Qatar's title to those islands<sup>132</sup>. Second, the most southerly segment of the 1947 line, between points Q and M, is not to be taken into consideration either, since point M encroaches upon the rights of Saudi Arabia at the mouth of the Dawhat Salwa. Therefore, for reasons relating to non-encroachment upon the rights of third States and also for reasons of simplification and clarity of the delimitation in this area, the starting-point of the line claimed by Qatar in the southern sector must correspond to point 1 of the dividing line established by the agreement entered into on 22 February 1958 between Bahrain and Saudi Arabia<sup>133</sup>. In addition, the first segment of Qatar's line must therefore be a straight line linking points S1 and L. The adjustment of the provisional median line to coincide with the 1947 line as defined above, *i.e.*, from point L up to its terminal point BLV, complies with the fundamental norm of the present-day law of maritime delimitation. The dividing line must be drawn in application of equitable principles, taking into account all the special or relevant circumstances, in order to achieve a reasonable and equitable result. As Qatar has demonstrated, this was already the aim of the British authorities when, on the basis of the Truman Proclamation and of the notion of equitable principles, they drew the 1947 line<sup>134</sup>.

### **B. Adjustments to the provisional equidistance line in the northern sector**

9.60 The provisional equidistance line, as constructed above on the basis of the mainland-to-mainland method, without taking into account the islands, islets, rocks, reefs and low-tide elevations, and relying on the high-water line, is as follows in the northern sector. It is the line running from the point of intersection of this provisional equidistance line with the RK-MQ closing line up to its point of intersection with the boundary laid down in the central part of the Arabian-Persian Gulf in the agreements entered into by Iran with Qatar on 20 September 1969 and with Bahrain on 17 June 1971<sup>135</sup>. This line, in the northern sector as in the southern sector, must be shifted westwards because of the special or relevant circumstances in the present case which, in both sectors, are both historical and geographical. The equitable nature of the adjustment made in the northern sector is confirmed by application of the proportionality test.

#### **1. The reasons for the adjustment made by Qatar to the provisional equidistance line in the northern sector**

##### **(a) The special historical circumstances justifying the first section of Qatar's line, from N to BLV**

9.61 In its written pleadings, Qatar has argued that the first portion of the single maritime boundary that it claims in the northern sector should coincide with the final part of the 1947 line, beyond the area where Qatar and Bahrain have directly opposite coasts, linking points N, NSLB and BLV<sup>136</sup>. Point N (50°48'31"E and 26°15'02"N) lies at the intersection of the line laid down by the 1947 British decision and of the RK-MQ closing line, which is the southern limit of the delimitation area in the northern sector. Points NSLB (50°49'48"E and 26°21'24"N) and BLV (50°57'30"E and 26°33'35"N) are two points on the 1947 line, which are turning points on Qatar's line. In particular, point BLV is a real anchor point, and is a highly significant circumstance in the maritime delimitation between the two Parties to this case: it is both the end point of the 1947 line and the starting point of the second section of Qatar's line.

9.62 With respect to this first section of Qatar's line, from N to BLV, which coincides with the 1947 line, Bahrain has not failed to make the same criticisms as those that it had already made with respect to the same line between points L and N in the southern sector. Bahrain adds that "the points NSLB and BLV bear no relationship whatever to the coastal geography... In short, ... the segment of the boundary claimed by Qatar to the south of BLV has no known *raison d'être*, justification or explanation"<sup>137</sup>. Qatar has already shown that there is no foundation for Bahrain's

objections<sup>138</sup>, and it therefore suffices to refer to the preceding discussion and to add the following two observations.

9.63 *First*, Bahrain cannot ignore the existence of the 1947 line. This is, above all, a special circumstance for the first segment of Qatar's line, delimiting the territorial waters, which links point N to a point located just beyond point NSLB<sup>139</sup> and, beyond that point, a relevant circumstance for the delimitation of the continental shelf and the superjacent fishing zone. The 1947 line is the *raison d'être* for the shifting westwards of the provisional equidistance line, which is itself constructed on the basis of coastal geography.

9.64 *Second*, there is evidence that the Parties have relied upon the 1947 line between points N, NSLB and BLV, corresponding to the first section of Qatar's line in the northern sector, for the operating limits of their offshore petroleum activities<sup>140</sup>. As was pointed out by the International Court of Justice in its judgment of 24 February 1982 in the case concerning the continental shelf between Libya and Tunisia, the line of the concessions "which was tacitly respected for a number of years... does appear to the Court to constitute a circumstance of great relevance for the delimitation"<sup>141</sup>. The fact that the 1947 line has been taken into account in the Parties' petroleum operations in the N-NSLB-BLV area confirms the appropriateness of this segment of the line as the first section of Qatar's proposed maritime boundary in the northern sector.

**(b) The relevant geographical circumstances justifying the second section of Qatar's line, from BLV to 2(2B)**

9.65 Qatar has argued that the second section of the line that it claims in the northern sector should link point BLV, the end point of the 1947 line, to point 2(2B)<sup>142</sup>, and that its construction should be based on the modified perpendicularity method<sup>143</sup>. The two stages of its implementation will be briefly recalled here<sup>144</sup>. As a first stage, Qatar drew a strict perpendicular from BLV, the basepoint of which, on the RK-MQ closing line, is point R (50°52'28"E and 26°14'12"N) and the end point of which intersects the boundary laid down by the agreement entered into in 1971 between Bahrain and Iran at point S (51°05'12"E and 27°03'04"N)<sup>145</sup>. Then, as a second stage, Qatar rotated the strict perpendicular R-BLV-S slightly eastwards and thus in favour of Bahrain. This involved a shift from point S to point 2(2B), the easternmost turning point defined by coordinates on the dividing line laid down by the 1971 Bahrain/Iran agreement<sup>146</sup>. The result is that the foot of the modified perpendicular from 2(2B) to BLV on the RK-MQ closing line was in turn shifted slightly westwards, from point R to point T (50°51'59"E and 26°14'18"N). As may be seen from *Map No. 15* facing this page, and as Qatar has already pointed out, the shifting effect - 800 metres at the starting point of the construction (R-T) and 1300 metres at its end point (S-2(2B)) - is practically negligible at the scale of the construction<sup>147</sup>.

9.66 This line, which not only in itself but also, *a fortiori*, if it is compared with Bahrain's claims in the northern sector, is technically simple and leads to an equitable result<sup>148</sup>, has nevertheless been subjected to excessive, often repetitive, and moreover groundless criticism by Bahrain<sup>149</sup>. Bahrain's criticisms in fact boil down to two. *First*, the perpendicularity method is unrefined and obsolete. *Second*, that method is inapplicable in the present case, because there is no coastal concavity and consequently no closing line. Neither of these arguments withstands scrutiny.

9.67 The first argument, as to the out-dated nature of the perpendicularity method, is surprising. Bahrain seems to have forgotten the pertinent comments of a distinguished specialist in the field of maritime delimitation according to whom, when, as in the present case, there is an inequitable provisional equidistance line, which therefore has to be adjusted "the range of methods of adjustment which can be employed, either alone or in combination with one another, is very broad: a simple correction of the equidistance line, a line *perpendicular* to the coast or *in a notional direction*, one which follows a line of latitude or longitude, etc."<sup>150</sup>. And the same author cites the words of the Arbitral Tribunal in the 1977 Award, according to which the choice

of the method and of the final course of the line "is very much a matter of appreciation in the light of the geographical and other circumstances"<sup>151</sup>, explaining that "The *perpendicular* method can also, in certain cases... be a useful variant for correcting the line of equidistance", in particular "in the case of a coast which is more or less straight, or *the imaginary closing-line of a gulf*"<sup>152</sup>. That is precisely the case here.

