

## HIGHLIGHTED VERSION

The highlighted versions of Qatar's Memorial and Counter-Memorial are designed to assist the Court in determining which passages of those pleadings are no longer relied upon by Qatar because they depend solely upon documentary annexes which Qatar has pledged itself to disregard (See Qatar's Reply, para. 1.12)

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**PREFACE**

For the sake of convenience, a list of the main abbreviations used from time to time in Qatar's Counter-Memorial and its Documentary Annexes and Appendices is set forth below.

RQ Ruler of Qatar

RB Ruler of Bahrain

PRPG Political Resident in the Persian Gulf, sometimes referred to simply as the Political Resident

PAB Political Agent, Bahrain

PAQ Political Agent, Qatar

ABG Adviser to the Bahrain Government

IO India Office

FO Foreign Office

IOR India Office Records

BAPCO Bahrain Petroleum Company

PCL Petroleum Concessions Limited

EGS Eastern and General Syndicate Ltd.

APOC Anglo-Persian Oil Company

QM Memorial of the State of Qatar

BM Memorial of the State of Bahrain

QMJA Memorial of the State of Qatar on Questions of Jurisdiction and Admissibility

Where reference is made in this Counter-Memorial to Archives of the State of Qatar, the documents are from the Archives of the Diwan Amiri of the State of Qatar.

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**PART II**

**THE HISTORICAL AND GEOGRAPHICAL BACKGROUND TO THE DISPUTE**

**CHAPTER II**

**MISSTATEMENTS AND OMISSIONS IN BAHRAIN'S PRESENTATION OF THE HISTORICAL AND GEOGRAPHICAL BACKGROUND**

2.1 In this Chapter, Qatar will confine itself to drawing attention to some significant misstatements and omissions in Bahrain's presentation of the historical and geographical background.

**Section 1. Development of Al-Thani authority over the entire peninsula**

2.2 One of the most flagrant false assertions contained in the Bahrain Memorial is that by 1916 the authority and control of the Rulers of Qatar did not extend much beyond Doha, and that it was not until the 1930s that their "expansion" reached the Zubarah region<sup>1</sup>. Equally falsely, Bahrain alleges that the authority of the Rulers of Qatar never extended to the Hawar islands<sup>2</sup>. On the basis of these assertions, Bahrain claims that it was only as the authority of the Rulers of Qatar gradually expanded that the authority of the Rulers of Bahrain within the peninsula contracted<sup>3</sup>.

2.3 Qatar will demonstrate in the present section that, contrary to Bahrain's assertions, the Rulers of Qatar exercised their authority and control in and over Qatar on different occasions during the second half of the 19<sup>th</sup> century, and that at least by the 1870s their authority and control covered the whole peninsula including the Hawar islands and Zubarah. Conversely, it will be seen that far from exercising authority over Qatar, the Rulers of Bahrain were at many times unable even to exercise effective authority in and over Bahrain.

#### **A. The international context in the area**

2.4 In its Memorial, Bahrain has of course completely failed to acknowledge the influence that was exercised in the area by powers other than the Al-Khalifah. As will be seen below, various foreign powers from time to time exercised such influence.

#### **1. The Wahhabi presence in Qatar and Bahrain**

2.5 In 1795 the Wahhabis defeated the Beni Khalid tribe who had been occupying the Hasa region. Following that victory, and with the assistance of the Al-Naim and other tribesmen, they besieged Zubarah and various other localities in the north of Qatar<sup>4</sup>. By 1802-1803 they had nominally subjected all the inhabitants of the Arab shore of the Gulf from Basra to Muscat<sup>5</sup>.

2.6 The Wahhabis also turned their attention to Bahrain, demanding in particular the payment of *zakat*<sup>6</sup>, and their influence was extended over Bahrain from 1803 to 1809, culminating in a period of strict Wahhabi control in 1810-1811<sup>7</sup>. After a confused period of twenty years marked by attacks on Bahrain by Muscat, the Wahhabis again obtained the submission of the Sheikhs of Bahrain in 1830<sup>8</sup>. Thereafter, they continued to play a role in Bahrain's affairs, notably by intervening in the struggles for power that took place between rival Bahraini Sheikhs during the period from 1840 to 1860<sup>9</sup>.

2.7 Meanwhile, on at least two occasions, in 1835<sup>10</sup> and again in 1851<sup>11</sup>, the people of Qatar took advantage of the Wahhabis' presence to oppose the attempts of the Sheikhs of Bahrain to exercise authority over them. It is important to note that at one time between 1852 and 1866 the Wahhabi Amir had a representative at Doha<sup>12</sup>.

#### **2. The Ottoman presence in Hasa and Qatar**

2.8 The Ottomans ~~undertook surveys in the region in the 1860s and early 1870s<sup>13</sup>~~, and were present in Hasa uninterruptedly from 1871 until 1915. As has already been noted, at the same time they also established a presence in Qatar at the invitation of Sheikh Jassim, the son of Sheikh Mohamed bin Thani, and a Turkish garrison was installed in Bida from January 1872<sup>14</sup>.

2.9 Hasa and Qatar were thus included in the administrative system of the Ottoman Empire, and the *sanjak* or sub-province of Nejd and Hasa included the *kaza* or district of Qatar. In turn, the *kaza* of Qatar included the *nahiyesi* or sub-districts of Zubarah and Odeid<sup>15</sup>.

2.10 In 1876, Sheikh Jassim bin Mohamed bin Thani was appointed *kaimakam* or governor of the *kaza* of Qatar<sup>16</sup>. Although the Turks were nominally in control of the whole peninsula, it was Sheikh Jassim who wielded the real power in Qatar during the Turkish period<sup>17</sup>. As will be seen below, the nominal Turkish authority together with the exercise of power by Sheikh

Jassim prevented any third parties - notably Britain and the Bahraini sheikhs - from exercising any form of authority in the peninsula during the period from 1871 to 1915<sup>18</sup>.

### **3. The British presence in the Gulf**

2.11 The British began entering into treaties with the local sheikhly powers from 1820 onwards<sup>19</sup>. Although ostensibly for the purpose of preventing piracy and protecting trade routes, these treaties allowed the British to increase their influence in the internal affairs of some of the local sheikhs, as was notably true in the case of Bahrain. As from 1871 onwards, the British adopted a "hands off" policy with respect to the Ottoman presence in Qatar, there being a tacit understanding that they would not interfere in Qatar, provided that the Ottomans would not interfere in Bahrain.

### **4. The Persian claim to sovereignty over Bahrain**

2.12 In 1622 the Persians had expelled the Portuguese from Bahrain and held possession until 1783. From 1843 the Persian Government renewed its claim to sovereignty over Bahrain<sup>20</sup>. In response, the British decided to resist by force any attempt of the Persian Government to establish troops on the island of Bahrain and refused to recognize its claims. However, the Persian claim was renewed regularly, in particular in 1869, when the British deposed the Ruler of Bahrain, and again in the 1920s. This claim was dropped only in 1970, one year prior to the end of the British presence in Bahrain in 1971.

### **B. The internal context: existence of a tribal system**

2.13 For purposes of the following discussion, it is helpful to bear in mind the fact that until 1923 for Bahrain and after World War II for Qatar, the type of government was "traditional", as opposed to the "modern" type, which was characterised by the establishment of modern administration along with greater British involvement in the domestic affairs of each country.

2.14 Thus, in the 19<sup>th</sup> century neither Bahrain nor Qatar could be considered as States in the modern sense of the word. At that time there were only tribal chiefs who endeavoured to consolidate their position by developing their relations with other tribes and controlling the trade networks. The functioning of this tribal system has been described as follows:

"As long as [the individual bedouin] is with his tribe, he must conform to certain rules, and he takes part in all its deliberations, but he can at any time withdraw from its authority, if he finds his opinions in a minority or his independence hampered.

...

The individual then is the basis, from which one should start in a review of the political system of the desert... he is free of all control, whether from tax-gatherer or policeman, and he is obliged to contribute nothing, not even his services in time of war, to his neighbours. It is however immensely to his advantage to yield a little of this absolute independence, for the sake of protection, for he cannot practically live alone, or he would be pillaged by the men of other tribes, who have a natural right to despoil him.

...

The system of government is a simple one. Each tribe or section of a tribe is under the nominal rule of a sheykh, chosen by vote; and there is no qualification required either in the electors or the elected. Common prejudice, nevertheless, is in favour of the supreme power being entrusted to members of certain families; and the sheykh is usually chosen out of these. A certain amount of wealth is necessary too in a sheykh, for on him the principal burden of hospitality falls; and the qualities for governing, which seem to be hereditary everywhere, are fully recognised as such in the Desert...

...

Each tribe, in fact, is a separate nation with its own rights of peace and war, and its own political independence"<sup>21</sup>.

2.15 It should however be borne in mind that it was difficult for outsiders to determine what the true situation was on the ground. This has been highlighted by the *Gazetteer of Arabian Tribes*, which tells the story of Arabia's tribes from the mid-nineteenth century to the mid-twentieth century:

"A word of caution, however. Few tribespeople could read or write before the 1950s. Most of the written records come from European travellers, British administrators and oil company employees - outsiders. These outsiders were not always told the truth. 'Front men' were appointed by tribes to deal with these new power claimants, while real power remained inviolate and hidden...

To compound the problem, European officials, with their preconceived cultural attitudes and over-respect for hierarchies tended to assume that tribal structures were permanent. In reality structures changed all the time, depending on the ever-changing relationship between shaikhs and tribespeople. Sections turned into independent tribes at times of weak centralised authority, and confederations turned into single units at times of strong leadership...

Most of the Europeans in Arabia were unable to penetrate into the true tribal society: either because, like the travellers and explorers, they were more interested in places than people; or because, like the policeman and the administrator, they constantly sought to impose their concept (and convenient hierarchy) on the tribe"<sup>22</sup>.

## 1. Qatar

2.16 Until the development of oil in relatively recent times, the tribes in Qatar could be divided into two groups. One was composed of the settled tribes (*hadar*), concentrated in towns and villages along the coast, and the other of nomadic tribes (*bedu*) living in tents. Some of the latter were partially nomadic, others primarily nomadic. They frequented mainly the interior of Qatar, but also the borderlands and the coastal sides of the peninsula<sup>23</sup>.

2.17 There is no substance whatsoever in the Bahraini arguments that Al-Thani authority in Qatar in the nineteenth century and up until the 1930s was confined to a small area around Doha, and that the interior of Qatar was essentially uninhabited. In fact, the extent of Al-Thani authority with respect to the tribes living permanently or temporarily in Qatar may have varied from time to time, but there is no doubt that it extended in some measure to the tribes or tribal elements listed in footnote 23; there is equally no doubt that the interior of Qatar was the preserve of most of the bedouin tribes referred to in that footnote.

2.18 The tribal situation in Qatar has been described as follows as far as the bedouins were concerned:

"The principal bedouin tribes that migrated to Qatar from Hasa were the Murrah and the Ajman. Those that came from Trucial Oman were the Manasir; and the Naim, the other important tribe, fluctuated between Bahrain and Trucial Oman. The pattern of the migratory population of Qatar could thus be seen as almost mosaical in the power structure of the peninsula; their vicissitudes caused considerable apprehension in the coastal towns and villages, Doha being the most prominent. The Bani Hajir, for example, who were allied by religion to the Wahhabis, paid the latter *zakat*, and at the same time received gifts from the ruler of Qatar. The role of the bedouin in the political evolution of Qatar cannot be underestimated, since they could hold most of the settled places at their mercy. The Murrah were perhaps the most feared of all the tribes, with the Bani Hajir coming a close second"<sup>24</sup>.

2.19 As will be seen in greater detail below<sup>25</sup>, as time went by the Al-Thani family, a division of the Maadhid tribe, who already dominated Doha by the end of the 18<sup>th</sup> century, became progressively recognised as rulers of Qatar:

"Towards the end of the nineteenth century, the Al-Thani grew to prominence as the leading family of Qatar. As their relationship with first the Ottomans and later the British government of India developed, their position was given an added acknowledgement of authority...

...

The ruler governed in a paternal fashion. He was the sole source of power, and conducted all the administration of Qatar himself. No government services or departments existed until very recently. Although he governed with absolute authority, he would often consult his *majlis* (assembly of notables) on matters of unusual importance. He was supposed to remain accessible to his people since they had recourse to no one else for their petitions and problems. He also had to reassure his people of his protection, particularly from the inland bedouins, and often paid the latter large subsidies to obtain this security"<sup>26</sup>.

## 2. Bahrain

2.20 Before 1923, the populations who were actually under the control of the Sheikh of Bahrain or the Al-Khalifah family lived in the north (Manama, Muharraq) and centre (Rifa') of Bahrain. Outside these areas, the Sheikh had more tenuous relations with the tribes.

2.21 The general administration of Bahrain under the rule of Isa bin Ali (1869-1932) has been described as follows:

"The Government of Bahrain is of a loose and ill-organised character. It is ruled by a Shaikh - at present Isa bin-Ali - who, with the assistance of a Wazir or principal adviser, disposes of matters of political or general importance and personally governs, unless when absent on sporting expeditions to the mainland, the island of Muharraq and the part of Bahrain Island which is adjacent to Manamah. During four months in the hot weather the Shaikh has his seat at Manamah: his headquarters during the rest of the year are at Muharraq Town, but he indulges in frequent journeys. A brother, sons, nephews and other near relations hold fiefs in various places, of which they have almost independent possession for life; upon these estates they collect taxes for their own behoof and exercise magisterial and seignorial jurisdiction.

The most important semi-independent holding of this sort at the present time is in the hands of the Shaikh's brother Khalid; it includes the islands of Sitrah and Nabi Salih, as well as all the villages on the east side of Bahrain Island to the south of Khor-al-Kabb and the inland villages of Rifa-ash-Sharqi and Rifa-al-Gharbi"<sup>27</sup>.

This citation demonstrates that in the 19<sup>th</sup> century the Sheikhs of Bahrain were far from exercising control over the whole of Bahrain. In addition, it may be noted that no mention is made of any control that the Al-Khalifah sheikhs might have had over the towns of Zellaq and Budaiya, on the west coast of Bahrain, which were held by the Dowasir tribe<sup>28</sup>.

## **C. Establishment by the Al-Thani of authority and control over Qatar**

### **1. The policy of the Al-Thani**

2.22 As Qatar has already shown in its Memorial, by the 1850s Mohamed bin Thani, the Sheikh of Bida, had established himself as the paramount sheikh in Qatar ~~and had even entered into relations with the Wahhabi Amir for the purpose of protecting his territories<sup>29</sup>~~. At that time, Qatar was far from being closely controlled by the Sheikhs of Bahrain, who maintained a claim to authority over the territory, and on several occasions the Qatari tribes revolted against attempts to impose Bahraini authority over them<sup>30</sup>.

2.23 As has also been seen, the separation of Qatar from Bahrain was formally recognised by the British in 1868<sup>31</sup>. Thereafter, Sheikh Mohamed bin Thani and, particularly, his son Sheikh Jassim, undertook a policy of consolidation of their rule over the whole of Qatar, relying on the tribal system and often playing off against each other the various foreign powers in the area. This policy has been described as follows:

"For the next forty years [following the Ottoman occupation of Hasa], Qasim (sometimes referred to as Jassim) bin Muhammad had to balance the power of the Ottomans against the growing British fears of Ottoman encroachment on their interests in the Gulf... Although the results sometimes left Qasim in a precarious and vulnerable position, his tenacity ultimately brought rewards to Qatar and the Al-Thani"<sup>32</sup>.

### **2. The establishment and consolidation of Al-Thani authority**

#### **a) General authority prior to the Ottoman presence**

2.24 The origins of the Al-Thani family<sup>33</sup> have been described as follows:

"Somewhere towards the end of the seventeenth century the Ma'adid (which included the forebears of the Al Thani Family) and the closely related Al Bu Kawara migrated from Ashayqir in Washm first to Jabrin, from where they migrated onwards to al-Sikak/Sakak and to Salwa near the base of the Qatar Peninsula; the Ma'adid initially settled in the former and the Al Bu Kawara in the latter. They soon moved on to the prospering north, the Ma'adid grouping settling in the Zubara area and nearby Ruways (then the Jalahima 'capital') and the Al Bu Kawara towards the north-east, where they started to develop a fairly important settlement at Fuwayrit in the vicinity of the Musallam centre at al-Huwayla... settlement in the north-eastern corner of Qatar was intensifying when the Al Khalifa moved to Bahrain, and it was to Fuwayrit that the eponymous Thani (b. Muhammad b. Thamir b. 'Ali) moved when the Zubara area was ruined"<sup>34</sup>.