9.68 The second argument advanced by Bahrain is even more surprising than the first. In Bahrain's view, "The situation in the present case is certainly not that of a 'coastal concavity', an 'estuary' or a 'gulf'. *The waters between Bahrain and Qatar* are not a more or less pronounced concavity, they *are not a gulf* or an estuary, they do not conclude in common *terra firma*. The waters between Bahrain and Qatar are, rather, a channel open on both sides"<sup>153</sup>. It is however difficult to see how Bahrain can maintain this argument when, in its Memorial, it states the exact opposite: "Bahrain has consistently exercised sovereignty over all of the maritime features situated *in the Gulf of Bahrain*, from the Hawar Islands in the south to Fasht ad Dibal in the north"<sup>154</sup>. Qatar has thus done no more than use the geographical description given by Bahrain of the maritime areas concerned. Bahrain cannot criticise Qatar for doing so, nor can it prevent Qatar from highlighting Bahrain's inconsistencies and successive contradictions. Thus, Bahrain's argument that: "In the present case there is no coastal concavity... and, therefore, no 'closing line'"<sup>155</sup>, falls to the ground, just like the whole of Bahrain's discussion directed against Qatar's use of the modified perpendicularity method in making the delimitation in the northern sector.

9.69 Bahrain's argument is all the more unfounded in that the shifting of the provisional equidistance line in the northern sector towards the line linking points N, NSLB, BLV and 2(2B), which is a technically simple and legally well-founded line, results in a reasonable and equitable delimitation. This line is consistent with equitable principles which, as the International Court of Justice recalled, in its Judgment of 3 June 1985 in the *Libya/Malta* case, are of a "normative character", stressing that they were "expressed in terms of general application"<sup>156</sup>. Moreover, as Qatar has shown, the line joining N, NSLB, BLV and 2(2B) "is scrupulously observant of the principle of non-encroachment"<sup>157</sup>; it takes full account of Bahrain's maritime projection, and in no way interferes with its natural north-north-easterly projection. Qatar's line also ensures observance of another equitable principle that is just as fundamental as the principle of non-encroachment: the principle that "equity does not necessarily imply equality"<sup>158</sup>. Indeed, the line is governed by nature and geography, taking full account of the configuration of the Parties' coasts, and especially of the disparity or disproportion in their respective lengths<sup>159</sup>. In all these respects, the reasonable and equitable nature of Qatar's line is in stark contrast with Bahrain's line, as is strikingly illustrated by *Map No. 10*, facing page 314, showing the two maritime claims.

9.70 Confirmation of this analysis is to be found in the equitable nature of the terminal point of Qatar's line, *i.e.* point 2(2B) (51°05'54"E, 27°02'47"N), the location of which is particularly significant. It should be recalled that it is a potential tripoint, practically equidistant from the respective coasts of Qatar, Iran and Bahrain<sup>160</sup>. In its agreement of 17 June 1971 with Iran, Bahrain acknowledged that point 2(2B) was an equidistance point and thus that to the east of point 2(2B), the coasts of Bahrain no longer had any influence on the drawing of the dividing line between the coasts of the Arab States and Iran. In other words, to the east of point 2(2B), Qatar's coasts alone have to be taken into consideration, and the dividing line corresponds exclusively to the delimitation laid down by the agreement of 20 September 1969 between Qatar and Iran. Finally, it should be recalled that point 2(2B) is approximately the same as the terminal point of the lateral line proposed by Kennedy and Boggs in their report of 16 December 1948 at its intersection with the longitudinal median line that they had drawn, in the centre of the Arabian-Persian Gulf, the coordinates of which were, according to those two experts, "approximately 27°04'N. latitude, 51°07'E. longitude"<sup>161</sup>. The differences in the geographical coordinates of these two points are no doubt due to the differences appearing between the

various marine charts used in 1948 at the time of the Boggs-Kennedy Report and those used in 1971, at the time of the Bahrain-Iran agreement.

## **2. The *a posteriori* verification of the equity of Qatar's line, by means of proportionality tests**

9.71 Qatar has always attached great importance to the Court's dictum in its judgment of 14 June 1993 in the *Denmark-Norway* case, according to which:

"The frequent references in the case-law to the idea of proportionality - or disproportion - confirm the importance of the proposition that an equitable delimitation must, in such circumstances, take into account the disparity between the respective coastal lengths of the relevant area"<sup>162</sup>.

This is why Qatar has always pointed out in its written pleadings that proportionality allows the verification of whether the single maritime boundary linking points N, NSLB, BLV and 2(2B) that it claims in the northern sector is equitable<sup>163</sup>.

9.72 Bahrain, on the other hand, has totally neglected the significant factor of the disparity in the lengths of the Parties' coastlines. The reason is quite obvious: a proportionality test applied to the line proposed by Bahrain in the northern sector has the immediate effect of showing still further just how extravagant Bahrain's line is. Bahrain raises numerous objections to Qatar's use of proportionality<sup>164</sup>, which can be met by at least four arguments.

9.73 *First*, Bahrain is simply denying the obvious when it asserts that "there is no significant disparity between Bahrain's and Qatar's respective coastal lengths"<sup>165</sup>. It bears repeating that the respective lengths of the relevant coasts are 88.2 kms (47.6 nautical miles) for Qatar and 55.5 kms (29.9 nautical miles) for Bahrain, and that the proportionality ratio is 1.59 to 1 in favour of Qatar<sup>166</sup>. It also bears repeating that, in the *Gulf of Maine* case, the Chamber took into consideration a proportionality ratio of 1.38 to 1 in favour of the United States<sup>167</sup>.

9.74 *Second*, in trying to equate its own geographical situation with that of Guinea-Bissau and the Bijagos Islands, Bahrain is making a caricature of the reality<sup>168</sup>. The islets, rocks, reefs and low-tide elevations scattered off the eastern coast of the main Bahrain island have nothing in common with the large and tightly-packed Bijagos Islands lying off the coast of Guinea-Bissau. The absurdity of the comparison is immediately apparent from *Map No. 16*, facing page 352.

9.75 *Third*, even more fallacious is Bahrain's comparison of Qatar's use of the proportionality test in the present case with France's use of the smoothing method in its dispute with the United Kingdom, in order to justify the course of the line that it was claiming in the Atlantic sector, beyond the area in the English Channel where the Parties had opposite coasts<sup>169</sup>. Here, Bahrain confuses a method of delimitation with a means of verifying the equitable nature of a dividing line drawn in accordance with that method.

9.76 *Fourth*, and finally, Bahrain observes that "There is no possible justification for verifying the equitableness of a proposed delimitation *in the northern sector* by reference to the ratio of the Parties' respective coastal lengths *in the southern sector*"<sup>170</sup>. Bahrain forgets that in the *Gulf of Maine* case, in order to determine the course of the third segment of the dividing line - which, it may be recalled, "lies outside and over against the Gulf of Maine" and thus is located "throughout its length... in the open ocean"<sup>171</sup> - the Chamber strongly emphasised that "from the geographical point of view, there is no point of reference, outside the actual shores of the Gulf, that can serve as a basis for carrying out the final operation required"<sup>172</sup>. In applying the criterion of proportionality for purposes of establishing the seaward portion of the maritime boundary in that case, the Court relied on the difference in the respective lengths of the coasts of the parties along the Gulf. It is thus clearly necessary to refer to the respective lengths of the coastlines of Qatar and Bahrain in order to test the equitable nature of the dividing line claimed in the northern sector.

9.77 It is also necessary clearly to define the role that Qatar attributes to proportionality in the present case. Qatar "has never suggested dividing the relevant delimitation area in proportion to the lengths of the Parties' coasts"<sup>173</sup>. Qatar simply asserts that, in accordance with the Court's consistent jurisprudence<sup>174</sup>, proportionality is an *a posteriori* test of the equity of the line that it proposes in the northern sector, where the delimitation area has been defined in a reasonable manner. The delimitation area in the northern sector joins points RK, MQ, WB, 4, 3, 2(2B), 2(2Q), WQ and RK, being a polygon with a total surface area of 6005.06 km<sup>2</sup><sup>175</sup>. Proportionality allows the verification of the equitable nature of Qatar's line in the northern sector, which from point N on the RK-MQ closing line, follows the course of the 1947 line up to point BLV then extends it, on the basis of the modified perpendicularity method, up to point 2(2B) at its intersection with the line established by the 1971 agreement between Bahrain and Iran. Proportionality allows this verification to be made on two bases. *First*, as Qatar has already stated in its earlier written pleadings, and as will be briefly recalled hereafter, it allows a verification of the equitable nature of the line with regard to the relationship between the lengths of the Parties' relevant coasts and the surface areas of the maritime areas thus attributed to each of them<sup>176</sup>. Proportionality also allows an *a posteriori* verification of the equitable nature of Qatar's line from a second point of view, with regard to the relationship between the lengths on either side of the foot of the perpendicular on the RK-MQ closing line which separates the northern from the southern sector.

**(a) Proportionality between the coastal lengths and the surface areas of the maritime areas**

9.78 As has been noted above, the equitable nature of Qatar's line has already been verified in the light of the ratio between the lengths of the relevant coasts of the Parties and the surface areas of the maritime areas respectively attributed to them in the delimitation area in the northern sector. In this delimitation area, and to the east of the line linking N, NSLB, BLV and 2(2B), Qatar is allotted maritime areas covering approximately 3,768.55 km<sup>2</sup>, and to the west of that line Bahrain is allotted maritime areas covering approximately 2,236.51 km<sup>2</sup>. The ratio of these areas is thus 1.68 to 1 in favour of Qatar; in other words it is close to the ratio of coastal lengths which, it will be recalled, is 1.59 to 1 in favour of Qatar.

9.79 It is true that these two ratios are not exactly the same, but as Qatar has already pointed out, the difference is only around 6%<sup>177</sup>. In these circumstances, as was noted in Qatar's Counter-Memorial, the difference is not great in view of the scale of the constructions and does not permit a conclusion that Qatar's line is inequitable. The test of equitableness is indeed conclusive insofar as it may be seen that the BLV-2 (2B) segment of this line put forward by Qatar is, so to speak, embraced between the BLV-S segment corresponding to a strict application of the perpendicularity method and the BLV-EQ segment corresponding to a strict application of proportionality<sup>178</sup>. This first proportionality test alone allows the conclusion that Qatar's line in the northern sector is equitable<sup>179</sup>.

**(b) Proportionality between the lengths on either side of the foot of the perpendicular on the RK-MQ closing line**

9.80 The equitable nature of the dividing line put forward by Qatar, as already demonstrated on the basis of proportionality between the Parties' coastal lengths and the surface areas of the maritime areas, is also confirmed by a second proportionality calculation. This new test of equitableness is based on the closing line of the area where Qatar and Bahrain have opposite coasts, linking points RK and MQ which, as has been seen, are the northernmost points on the Qatar peninsula and the island of Muharraq. This line from RK to MQ has an important role to play in the present case, insofar as it separates the northern and southern sectors of the disputed maritime areas<sup>180</sup>. It is both the northern limit of the sector where the Parties have opposite coasts, and the southern limit of the sector lying beyond. The geographical coordinates of point RK are 51°15'02"E and 26°09'25"N; those of point MQ are 50°37'54"E and 26°17'15"N, the

length of the line from RK to MQ being approximately 63,500 metres (or, to be precise, 63,515 metres).

9.81 This second test of equitableness, as may be seen from *Map No. 18*, facing page 356, is based on points R and T of the line from RK to MQ. Points R and T played an important role in the construction, beyond point BLV, of the dividing line in the northern sector, based on the perpendicularity method<sup>181</sup>. Point R, the geographical coordinates of which are 50°52'28"E and 26°14'12"N, at the intersection of the extension of the perpendicular from S to BLV with the line from RK to MQ, is approximately 38,600 metres (or, to be precise, 38,610 metres) from point RK and approximately 24,900 metres (to be precise, 24,905 metres) from point MQ. Point T, the geographical coordinates of which are 50°51'59"E and 26°14'18"N, at the intersection of the extension of the dividing line from 2(2B) to BLV with the line from RK to MQ, is approximately 39,430 metres (to be precise, 39,432 metres) from point RK and approximately 24,080 metres (to be precise, 24,083 metres) from point MQ.

9.82 It is noteworthy that points R and T divide the closing line of the area where Qatar and Bahrain have opposite coasts almost exactly in proportion to the ratio of the Parties' coastal lengths, which is 1.59 to 1 in favour of Qatar. The ratio is 1.55 to 1 for point R and 1.64 to 1 for point T. Points R and T on the line from RK to MQ are therefore at an almost equal distance from point PP, give or take 100 metres, on either side of that point, as may be seen from *Map No. 18*, facing page 356. Point PP is the exact point dividing the RK-MQ closing line of the area where the Parties have opposite coasts in accordance with the ratio of 1.59 to 1. This point, the geographical coordinates of which are 50°52'16"E and 26°14'14"N, lies approximately 38,950 metres (to be precise, 38,966 metres) from point RK and approximately 24,550 metres (to be precise, 24,549 metres) from point MQ<sup>182</sup>. This new proportionality calculation supports the preceding test of equitableness and consequently the construction submitted by Qatar to the Court for the delimitation of the maritime areas in the northern sector, along the line joining points N, NSLB, BLV and 2(2B). Insofar as it shows that the method of delimitation that is used by Qatar is perfectly appropriate in the geographical circumstances, it underscores the equitable nature of this dividing line in the northern sector.