2.25 Mohamed bin Thani subsequently left Fuwayrat and settled in Doha, of which he became the governing sheikh, rising to the position of paramount sheikh of Qatar by the 1850s<sup>35</sup>. In his *Narrative of a Year's Journey through Central and Eastern Arabia (1862-63)*, written at a time when the Sheikhs of Bahrain still claimed nominal authority over Qatar, Palgrave reported that:

"Ebn-Thanee, the governor of Bedaa', is indeed generally acknowledged for head of the entire province, which is itself dependent on the Sultan of 'Oman; yet the Bedaa' resident has in matter of fact very little authority over the other villages, where everyone settles his affairs with his own local chief, and Ebn-Thanee is for those around only a sort of collector-in-chief, or general revenue-gatherer [for the Al-Thani family], whose occupation is to look after and to bring in the annual tribute on the pearl fishery. Mohammed-el-Khaleefah has also a sort of control or presidential authority in Katar, but its only exercise in the hands of this worthy seems to be that of choosing now and then a pretty girl... on whom to bestow the brief honours of matrimony for a fortnight or a month at furthest, with a retiring pension afterwards"<sup>36</sup>.

2.26 Thus, even prior to the events of 1867 and 1868<sup>37</sup>, Mohamed bin Thani was governor of Bida and acknowledged as head of the entire province of Qatar. When in 1868 the British entered into agreements with Sheikh Ali bin Khalifah and Sheikh Mohamed bin Thani, respectively, Sheikh Mohamed bin Thani's position as Chief of Qatar gained formal recognition:

"After... the devastation of Doha and... Wakrah in 1867, the British decided to resort to Draconian measures to impose peace in the region. They forced out the ruler of Bahrain, Muhammad b. Khalifah, and replaced him with his more docile brother, Ali; and, in September 1868, they sent the Political Agent in the Gulf, Colonel Pelly, to Qatar to hold direct talks with the local people. Even at the time the visit must have been seen as an historic occasion. *For it signalled the ending of Britain's treatment of Qatar as a dependency of Bahrain and the first recognition of Qatar as a place in its own right. For the Al-Thani, too, the meeting was historic since it was Shaikh Muhammad b. Thani who received the Resident on behalf of 'all the shaikhs and tribes of Guttar' and who signed a Treaty of Maritime Peace precluding further involvement in the feuds of the Khalifah family...*"<sup>38</sup>.

2.27 A further point with regard to the 1868 Agreements has become significant only because of Bahrain's continual insistence in its Memorial that any reference to "Qatar" until comparatively modern times simply meant Doha and that thus even when reference was made, for example, to Mohamed bin Thani "of Guttur", this in no way implied that his authority extended beyond Doha. In this respect it should be noted that the Agreement signed with Mohamed bin Thani made a clear distinction between the two, Mohamed bin Thani "of Guttur" promising "to return to Dawka [Doha]"<sup>39</sup>.

#### **b) General authority following arrival of the Ottomans in 1871**

2.28 It will be remembered that in 1871-1872 the Ottomans had entered Qatar and established a garrison at Bida at the invitation of Sheikh Jassim<sup>40</sup>. ~~They had also prepared maps which showed the boundary between Qatar and Bahrain and which were seen and apparently approved by the British authorities<sup>41</sup>.~~ For Sheikh Jassim, the Ottoman presence had the desired effect of preventing outside intervention, notably by Britain, Bahrain and the Wahhabis, in the area ~~thus demarcated by the Ottomans~~ as comprising Qatar, *i.e.*, the whole

peninsula and adjoining islands<sup>42</sup>. Indeed, as will be seen in more detail below, although the Ottomans did not establish a permanent garrison in Qatar elsewhere than in Doha, they were well aware of the extent of the territory forming the *kaza* of Qatar, and did from time to time go to other parts of the peninsula ~~and to the Hawar islands~~<sup>43</sup>.

2.29 The Ottoman presence did little to change the political situation in Qatar, in particular insofar as the status of the Al-Thani sheikhs was concerned. Lorimer commented as follows:

"Except in the internal affairs of Qatar, especially the administration of the chief town and its immediate environs, little or no change was produced by the presence of a Turkish post at Dohah; tribal relations generally continued on the same footing as formerly and the Al-Thani Shaikhs of Dohah were still the principal factor in politics"<sup>44</sup>.

Indeed, far from diminishing Al-Thani authority, the Ottoman presence helped consolidate it, in particular by the appointment of Sheikh Jassim as *kaimakam* of the *kaza* of Qatar in 1876, and as Ottoman governor of Doha in 1879. Conversely, the appointment as *kaimakam* of Sheikh Jassim, who wielded the real power in the country, helped the Ottomans assert their nominal authority over the whole peninsula despite their limited physical presence.

2.30 Thus, although the Ottomans' only garrison in Qatar was at Doha, they were able, via the authority personally exercised by Sheikh Jassim, their *kaimakam*, to claim jurisdiction over all the areas where he exercised such authority and, while the British from time to time purported to deny Ottoman jurisdiction over the whole of Qatar, they asserted neither their own nor Bahrain's jurisdiction over the place, thereby tacitly acknowledging both the Ottoman presence and the control of the Al-Thani sheikhs in Qatar.

2.31 The British attitude may be seen in a letter of 28 August 1873 from Colonel Ross, the British Political Resident, according to which, although the matter of sovereignty over Qatar had apparently never been formally decided, the Turkish authorities had established an influence over the Qatar coast as far as the Odeid boundary - in other words, from the south-west of the Qatar peninsula (in the vicinity of Dawhat Salwa) as far as the extreme south-east of the peninsula<sup>45</sup>. In a subsequent letter Colonel Ross again pointed out that "Since the Turkish occupation of El Hassa, the whole line of coast as far as Odayd has fallen under Turkish influence"<sup>46</sup>.

2.32 Indeed, in a Government of India memorandum on Ottoman jurisdiction along the Arabian coast of the Gulf, dated 22 May 1879, reference was made to a note of 28 July 1871 from the Foreign Secretary, Mr. Aitchison, according to which:

"It is a matter of absolute indifference whether these quasi-independent tribes are sovereign or absolutely controlled by Turkey... There is nothing... in our maritime position to call for our interference on land... I think it would be rather an advantage than otherwise to establish a firm Turkish rule along the coast"<sup>47</sup>.

2.33 Again, in a letter from the India Office of 17 September 1879, the following is stated:

"Provided, however, that no obstacles be interposed to any operations which may be necessary to preserve the peace of the seas and to punish marauders, and that no interference is attempted either with Bahrein, or the crucial Chiefs from Odeid to Ras-el-Khymah, or with

Muscat, Lord Cranbrook does not consider that exception need be taken to the proceedings of the Turks at any point of the coast north of Odeid.

In expressing this opinion, his Lordship does not forget that the Government of India would restrain the Porte from extending its influence beyond Ojair; but, subject to the conditions above stated, Lord Cranbrook does not see any sufficient reason for objecting to the establishment of such relations between the Turkish authorities in El Hassa and the tribes of the Guttur peninsula to the north of Odeid, as may be agreeable to the parties concerned<sup>48</sup>.

The India Office noted that Colonel Ross had concluded in 1879 that:

"The Turkish Government may... with some reason argue that their present actual position on this coast does involve, constructively, domination over the entire tract lying between Ojair and El Bidaa. Such a claim would, of course, be affected by the existence of any British rights or obligations on the coast referred to. But it is not held that the British Government has engagements, as concerns this particular tract, of a nature to constitute an obligation to oppose the full establishment of Turkish authority therein; nor has it seemed probable that opposition would be offered on other grounds. We have, in fact, rather prepared the way for recognition of the eventual establishment of Turkish rule by gradually withdrawing from active supervision and control over this portion of the mainland coast"<sup>49</sup>.

2.34 Alongside nominal Ottoman control, the British also recognised Sheikh Jassim's authority, holding him responsible for maintaining order in Qatar and preventing piracy from Qatari ports. In this connection Bahrain has not failed to point out that on one occasion Sheikh Jassim disclaimed this responsibility when he was requested by the British to keep order along the whole coastline of Qatar<sup>50</sup>. However, it has been suggested that this disclaimer was merely a part of Sheikh Jassim's policy of playing off the great powers against each other:

"This particular statement could have been made to avoid responsibility for reported cases of piracy in Qatar that the British representative was investigating, for there is no doubt that it was during the Ottoman period that Qasim extended the authority of the Al-Thani throughout the peninsula of Qatar. Three factors combined to enable this to take place. The first and most important of these was the complexity of Anglo-Ottoman relations. While the British Government never officially accepted the Porte's claim of sovereignty over Qatar, it avoided any possibility of jeopardising its delicate relations with the Ottomans at a time when British policy was to maintain the territorial integrity of the Ottoman Empire in order to preserve the balance of power in Europe. The 'vexed question' of Qatar, as it was referred to by Foreign Office officials, conflicted with another, equally important, aspect of British policy: the maintenance of the Gulf as a British lake which provided a vital link in the route to India. This clash of interests was reflected in the opposing attitudes towards Qatar of the Foreign Office in London and the Government of India in Delhi ... The resulting situation was a curiously nebulous attitude on the part of British officials: while never actually accepting the *de jure* rule of the Porte in Qatar, they tacitly acknowledged the *de facto* situation, consequently steering clear of any embarrassing confrontation, an attitude echoed by the Ottomans who repeatedly claimed sovereignty over both Bahrain and Qatar.

The second factor was the personality and character of Qasim himself. A headstrong, sometimes rash man, he also displayed great tenacity and courage. While it is doubtful that he was aware of the many aspects of Anglo-Ottoman relations, he seemed to know intuitively the value of setting off the two powers against each other. His actions often had him walking a

tightrope, but he finally emerged in a far more powerful position than the one he had inherited from his father.

The third factor was the numerous claims made by the Al-Khalifah for sovereignty over Zubarah. These claims led to armed clashes in which Britain and the Porte became involved. Both powers, however, sought to avoid the very real dangers of direct confrontation by reaching compromises"<sup>51</sup>.

2.35 British reports on the status and position of Sheikh Jassim and his sons were issued in the period 1902-1904. On 7 March 1902 the Political Resident wrote that:

"Sheikh Jasim lives in the interior of Katr...

It would be possible to arrange that Sheikh Ahmad should be interviewed at some place in Katr, say, at Zobara, where an interview could be held without interference"<sup>52</sup>,

and on 26 April the Political Resident stated that if he

"... may be authorised to enter into an agreement with the Chief of Katar whereby his independence is recognized and a promise of protection from interference by other Powers given to him, on the condition that he is responsible for the maintenance of order in Katar and for the prevention of piracies by sea, most satisfactory results may be expected to follow...

Sheikh Jasim is the actual Chief so far as the tribes are concerned"<sup>53</sup>...".

2.36 As has already been seen, a Convention was signed by the British and the Ottomans in 1913<sup>54</sup>. While Bahrain contends 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>55</sup>, it is in fact quite clear, as will be seen below, that the negotiations for the Convention concerned the whole geographical entity of Qatar<sup>56</sup>.

2.37 Again, when it comes to discuss the 1916 Anglo-Qatari Treaty<sup>57</sup>, which was entered into following the final departure of the Ottomans, Bahrain once again asserts that in signing this Treaty the British formally recognised the exercise of authority by the Al-Thani "in the area around Doha Town" and no further<sup>58</sup>. In this connection, Bahrain persists in referring to the "Ottoman administrative unit of Qatar", ignoring both the fact that such administrative unit extended much further than Doha and its environs, and also the fact that Qatar had been clearly understood by both the British and the Turks in 1913 (and indeed much earlier) as comprising the whole peninsula. Further, the text of the 1916 Treaty itself speaks of the Ruler of Qatar's "territories", "frontiers" and "ports", elements which are clearly inconsistent with Bahrain's proposition that Al-Thani rule was recognised only over a few square kilometres; and it may also be noted that, like the Agreement of 12 September 1868, the Treaty refers to both Al Bidaa and Qatar, a clear indication that the two are not synonymous<sup>59</sup>.

2.38 As Qatar will now show, in addition to the general assertion and recognition of Al-Thani authority over the whole of Qatar, there were, contrary to Bahrain's repeated contention, many instances of effective exercise of Al-Thani authority elsewhere than in Doha.

#### **e) ~~Al-Thani authority on the Hawar islands~~**

2.39 As has already been seen, when the Ottomans performed their surveys and drew up maps on the basis of those surveys in the 1860s, showing the boundary between Qatar and Bahrain, the Hawar islands were always included as part of Qatar<sup>60</sup>. Indeed, Qatar has provided evidence that by the time of the Ottoman arrival in Qatar, the Hawar islands were recognised by third parties and by the fishermen who visited them as being under Al-Thani control<sup>61</sup>.

2.40 Once the Ottomans had established their presence in Qatar at the invitation of Sheikh Jassim, they raised their flag on Hawar, without any objection from the British<sup>62</sup>. They subsequently undertook further surveys and, in particular, produced maps of the various dwellings on Hawar<sup>63</sup>. On several occasions following the arrival of the Ottomans, Sheikh Jassim's banner was raised on the main Hawar island, and a representative was sent to collect levies from the fishermen who used the place, on behalf of Sheikh Jassim<sup>64</sup>. The Al-Thani continued to exercise their authority on Hawar following the departure of the Ottomans, and on several occasions Sheikh Hamad bin Abdulla himself, Sheikh Jassim's grandson, visited the islands<sup>65</sup>.

#### **d) Al-Thani authority in and around Zubarah**

2.41 A full rebuttal of Bahrain's arguments relating to Zubarah is contained in Chapter V below. In the present section, Qatar's intention is simply to highlight a few omissions of which Bahrain is guilty in its attempt to show that the Al-Thani did not exercise any authority in the "Zubarah region".

2.42 A first omission relates to the events which occurred in 1874, when several hundred Beni Hajir bedouins attempted to seize boats from the villagers of northern Qatar with which to attack Bahrain, in sympathy with the Al-Khalifah dissident Nasir bin Mubarak, and encouraged by the Ottomans. However, the Beni Hajir were prevented from obtaining boats by the intervention of Mohamed bin Thani<sup>66</sup>, a fact which Bahrain has failed to mention.

2.43 Significantly, Bahrain has also omitted from its Memorial any explanation of the events which took place in Zubarah four years later. Thus, although it mentions the destruction of the town of Zubarah in 1878, it fails to mention that prior to this destruction the British had complained to the Turks about disorders and piratical activities occurring in and around Zubarah and requested that they take action against the place, but that before the Turks could do so, Sheikh Jassim had taken the necessary action himself<sup>67</sup>. This event is further evidence that Sheikh Jassim, rather than the Turks, was the effective power in Qatar at the time, and that his authority extended to Zubarah.

2.44 Bahrain's assertion that the Al-Thani did not exercise any authority in the Zubarah region is again belied by the events of 1895. In that year, 1500 members of the Al bin Ali tribe moved over to Qatar from Bahrain to settle at Zubarah, with the support and encouragement of Sheikh Jassim and the Turks. Panic mounted in Bahrain because it was feared that Zubarah would be used as a base for attacking the island. As a preventive measure to protect Bahrain, the British destroyed forty-four native craft assembled at Zubarah. Thereafter the British imposed upon Sheikh Jassim the payment of a fine, and when Sheikh Jassim refused to pay this fine his fleet was also destroyed by the British. Nevertheless, these events served to consolidate yet further the authority of the Al-Thani in Zubarah:

"But the defeat held unexpected gains. The British Government realised how close they had come to an armed conflict with the Ottomans, and wanted to make sure there would be no

repetition of events. The Resident was consequently instructed to warn the ruler of Bahrain against interfering in the affairs of Qatar. This was, of course, an implicit recognition of the rights of the Al-Thani in Zubarah. At almost the same time, but without the knowledge of the warning to Bahrain, Qasim sought to strengthen his hold on the town. He was successful in influencing those members of the Naim tribe who still lived in Zubarah to transfer their allegiance from the Al-Khalifah to the Al-Thani"<sup>68</sup>.