9.83 Qatar would have liked to apply to Bahrain's line linking points O, Q, R, S, T, U and 2(2Q)<sup>183</sup> the same treatment that it has applied to the line it claims itself in the northern sector, and to carry out the same proportionality tests on Bahrain's line. However, such an exercise is impossible, because of the extravagance of Bahrain's claims. Indeed, the greater part of Bahrain's line in the northern sector falls outside the delimitation area defined by Qatar. As may be seen from *Map No. 19*, facing page 358, Bahrain's line gives Qatar less than 8% (to be precise, 7.92%), *i.e.*, 138.63 square nautical miles or 475.48 square kilometres, of that delimitation area and gives Bahrain 92% (to be precise, 92.08%), *i.e.* approximately 1612.17 square nautical miles or 5529.58 square kilometres. This means that if account were also taken of the maritime areas that Bahrain allots to itself to the *east* of that delimitation area, being the irregular polygon formed between R', S, T, U and U', the surface area of which is 263.05 square nautical miles or 902.23 square kilometres, the result would in a manner of speaking be negative. There could be no better way of demonstrating just how absurd is Bahrain's idea of equitableness. As Professor Paul Reuter rightly observed, "le principe de l'égalité des Etats devrait conduire à accorder à l'Etat qui a fait l'usage le plus modéré de ses droits le bénéfice d'une délimitation selon les données retenues par l'autre Etat"<sup>184</sup>.

9.84 In conclusion, the two proportionality tests applied by Qatar are consistent with each other. They confirm the equitable character of Qatar's line in the northern sector, *i.e.* the line joining N, NSLB, BLV and 2(2B). This is why Qatar submits to the Court the same line that it had already proposed in its Submissions in its Memorial<sup>185</sup> and Counter-Memorial<sup>186</sup>.

## FOOTNOTES

1 The BCM contains just one map illustrating Bahrain's maritime claims (Map 1), which is quite lacking in detail.

2 BCM, Vol. 3, Maps.

3 The BCM acknowledges that Qatar (QM, paras. 11.37, 11.41 and 12.13-12.16) "correctly emphasises the unity of the rules governing the delimitation process under contemporary international law. Whether the delimitation concerns the territorial sea, the continental shelf, the exclusive economic zone or a single maritime boundary; whether the relevant coasts are opposite or adjacent; and whether the applicable law is treaty law which refers to the equidistance-special circumstances rule, or customary law which refers to the equitable principles-relevant circumstances rule, the method to be applied is always the same: namely, a provisional equidistance line which may be adjusted or shifted, if circumstances so require, in order to arrive at an equitable result" (BCM, para. 653).

4 *See*, Chap. VIII, Sect. 1, above, and paras. 9.37, *et seq.*, below.

5 BCM, para. 653.

6 QCM, paras. 7.28, *et seq.*; QCM, Map No. 5, Vol. 6.

7 QCM, paras. 7.44, *et seq.*; QCM, Maps Nos. 6 and 7, Vol. 6.

8 QM, paras. 12.44, *et seq.*; QCM, para. 8.96.

9 QCM, para. 8.96, fn. 274; para. 8.42.

10 BCM, para. 653; *see*, para. 9.2, above.

11 *U.N.R.I.A.A.*, Vol. XVIII, pp. 112-113, paras. 240-244, at para. 242.

12 P. Weil, *The Law of Maritime Delimitation - Reflections*, Cambridge, 1989, pp. 207-208 (QR, Annex IV.54, Vol. 4, p. 303).

13 *I.C.J. Reports 1993*, p. 64, para. 59.

14 BCM, para. 650.

15 BCM, para. 651.

16 *See*, paras. 8.27, *et seq.*, above.

17 *See*, QCM, para. 8.4.

18 *See*, Map No. 11, facing page 318.

19 BCM, para. 651.

20 *See*, QCM, paras. 8.34, *et seq.*, and 8.100.

21 *See*, Map No. 11, facing page 318.

22 BCM, para. 650.

23 BCM, Chap. 6, p. 206.

24 *See*, paras. 8.7, *et seq.*, above.

25 BCM, para. 484; *see*, also, BCM, para. 537.

26 BCM, para. 524; *see*, also, BCM, paras. 468 and 525, *et seq.*

27 BM, Maps 8 and 10, Vol. 7.

28 P. Weil, "A propos de la double fonction des lignes de base et points de base dans le droit de la mer", *Essays in Honor of Judge Taslim Olawale Elias*, Nijhoff, 1992, pp. 145-162 (QCM, Annex IV.56, Vol. 4, p. 429).

29 See, BM, paras. 609, *et seq.*, for the southern sector and paras. 649, *et seq.*, for the northern sector. Qatar does not of course agree that all of the "maritime features" relied upon by Bahrain can be used as basepoints for measuring the territorial sea.

30 See, BM, Maps 8 and 10.

31 See, the criticisms in the QCM, paras. 7.32, *et seq.*, for the southern sector and paras. 8.55, *et seq.*, for the northern sector.

32 QCM, paras. 8.44, *et seq.*

33 See, para. 9.3, above.

34 QM, para. 11.37.

35 QM, Annex IV.127, Vol. 10, p. 123.

36 QCM, para. 8.96, fn. 274.

37 New editions of this chart, first published on 1 May 1862, had been issued on 3 April 1925 and 21 January 1938. Subsequently, "large corrections" were made to the 7 August 1942 edition and, after that date, "small corrections" were included, the last of which were made at the beginning of 1948. This document was therefore the best general cartographic document in existence at the time with respect to the whole of the northern and central parts of the Gulf.

38 QM, Annex IV.127, Vol. 10, p. 123. See, *Map No. 12*, facing p. 320.

39 QM, Annex IV.127, Vol. 10, p. 123, at p. 125, para. 1.1.

40 It will be noted in this regard that the Boggs-Kennedy report does not mention the 1947 British line, although it does assume that the Hawar islands appertain to Bahrain by virtue of the British "decision" of 11 July 1939 (*see*, para. 9.23, below).

41 QM, Annex IV.127, Vol. 10, p. 123, at p. 125, para. 1.1.

42 *Ibid.*, para. 1.2.

43 Their practical experience and their theoretical studies of maritime delimitation problems were outstanding. It may be recalled that they were both members of the Committee of Experts that met in 1953 - at the request of Professor J.P.A. François, the special rapporteur of the International Law Commission on the régime of the high seas and of the territorial sea - to answer certain technical questions about the territorial sea (Add. to the 2<sup>nd</sup> François report on the territorial sea of 15 May 1953, Yearbook of the International Law Commission, 1953, Vol. II, pp. 77-79). It may be added that at the request of the United Nations Secretariat, Commander Kennedy prepared, in view of the First Geneva Conference on the Law of the Sea, two reports that have been published in the *travaux préparatoires* of the Conference, a "brief geographical and hydrographical study of straits constituting international waterways" of 23 October 1957 and a "summary geographical and hydrographical study of bays and estuaries whose coasts belong to different States" of 13 November 1957 (United Nations Conference on the Law of the Sea, Off. Doc., Vol. I, Preparatory Documents A/CONF. 13/37, Doc. A/CONF. 13/6 and Add. 1, pp. 115-164 and Doc. A/CONF. 13/15, pp. 198-243). As a member of the British delegation to the Geneva Conference, Commander Kennedy prepared "brief remarks on median lines and lines of equidistance and on the methods used in their construction", a document distributed at the Conference on 2 April 1958. Mr. S. Whittemore Boggs was just as well known for his extensive work on these problems. Mention may be made, in particular, of "Delimitation of the Territorial Sea: the Method of Delimitation proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law", *American Journal of International Law* 1930, Vol. 24, pp. 541-555; "Problems of Water-Boundary Definition. Median Lines and International Boundaries through Territorial Waters", *The Geographical Review* 1937, pp. 445-456; *International Boundaries. A Study of Boundary Functions and Problems*, Columbia U.P.