#### **e) Al-Thani authority in the south-west of Qatar**

2.45 By 1905 it was clear that the Al-Thani had also established their authority in the south-west of the peninsula. When in the summer of that year the son of the Wahhabi Amir visited "districts adjoining Qatar", including the wells of Araiqa a few miles to the north-east of the foot of Dawhat Salwah, he was warned by Sheikh Ahmad, Sheikh Jassim's brother, not to cross the border of Qatar<sup>69</sup>.

2.46 The Al-Thani were also active in imposing order among the Bedouin on their southwestern border. In April 1905 Sheikh Ahmad led a raid of Al Murra and Al Makhadhhaba (Beni Hajir) against the Ajman, Amayir and Al Muhammad (Beni Hajir) in the Jafura desert<sup>70</sup>. In July 1906 Sheikh Abdullah bin Jassim led raids against bedouin near Salwa and Sufayra, and Sheikh Jassim arrested Manasir robbers who had attacked the mail convoy on the darb al-sa'i (the route from Doha to al-Hasa) near Salwa<sup>71</sup>. In the same year the long-standing feud between Qatar and the Ajman was brought to a conclusion by the restoration of captured camels to Qatar, and friendly alliances were concluded between Sheikh Jassim and the Chiefs of the Al Murra (Ibn Shuraym) and Beni Hajir (Ibn Shafi)<sup>72</sup>. In 1909 there were further Bedouin raids about Hasa and southwestern Qatar and Sheikh Jassim sent Sheikh Abdullah to retaliate against the Ajman<sup>73</sup>.

#### **f) Al-Thani authority in the interior**

2.47 Al-Thani authority in the interior of the peninsula rested on the careful management of alliances with semi-nomadic bedouin tribes.

2.48 In 1875 it was reported that Sheikh Jassim subsidised and maintained the Beni Hajir as almost a standing army: 200 armed Beni Hajir tribesmen were then living semi-permanently in Doha while a further 300 camped close to the town<sup>74</sup>. Because of the close association of the Beni Hajir with Nasir bin Mubarak, a dissident member of the Al-Khalifah family, the British tended always to view Sheikh Jassim's support for them in terms of a threat to Bahrain, but in fact there was very little to indicate that Jassim was ever seriously interested in invading Bahrain; rather, his concern was with the unity of Qatar<sup>75</sup>.

2.49 Fears of an impending attack on Doha by the Abu Dhabi forces in 1881 caused a general mobilisation in Qatar, demonstrating the strength and breadth of support for Sheikh Jassim in the face of an outside enemy. About 4000 men came to his aid from Fuwayrit, Khawr Shaqiq, Wakra, and the Al-Naim and Qubaysat tribes:

"They say even the Persians in El Bidaa went to his assistance and had a separate standard. The Al Bookoowarah and Amamerah [from Fuwayrat, but who were visiting Bahrain] proceeded most quickly from Bahrain also to assist him"<sup>76</sup>.

2.50 In 1891 an open rift developed between Sheikh Jassim and the Turks over the Turkish plan to establish a customs post at Doha and to appoint a Turkish assistant *kaimakam*. In order to deal with the problem, the Vali of Basra arrived at Doha in February 1893, travelling overland accompanied by Turkish cavalry and troops. Sheikh Jassim, who was camping in the interior, refused to meet him but sent his brother Ahmad to negotiate. Ahmad was seized by the Turks, who sent a force to Wajba to compel Jassim's attendance. However, these troops were ambushed by Sheikh Jassim's bedouin army on 3 April 1893 and a large number were killed. A second battle took place about two weeks later in which many lives were lost on both sides<sup>77</sup>. The consequences of these events have been described as follows:

"Qasim's popularity and reputation in Qatar as a man of valour and strength grew further when the Ottomans had no choice but to grant him a full pardon. His authority was completely established, and although he chose to live in semi-retirement for the rest of his life, no one ever questioned his position as ruler. His brother, and later his sons, deputised for him in all matters that concerned relations with the Turks, but his decisions remained the most important. He 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>78</sup>.

#### **D. The absence of Al-Khalifah authority in Qatar**

2.51 In order to build up its fanciful image of the Al-Khalifah family's power, Bahrain conveniently forgets many events that occurred during the 19<sup>th</sup> and early 20<sup>th</sup> centuries. For example, no mention is made in Bahrain's Memorial of the period from 1783 to 1820, when Muscat, the Wahhabis and Persia all vied for control over the island of Bahrain, and when the Al-Khalifah from time to time acknowledged their submission to one or other of these powers<sup>79</sup>. Nor is any mention made of the later attempts on Bahrain by Muscat, the Wahhabis and the Egyptians which were rebuffed only because of intervention by the British who, following signature of the 1820 General Treaty of Peace, took action each time in order to preserve peace in the region<sup>80</sup>. Similarly, Bahrain makes no reference to its acknowledgement of Egyptian supremacy in 1839 and its payment of tribute to the Egyptians in that year<sup>81</sup>. Bahrain further ignores the numerous internal conflicts by which the Al-Khalifah family was riven, in particular during the period from 1840 to 1860, when the two co-rulers were constantly vying with each other and expelled each other in turn from the country<sup>82</sup>. Bahrain also chooses to mention neither the various inroads into the Qatar peninsula by the Wahhabis and Muscat, nor the use of Qatar territory by Rahmah bin Jaber, a dissident member of the Al-Utub tribe, for his attacks on Bahrain, nor the fact that exiled members of the Al-Khalifah family also used Qatar as a foreign base for preparing to retake Muharraq.

2.52 It is therefore hardly surprising that Bahrain provides no evidence whatsoever for its sweeping statement that "the territorial extent of the authority held by the Al-Khalifa over the inhabited section of the Qatar Peninsula encompassed both the Zubarah region and the region around Doha Town as well as all the territory in between"<sup>83</sup>. This statement simply takes no account of the facts set out above nor of the various uprisings by Qatari tribes against the Al-Khalifah, and it conflicts with the realities of tribal life at the time in the peninsula<sup>84</sup>.

2.53 In fact, Al-Khalifah influence in Qatar dwindled progressively from the time they moved their headquarters to Bahrain in 1783<sup>85</sup>:

"From the 1780s to the mid 1800s, the Al Khalifas became involved in a complex struggle to maintain control of both Bahrain and Qatar. The Al Khalifas faced a steadily greater challenge from the Al Thanis, a tribe that had lived in Qatar for nearly 200 years and had migrated from the Najd in the Arabian Peninsula. The Al Thanis... emerged as the leading family in eastern and southern Qatar in the 1850s, after the Al Khalifas migrated to Bahrain and began to compete with Al Khalifas for control over the Qatari peninsula.

This struggle occurred at a time when the British, Turks, Omanis, Iranians and other Arab families were competing to control the Gulf<sup>86</sup>.

2.54 In its Memorial Bahrain seeks to reduce the events of 1867 and 1868, referred to above<sup>87</sup>, to a rebellion by tribal chiefs in Doha and its environs against the level of taxation imposed by Bahrain. It also seeks to give the impression that this rebellion was repressed by the British, who compelled the rebellious tribal chiefs to recognise the authority of the Ruler of Bahrain<sup>88</sup>.

2.55 In fact, the true story, as explained in greater detail below, is quite different<sup>89</sup>. Far from simply lending assistance to Bahrain in order to compel a few unruly tribesmen from the Doha area to acknowledge their submission to Al-Khalifah authority, Britain's first move was to take punitive measures against Bahrain. It deposed Mohamed bin Khalifah as Ruler of Bahrain and established Ali bin Khalifah as Ruler in his place, signing an agreement with the latter on 6 September 1868 whereby he undertook to hand over all war vessels, to pay a heavy fine, to make over Mohamed bin Khalifah to the British if he returned to Bahrain, and in general to preserve the peace at sea. This can hardly be construed as British support for Al-Khalifah authority in Qatar.

2.56 It was only after this first Agreement had been secured that the Political Resident moved on to Qatar to sign an Agreement with Mohamed bin Thani, described as the "Chief of Guttur". That Agreement neither states nor implies any acknowledgment by Mohamed bin Thani of any Bahraini authority either over himself or over any part of the territory of Qatar.

2.57 Despite this recognition of Al-Thani authority in Qatar and the corresponding absence of Al-Khalifah authority, the Al-Khalifah continued after 1868 to raise claims with regard to Zubarah. As will be seen below, such claims were always rejected by the British<sup>90</sup>.

2.58 Furthermore, Zubarah was destroyed in 1878. With regard to the events that occurred in that year<sup>91</sup>, an author much relied on by Bahrain has written as follows:

"... 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>92</sup>.

In other words, any residual connection that the Sheikhs of Bahrain might have had with the peninsula disappeared after the events of 1878.

2.59 Indeed, Al-Khalifah control even over Bahrain itself was much more tenuous than Bahrain would have the Court believe:

"The Al Khalifas maintained their rule over Bahrain from 1783-1861 - although they sporadically acknowledged the authority of Iran, Muhammed Ali, the Ottoman Empire, and even the Wahhabi Emirs of the Najd, when the Al Khalifas found this to be politically expedient or useful as a way of avoiding attack. On several occasions, the Al Khalifas paid

fealty to several outside states at once - balancing the power of one state against another until the complex power struggles in the Gulf again allowed the Al Khalifas to assert their independence"<sup>93</sup>.

2.60 Bahrain is thus clearly exaggerating when it asserts before the Court that it has been recognised as a sovereign entity since 1820. Although it may be said that the 1820 Treaty with Britain laid down the initial foundations of the State of Bahrain, this hardly amounted to sovereignty:

"Britain's involvement in local political affairs and her decision in 1820 to style herself policeman of the Gulf opened a new phase in the history of the area, altering the formal authority system. Whoever was granted the right to negotiate and sign a treaty with British imperial authorities was likewise accorded a 'legitimate' right to the territory he, or his tribe, happened to occupy at that time. It was through this series of treaties concluded in the nineteenth century that the initial foundations of the small but sovereign states of the contemporary Gulf were laid"<sup>94</sup>.

2.61 In addition, it is to be recalled that following their arrival in Bahrain in 1783, the Al-Khalifah divided into two factions: the Al-Salman branch at Manama and the Al-Abdullah at Muharraq, each retaining a separate tribal administration<sup>95</sup>. From that period up to 1846, when the Al-Salman branch of the Al-Khalifah defeated the Al-Abdullah to become the sole rulers of Bahrain, there was often civil strife between the two factions; and even after 1846, various claims to Bahrain continued to be advanced by the Wahhabis, the Turks and the Persians<sup>96</sup>. The British took this opportunity to place Bahrain under their protection and from then on intervened from time to time in its internal affairs. Thus, for example, in 1868 they deposed Mohamed bin Khalifah as Ruler and replaced him with Ali bin Khalifah<sup>97</sup>. In 1869 Ali was killed in battle against an invasion force organised by Mohamed bin Khalifah, who had been joined by Mohamed bin Abdullah, a relative from the Al-Abdullah branch who until then had been ruling in Rifa town. Mohamed bin Abdullah took power shortly afterwards, only to be deposed two months later by the British, who replaced him by Isa bin Ali<sup>98</sup>. Isa bin Ali himself was in turn forced by the British to abdicate in 1923<sup>99</sup>.

2.62 As to the territorial extent of Al-Khalifah authority, this was limited even on the main island of Bahrain itself. Once the Al-Khalifah had arrived in Bahrain they occupied Manama, Muharraq and Rifa', then they seized the palm-groves, located in the north of Bahrain island, which were held by the Baharnah and Huwalah populations. These cultivated areas were limited to the northern and western strips of the main island of Bahrain.

2.63 On the other hand, the Al-Khalifah at no time had any effective control over autonomous tribal groupings engaged in fishing and pearling activities:

"Whereas palm cultivation was directly controlled by Al-Khalifa shaikhs of different orders, pearl production fell almost entirely into the hands of enterprising Arab tribesmen. Each group of them was an autonomous unit governed by a tribal chief or chiefs assisted by a council composed of fellow tribesmen and other intimates. Within their domain, tribal chiefs and councils ruled as sovereigns, maintaining order, settling disputes, holding court, and resolving conflicts. Short of tax collection, their autonomy was no different from that of the ruler and other Al-Khalifa shaikhs, each within his own estate or domain...

...

Pearl production fell almost entirely into the hands of tribal settlements scattered along the coastline in the northern half of the island... Each of these tribes had roots, alliances, and tribal followings on the mainland, either in Qatar or in central Arabia. The power and influence these tribes or segments of tribes exerted in Bahrain, and the autonomy they exercised, were dependent upon the entire tribal power structure of the Gulf and Arabia. Al-Dawasir of Budayya and Zallaq, for example, were the most powerful, influential, and autonomous of all tribal groups because they were relatively numerous, wealthy, and, above all, able to mobilize a wide variety of tribal alliances on the mainland. Other tribes exercised autonomy as granted them by the Al-Khalifa ruler...

Within their settlements, tribal chiefs exercised complete autonomy

... Tribes or segments of tribes resisted interference in their affairs and considered it a limitation of sovereignty. They dealt with the regime as sovereigns and threatened to 'emigrate' en masse from Bahrain at the slightest hint of intrusion or limitation of their freedom of action. This was what happened with the Bin Ali tribe in 1895 after an irreconcilable conflict with Al-Khalifa over a petty affair of invasion of privacy, and with Al-Dawasir in 1923 when their freedom of operation was restricted... <sup>100</sup>.

## **Section 2. The myth of Bahrain's maritime supremacy and the failure of its expansionist policies**

2.64 Among the major misstatements and omissions in Bahrain's presentation of the historical background there must be included the fantasy of Bahrain's supremacy over the seas and Bahrain's telling silence as to the failures of its expansionist policy.

2.65 Indeed, looking at the history of Bahrain one is struck by the fact that this small island in the Gulf was, just like any other territorial entity in the area - no less but no more - legitimately encouraging its fishermen to exploit the natural resources of the Gulf (fish and pearls). It will be recalled that pearling banks were considered to be the common property of the tribes bordering the Gulf and that members of those tribes traditionally enjoyed freedom of fishing for swimming fish in the waters of the Gulf. But unlike other territorial entities in the Gulf, Bahrain sought to invoke this feature of its economic life as a device for territorial expansionism by always using the same argument. This was that it had acquired sovereignty over islands or shoals in consequence of the use of these geographical features by members of local tribes who were allegedly Bahraini subjects. In a word, it tried to utilise the private economic activities of individuals it claimed to be its subjects as a basis of title to acquire sovereignty over such features.

2.66 What the Bahrain Memorial carefully conceals is that this policy was based on the arguments presently raised with Qatar as regards maritime features off the east coast of Bahrain; and that the policy had completely failed in the context of the resolution of earlier disputes between Bahrain and Saudi Arabia (or the Ottoman Empire) over the legal status of similar features. Qatar will illustrate this by three examples: Zakhnuniya, the Lubainah islands and Fasht Bu Saafa<sup>101</sup>.

### **A. Zakhnuniya island**

2.67 Zakhnuniya island (Jezirat Zakhnuniyah) is situated close to the mainland of what is now Saudi Arabia; it lies immediately off the southern Hasa coast near the entry of the Dawhat

Salwa. It was claimed in 1909-1910 by the Ruler of Bahrain on the basis of exercise of jurisdiction (which was not evidenced), building of a fort (which by then was in ruins) fifty years previously, and use of the island by alleged Bahraini fishermen (Dowasir tribesmen).

2.68 The Hasa coast was at the time in the hands of the Ottoman Empire. The Ottoman authorities based their own claim to Zakhnuniya exclusively on proximity to the mainland. They never tried to justify their claim by any act of jurisdiction or occupation.

2.69 The validity of the Ottoman position was finally acknowledged by the British Government when the Anglo-Ottoman Convention was concluded on 29 July 1913. Article 11 of that Convention reads as follows:

"The Ottoman sancak of Najd... ends in the south of the Gulf facing the island of al-Zakhnuniyah which belongs to the said sancak"<sup>102</sup>.

The Ruler of Bahrain was paid £1,000 in compensation for the waiver of his claim. Ultimately Zakhnuniya was to become part of the territory of Saudi Arabia.

2.70 It will be seen therefore that this instance, far from reinforcing the claim of Bahrain to Hawar, as argued by Bahrain in its Memorial<sup>103</sup>, substantially weakens it. It shows that the use of an island for fishing purposes - an activity which was open to all the tribes in the Gulf - by some Dowasir tribesmen (whose allegiance to Bahrain was in any event doubtful) was incapable of displacing and overriding the prior sovereign rights of the State to which the island was closer.

### **B. The Lubainah islands**

2.71 The Lubainah islands consist of two small rocky islets: a southern one, Lubainah al-Saghirah or Bain-al-Saghir (lying between Bahrain and the Hasa coast at 26°10'16" N, 50°18'40" E within the territorial waters of the Bahraini island Umm Na'san) and a northern one, Lubainah al-Kabirah or Bain-al-Kabir (lying nearer to the Hasa coast than to Bahrain at 26°15'08" N, 50°19'00" E).

2.72 Both islets were from time to time claimed by Bahrain on the following grounds: ancient occupation, levy of taxes on all boats collecting turtleshell from the islands, a private sale deed in respect of a part of the sea including these islets, the marking of the islets with beacons and the fact that Article 13 of the above-mentioned Anglo-Turkish Convention of 29 July 1913 recognised Bahrain's sovereignty over both islets.

2.73 This claim was disputed however by the Saudi Government. Saudi Arabia, having been in occupation of the Hasa coast since the beginning of 1913, considered that the Ottoman Empire had no right to disclaim title to a territory which was no longer under its control and, in any case, the Saudi Government never accepted that Saudi Arabia was bound by the 1913 Convention as a successor State. Saudi Arabia also denounced the evident weakness of the other Bahraini arguments. Although from time to time it referred to use of the islets by its own fishermen, Saudi Arabia essentially invoked proximity to support its claim to the northern islet.

2.74 The solution eventually agreed upon between Saudi Arabia and Bahrain in their Agreement of 22 February 1958 was the sharing of the islets: Lubainah al-Saghirah for

Bahrain and Lubainah al-Kabirah for the Kingdom of Saudi Arabia. The text is essentially declaratory in character. The solution was based on the proximity principle, Saudi Arabia being given the islet closer to the mainland and Bahrain the one closer to its own shores. The usual expansionist arguments of Bahrain were therefore totally disregarded.

### **C. Fasht Bu Saafa**

2.75 Fasht Bu Saafa is located at approximately 26°58' N - 50°23' E<sup>104</sup>. This feature was claimed by Bahrain during the negotiations with Saudi Arabia on the delimitation of their respective continental shelves, on the following grounds: erection of beacon lights, erection of markers, pearl fisheries and oil drilling by BAPCO.

2.76 Saudi Arabia, for its part, relied largely on the *proximity* principle, arguing that its sovereignty extended to the places in dispute lying nearer to its own shores than to Bahrain's. Saudi Arabia maintained with great tenacity all along its preference for attribution of islands or shoals to the State to whose shores they lay closer.

2.77 The final settlement reached by the Agreement of 22 February 1958 relied on the modified equidistance principle without taking into account the economic arguments advanced by Bahrain. Saudi Arabia accepted to share the revenues obtained by the Government in the area called the Fasht Bu Saafa hexagon, but it was specifically stated in Article 2 of the Agreement that: "It is understood that this shall not impair the right of sovereignty and administration of the Saudi Arabian Government in the above-mentioned area"<sup>105</sup>.

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1 See, for example, BM, paras. 23-24.

2 See, for example, BM, para. 342.

3 See, BM, para. 64.

4 See, A.M.A. Hakima, *History of Eastern Arabia, 1750-1800*, Beirut, 1965, QCM, Annex II.72, Vol. 2, p. 391; see, also, Z.M. Al Rashid, *Su'udi Relations with Eastern Arabia and 'Uman (1800-1871)*, London, 1981, QCM, Annex II.69, Vol. 2, p. 377, at p. 379.

5 See, R.H. Thomas (ed.), *Arabian Gulf Intelligence, Selections from the Records of the Bombay Government, New Series, No. XXIV, 1856*, QCM, Annex II.79, Vol. 2, p. 429.

6 See, J.B. Kelly, *Eastern Arabian Frontiers*, London, 1964, QCM, Annex II.73, Vol. 2, p. 395.

7 See, J.G. Lorimer, *Gazetteer of the Persian Gulf, Oman and Central Arabia*, 1908 and 1915, QM, Annex II.5, Vol. 3, pp. 249-250.

8 See, *ibid.*, p. 263.

9 See, QM, paras. 3.26, *et seq.*

10 See, Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 201.

11 See, *ibid.*, p. 207.

12 *Ibid.*

13 See, QM, paras. 5.15, *et seq.* and QM, Annexes II.30, Vol. 5, p. 91, and III.7 III.10, III.14 III.16 and III.19 III.20, Vol. 6, pp. 37, 41, 45, 51, 69, 75, 81, 93 and 99.

14 See, QM, paras. 3.43-3.44.

15 BM, para. 65; see, also, BM, Annex 66, Vol. 2, p. 279.

16 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 211.

17 See, paras. 2.28, *et seq.*, below.

18 See, paras. 2.30, *et seq.*, below.

19 See, QM, paras. 3.6, *et seq.*

20 For an account of the Persian claim, see the "Memorandum on the separate Claims of Turkey and Persia to Sovereignty over the Island of Bahrein" by E. Hertslet, which describes Bahrain as "a small group of islands, three in number", QCM, Annex II.4, Vol. 2, p. 13. See, also, the two Iranian maps depicting the extent of Bahrain, which are being deposited with the Registry, pursuant to Article 50, paragraph 2 of the Rules of Court.

21 R. Trench (ed.), *Gazetteer of Arabian Tribes*, Archive Editions, 1996, QCM, Annex II.80, Vol. 2, p. 433, at pp. 437-443.

22 *Ibid.*, at pp. 435-436.

23 ~~The earliest source of information on tribes in Qatar is to be found in Annex II.13 to Qatar's Memorial (Vol. 5, p. 5), which dates from 1638. In that document, the inhabitants of Zubarah are listed as the Naim, Musallam, Twar, Hawajer, Beduins, Lisaud, freemen and slaves. A further source is a letter of 1858 to Sheikh Zayed Bin Khalifah Al Bin Yas of Abu Dhabi signed by three chiefs of tribes in Qatar and their Sheikh, Mohamed Bin Thani, where it is indicated that Qatar extends in the south up to Al Sila and beyond for the distance of half a day's walk, and that the tribes living in Qatar included the Al Bin Hajer, Al Moslamani, Hassan Bin Bakheet, Al Mizaree, Al Rawashid, Al Maharbah, Hawamil, Mroor and Qamzan (QM, Annex II.18, Vol. 5, p. 37). Ten years later, the 13 September 1868 undertaking by various chiefs of Qatar to pay the Chief of Bahrain an annual sum of money for payment on to the Wahhabis, cited at page 55 of Bahrain's Memorial, refers to the Mahanda, Al Bu Aainen, Nayim, Al Bu Kuwara, Keleb, Sudan, Maadhid, Mussallam and Amamera tribes (BM, Annex 13, Vol. 2, p. 159). A report dated 16 August 1873 mentions the Chibisa, Maranareh, Saleh, Hamadal and Naim tribes, all of whom are said to be living in Zubarah (QCM, Annex II.2, Vol. 2, p. 5). In Lorimer's *Gazetteer* (QM, Annex II.4, Vol. 3, pp. 137-139), the tribes and communities mentioned as being in Qatar are as follows: Al-Bu-Ainain, Al-Bin-~~

Ali, Amamarah, Arabs of Najd, Baharinah, Baqaqalah, Dawasir, Hamaidat, Huwalah, Khalaifat, Kibisah, Al-Bu-Kawarah, Maadhid, Madhahakah, Mahandah, Mananaah, Al-Bin-Maqla, Al-Musallam, Negroes (free), Negroes (slaves, but not living in their masters' houses), Negroes (slaves, living with their owners), Persians, Sadah, Sudan, Sulutah, Bani Yas of the Al-Bu Falasah and Qubaisat sections. In the *Handbook of Arabia* of 1916 (QCM, Annex II.68, Vol. 2, p. 373), the population of Qatar was said to fall into some 25 groups of which the most numerous were as follows: Al bu 'Ainein, a clan of the Al Subaih sub-tribe of the Beni Khalid, Al Bin 'Ali, Huwalah, Khaleifat, Al Bu Kuwarah, Ma'adhid, Mahandah, Sulutah, negro slaves, free negroes, Arabs from Nejd, Baharinah, Persians, Beni Hajar, Ka'ban, Na'im, Al Murrah, Manasir and 'Ajman.

24 R.S. Zahlan, *The Creation of Qatar*, London, 1979, QCM, Annex II.82, Vol. 2, p. 449, at p. 452.

25 See, paras. 2.22, *et seq.*, below.

26 Zahlan, *op. cit.*, QCM, Annex II.82, Vol. 2, p. 449, at pp. 453-455.

27 Lorimer, *op. cit.*, QM, Annex II.3, Vol. 3, p. 102.

28 See, also, paras. 3.82, *et seq.*, below.

29 See, QM, para. 3.22 and QM, Annexes II.17 and II.18, Vol. 5, p. 33 and p. 37.

30 See, QM, paras. 3.19, *et seq.* and 3.30, *et seq.*

31 See, QM, para. 5.6; see, also, paras. 2.26 and 3.20, *et seq.*, below.

32 Zahlan, *op. cit.*, QCM, Annex II.82, Vol. 2, p. 449, at p. 461.

33 Bahrain asserts that the Al-Thani were of the Al bin Ali tribe (BM, para. 131) and that the Al bin Ali remained loyal subjects of the Al-Khalifah after helping them to conquer Bahrain, that however some of them fell out with the Ruler of Bahrain during a dynastic struggle, and at some point thereafter, the Al-Thani family began to exercise influence in Doha as its principal pearl merchants and tax collectors (BM, para. 132). In truth, the Al-Thani tribe is a branch of the Al-Maadid: "According to Lorimer ... he belonged to the Maadhid section of the Bani Tamim tribe consisting of the descendants of the eponymous Maadhid b. Musharraf, overlord of the Jabrin oasis in central Arabia" (A. de L. Rush, *Ruling Families of Arabia, Qatar: The Ruling Family of Al-Thani*, QCM, Annex II.77, Vol. 2, p. 421).

34 J.C. Wilkinson, *Arabia's Frontiers: The Story of Britain's Boundary Drawing in the Desert*, 1991, QCM, Annex II.81, Vol. 2, p. 445.

35 See, QM, Annexes II.17 and II.18, Vol. 5, p. 33 and p. 37.

36 W.G. Palgrave, *Narrative of a Year's Journey through Central and Eastern Arabia (1862-63)*, London, 1865, QCM, Annex II.75, Vol. 2, p. 413.

37 See, QM, paras. 3.30, *et seq.*

38 A. de L. Rush, *op. cit.*, QCM, Annex II.77, Vol. 2, p. 421, at p. 424; emphasis added; *see*, also, paras. 3.20, *et seq.*, below.

39 QM, Annex II.28, Vol. 5, p. 83.

40 *See*, QM, paras. 3.43, *et seq.*

41 ~~*See*, QM, paras. 5.15, *et seq.*~~

42 *See*, ~~*ibid.*~~, and paras. 2.8, *et seq.*, above.

43 *See*, paras. 2.8, *et seq.*, above, and 2.36, *et seq.*, ~~2.39, *et seq.*~~ and 3.40, *et seq.*, below.

44 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 210.

45 QCM, Annex II.3, Vol. 2, p. 11.

46 BM, Annex 20, Vol. 2, p. 174.

47 QCM, Annex II.1, Vol. 2, p. 1.

48 QCM, Annex II.8, Vol. 2, p. 35.

49 QCM, Annex II.7, Vol. 2, p. 27.

50 *See*, BM, para. 133.

51 Zahlan, *op. cit.*, QCM, Annex II.82, Vol. 2, pp. 449, at pp. 462-463.

52 QCM, Annex II.13, Vol. 2, p. 71.

53 Saldanha, *The Persian Gulf Précis*, QM, Annex II.8, Vol. 4, pp. 235-236.

54 *See*, QM, paras. 3.55, *et seq.* and paras. 5.42, *et seq.*

55 BM, para. 194.

56 *See*, paras. 3.40, *et seq.*, below.

57 BM, Annex 84, Vol. 3, p. 512.

58 *See*, BM, para. 221.

59 For a discussion of the 1916 Treaty, *see*, also, paras. 3.44-3.45, below.

60 ~~QM, Annexes II.21-II.24 and II.30-II.35, Vol. 5, pp. 51, 55, 59, 65, 91, 95, 101, 105, 109 and 113.~~

61 ~~QM, Annexes III.13, III.15, III.18 and III.21, Vol. 6, pp. 65, 75, 89 and 103.~~

- 62 ~~QM, Annex III.26, Vol. 6, p. 129.~~
- 63 ~~See, Map No. 1, facing this page. See, also, QM, Annex III.37, Vol. 6, p. 173.~~
- 64 ~~QM, Annexes III.36 and III.39-III.40, Vol. 6, pp. 169, 181 and 185.~~
- 65 ~~QM, Annexes III.82, Vol. 6, p. 421 and III.175, Vol. 7, p. 385.~~
- 66 Saldanha, *op. cit.*, QM, Annex II.7, Vol. 4, p. 59; *see*, also, para. 5.17 (1), below.
- 67 Saldanha, *op. cit.*, QM, Annex II.7, Vol. 4, p. 62; *see*, also, para. 5.17 (2), below.
- 68 Zahlan, *op. cit.*, QCM, Annex II.82, Vol. 2, p. 449, at pp. 465-466.
- 69 *See*, Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 242.
- 70 *See*, QCM, Annex II.15, Vol. 2, p. 83.
- 71 *See*, QCM, Annex II.16, Vol. 2, p. 93.
- 72 *See*, QCM, Annex II.17, Vol. 2, p. 103.
- 73 *See*, QCM, Annex II.18, Vol. 2, p. 113.
- 74 Saldanha, *op. cit.*, QM, Annex II.8, Vol. 4, p. 197, and QCM, Annex II.9, Vol. 2, p. 43.
- 75 QCM, Annexes II.9 and II.14, Vol. 2, p. 43 and p. 75.
- 76 QCM, Annex II.11, Vol. 2, p. 59; *see*, also, QCM, Annex II.10, Vol. 2, p. 55.
- 77 Saldanha, *op. cit.*, QM, Annex II.8, Vol. 4, p. 224.
- 78 Zahlan, *op. cit.*, QCM, Annex II.82, Vol. 2, p. 449, at p. 469.
- 79 *See*, QM, para. 3.24 and Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, pp. 247-255; *see*, also, paras. 2.6 and 2.12, above.
- 80 *See*, QM, para. 3.25 and Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, pp. 255-266.
- 81 *See*, QM, para. 3.25 and Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, pp. 268-273.
- 82 *See*, QM, para. 3.26 and Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, pp. 206 and 276-286.
- 83 BM, para. 121.
- 84 *See*, paras. 2.7 and 2.14, above.
- 85 *See*, QM, paras. 3.19, *et seq.*

86 A.H. Cordesman, *Bahrain, Oman, Qatar and the U.A.E. Challenges of Security*, Boulder, 1997, QCM, Annex II.70, Vol. 2, p. 381.

87 *See*, para. 2.26, above.

88 *See*, BM, para. 127.

89 *See*, paras. 3.20, *et seq.*, below.

90 *See*, paras. 5.14, *et seq.*, below.

91 *See*, para. 5.17 (2), below.