1940; "Delimitation of Seaward Areas under National Jurisdiction", *American Journal of International Law*, 1951, Vol. 45, pp. 240-266.

44 In particular islands situated "on the wrong side of the boundary" (QM, Annex IV.127, Vol. 10, p. 123, at p. 146, Appendix B, para. 6).

45 *Ibid.*, at p. 127, para. 3.2.

46 *Ibid.*, at p. 128, para. 3.2.

47 *Ibid.*, at p. 141, Appendix B, para. 3.

48 *Ibid.*, at p. 129, Appendix A, para. 1 and p. 144, Appendix B, para. 4; the line was drawn on British Chart No. 2837b, signed by both experts, Annex I to the report.

49 *Ibid.*, at p. 133, Appendix A, para. 6.

50 *Ibid.*, at p. 134, Appendix 1, para. 6a.

51 *See*, paras. 9.16 and 9.18, above.

52 The report had previously indicated that "It is recommended that, so far as feasible, the same baseline be employed in delimiting both the longitudinal line ('median line') and the lateral jurisdictional lines between adjacent states"; QM, Annex IV.127, Vol. 10, p. 123, at p. 141, Appendix B, para. 3.

53 *Ibid.*

54 *Ibid.*, at p. 134, Appendix A, para. 6.a; the line is shown on British Chart No. 2837b, Annex I.

55 *Ibid.*

56 *See*, para. 9.29, below.

57 QM, Annex IV.127, Vol. 10, p. 135, para. 6.a.

58 *Ibid.*, Appendix A, para. 6.b; the line was drawn on Chart No. 2837b signed by both experts, Annex I.

59 *Ibid.*, at p. 136, para. 6.b.

60 *Ibid.*, at p. 125, para. 1.

61 *Ibid.*, at p. 136, para. 6.c; the line was drawn on British Chart No. 2837b signed by both experts on 16 December 1948, Annex I.

62 *Ibid.*, at p. 137, Appendix A, para. 6.c.

63 *See*, para. 9.22, above.

64 *See*, para. 9.14, above.

65 *See, ibid.*

66 The text of the agreement is to be found in QM, Annex IV.216, Vol. 11, p. 235.

67 QR, Annex IV.15, Vol. 4, p. 79. It should be noted that this agreement was supplemented by a communiqué dated 20 December 1992 (QR, Annex IV.29, Vol. 4, p. 173). The parties have since engaged in a process of demarcation of the basepoints and identification of the turning points on the line, which is nearing completion.

68 For the text of the agreement, *see*, QM, Annex IV.259, Vol. 12, p. 77.

69 On the official map attached to the Qatar-Abu Dhabi agreement (British chart 3707 Sheet Umm al Qaiwan to Ras al Matbakh 1967, scale 1:330,000) point A is located 82 miles from Ras Abu Al Mishut in Qatar and 81.8 miles from Ras al Aish in Abu Dhabi and on the official map used for the Qatar-Iran agreement (the British Persian Gulf Eastern sheet 1960 No. 2837, 1:750,000) point 6 is approximately 79 miles from Ras Abu Al Mishut in Qatar and 80 miles

from Chiru on the Iranian mainland. It may thus be considered that, accounting for slight differences due to the use of different charts, point A is roughly an equidistance tripoint mainland-to-mainland between Abu Dhabi, Iran and Qatar.

70 See, QM, Annex IV.259, Vol. 12, p. 77.

71 For the text of the Agreement, see, QM, Annex IV.260, Vol. 12, p. 81.

72 For the text of the Agreement, see, QM, Annex IV.264, Vol. 12, p. 111.

73 According to H. Al-Baharna "the Iranian Islands of Nakhilu and Jabrin [were] given full effect in fixing the base-lines from which the Bahrain-Iran median line could be drawn". See, *The Arabian Gulf States*, 1978, p. 356 (QR, Annex IV.32, Vol. 4, p. 195).

74 *Webster's Third New International Dictionary of the English Language, Unabridged* defines the word "mainland" as "a continuous body of land constituting the chief part of a country or continent" (1986, Vol. II; p. 1362). See, para. 8.3, above.

75 This matter has been discussed in Chap. VIII, Sect. 2, and Sect. 2.B, above. See, also, D. Bowett, "Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations", in J.I. Charney & L.M. Alexander, *International Maritime Boundaries*, Vol. I, p. 149 (QCM, Annex IV.37, Vol. 4, p. 307) and para. 9.40, below; see, finally, the commentary by R.F. Pietrowski, *ibid.*, Vol. II, p. 1513, para. 5 (QR, Annex IV.48, Vol. 4, p. 275).

76 Excluding, naturally, the two sand islets of Rabad al Gharbiyah and Rabad ash Sharqiyah, lying to the north of Jazirat Hawar (QM, Map No. 9, Vol. 17).

77 QM, Map No. 9, Vol. 17.

78 An author who has written about the Bahrain/Iran agreement of 17 June 1971 has rightly remarked that "The Bahraini island of Jazirat Al Muharraq (which is connected to the island of Bahrain by a causeway) was apparently considered a part of the Bahraini mainland for delimitation purposes" (R.F. Pietrowski, in J.I. Charney & L.M. Alexander, *International Maritime Boundaries*, Vol. II, p. 1483, para. 5 (QR, Annex IV.47, Vol. 4, p. 271)). In that delimitation between Bahrain and Iran, only the island of Muharraq was in a position to be taken into account, whereas in the present delimitation between Qatar and Bahrain, Muharraq and Sitrah should, in Qatar's view, be used as basepoints for constructing the provisional equidistance line.

79 See, QCM, paras. 7.24, *et seq.*

80 See, para. 7.17, above. See, also, QCM, paras. 8.47, *et seq.*

81 QCM, para. 7.24.

82 See, paras. 9.5, *et seq.*, above.

83 *I.C.J. Reports 1969*, p. 36, para. 57.

84 *I.C.J. Reports 1984*, pp. 329-330, para. 201. The Chamber was also careful not to make "a series of such minor features the very basis for the determination of the dividing line" and to transform them "into a succession of basepoints for the geometrical construction of the entire line"; *ibid.*, p. 330, para. 201. It will also be recalled that in the *Libya/Malta* case (Judgment of 3 June 1985), the Court rejected the islet of Filfla as a basepoint for constructing the provisional median line between the Parties' coasts, although it was included among the Maltese basepoints used for measuring the breadth of the territorial sea (*I.C.J. Reports 1985*, p. 48, para. 64; p. 52, para. 73 and p. 57, para. 79C). See, finally, the Judgment of 24 February 1982 in the *Libya/Tunisia* case (see, para. 8.6, fn. 17, above), and the Separate Opinion of Judge Weeramantry in the *Denmark/Norway* case (*I.C.J. Reports 1993*, pp. 270-271, paras. 221-223).

85 See, paras. 9.27, *et seq.*, above.

86 D. Bowett, *International Maritime Boundaries*, ed., J.I. Charney & L.M. Alexander, Vol. I, 1993, p. 149 (QCM, Annex IV.37, Vol. 4, p. 311).