92 K. Ferdinand, *Bedouins of Qatar*, London, 1993, QCM, Annex II.71, Vol. 2, p. 385.

93 Cordesman, *op. cit.*, QCM, Annex II.70, Vol. 2, p. 381.

94 F.I. Khuri, *Tribe and State in Bahrain*, Chicago, 1980, QCM, Annex II.74, Vol. 2, p. 399, at p. 401.

95 *See, ibid.*, p. 402.

96 *See, ibid.*, p. 403.

97 *See, ibid.*, p. 404.

98 *See, ibid.*, p. 405.

99 *See, ibid.*, p. 411.

100 *Ibid.*, pp. 406-407 and 408-410. These comments appear to apply to a period up until 1923.

101 *See*, also, QCM, Appendix 2, Vol. 5, p. 145. These features are shown on *Map No. 2*, facing this page.

102 QM, Annex III.58, Vol. 6, p. 273.

103 BM, paras. 426, *et seq.*

104 *See*, QCM, Annex II.76, Vol. 2, p. 417.

105 QM, Annex IV.262, Vol. 12, p. 95.

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### PART III

# THE HAWAR ISLANDS AND OTHER TERRITORIAL QUESTIONS

## CHAPTER III

### THE HAWAR ISLANDS

#### Section 1. Introduction

3.1 Qatar has already shown in its Memorial that it has original title to the Hawar islands, and has described the various events indicating clearly consolidation of this title through its recognition ~~and confirmation by countries in the region including~~ Bahrain itself, by the Ottomans, and also by the British, certainly up to 1936 when Bahrain made a claim to the Hawar islands soon after oil became a significant feature in the Gulf area<sup>1</sup>. Qatar has also shown how the British gave unjustified credence to this claim, and has set out compelling reasons why the British decision of 11 July 1939 is fundamentally flawed<sup>2</sup>.

3.2 Bahrain, however, as shown above<sup>3</sup>, has chosen to build up a fanciful image of the Bahrain ruling family exercising "authority and control" not only over the Bahrain islands but over the entire Qatar peninsula, its adjoining islands as well as "all the waters" between the main Bahrain island to the west and the Zubarah coast and Hawar islands to the east<sup>4</sup>. Bahrain further claims that even after 1871, when the Ottomans arrived in Qatar, the authority of the Al-Khalifah Chiefs receded only from around Doha on the eastern coast of Qatar but not from elsewhere<sup>5</sup>. Bahrain in fact carries these fanciful assertions to the extreme in claiming that despite the provisions of the Agreements of 1868, of the Anglo-Ottoman Convention of 1913 and the British-Qatar Treaty of 1916, there was no effective political entity called "Qatar"<sup>6</sup>.

3.3 With regard to the Hawar islands, Bahrain claims to show that its title to these islands was confirmed by the British "adjudication" of 1939, which it contends is *res judicata*. It further claims that in any event, it has continuously exercised more than the appropriate level of occupation and administration required by international law<sup>7</sup>.

3.4 Qatar in its Memorial<sup>8</sup> has already given compelling reasons for its submission that the British decision of July 1939 to the effect that the Hawar islands belonged to Bahrain is wrong and must be disregarded. It will show later in this chapter how the plea of *res judicata* is unavailable to Bahrain<sup>9</sup>.

3.5 Bahrain's other assertion in support of its alleged title - that it has exercised "control and authority" over the Qatar peninsula and the adjoining islands - is a remarkable and deliberate attempt at distortion of the historical facts and is dealt with more fully elsewhere in this Counter-Memorial<sup>10</sup>.

3.6 Qatar has shown that the Al-Thani Chiefs had already established their influence and authority in Qatar at least by the middle of the 19th century. After a flagrant breach of the maritime peace following upon Bahrain's attempt to suppress by force an agitation in Qatar in 1867, the Al-Khalifah Chief of Bahrain and the Al-Thani Chief of Qatar were prevailed upon to enter into separate Agreements with the British in 1868, undertaking to maintain the maritime peace. Qatar will elaborate and explain in the next Section some of the well documented historical facts and events leading up to the Agreements of 1868, the scope of these Agreements and their significance for Qatar's title to the peninsula and the Hawar islands<sup>11</sup>. It will be shown that there is no substance in Bahrain's contention that the

formalisation, at the time of the 1868 Agreements, of the arrangements for the payment of tribute by the Qatar Chiefs to the Chief of Bahrain confirmed him as the sovereign authority on the peninsula; the proposed payments had no effect on Qatar's title since they were for onward transmission to the Wahhabi Amir and were in any event stopped altogether after 1871. The significance of the Anglo-Ottoman Convention of 1913 and the scope and intent of some of the provisions of the Treaty of 1916 between Qatar and Britain as well as some other facts will also be considered to show how Qatar's title to the peninsula and its adjoining islands has been sustained over a long period<sup>12</sup>.

## **Section 2. Qatari title to the Hawar islands prior to 1936 and its recognition by third States**

3.7 The Court will recollect that Qatar has submitted in its Memorial detailed evidence of the territorial integrity of Qatar and its long-standing sovereignty over the Hawar islands<sup>13</sup>. Such evidence includes, apart from the Agreements of 1868:

- ~~—numerous Ottoman documents and maps showing the extent of the respective territories of Qatar and Bahrain that clearly show the Hawar islands as part of Qatar,~~
- ~~—express recognition of Qatar's title to the Hawar islands by local rulers including the Rulers of Abu Dhabi, Dubai and Saudi Arabia,~~
- ~~—similar recognition by Bahrain itself (with its Ruler seeking Qatari permission for Bahrainis to enter Hawar);~~
- evidence from British archives and documents including Lorimer's description of the Hawar islands as part of Qatar,
- recognition of the territories of Qatar (obviously understood to include the Hawar islands) by the Anglo-Ottoman Convention of 1913,
- the description of the Hawar islands as part of Qatar in the British Admiralty Survey of 1915,
- the British-Qatar Treaty of 1916,
- numerous maps from renowned publishing houses in Europe similarly showing the Hawar islands as part of Qatar,
- and a number of other documents in the British records which show that the Hawar islands were always regarded by the British as part of Qatar right up until 1936.

3.8 There is additional evidence showing the Hawar islands as part of Qatar in a map compiled after a geological survey of Qatar was carried out at the instance of the Anglo-Persian Oil Company (APOC) in 1933<sup>14</sup>.

3.9 An aerial reconnaissance by the Royal Air Force prior to the 1935 British assurance of protection of Qatar territories against aggression from land is further evidence of this fact. It is of particular significance that not only did the survey report cover Hawar and have a photograph of Hawar attached to it<sup>15</sup>, but that the British Political Agent in Bahrain, Lt. Col.

Loch, accompanied the RAF team and in his letter dated 12 May 1934<sup>16</sup> reporting on the reconnaissance of Qatar spoke about the flight having "proceeded over Hawar Island..."<sup>17</sup>.

3.10 As indicated above, Bahrain has sought to challenge Qatar's title and assert its ownership over the Hawar islands on two main grounds. Bahrain claims, firstly, that "the historical genesis of Bahrain's title to the Hawar Islands is Bahrain's original dominance and authority over all the territories in the Gulf of Bahrain *and the Qatar peninsula*"<sup>18</sup>. It attempts to demonstrate on the other hand that the Al-Thani Chiefs of Qatar had only a restricted area of influence on the south-east coast of Qatar peninsula in and around Doha and that the land and the waters as well as islands to the west of that area were somehow under Bahrain's "authority and control"; and that Bahrain's authority met no opposition "whatsoever in the Qatar peninsula"<sup>19</sup>. Bahrain contends, secondly, that the Dowasir tribe who were "subjects" of the Rulers of Bahrain had occupied the Hawar islands "on behalf of the Ruler of Bahrain" for some 200 years and that this evidenced Bahrain's sovereignty over the island<sup>20</sup>. While this contention and certain other grounds mentioned by Bahrain are dealt with later in this Chapter, it would be useful to begin by showing the lack of any historical or other factual or legal basis for the first main contention put forward to support Bahrain's claim to the Hawar islands based on its alleged "dominance and authority" over the whole of the Qatar peninsula. Qatar will show that there has in fact been no such "dominance and authority" and that any political connection between Bahrain and the peninsula as well as its adjoining islands ended well over a century ago.

3.11 Qatar has shown in its Memorial the limited nature of Utubi presence on the Qatar peninsula (near Zubarah) from 1766 to 1783 when the Al-Khalifah moved their headquarters to Bahrain<sup>21</sup>. There is hardly any evidence of the involvement of the Al-Khalifah Chiefs in the territories of Qatar thereafter except for occasions when some members of the Al-Khalifah family took refuge in the vicinity of Zubarah following internecine conflicts<sup>22</sup>. As noted in Chapter II above, by 1809 the Wahhabis had brought Qatar under their rule and Bahrain itself succumbed to the powerful Wahhabi influence which was then directed from Zubarah in Qatar<sup>23</sup>; and in 1810 the Wahhabi Governorship of Qatif, Qatar and Bahrain was instituted, with its headquarters in Bahrain. As shown above, Wahhabi power and influence in the area continued intermittently until 1860<sup>24</sup>. Furthermore, in the years following 1811, Rahmah bin Jabr (whose hatred for the Utub of Bahrain was well known), in association with others, including at times the Ruler of Muscat, engaged in various skirmishes with the Al-Khalifah Sheikhs mainly from Qatar where "to the present day the western and northern coasts of Qatar are dotted with the remains of forts attributed to Rahmah"<sup>25</sup>.

3.12 When the Bahrain Sheikhs signed the General Treaty of Peace of 1820, the British appeared to think that the provisions of the Treaty also applied to Qatar<sup>26</sup>. This in fact was found not to be so. The provisions of the Treaty required ships belonging to the friendly Arab signatories to fly a prescribed flag and carry a register signed by the Chief (Articles 3 and 5), which had to be produced if a British vessel met them. However, upon a visit to Al Bida in 1823, the British Political Resident found that "the people seemed to know very little of the conditions of the Treaty, and had neither flag nor register" for their boats<sup>27</sup>. In fact, Bahrain, at that period, far from being capable of exercising authority over extensive territories, was itself described as a very weak and strife-torn entity<sup>28</sup>.

3.13 Accordingly, Bahrain was itself constantly threatened from within, or under the control or influence of, or threatened by, other powers in the area.

3.14 It is instructive to note the view expressed by the First Assistant Resident in the Persian Gulf in 1873, referring obviously to the period prior to 1868, when he stated:

"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>29</sup>.

Lorimer also states that the Sheikh of Bahrain's "suzerainty" over Qatar by the middle of the 19<sup>th</sup> century was *more apparent than real*<sup>30</sup>.

3.15 Moreover, it is clear that around this time, such activities in Qatar as the Al-Khalifah were able to engage in were of an oppressive nature and were leading to protests and agitation. ~~Mohamed bin Thani, in his capacity as Chief of the people of Qatar, in a communication of 7 November 1854 to Imam Sayed Saeed, stated *inter alia*:~~

~~"We inform you, may your honour be sustained, that Al Bida is all right, through your prayers; and that the Al Khalifah have been oppressing people a lot. You may not care about the people of a country if it does not belong to you. We are awaiting release from grief through Allah's assistance and yours"<sup>31</sup>.~~

3.16 As already described in Qatar's Memorial<sup>32</sup> and also hereafter, Bahrain's activities in the area led a few years later to the British efforts to discipline the Bahraini Sheikhs through the signing of "the Friendly Convention" between them and the British Political Resident on 31 May 1861. As has also been shown, friction between Bahrain and Qatar had become endemic in the first half of the 19th century and culminated in Bahraini attacks on Qatar in 1867 which were regarded by the British as a violation of the 1861 Convention<sup>33</sup>. It is to the background to the events of 1867 and 1868, and the events themselves, that this narrative will now turn to show their particular significance for the territorial integrity of Qatar and its title to the entire peninsula as well as the adjoining islands.

#### **A. Events leading up to the Agreements of 1868 and British recognition of the separate identities of Qatar and Bahrain**

3.17 It was following the conclusion of the 1820 Treaty that the British, going beyond their avowed intent of simply protecting maritime trade, began to take a particular interest in Bahrain and to defend it against claims by foreign powers, notably Egypt in 1839, Persia in 1843, the Ottomans in 1847 and the Wahhabis in 1853<sup>34</sup>.

3.18 In its Memorial Bahrain has referred only in passing to the Friendly Convention of 1861 between Britain and the then Ruler of Bahrain, Sheikh Mohamed bin Khalifah<sup>35</sup>. Yet this Convention is a significant part of the background. It was concluded as a result of Bahrain's blockade of Wahhabi ports in that year, which Britain viewed as a violation by Bahrain of its treaty obligations to keep the maritime peace. By this Convention, the Ruler of Bahrain bound himself, his heirs and successors to abstain from all maritime aggressions of every description. In exchange, he was promised British support in the maintenance of the security of his own possessions against similar aggressions by the Chiefs and tribes of the Gulf. In particular, the Ruler undertook, in the event of aggression against himself, his territories or subjects, that no act of aggression or retaliation would be committed at sea on other tribes by

Bahrainis or in the name of Bahrain, without the consent of the Resident or the British Government. He also undertook to afford full redress for all maritime offences which could be charged against his subjects or himself.

3.19 The 1861 Convention is thus further evidence of Britain's growing interest and intervention in the activities of Bahrain. In the present case it is particularly significant, since its violation by Bahrain was to lead to the conclusion of the various 1868 Agreements, whereby the British first formally recognised the separate identity of Qatar under the rule of Mohamed bin Thani.

## **B. Events of 1867 and 1868**

3.20 Bahrain's account in its Memorial of the events of 1867 and 1868, while acknowledging that the Al-Thani family had attained predominant influence in Qatar by 1868<sup>36</sup>, attempts to show that the entire episode ended in the British taking steps to discipline *the Al-Thani and Qatar* rather than Bahrain and in fact confirmed the Ruler of Bahrain as the sovereign authority on the peninsula<sup>37</sup>. It will now be shown, by reference to contemporaneous documentation, that the opposite was in fact the case.

3.21 It is particularly revealing to begin by referring to the letter of 7 December 1867 from Lt. Col. Lewis Pelly, British Political Resident in the Gulf, in which he reports the 1867 Bahraini attacks on Qatar to the Government of Bombay:

"It appears that the Chief of the Bahrain Islands, *claiming sovereignty over the region of Gattar* on the neighbouring Main Land of Arabia, plotted an attack on the inhabitants of that region; and secured the aid of the Abuthaby Chief in making the attack... The combined Chiefs then plundered the towns of al-Wakrah and Al Biddah..."<sup>38</sup>.

3.22 The British regarded this outrage as a violation of the 1861 Convention and a challenge to their effectiveness in maintaining maritime peace in the Gulf area<sup>39</sup>. In addition, there was regional condemnation of Bahrain's action. Pelly, writing again on 4 April 1868 to the Government of Bombay, stated:

"3. The recent proceedings of the Chief of Bahrain in regard to Kuttur have already been reported and since that date both the Sultan of Muscat and the Wahabee Lieutenant have complained to me against this flagrant breach of the peace at sea.

4. Government will observe that the writing of *the Bahrain Chief* is remarkably polite, but his actions, as enumerated in a long series of reports from my predecessors and self show that he *is one of the most troublesome and least reliable subscribers to the Maritime Truce*"<sup>40</sup>.

3.23 Another communication of 23 April 1868 from Capt. A. Cotton Way, First Assistant Resident in the Persian Gulf, to the Resident, Lt. Col. Lewis Pelly, made a fuller report of the 1867 outrage and recorded, *inter alia*:

"4. One Ali bin Shamir *al Naimi* of the Bedouins of Guttar having been seized and sent to Bahrein by Sheikh Ahmed bin Mahomed bin Sulman, the representative of the Chief of Bahrein on the Guttar coast for going to his tribes, *the naims of Wakra*, the naims and the people of Biddah, Doha and Dougha [Doughaih?] combined and demanded his release. This demand was refused, and they then determined to turn Sheikh Ahmed out of Wakra"<sup>41</sup>.

3.24 Sheikh Ahmed, hearing of their determination, fled Qatar and reported what had occurred to the Chief of Bahrain, who then invited Sheikh Jassim bin Mohamed of Qatar to Bahrain for a meeting but on his arrival imprisoned him. There then followed the attacks by Bahrain across the sea (with help from Abu Dhabi) during which the towns of Wakra, Biddah, Doha and Dougha were given up to plunder and the inhabitants of five tribes were scattered<sup>42</sup>. However in the following year (1868), the Qatar tribes organised a retaliatory attack, and nearly succeeded in surprising the island of Bahrain.

3.25 Subsequently, peace was restored when the Bahrain Sheikh's son who had been captured by the Qataris was released after the Bahrain Sheikh undertook "to refrain for the future from injuring Guttur". Reporting to the Government of Bombay on 22 June 1868, the Political Resident observed:

*"The root and promoter of these disturbances is Shaikh Mohammed bin Khalifah, the Head Shaikh or Chief of Bahrain, whose proceedings have formed the subject of reiterated complaint from successive British Residents during the past quarter of a century. On this subject, I would refer to my letters now noted, and almost endless previous correspondence scattered through the records of this office..."<sup>43</sup>.*

3.26 Since these incidents were viewed as a serious challenge to the British ability to maintain the maritime peace, C. M. Aitchison, then Officiating Secretary to the Government of India, stated in a telegram to the Government of Bombay on behalf of the Viceroy and Governor-General in Council that:

"It is not a matter of surprise that... the Guttur tribes should have risen and retaliated on Bahrain. Our interference to prevent aggressions, such as those perpetrated by Bahrain and Aboothabee, is not a matter of policy merely but of express obligation. The British Government is bound, on information of an act of aggression by sea, to forthwith take the necessary steps for obtaining reparation for the injury inflicted..."<sup>44</sup>.

3.27 After being duly instructed to take strong action, on 2 September 1868 Pelly served a notice on Mohamed bin Khalifah, Sheikh of Bahrain, and while demanding compensation of 300,000 dollars for Qatari losses and compliance with other terms of the notice, stated *inter alia*:

"It is with great regret that the Viceroy of India finds you increasingly determined and on a large scale to disturb the Maritime peace of the Gulf in violation of the written engagements into which you have entered.

... You proceeded with an armed force and plundered and devastated the Guttur towns, carrying off with you the principal Chief of Guttur. A retaliatory attack being made you fought at sea and then again despatched your brother to attack the Guttur coast.

...

It is my painful duty to add that if you refuse or hesitate to comply with these demands they will be enforced..."<sup>45</sup>.

3.28 It was against this background that Pelly thereafter proceeded to Bahrain and Qatar and secured acceptance of the Agreements of September 1868 by Chief Ali bin Khalifah

(recognised as the new Chief of Bahrain in place of Mohamed bin Khalifah who was thereby deposed) and Mohamed bin Thani, "the most influential man in the whole promontory"<sup>46</sup>, requiring Bahrain to pay compensation and both Chiefs to maintain the maritime peace, thus effectively prohibiting them from interfering with each other's territories across the sea that separates these territories. Pelly also reported that by way of further action against the Chief of Bahrain, they had "destroyed both fort and cannon and burnt [his] three war crafts, lying immediately under the walls of the Fort"<sup>47</sup>.

3.29 As for the agreements themselves, while there were four of them in total, Bahrain has chosen to concentrate on one of the least significant - the undertaking of 13 September 1868<sup>48</sup> - while hardly mentioning the main Agreements signed on 6 September<sup>49</sup> and 12 September 1868<sup>50</sup> respectively by Sheikh Ali bin Khalifah of Bahrain and Sheikh Mohamed bin Thani of Qatar and failing even to exhibit the Agreement of 6 September signed by the Sheikh of Bahrain<sup>51</sup>. Bahrain appears to hope that in doing so, it will convince the Court that the whole purpose of the British in 1868 was, to use Bahrain's words, to compel the rebellious tribal chiefs "to return to the Bahraini fold" and to "formally express their recognition of the authority of the Ruler of Bahrain"<sup>52</sup>. But it will be seen from the account given above that it was *Bahrain* that was disciplined by the British action. Furthermore, the British perception of these events was obvious; as a result of the Agreements of 1868, the territories of Qatar and Bahrain were to remain separated without interference from one or the other and their integrity respected. The Political Resident's letter of 11 September 1868 to Mohamed bin Thani requests him to "continue towards Sheikh Ali bin Khalifeh the peaceful relations formerly subsisting between Bahrain and Guttar"<sup>53</sup>. Not only are Bahrain and Qatar distinguished here as separate entities, but there is no hint of any subordination of the latter to the former or *vice versa*. Similarly, the Agreement itself neither states nor implies any acknowledgment by Mohamed bin Thani of any Bahraini authority either over himself or over any part of the territory of Qatar. On the contrary, the provisions of the Agreement which, for obvious reasons, are not mentioned by Bahrain show that Mohamed bin Thani was recognised as being on an equal footing with the Chief of Bahrain, and not as a subordinate in a hierarchical relationship.

3.30 Some fifty years later, Lorimer, writing his well-known account of these events also confirmed this position and stated:

"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>54</sup>

In fact, in the same work, Lorimer describes the boundaries of Qatar as follows:

"*Boundaries.* - On the east, north and west Qatar is surrounded by the sea. The southern boundary is somewhat indeterminate..."<sup>55</sup>.

Similarly, in a report of 1905, Captain Prideaux noted:

"... we recognize that our interests in the Katr Peninsula are purely confined to the maintenance of order along its coasts and on the adjacent seas..."<sup>56</sup>.

3.31 It is accordingly Qatar's submission that one of the major objects of the Agreements of 1868 was to protect the territorial integrity of Qatar and its coasts, including its adjoining islands, against attacks from across the sea. The British action in enforcing separation of the two entities, together with the written engagements in 1868 by the Chiefs of Qatar and Bahrain not to commit a breach of the maritime peace also amounted to British recognition of the separate identities and the integrity of the territories of Qatar and Bahrain<sup>57</sup>. As this recognition was in the context of the maintenance of maritime peace, it clearly covered the coasts and the islands adjoining mainland Qatar and therefore the Hawar islands, most of which lie within Qatar's territorial waters. A contrary view would deprive the 1868 Agreements of any meaning or purpose.

3.32 This British recognition was reiterated on numerous occasions over the next seventy years or so, in the context of the repeated British denials of Bahrain's alleged claims to Zubarah on the mainland of Qatar. The British therefore refused to allow any Bahraini interference across the sea on the mainland and in fact made such non-interference a condition for British protection of Bahrain which the Ruler expressly accepted<sup>58</sup>.

3.33 A final word must be said about Bahrain's insistence that the 1868 Agreements did not constitute treaties between Britain and sovereign political entities<sup>59</sup>. Whatever Bahrain might argue with respect to the lack of formalities, it is clear that these Agreements - at least those of 6 and 12 September with Ali bin Khalifah and Mohamed bin Thani, respectively, and that of 16 September with the Ruler of Abu Dhabi - were considered by all concerned as binding treaties. Thus, not only were they included by Aitchison in his *Collection of Treaties, Engagements and Sanads*<sup>60</sup>, published under the authority of the British Government of India, but the Agreement of 12 September 1868 was confirmed by the Treaty signed in 1916 between the British Government and the Ruler of Qatar<sup>61</sup>.

### **C. Payment of "tribute"**

3.34 Before leaving the events of 1868 and British recognition of the separate identities of Qatar and Bahrain, it would be appropriate to deal here with Bahrain's contention that the formalisation in September 1868 of the tribute payable by the tribes of the Qatar peninsula to the Chief of Bahrain confirmed him as the sovereign authority on the peninsula. This contention is clearly wrong, having regard to the content of the two main Agreements signed almost simultaneously between the British and Ali bin Khalifah and Mohamed bin Thani, respectively. In fact the 13 September undertaking is ancillary to those Agreements and, while it contemplated the payment of certain sums of money to the Chief of Bahrain by Mohamed bin Thani on behalf of Qatari tribes, it had no effect on the independence of Qatar vis-à-vis Bahrain. The significance of this so-called formalisation of the tribute payable to the Chief of Bahrain came up for consideration upon the arrival of the Ottomans in Qatar in 1871, *i.e.* 3 years after the 1868 Agreements, when Ibn Saud appears to have demanded these payments from the Ottomans who in turn addressed an inquiry in this regard to the British. In dealing with the Turkish inquiry, the Political Resident, Colonel Pelly, referring to the events of 1867 and 1868, informed the Government of Bombay that at the time:

"Government, as Arbitrators of the Maritime Peace, intervened; and in settling affairs, arranged that, in view to preventing collision between Guttur and Bahrain, and in view to further precluding the possibility of future uncertainty as to whether the Annual Tribute falling on Guttur had or had not been duly paid - such Tribute should be paid through the Residency.

7. In the present year, however, and having regard to the distracted condition of Guttur consequent on the Turkish Invasion of the Arab Coast, I refrained from demanding the Tribute.

8. Had I demanded and received it - It would have been handed over by this Residency to the Chief of Bahrain who would have transmitted it as a portion of the Tribute which he pays to whomever he may acknowledge as Imam of the Wahabees..."<sup>62</sup>.

3.35 Based on the above, in a report of 28 October 1871 from the Political Department to C.M. Aitchison, Secretary to the Government of India, Foreign Department, it was stated *inter alia*:

"... 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>63</sup>.

3.36 These documents show the true nature of the "tribute" payable. It will be apparent that the arrangement for the payment of the tribute by the tribes of Qatar in 1868 to the Chief of Bahrain for onward transmission to the Wahhabi Amir could not and did not involve any question of recognition of Bahraini sovereignty over Qatar or, for that matter, of the Wahhabi Amir's sovereignty over either Bahrain or Qatar.

3.37 Despite the position described above, the issue of tribute was sought to be revived by the Ruler of Bahrain at the time of the British negotiations with the Ottomans in 1913. Bahrain claims that when the 1913 Anglo-Ottoman Convention (referred to below) was being negotiated:

"the Ruler of Bahrain reopened with Britain the question of his right to levy tribute from 'Qatar' in accordance with the terms of the 1868 document..."

but goes on to state:

"... There is no record of Britain's ultimate view of the matter..."<sup>64</sup>.

3.38 In fact Bahrain should have been aware that the Government of India gave the following instructions to the Political Resident on 31 July 1913:

"I am directed to invite a reference to your telegram... in which you report that the Shaikh of Bahrain is contemplating the possibility of reviving his claim to levy tribute on the Shaikhs of El Katar.

2. This claim which was previously only exercised for two years and has not been enforced since 1870, in view of article 10 of the draft Anglo-Turkish Convention and in particular of the following sentence: - 'Le Gouvernement de sa Majesté Britannique déclare qu'il ne permettra pas au cheikh de Bahreine de s'immiscer dans les affaires intérieures d'El Katr', is one which is clearly inadmissible.

3. I am to request therefore that you will firmly resist any such interference should it be attempted"<sup>65</sup>.

3.39 The documents quoted above thus clearly demonstrate that the payment of tribute carried no implication that Bahrain had sovereignty over any part of Qatar.

#### **D. Anglo-Ottoman Convention of 1913**

3.40 Bahrain's treatment of the Anglo-Ottoman Convention of 1913<sup>66</sup> is similar to its treatment of the 1868 Agreements. Here again, Bahrain practically ignores the main text of the Convention, which it dismisses as an unratified treaty, only to concentrate on an ancillary document, the secret declaration whereby the Ottomans undertook to pay £1000 to the Ruler of Bahrain in compensation for his renunciation of all claim to Zakhnuniya<sup>67</sup>. Of the substance of the Convention itself, all Bahrain can say is 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>68</sup>.

3.41 The historical facts show that the "Ottoman province of 'Qatr'" encompassed much more than just "Doha and its environs"<sup>69</sup>. That the Anglo-Ottoman negotiations concerned the whole peninsula is also evident from the text of the Convention itself which, even though unratified, is nevertheless of considerable evidentiary value. In fact the artificiality of Bahrain's continued insistence on the alleged limited extent of Al-Thani authority becomes ever more evident as one reads the Convention. Article 11 was also mentioned in the Anglo-Turkish Treaty of 1914 which was ratified<sup>70</sup>, and contains no fewer than three references to the *peninsula* of al-Qatar. It is therefore quite clear that what was at stake here was the whole peninsula, without excluding the adjoining Hawar islands. It may be noted that Article 11 expressly recognises the continuity of Al-Thani rule over the whole peninsula when it provides that "the peninsula will be governed as in the past by the shaykh Jasim-bin-Sami [*sic*] and his successors". Finally, it may also be noted that the Ruler of Bahrain was to be prevented from interfering in the "internal affairs of al-Qatar", which in the context can only be understood to mean that he was to be excluded from the affairs of the entire peninsula including its coasts.

3.42 The Court will recollect that the British Political Agent in Bahrain, Major Prideaux, had visited Zakhnuniya and the Hawar islands in March 1909 when there was some apprehension as to Ottoman designs with respect to these islands. Major Prideaux was anxious that the Ruler of Bahrain should lay claim to both Zakhnuniya and the Hawar islands to enable the British to counter the Ottoman designs. However, the Ruler of Bahrain immediately thereafter made a claim in writing to the island of Zakhnuniya but not to the Hawar islands<sup>71</sup>. It was for this reason that four years later, Article 12 of the Anglo-Ottoman Convention of 1913 made a special provision to the effect that the inhabitants of Bahrain would be allowed to visit Zakhnuniya for fishing purposes during the winter, and Bahrain renounced any other claims to that island against a payment made to it by the Ottomans<sup>72</sup>. At the same time, in terms of Article 13, the British secured renunciation of all Ottoman claims to the islands of Bahrain including the two islets of Lubainah al-Saghirah and Lubainah al-Kabirah as well as Ottoman recognition of the independence of Bahrain. The British Government for its part also declared that it had "no intention of annexing the islands of Bahrayn to its territories"<sup>73</sup>. However, while such specific provisions were made regarding Bahrain and the islands it claimed, no reference or provision was made in respect of any Bahraini claim or potential claim to the Hawar islands<sup>74</sup>. This was obviously because the Hawar islands were recognised and treated

as being part of the territories of Qatar in which the British undertook under Article 11 of the Convention not to allow any "interference of the shaykh of Bahrayn".

3.43 There is other clear evidence demonstrating that the British regarded the 1913 Convention as reinforcing the independence and integrity of the territories of Qatar. This is apparent from the British attitude and action following the death of Sheikh Jassim in 1913. When the Viceroy communicated to the India Office news of the death of Sheikh Jassim on 17 July<sup>75</sup>, the India Office proposed to the Foreign Office that the Political Resident (Cox) should be given the following instructions:

"the new Sheikh &, if necessary, Bin Saud, sd. be informed that H.M.G. will allow no outside interference in the affairs of Katr. It sd. be made clear to the latter that any attempt to interfere will be forcibly resisted, while the former might be told that he has nothing to fear from the Turks"<sup>76</sup>.

This proposal was clearly based upon the policy recorded in a Minute of the India Office of 12 August referring to the death of Sheikh Jassim and the "possibility that the Peninsula will be occupied by Bin Saud" stating, *inter alia*:

"This must be nipped in the bud. We are bound by our agreement not to allow the Sheikh of Bahrein to annex El Katr - and *a fortiori* not Bin Saud, a Turkish rebel. Moreover we have not succeeded in getting the Turks out of El Katr (on paper, at all events) for the sole purpose of letting some one else in, without our permission"<sup>77</sup>.

Again, after Bin Saud had occupied Hasa and sought assurances from the British of continuing good relations<sup>78</sup>, the Viceroy advised London in his communication of 5 September 1913, that he had authorised Cox to reply to Bin Saud, *inter alia*, as follows:

"Meanwhile I have my Government's authority to assure you that, provided you undertake on your part to abstain from all action calculated to disturb the *status quo*, or to create unrest amongst Arab principalities whose rulers are in relations with His Majesty's Government, including principality of Qatr, independence of which under the government of the late Sheikh Jasim and his successors of the Bin Thani has been recently recognised by British and Turkish Governments, the British Government will continue to maintain friendly relations which have been sustained in the past"<sup>79</sup>.