87 *See*, the definitive analysis by P. Weil, "A propos de la double fonction des lignes et points de base dans le droit de la mer", *Essays in Honour of Judge Taslim Olawale Elias*, 1992 (QCM, Annex IV.56, Vol. 4, p. 429). The same idea had already appeared in the "Brief Remarks on median lines and lines of equidistance and on the methods used in their construction" by Commander R.H. Kennedy, which were distributed by the British delegation on 2 April 1958 at the Geneva Conference on the Law of the Sea. These comments read as follows, with regard to the complications caused by the presence of islands or islets when a maritime delimitation is being made:

"In the case of the delimitation of a boundary through the territorial sea it may in general seem reasonable to take into account the base lines of islands lying within the belt of territorial sea in order to arrive at the boundary. Should, however, one State claim a wider belt of territorial sea than its neighbour, an inequitable result may often occur.

For a boundary across a continental shelf the problem of islands may become very acute. It would seem most inequitable for instance, if the existence of an island or islet (which by definition need only be a small above-water rock or sandbank, possibly only a few yards long and a few feet high) should be allowed to divert a boundary and thus give extensive areas of shelf to the State possessing the island. Should such an island exist about halfway between opposite States, both on the same continental shelf, and its base lines be allowed to be used in forming the median line, this line would be switched from the middle of the area separating the States to three quarters of the way across, towards one side or the other dependent upon the sovereignty of the islet. Such a situation might well give rise to international friction as to the ownership of the islet. This is of course an extreme case but any islands near a boundary may have a similar but lesser effect. *It might seem reasonable under such circumstances not to permit these islands to have any influence on a boundary but to allow them only their own belts of territorial sea for the purposes of exploration and exploitation*". (Emphasis added).

88 *See*, para. 9.39, above.

89 BM, Map 8, Vol. 7.

90 *See*, BM, Map 10, Vol. 7.

91 *See*, QCM, paras. 8.42, *et seq.*

92 *See*, *Map No. 14*, facing page 342.

93 *See*, para. 9.37, above.

94 While the standard baseline is the low-water line, it should be remembered, as Prof. D.P. O'Connell has pointed out, that:

"The use of the low-water mark is relatively recent, Roman Law having designated the shore by reference to the high-water mark, and the Common Law having treated the area *intra fluxium et refluxium* as one of ambulatory curial jurisdiction. The reference to the low-water mark first appeared in the Fishery Convention of 1839 between Great Britain and France. For a time the low-water mark had several competitors. First, there was the argument that the extent of the territorial sea should be measured by reference to the state of the tide at the moment when the relevant event occurred. Secondly, there was the argument that the distance should be measured from the point where the sea first became navigable; thirdly, there was the argument that, since the extent of the territorial sea was the actual limit of the range of coastal artillery, it should logically be determined by reference to the point where it was possible to erect batteries which would not be endangered by the sea but could dominate it; fourthly, there was the high-water standard; and fifthly, there was the view that each State

could determine its own standard in lieu of the cannon-shot standard. However, the legislation in European countries giving effect to the North Sea Fishery Convention of 1882 established the low-water mark as the practical standard. The English writers, reflecting the Admiralty rule, adhered to the low-water mark, and they were followed by some civil law writers. Eventually the low-water mark was employed in the Institut de Droit International in 1894". (The International Law of the Sea, ed. by I.A. Shearer, Oxford, 1982, Vol. 1, pp. 171-172; QR, Annex IV.46, Vol. 4, p. 267).

Moreover, it should be added that in their domestic legislation certain States have expressly referred to the high-water line to determine the normal baseline from which their territorial sea is measured. For example, in Ethiopia's Maritime Proclamation No. 137 of 1953, it is provided in Article 6(f) that: "The territorial waters of Our Empire are defined as extending *from the extremity of sea-board at maximum annual high tide* of the Ethiopian continental coast and of the coasts of Ethiopian islands, in parallel line on the entire sea-board and to an outward distance of twelve nautical miles, except that in the case of the Dahlac archipelago..." (Negarit Gazetta No. 1, 25 September 1953, pp. 2164-2165; emphasis added, QR, Annex IV.9, Vol. 4, p. 41). It is noteworthy that when Eritrea became independent, it maintained the Ethiopian regulations. In Proclamation No. 7 relating to the Transitional Maritime Code, it declared that "The provisions of... Article 6(f)... of Proclamation No. 137 of 1953... are hereby adopted and shall take effect while the other provisions of the said Proclamation are hereby repealed" (QR, Annex IV.28, Vol. 4, p. 169).

95 *I.C.J. Reports 1951*, p. 128.

96 A.L. Shalowitz, *Shore and Sea Boundaries with Special Reference to the Interpretation and Use of Coast and Geodetic Survey Data*, U.S. Department of Commerce, Washington, Vol. I, 1964, p. 183 (QR, Annex IV.52, Vol. 4, p. 291). The same author has also noted that "The low-water line on topographic surveys must necessarily be an approximation for the most part, coinciding but rarely with the actual low-water line" (*ibid.*, p. 187). Referring to the American practice in this regard, and alluding to the "difficulties attending its location by the topographer alone or by the hydrographer alone", he explained that: "Where the hydrography failed to establish the low-water line, the line was transferred from the topographic survey, the chart compiler making the necessary adjustments for charting purposes" (*ibid.*, pp. 246-247). Similarly, it has been noted that, by its very definition, the low-water line is "pratiquement toujours submergée, et les techniques habituelles de la phototopographie ne lui sont pas normalement applicables. Compte tenu de sa sensibilité... elle est donc plus difficile à déterminer avec précision que la laisse de pleine mer" (A. Roubertou, in L. Lucchini et M. Voelcker, *Droit de la mer*, Tome 2, Vol. I, Délimitation, Pedone, 1996, p. 365, para. 35; QR, Annex IV.43, Vol. 4, p. 253).

97 M. Thamsborg, Hydrographic Office, Copenhagen, *On the precise determination of maritime boundaries*, October 1986, p. 24, para. 2.4.

98 *See*, QCM, para. 7.43 and QCM, Map No. 5.

99 *See*, Map No. 14, facing page 342.

100 QM, Annex IV.127, Vol. 10, p. 123, at p. 141, para. 3.1.

101 *See*, para. 9.43, above.

102 *See*, para. 9.43, fn. 94, above.

103 *See*, *Maritime Limits and Baselines. A Guide to their Delineation*, published by The Hydrographic Society, Special Publication No. 2, Third Edition, June 1987 (QR, Annex IV.34, Vol. 4, p. 203).

104 *See*, *ibid.*, para. 5.5.

105 See, *ibid.*, para. 5.6.

106 See, *ibid.*, para. 5.7.

107 See, *ibid.*

108 L.B. Sohn, "Baseline Considerations", in J.I. Charney & L.M. Alexander, *International Maritime Boundaries*, Vol. I, p. 155 (QR, Annex IV.53, Vol. 4, p. 299).

109 *I.C.J. Reports 1969*, p. 36, para. 57.

110 *I.C.J. Reports 1984*, p. 333, para. 216. Similarly, the Chamber stated: "Just as the criteria to which they must give effect are basically founded upon geography, the practical methods in question can likewise only be methods appropriate for use against a background of geography" (*ibid.*, para. 199). The Award of the Arbitral Tribunal of 30 June 1977 in the case concerning delimitation of the continental shelf between France and the United Kingdom had earlier stated that: "it is the geographical situation which indicates the applicable method of delimitation" (*U.N.R.I.A.A.*, Vol. XVIII, p. 53, para. 87).

111 See, paras. 9.27, *et seq.*, above.

112 See, QCM, paras. 8.44, *et seq.*

113 See, paras. 9.27, *et seq.*, above.

114 In this regard it will be recalled that at the First United Nations Conference on the Law of the Sea, before the Fourth Commission on 8 April 1958, the Iranian delegate proposed an amendment to the International Law Commission's draft Article 72 (QR, Annex IV.11, Vol. 4, p. 57). This involved, first, adding at the end of paragraph 1 the following sentence: "Where special circumstances, as envisaged in this paragraph, so warrant, *the median line may be measured from the high-water mark along the coastline of the States concerned*" (emphasis added) and, second, including an additional paragraph reading as follows: "Where an island or islands exist in a region which constitutes a continuous continental shelf, the boundary shall be the median line and shall be measured from the low-water mark along the coasts of the States concerned, provided, however, that where special circumstances so warrant, *the median line shall be measured from the high-water mark along the coastline of such States*" (Doc. A/CONF.13/C.4/L60, in A/CONF. 13/42, United Nations Conference on the Law of the Sea, Official records, Vol. VI, Fourth Committee (Continental Shelf), p. 142; emphasis added). When he addressed the Commission, the Iranian delegate, Mr. Rouhani, explained, notably, that: "9... One special case arose when large bodies of water carrying sediment deposited it near the coast and formed extensive mud flats which were exposed at low water. In such cases it would be almost impossible to identify the low-water line by visual observation or photography. It would have to be established by calculation from the high-water mark and time [*sic*: tide] measurements, but there were many areas where no tide measurements had been made and where it might be necessary to define a boundary line for the continental shelf in the near future. His delegation therefore proposed that in such circumstances *the boundary should be measured from the high-water mark instead of the low-water mark*. 10. It might also be a complicated matter, where there were islands on a continuous continental shelf, to identify the low-water line for each island and it was therefore proposed that in such cases the boundary should be measured from the low-water line along the coast. His delegation's proposal was substantially the same as the Italian amendment, except that the Iranian amendment recommended the reference in special circumstances to the high-water mark" (*ibid.*, Vol. VI, p. 92; emphasis added). It is clear that the Iranian delegate was alluding to the delimitations to be made in the future in the Arabian/Persian Gulf, and in fact Iran was to rely on the high-water line on the coasts of the States concerned in drawing the limits of the continental shelf that it negotiated with certain Arab States bordering the Gulf, and notably with Qatar (*see*, para. 9.33, above).

115 See, paras. 9.37, *et seq.*, above.

116 *See*, QM, para. 12.64, fn. 153.

117 *See*, QCM, paras. 7.44, *et seq.*; QCM, Maps No. 5, 6 and 7.

118 *See*, QM, paras. 12.30, *et seq.*; QCM, para. 7.45 and 8.101.

119 BCM, para. 648; *see*, also, para. 614.

120 This is not, as Bahrain contends, "a caricature of Bahrain's coastline by arbitrarily excluding from the computation the coasts of the islands and other legally relevant features of Bahrain" (BCM, para. 614). Qatar has already demonstrated that Bahrain's choice of basepoints, including Fasht Dibal, for the construction of the equidistance line that it claims, runs counter to the consistent jurisprudence (QCM, paras. 8.44, *et seq.*; *see*, paras. 9.9-9.10, above).

121 *I.C.J. Reports 1984*, p. 334, para. 218; emphasis added.

122 *Ibid.*, p. 323, para. 185.

123 Application filed in the Registry of the Court on 8 July 1991, paras. 18-25 and para. 41.II; QM, paras. 11.1, *et seq.*, paras. 12.1, *et seq.*, and para. 12.62; and QCM, paras. 7.49, *et seq.*, and paras. 8.95-8.96.

124 BCM, paras. 552-587.

125 *Ibid.*, para. 587.

126 *See*, Chap. VIII, Sect. 2, above.

127 BCM, para. 575.

128 *See*, QCM, paras. 8.65-8.66. It should moreover be recalled that contrary to what Bahrain now claims, the pearling banks in question were never subject to the exclusive jurisdiction of Bahrain (BM, para. 638 and paras. 641-642). Indeed, in accordance with well-established regional custom, the pearling banks were always considered as the collective property of the tribes and rulers on the Arabian side of the Gulf (QCM, paras. 8.78, *et seq.*). The various arguments put forward by Bahrain on this question (BM, paras. 638, *et seq.*) have been fully rebutted by Qatar (QCM, paras. 8.60, *et seq.*).

129 QM, Annex III.256, Vol. 8, p. 265, para. 2.

130 *See*, QM, para. 10.17.

131 *See*, QM, Maps Nos. 14, 15 and 16.

132 *See*, QM, paras. 11.21, *et seq.*

133 Point S1 on QM, Maps Nos. 15 et 16.

134 *See*, QM, paras. 10.15, *et seq.*

135 *See*, Map No. 14, facing page 342.

136 *See*, QM, paras. 10.40-10.42, 12.5, 12.7 and 12.62; QCM, paras. 8.95-8.96, and QCM, Map No. 11.

137 BCM, para. 627.

138 *See*, Chap. VIII, Sect. 2 and para. 9.7, above.

139 *See*, QM, Maps Nos. 14 and 21.

140 *See*, paras. 8.27, *et seq.* and 9.7, above.

141 *I.C.J. Reports 1982*, p. 71, para. 96.

142 *See*, QM, paras. 12.57, *et seq.*; QCM, paras. 8.95, *et seq.*

143 *See*, QM, Maps Nos. 20 and 21; QCM, Map No. 11 and QR, Map No. 15, facing page 350.

144 For further details, *see*, QM, paras. 12.62-12.64 and QCM, paras. 8.96-8.97.

145 The segment R-BLV-S of this perpendicular forming a right angle of 90° with the RK-MQ closing line.

146 QM, Annex IV.264, Vol. 12, p. 111.

147 *See*, QM, para. 12.64; *see*, also, QCM, para. 8.97.

148 *See*, Map No. 10, facing page 314.

149 *See*, BCM, paras. 628-646.

150 P. Weil, *The Law of Maritime Delimitation - Reflections*, p. 270 (QR, Annex IV.54, Vol. 4, p. 303; emphasis added).

151 *U.N.R.I.A.A.*, Vol. XVIII, p. 45, para. 70.