### **E. British-Qatar Treaty of 3 November 1916**

3.44 Bahrain contends that there is nothing to indicate that for the purposes of the 1916 British-Qatar Treaty the entire peninsula was regarded as part of Al-Thani territories<sup>80</sup>; it further contends that the Ruler of Bahrain continued to exercise authority over the Zubarah region<sup>81</sup>. Bahrain thus takes the position that part of the peninsula (and the adjoining Hawar islands) continued to remain under its authority. That this contention is wholly without substance will be apparent from the following:

(1) A particularly striking example of Bahrain's efforts to distort the presentation of historical facts by using selective quotations and deliberately ignoring other materials is the reference to certain events of 1903-04 when the British were considering whether it would be appropriate to offer protection to the Al-Thani Sheikhs in return for making them responsible for maintaining peace amongst the inhabitants of Qatar and preventing any piracies off the Qatari

coast. Bahrain reproduces a passage recording the opinion of one British official (Mr. Gaskin) to the effect that he "thought the influence of the Thani family was likely to decrease in Katar..."<sup>82</sup> but neglects to point out the opinion of his superior, Colonel Kemball, on the next page to the effect that he was "inclined to doubt if it is the case that the influence of the Thani family in Katar is rapidly waning..."<sup>83</sup>. Bahrain also fails to cite the formal view expressed to the Foreign Office in March 1904 by the Government of India that the Al-Thani Ruler's "authority is sufficiently established among the tribes to justify the conclusion of an Agreement with him, should it be thought advisable on grounds of policy"<sup>84</sup>.

It is also of interest to note that in his historical account of Qatar, Lorimer observes:

"In November 1905, through a visit by Captain Prideaux, Political Agent in Bahrain, much light was cast upon the administrative position in Qatar. It appeared that Shaikh Jasim, though for five or six years he had been living in retirement at Lusail and had nominally abdicated both the Qaim-Maqamship and the chiefship, was still in reality ruler of Dohah and all its dependencies, and that nothing of importance was done in Qatar without his being consulted"<sup>85</sup>.

(2) Article 11 of the Anglo-Ottoman Convention of 1913 which provided that the "peninsula" of Qatar would "be governed as in the past by shaykh Jasim-bin-Sami [*sic*] and his successors"<sup>86</sup> clearly records and is evidence of the British understanding that the Al-Thani ruled the entire peninsula and its adjoining islands (as no exceptions were made).

(3) Before entering into the 1916 Treaty, the British undertook a careful examination to assure themselves that they would be entering into an arrangement with an authority with whom an effective Treaty could be entered into. Thus, in a communication of 22 August 1914 from Major Knox (the officiating Political Resident) to the Government of India, it was stated:

"With reference to your telegram No. 436-S., dated 18th July 1914, regarding Qatar, I have the honour to state that reports from the Political Agent, Bahrain, confirm my first impression that there are no Shaikhs except the Al Thani family with whom it would be worthwhile concluding a treaty"<sup>87</sup>.

(4) By then, the British had repeatedly refused to recognise any Bahraini rights over any part of the Qatar peninsula and had in fact made it a condition of providing British protection for Bahrain that the Ruler of Bahrain must refrain from any interference in mainland Qatar, a condition that the Ruler had accepted.

(5) The provisions of the Treaty itself (as did those of the Agreements of 1868) obviously covered the whole peninsula and the adjoining islands. Article 3 placed an obligation upon the Ruler of Qatar to forbid the import and sale of arms "into my territories and port of Qatar"<sup>88</sup>. Article 4 prohibited the Ruler without British consent from ceding to any other power or its subjects "land either on lease, sale, transfer, gift, or in any other way whatsoever". Article 5 containing a prohibition against the grant of pearl fishery concessions or other monopolies, concessions or cable landing rights as well as the requirement in Article 6 not to charge custom duty on British goods at a rate higher than on Qatari subjects, all clearly applied to the entire peninsula of Qatar, its coasts, and its adjoining islands. Most significantly, the obligation of the British Government under Article 10 to protect the Ruler and his subjects and territory "from all aggression by sea" must necessarily cover the whole peninsula and the adjoining islands including the Hawar islands just as much as did the Agreements of 1868.

3.45 In this context it is also instructive to refer to a report which gives a clear indication of the British understanding of both the Anglo-Ottoman Convention of 1913 and the British-Qatar Treaty of 1916 and states *inter alia*:

"1. ... The status of the Peninsula formed the subject of lengthy discussion in the period prior to 1908...

2. The vexed question of the status of El Katr was finally disposed of in the Anglo-Turkish negotiations of 1912-14. Under the unratified Anglo-Turkish Convention of 29th 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. A supplementary article reserved the rights of the inhabitants of Bahrein to visit the island of Zakhnuniyah for fishing purposes, as in the past<sup>89</sup>.

3. A new situation arose with the conquest of Hasa by Ibn Saud in the course of 1913. El Katr, like the Oman coast, formed, in his view, part of his ancestral domains, to which he could therefore prefer a claim as of right. But the Amir was warned at the end of the year that non-interference with El Katr was a condition of the maintenance of friendly relations with His Majesty's Government, and no difficulty in consequence arose. The conclusion of a formal treaty between El Katr and His Majesty's Government, which, other considerations apart, was in the immediately pre-war period of much importance in connection with the arms traffic, was postponed until the final ratification of the Anglo-Turkish Convention, and so had not been disposed of on the outbreak of the European War.

...

6. ... Lengthy negotiation proved necessary before a satisfactory agreement could be reached, and it was not until 3rd November 1916 that a treaty was finally concluded between the Sheikh and His Majesty's Government. The treaty... secured to the Sheikh the advantages conferred under the Trucial treaties on the Sheikhs of Trucial Oman, while imposing on him the obligations in regard to piracy, the slave traffic, the arms traffic, the grant of concessions, the cession, sale, gift, lease or transfer of territory to other Powers, and the maintenance of relations with foreign Powers already accepted by those Chiefs...

7. The one respect of importance in which the treaty went beyond the normal type of Trucial treaty was that it contained an undertaking that the good offices of His Majesty's Government should be granted to the Sheikh in the event of unprovoked aggression against him *by land* within the territories of Katr (Article XI)"<sup>90</sup>.

This report therefore clearly recorded the British and Turkish position recognising Qatar as constituting *the whole peninsula* and its adjoining islands including the Hawar islands and not just "the area around Doha Town" as claimed by Bahrain<sup>91</sup>.

## **F. Other evidence of British recognition**

3.46 As already shown in Qatar's Memorial, the geographical dictionary of the Gulf Region compiled by Lorimer in 1908 had listed the Hawar islands under Qatar<sup>92</sup>. Furthermore, his description at that time of the Sheikdom of Bahrain is shown as consisting of islands that do not include the Hawar islands. Prideaux (who participated actively in the preparation of

Lorimer's compilation) had failed in an attempt in 1909 to instigate the Ruler of Bahrain to claim Hawar so as to protect the island from Turkish designs. A survey by the Admiralty War Staff (Intelligence Division) of 1915 had also included Hawar in the description of the territory of Qatar<sup>93</sup>. The conclusion must therefore follow that the British at the time of signature of the 1913 Anglo-Ottoman Convention and the British-Qatar Treaty of 1916 recognised the Hawar islands as included in the territories of Qatar. This position was more expressly considered and reiterated in subsequent years on a number of occasions:

- a British India Office report of 1928,
- an India Office letter of 3 May 1933,
- a map requested by the Secretary of State for India and supplied by the Political Resident on 4 August 1933 showing that Bahrain's territories did not include the Hawar islands,
- the acting Political Resident (Loch)'s telegram to the Secretary of State for India of 31 July 1933 that "Hawar Island is clearly not one of the Bahrain group" with which the India Office agreed,
- the R.A.F. report of 1934,
- and the APOC-Qatar Concession Agreement of 1935,

all of which have been described in some detail in Qatar's Memorial<sup>94</sup> and to some of which further reference is made in Section 4 of this Chapter below<sup>95</sup>.

### **G. Regional recognition**

~~3.47 Qatar has cited numerous documents in its Memorial showing that a number of rulers in the Gulf region, including in particular the Ruler of Abu Dhabi, Sheikh Zayed bin Khalifah, repeatedly acknowledged Qatar's sovereignty over the Hawar islands and, upon inquiries from Ottoman Valis, informed them accordingly<sup>96</sup>. Even the Ruler of Bahrain openly acknowledged Qatar's authority and control over Hawar in the early years of the 20<sup>th</sup> century<sup>97</sup>.~~

3.48 It is most significant that Bahrain does not even suggest in its Memorial that there was any recognition of its claimed ownership of Hawar by any other ruler in the Gulf region.

### **Section 3. Bahrain's illegal occupation of the main Hawar island**

3.49 Qatar has already shown in its Memorial that once oil became a significant feature in the Gulf area, the Ruler of Bahrain began to implement well-laid plans to maximise the territory over which he could claim sovereign rights and thereby grant valuable concessions<sup>98</sup>. ~~To this end, Belgrave and others had already been engaged in activities from 1930 onwards with a view to eventually advancing a Bahraini claim to the Hawar islands. These activities involved, inter alia, the tendering of evidence of doubtful value designed to support the claim.~~ Bahrain first formally made its claim to the Hawar islands by a letter from Belgrave to the British Political Agent on 28 April 1936, expressly making reference to the negotiations for an oil concession<sup>99</sup>. A major and glaring omission in Bahrain's Memorial is any reference to this express and sudden claim and the "provisional" British decision of July 1936 that these

islands belonged to Bahrain, a decision in total contradiction of the position taken by the British on numerous occasions prior to 1936. This deliberate omission is the subject of a detailed examination in the next Section<sup>100</sup>.

3.50 Qatar has already submitted in its Memorial that when Bahrain came seriously to press its claim to the Hawar islands, it did so through a clandestine occupation by moving a garrison to the main island; and that this occupation took place some time after Bahrain had made a written claim to the Hawar islands on 28 April 1936<sup>101</sup>. Bahrain's aggression and hostile occupation of the main Hawar island, being illegal, cannot therefore sustain its claim to sovereignty over the islands.

3.51 As already shown in Qatar's Memorial, the negotiations in respect of a new concession covering Bahrain's unallotted or additional area were undertaken between 1928 and 1933<sup>102</sup>. The negotiations for the unallotted area were suspended in the second half of 1933 at the request of BAPCO which had sought an extension of its 1925 exploration concession. The negotiations were then resumed in 1936. It was at this stage that Belgrave addressed his letter on 28 April 1936 containing the Ruler of Bahrain's first formal claim to the Hawar islands.

3.52 It would seem likely that Bahrain's illegal and clandestine occupation of the main Hawar island took place shortly after the Zubarah incident of 1937 which so upset the Ruler of Bahrain, and which also resulted in the suspension of the oil negotiations over the "additional area" of Bahrain not covered by BAPCO's existing concession. At this stage, the Ruler of Bahrain and Belgrave were already aware that Britain had provisionally decided in favour of the Bahrain claim to the Hawar islands, and obviously decided to occupy the islands. Thus, Bahrain itself now admits that after the Zubarah incident in 1937:

"Bahrain increased its military presence on the Hawar Islands and constructed a police fort there"<sup>103</sup>.

3.53 In fact the evidence shows that Bahrain did not merely "increase its military presence" but illegally occupied the main Hawar island. Bahrain took a number of other steps to establish control over the islands that the Ruler of Qatar later characterised as aggression in his letter of protest of 27 May 1938<sup>104</sup>. The evidence of the occupation of the main Hawar island by Bahrain in 1937 includes the following:

(1) As Bahrain admits, it moved a police garrison to Hawar.

(2) When the Ruler of Qatar complained of assistance by Bahrain to insurgent subjects of Qatar, Belgrave replied on 19 August 1937 to the Political Agent that Bahrain had only been giving food etc. to the Naim and also stated:

"Arms and ammunition were issued by the Bahrain Government to all the villages on the south coast of Bahrain and to the guards who garrison the Hawar islands when the disturbances in Qatar began"<sup>105</sup>.

(3) A letter from Belgrave of 10 November 1937 to the "Head Natur at Hawar":

"On no account are any people, European or Arab, from Qattar coast to be allowed on any of the Hawar islands"<sup>106</sup>.

(4) A Police Order issued by Belgrave on behalf of the Bahrain Government on 1 February 1938 that anyone cutting wood or pulling grass on Hawar and taking it to Bahrain would be arrested<sup>107</sup>.

(5) A letter from Packer of PCL of 19 February 1938 to Belgrave reporting an incident in which:

"a hired dhow... returning from Zekrit and tacking close to Hawar reports that two shots were fired at her by Bahrain Police on Hawar Island"<sup>108</sup>.

The letter went on to state:

"... I thought you would like early information as these incidents when highly exaggerated may lead to trouble especially *now* there are 300 Bahrainis in Hawar"<sup>109</sup>.

(6) The Government of Bahrain's Annual Report for the year 1937-38<sup>110</sup> which draws particular attention to the fact that "the Zubara affair" during the year was one of the events of outstanding importance and that there was an increase in the Police force (partly for Hawar); it also noted that:

"The fort and pier at Hawar were completed at the end of the year with the exception of some work on the courtyard wall...

Expenditure on the Hawar Fort was not allocated in the 1356 Budget but during the year it was decided that the Police post at Hawar should be strengthened and that the garrison should be housed in more comfortable quarters in a building which would be of military use in case of any emergency..."

(7) Police Orders from Belgrave of 24 May 1938 regarding the posting of and issue of arms and ammunition to the Hawar garrison, etc. and stating:

"... When available one Very Light Pistol will be issued to the N.C.O., in Charge and one large mirror, these to be used by day and by night for signalling to Bahrain should any emergency occur.

The inhabitants of Askar, Jaw and Door must be informed that if at any time they see signals by Very Pistol or by glass from Hawar they must instantly notify the Fort in Manama, by telephone from nearest telephone available"<sup>111</sup>.

(8) It is important to recollect that the Ruler of Qatar complained of Bahrain's occupation of Hawar to the Political Agent (Weightman) orally in February 1938 and in his letter of 27 May 1938 to Weightman stated:

"the Bahrain Government have only recently occupied them [the Hawar islands] which fact made me move in the matter and submit protests against it"<sup>112</sup>.

3.54 Even more significant is Weightman's observation in his letter of 3 June 1938 to the Political Resident when he states that he had advised the Ruler of Qatar that:

"the Bahrain Government are now, and have been, to my personal knowledge, *for many months past*, in actual occupation of the Islands"<sup>113</sup>.

For this reason, he did not think the British Government would disturb the *status quo*.

3.55 The fact that the Bahraini occupation occurred in 1937 is also clearly brought out by a reported incident. After Sheikh Abdullah of Qatar had formally protested to the British in May 1938 about Bahrain's unauthorised occupation of Hawar, the Political Agent (Weightman) in his reply of 20 May 1938 had warned Sheikh Abdullah that the British Government understood that Bahrain was in occupation of and claimed the Hawar islands; and that while any claim from Qatar was being considered, it was absolutely necessary that:

"your subjects do nothing which might lead to hostilities with the subjects of Bahrain *now* in the Hawar Islands"<sup>114</sup>.

3.56 It was the prohibition mentioned in paragraph 3.53(3) above which became the subject-matter of a letter of the Ruler of Qatar of 8 July 1938 to Weightman stating:

"I write to say that one of my subjects named 'Isa bin Atiq al Arbidi had a boat which, formerly *before the prohibition was imposed*, used to ply between Bahrain and Qatar. He left this boat which was his source of income at Hawar some time ago. When the time for sea work started, he went to Hawar with the intention of removing and using his boat as usual *without knowing of the interferences of the Bahrain Government there*, but *the residents of Hawar*<sup>115</sup> arrested and assaulted him and took him to Bahrain where he was kept in prison for one day. He was then returned to Hawar and left on the beach but was not allowed to take his boat away. It appears that the Rulers of Bahrain have been committing acts which are against the elements of justice. I should be grateful if you would kindly look into such matters, and cause the return of 'Isa's boat before they damage it"<sup>116</sup>.