152 P. Weil, *The Law of Maritime Delimitation - Reflections*, pp. 274-275 (QR, Annex IV.54, Vol. 4, p. 303; emphasis added). To illustrate his remarks, the same author refers to the Treaty of Rio de la Plata signed on 19 November 1973 between Argentina and Uruguay, which Qatar has itself relied upon (QM, paras. 12.50-12.53 et Map No. 18). Nonetheless, the BCM considers that that agreement is not a precedent for the present case, in particular because the geographical circumstances are not the same (BCM, para. 641; *see*, also, para. 637). The BCM comes to similar and equally erroneous conclusions as to the use of this technique by the Chamber in the *Gulf of Maine* case (QM, paras. 12.54-12.56; BCM, para. 638 and 641). It is difficult to share Bahrain's view that the Chamber used a method of delimitation that was "too crude" (BCM, para. 630) and also "primitive" (BCM, para. 631), when it applied it in order to determine the course of the third segment of the maritime boundary between points C and D (*see*, QM, Map No. 19), lying outside the closing line of the Gulf of Maine "throughout its length... in the open ocean" (*I.C.J. Reports 1984*, p. 337, para. 224). In the words of the Chamber, "Within the range of such methods, the most appropriate is that recommended above all by its simplicity, namely in this instance the drawing of a perpendicular to the closing line of the Gulf" (*ibid.*, pp. 337-338, para. 224). Qatar must also point out that while Bahrain refuses to accept the relevance of the precedents cited by Qatar (QM, paras. 12.48-12.56), it goes to considerable lengths to reduce their significance (BCM, paras. 633-642). However, Qatar reasserts that the concept of the closing line that is recognised under international law for the closing of a bay or of an estuary applies quite naturally in the present case to close the area where the Parties have opposite coasts by means of the line from RK to MQ, not only because these are strikingly similar situations (QM, paras. 12.60-12.61), but also because Bahrain itself has referred to the area as the "Gulf of Bahrain" (*see*, para. 9.68, below). Qatar moreover reasserts that "the factor of perpendicularity" has always been and still is, to repeat the Court's words in the *Libya/Tunisia* case, one of the "relevant criteria to be taken into account in selecting a line of delimitation calculated to ensure an equitable solution" (*I.C.J. Reports 1982*, p. 85, para. 120). A careful examination of State practice would reveal many other precedents in addition to those cited by Qatar in its Memorial (*see*, for example, Sang-Myon Rhee, "Sea boundary delimitation between States before World War II", *American Journal of International Law* 1982, Vol. 76, pp. 555-588; QR, Annex VI.51, Vol. 4, p. 287). In this regard mention will simply be made of the Protocol for delimitation of the boundary concluded in July 1926 by Albania and Yugoslavia, Annex III of which, relating to the general description of the boundary line, provides that "the boundary starting from the limit of the territorial waters in the Adriatic Sea follows first a straight line perpendicular to the general direction of the coast and ends up at the mouth of the principal area of the Boyana" (*see*, P. de Lapradelle, *La Frontière - Etude de droit international*, Paris Les Editions internationales 1928, p. 216, note 1; G. Gidel, *Le droit international public de la mer*, Tome III, *La mer territoriale et la zone contiguë*, Paris 1934, p. 768, note 1; Sang-Myon Rhee, *op. cit.*, p. 579; QR, Annex IV.51, Vol. 4, p. 287). But it must also be borne in mind that in negotiations that are still pending, the

perpendicularity method seems to have been invoked by the Parties, notably for the delimitation in the Black Sea between Romania and the Soviet Union/Ukraine (A. Oude Elferink, *The Law of maritime boundary delimitation: a case study of the Russian Federation*, Publications on Ocean Development, M. Nijhoff, p. 357; QR, Annex IV.37, Vol. 4, p. 25).

153 BCM, para. 641; emphasis added.

154 BM, para. 568; emphasis added.

155 BCM, pp. 292-293.

156 *I.C.J. Reports 1985*, p. 39, para. 46.

157 QCM, para. 8.100; *see*, also, paras. 9.5, *et seq.*, above.

158 *I.C.J. Reports 1969*, p. 49, para. 91; *see*, QM, paras. 12.17-12.19 and QCM, paras. 8.101-8.102.

159 *See*, para. 9.55, above.

160 *See*, QM, paras. 12.41, 12.64, fns. 153 and 154, and para. 12.72.

161 QM, Annex IV.127, Vol. 10, p. 123, at p. 136; *see*, also, paras. 9.23-9.24, above.

162 *I.C.J. Reports 1993*, p. 67, para. 65.

163 *See*, QM, paras. 12.30-12.32; QCM, paras. 8.103-8.105.

164 *See*, BCM, paras. 647-649.

165 BCM, para. 648.

166 *See*, para. 9.56, above.

167 *See, ibid.*, above.

168 *See*, BCM, para. 614.

169 *See*, BCM, para. 615.

170 BCM, para. 649; emphasis in the original.

171 *I.C.J. Reports 1984*, p. 337, para. 224.

172 *Ibid.* The Chamber also concluded from this that only "a geometrical method", and more precisely "the drawing of a perpendicular to the closing line of the Gulf" was "the most appropriate... in this instance" (*ibid.*).

173 QCM, para. 8.103.

174 Mention will be made here only of the *Gulf of Maine* case: "The Chamber's views on this subject may be summed up by observing that a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction" (*I.C.J. Reports 1984*, p. 323, para. 185).

175 *See*, QM, paras. 12.66-12.69 and Map No. 22.

176 *See*, QM, paras. 12.70-12.71 and Map No. 23; QCM, paras. 8.103-8.105.

177 *See*, QM, para. 12.71; QCM, para. 8.105.

178 QCM, para. 8.105. It should also be recalled (*see*, QCM, para. 8.105, fn. 295) that point EQ, which is the end point of the dividing line established on the basis of a ratio of 1.59 to 1 between the lengths of the respective relevant coasts of Qatar and Bahrain, is located approximately 3,000

metres to the east of point 2(2B), which is approximately 1,270 metres to the east of point S, the end point of the dividing line on the basis of the perpendicularity method when applied strictly.

179 See, *Map No. 17*, facing page 354, which is similar to Map No. 23 of the QM.

180 See, QM, paras. 12.10, 12.63 and 12.68 and Maps Nos. 17, 20 and 22. See, also, QCM, paras. 8.95-8.96.

181 See, QM, para. 12.64 and Map No. 21; QCM, para. 8.96.

182 Point PP is moreover located precisely 465.65 metres from point T and 365.59 metres from point R.

183 See, BM, Map 10.

184 P. Reuter, "Une ligne unique de délimitation des espaces maritimes", *Mélanges Georges Perrin*, Payot, Lausanne, 1984, p. 262, note 33.

185 QM, p. 307, II.

186 QCM, p. 303, II.

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**CASE CONCERNING MARITIME DELIMITATION AND  
TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN**

**(QATAR V. BAHRAIN)**

**REPLY OF THE STATE OF QATAR**

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**SUBMISSIONS**

In view of the above, the State of Qatar respectfully requests the Court, rejecting all contrary claims and submissions:

I. To adjudge and declare in accordance with international law:

A. (1) That the State of Qatar has sovereignty over the Hawar islands;

(2) That Dibal and Qit'at Jaradah shoals are low-tide elevations which are under Qatar's sovereignty;

B. (1) That the State of Bahrain has no sovereignty over the island of Janan;

(2) That the State of Bahrain has no sovereignty over Zubarah;

(3) That any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case;

II. To draw a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain on the basis that the Hawar islands and the island of Janan appertain to the State of Qatar and not to the State of Bahrain, that boundary starting from point 2 of the delimitation agreement concluded between Bahrain and Iran in 1971 (51°05'54"E and 27°02'47"N), thence proceeding in a southerly direction up to BLV (50°57'30"E and 26°33'35"N), then following the line of the

British decision of 23 December 1947 up to NSLB (50°49'48"E and 26°21'24"N) and up to point L (50°43'00"E and 25°47'27"N), thence proceeding to point S1 of the delimitation agreement concluded by Bahrain and Saudi Arabia in 1958 (50°31'45"E and 25°35'38"N). The line claimed by Qatar is illustrated on *Map No. 20*, facing this page.

(Signed) Dr. Abdullah bin Abdulatif Al-Muslemani

Agent of the State of Qatar

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