In fact Weightman replied to the complaint on 19 July 1938 and stated:

"... 3. In regard to Isa bin Atiq I find that he was sent to Bahrain for interrogation by the Adviser since he claimed a boat which was lying at Hawar but could not give any proof of ownership. He was then allowed to return to Qatar. In view of your letter stating that the man's boat is at Hawar it is now agreed that Isa bin Atiq should be allowed to land there for the purpose of removing the boat, provided that he is in possession of some paper proving his identity and that he gives a receipt for the boat. If therefore you give him such a certificate of identity no further difficulty will be made in regard to his taking his boat away.

4. I do not think you need fear that any persons will be arrested from now on unless they refuse to leave Hawar when told to go and make trouble there"<sup>117</sup>.

3.57 This incident demonstrates that Qatari fishermen had unrestricted access to the Hawar islands which was suddenly interrupted by Bahrain's illegal occupation in 1937.

3.58 There was a similar incident when two persons employed by PCL and engaged in fishing "lost their way or became thirsty", landed on Hawar and were arrested by people on the island. In another letter of 12 July 1938 (four days later), the Ruler of Qatar protested again to Weightman in respect of this fresh incident<sup>118</sup>.

3.59 The above documentation therefore clearly shows that Bahrain simply occupied the main Hawar island by force in 1937, the primary motive being to increase its territories for the oil concession under consideration. This occupation was entirely illegal.

**Section 4. Bahrain's failure to mention the crucial events of 1936 when Bahrain first formally asserted a claim to the Hawar islands and the British Government made a "provisional decision" in Bahrain's favour**

**A. The first formal Bahrain claim to the Hawar islands of 28 April 1936**

3.60 One of the most striking features of the Bahrain Memorial, insofar as it deals with the dispute as to title over the Hawar islands, is its total failure to make any mention of the crucial events of 1936 - no doubt because these events are not only inconsistent with the Bahrain thesis but flatly contradict it. Thus, no mention will be found in the narrative of events in Volume 1 of the Bahrain Memorial of Belgrave's letter to the then Political Agent in Bahrain (Lt.-Col. Loch) of 28 April 1936, in which Bahrain first formally put forward in writing its claim to the Hawar islands. That letter is of course included among the many annexes to the Bahrain Memorial<sup>119</sup>, but one looks in vain for any reference to its substantive content in Chapter 3 of Volume 1 of the Bahrain Memorial. That is no doubt a quite deliberate omission, since the inconvenient fact that it was *Bahrain* which first advanced a claim in writing to the Hawar islands in April 1936 is totally inconsistent with the argument put forward in the Bahrain Memorial that Qatar was the claimant State (*demandeur*) by virtue of its claim to the Hawar islands advanced only as late as May 1938<sup>120</sup>.

3.61 It is of course true that the British authorities, both in the Gulf and in London, were aware in the early 1930s that the Ruler of Bahrain was maintaining a vague claim to islands other than the main island, Muharraq, Sitrah and one or two neighbouring islets, and also to areas on the Qatar coast, and possibly even the Hasa coast<sup>121</sup>. The letter from Laithwaite (India Office) to Starling (Petroleum Department) of 3 May 1933<sup>122</sup> records the India Office view of the extent of the Sheikh of Bahrain's dominions. After stating that the Sheikh maintains "a rather nebulous claim" to certain areas on the Arab coast, Laithwaite states that his dominions may be regarded as consisting of the Bahrain archipelago which he defines as consisting of "... the Island of Bahrain, and of the adjoining islands of Muharraq, Umm Na'assan, Sitrah and Nabi Salih". Nevertheless, it is clear that Laithwaite did not in 1933 accept that the Hawar islands were part of the Bahrain archipelago (using that word as a convenient geographical description of a group of islands or islets). Nor of course did senior officials in the Gulf at this time. Thus, the acting Political Resident (Loch), in reporting on 31 July 1933 that the Sheikh of Bahrain wished the "unallotted area" to be referred to in the draft concession as the Bahrain Islands without specifically naming any, so that the question of Hawar Island and Qatar (*sic*) would not be made prominent by their omission, recommended that:

"I think that we may accept this as Hawar Island is clearly not one of the Bahrain group"<sup>123</sup>.

3.62 The Court will of course have noted that, within less than three years of expressing this view in a telegram to the Secretary of State for India in his capacity as acting Political Resident, Loch, in his normal capacity of Political Agent in Bahrain, concluded, in his letter to the Political Resident of 6 May 1936, that:

"... subject to any past correspondence which is not available to me... there is real substance in [the Ruler of Bahrain's] claim [to Hawar] and... it might in certain circumstances suit us politically to have as large an area as possible included under Bahrain"<sup>124</sup>.

If one reads this letter as a whole, it is evident that this conclusion was based on wholly insufficient evidence, and that the respective claims of Qatar and Bahrain to the Hawar islands were given only the most superficial examination by Loch and Fowle in the spring of 1936. Quite why Loch executed such a *volte face* between the end of July 1933 and the beginning of May 1936 must remain somewhat of a mystery in the absence of any clear explanation in the British archives.

3.63 Two other observations can be made on this letter of 6 May 1936 from Loch to the Political Resident. The first is Loch's inability to lay his hands on certain relevant documents and records. Not only is "past correspondence" unavailable to him; but he refers elsewhere in the letter (paragraph 3) to having "... not as yet been able to trace certain records... about Zubarah and Zaknuniyah Island...". Presumably among the "past correspondence" unavailable to Loch in Bahrain was the letter which he wrote on 31 July 1933 to the Secretary of State for India, expressing the view that Hawar was clearly *not* one of the Bahrain group of islands. It might be thought that these frank admissions by Loch might have induced some caution in the Political Resident; but this was not the case, for Fowle himself, in his letter to the Secretary of State for India of 25 May 1936, seems blithely to have accepted without question the grossly exaggerated (where not false) claims about Bahrain's connections with Hawar which had been advanced by Belgrave. The second observation relates to Loch's comment that "it might in certain circumstances suit us [the British] politically to have as large an area as possible included under Bahrain". Fowle appears to have interpreted this phrase as referring to the possibility that BAPCO might now compete with PCL for the "unallotted area" if it included Hawar<sup>125</sup>. But it is also possible that Loch might have used this cryptic phrase to refer to the broader advantages which might accrue to Britain in this run-up period to the Second World War from supporting Bahrain's claim to Hawar.

## **B. Attitude of the oil companies in the 1930s**

3.64 Whatever the explanation for the British *volte face* between 1934 and 1936, there is no doubt that the oil companies interested in the potential mineral resources of the Hawar islands in the mid-1930s displayed considerable arrogance and insensitivity in ignoring the Ruler of Qatar's sovereign rights over Hawar. PCL initially supported the principle that its concession with the Ruler of Qatar covered the Hawar islands as part of the Ruler's territories. However, it retreated from this position after it had become aware in 1936 that the British Government had made a provisional decision in favour of Bahrain on the conflicting claims to title over the Hawar islands by Bahrain and Qatar. Evidence for this is afforded by the record of an informal meeting held at the India Office on 12 April 1938 to discuss the activities of PCL on the Arab coast of the Persian Gulf<sup>126</sup>. This meeting was attended by Fowle (Political Resident), and two India Office officials (Gibson and Symon), on the one side, and by Messrs. Lewisohn and Longrigg, representing PCL, on the other side. It will be recalled that PCL had in effect taken the place of APOC by the mid-1930s and that the concession which APOC had secured from the Ruler of Qatar on 17 May 1935 had, with the consent of the Ruler, been transferred to Petroleum Development (Qatar) Ltd. (PDQ), a subsidiary of PCL. Thus, in April 1938, PCL was, in effect, Qatar's exclusive oil concessionaire. It may not occasion all that much surprise that the PCL representatives, at this meeting with India Office officials on 12 April 1938, should have argued against a postponement of the negotiations with the Ruler

of Bahrain for the new concession covering the "unallotted area": see paragraph 3 of the record. After all, APOC (PCL's predecessor) had already expressed an interest in bidding for this new concession as long ago as June 1933<sup>127</sup>. What is somewhat strange, however, is one of the reasons given by Mr. Longrigg for opposing postponement of the negotiations:

"Mr. Longrigg said, however, that the Company were opposed to any postponement and he personally thought it would be a pity to put ideas of ownership into the mind of the Sheikh of Qatar"<sup>128</sup>.

3.65 Of course, one has to remember that, by April 1938, PCL was very well informed about the British position on the conflicting claims to Hawar of Bahrain and Qatar as that position had developed since the beginning of 1936. As early as 29 April 1936, PCL (Skliros) had written to the India Office in London (Walton) mentioning that, in PCL's negotiations with the Ruler of Bahrain over the "unallotted area", the latter had laid claim to Hawar as part of his dominions. Skliros drew attention to the Qatar Concession of 1935 and the map annexed to it and said that all this pointed to the fact that Hawar belonged to Qatar and not to Bahrain. He concluded his letter by enquiring to which of the two sheikhdoms, in the opinion of the Government of India, Hawar belonged<sup>129</sup>. It will be noted that Skliros had written to the India Office in this sense only one day after Bahrain had lodged its formal claim to Hawar by virtue of Belgrave's letter to Loch of 28 April 1936. No substantive reply was vouchsafed to Skliros' letter of 29 April 1936, until 24 July 1936, when Walton (India Office) wrote to him informing PCL of HMG's "provisional decision" that Hawar belonged to the Ruler of Bahrain "and that the burden of disproving his claim would lie on any other potential claimant"<sup>130</sup>. So by mid-July 1936, PCL (but not the Ruler of Qatar) was informed that the British authorities had provisionally decided in favour of the Bahrain claim to Hawar. Obviously, PCL came swiftly thereafter to the conclusion that its only prospect of securing an oil concession covering Hawar was to obtain it from the Ruler of Bahrain. This may explain (even if it does not entirely excuse) the tone of Longrigg's intervention at the meeting with India Office officials on 12 April 1938; PCL's interest was of course a purely commercial interest and the company had no particular reason to uphold the Qatari claim to title over Hawar beyond the consideration that a decision in favour of Qatar would mean that Hawar was already covered by the Qatar Oil Concession of 1935. The British Government, however, had opted, even if only provisionally, in favour of the Bahrain claim of title to Hawar, and PCL pragmatically adjusted itself to this new situation.

3.66 Whatever excuses can be made for PCL, what this episode does demonstrate (and it is not the only episode of its kind) is that, throughout this whole period between 1933 and 1939, British officials in the Gulf and oil company executives seemed to be at one in ignoring the interests of the Ruler of Qatar, and even, as this example shows, in deliberately seeking to conceal from him vital information as to the course of negotiations affecting islands to which he had long-standing title.

### **C. British knowledge of Qatar's title to the Hawar islands**

3.67 It cannot moreover be objected that the British authorities in the Gulf and the relevant oil company executives had no knowledge of Qatar's title to the Hawar islands until 1938. The British authorities were certainly aware of the Ruler of Qatar's interest in the Hawar islands, although this is expressed by the Political Agent (Loch), in his letter to the Political Resident of 6 May 1936, in an indirect, almost negative, manner:

"I do not know what Shaikh 'Abdullah bin Jasim of Qatar's views about the Island [Hawar] are, but I have never heard of any protest from him against the activities of Bahrain subjects there"<sup>131</sup>.

3.68 This extract inevitably provokes three comments. In the first place, if the Political Agent in Bahrain (who also had responsibility for Qatar in the absence of any British representation in Doha) genuinely did not know the view of the Ruler of Qatar on a matter of vital importance to him, namely the question of title to islands lying immediately off the western coast of the mainland of Qatar, was it not his *duty* to find out? And yet, we know from Loch's letter to Fowle of 6 May 1936, that he had never landed on Hawar, but had flown over it, presumably when accompanying the RAF reconnaissance of Qatar in 1934. We also know that no effort was made by Loch or by Fowle to notify the Ruler of Qatar that Bahrain had advanced a formal claim to the Hawar islands on 28 April 1936, prior to the making of the "provisional decision" in favour of Bahrain in July 1936, itself not notified to the Ruler of Qatar. We equally know that the Political Resident (Fowle), in recommending on 25 May 1936 that Hawar should be regarded as belonging to the Sheikh of Bahrain, put the burden of disproving his claim on the Sheikh of Qatar, thereby acknowledging, although in a context which was demonstrably unfair to Qatar, the latter's vital interest in the matter<sup>132</sup>.

3.69 In the second place, Loch's argument that he had never heard of any protest from the Ruler of Qatar against the activities of Bahrain subjects in Hawar (and Fowle makes the same point) fails to take into account three significant points. Firstly, the Ruler of Qatar had never had occasion to protest against the occasional and short-lived presence of itinerant fishermen on Hawar during the winter months, including some fishermen normally resident in Bahrain, since this was normal practice in the Gulf and did not betoken any claim of title. Secondly, such other activities in relation to Hawar as Bahrain claimed to have engaged in prior to 1936, as outlined in Belgrave's letter to Loch of 28 April 1936, were either factually inaccurate or did not have any specific legal consequences on sovereignty. Thirdly, and most importantly, the Ruler of Qatar was deliberately kept in ignorance of the formal claim to title to the Hawar islands advanced on behalf of the Ruler of Bahrain on 28 April 1936. Silence in the face of a claim to sovereignty over a parcel of territory can be regarded as having legal effects only when the other party is made aware that such a claim to sovereignty is being asserted.

3.70 Finally, although there is clear evidence that Qatar's concessionaire (PCL) was informed, as early as 14 July 1936, that the British Government had provisionally decided that Hawar belonged to the Ruler of Bahrain<sup>133</sup>, it certainly cannot be assumed that PCL would have passed on this unpalatable news to the Ruler of Qatar. Indeed, it is more than likely that PCL did not do so. PCL was already in negotiation with the Ruler of Bahrain for the new concession over the "unallotted area", and these negotiations were based on that Ruler's assumption (confidently shared by Fowle) that he had title to the Hawar islands, and could therefore grant a new concession covering an area which would include the Hawar islands. Furthermore, it should be remembered that, less than two years after the "provisional decision" in favour of Bahrain, Longrigg, on behalf of PCL, was expressing the view that it would be a pity to put ideas of ownership (of Hawar) into the mind of the Sheikh of Qatar<sup>134</sup>.

3.71 All in all, it is difficult to escape the conclusion that, in the mid-1930s, everything was being done by British officials in the Gulf and in London, and by the interested oil company executives, to create the illusion that Bahrain had an incontrovertible title to the Hawar islands, despite the fact that the evidence which might be thought to sustain this view had not

been tested and despite the fact that the Ruler of Qatar had been kept in total ignorance of the claim to the Hawar islands advanced by Bahrain on 28 April 1936.

#### **D. Chronology of significant events relating to Hawar: 1933-1936**

3.72 To sum up on this part of the argument and to understand correctly the reactions of all the parties concerned, it is necessary to bear in mind the chronological order in which various events occurred:

(1) May 1933: Commencement of detailed negotiations between APOC and Ruler of Qatar for oil concession covering territory of Qatar following geological survey of Qatar peninsula which covered Hawar island: *see*, map entitled "APOC Sketch Map of Qatar Peninsula" enclosed with letter of 3 February 1934 from Elkington (APOC) to Fowle (PRPG)<sup>135</sup>.

(2) 25 June 1933: PAB (Loch) reports in letter to PRPG that he has advised Mr. Sampson (APOC) to "keep clear of the Western coast of Qatar" because of Bahrain claims "considered locally to be live". This letter clearly refers to Zubarah rather than Hawar, since Loch acknowledges that APOC "may find it necessary to raise the question later on to prevent another Company from interfering with their operations by *drilling draining wells on the coast*"<sup>136</sup>.

(3) 31 July 1933: PAB (Loch), in his capacity as Acting PRPG, states that "Hawar Island is clearly not one of the Bahrain group [of islands]"<sup>137</sup>.

(4) 1934: Secret negotiations between Ruler of Qatar and Ibn Saud about grant of Qatar oil concession to SOCAL, United States company holding concession from Ibn Saud covering Hasa coast. British authorities in Gulf get to hear of this and are very angry. They warn Ruler of Qatar of his obligation under Article 5 of the Treaty of 1916 not to grant any concession to anyone without the permission of the British Government.

(5) 5 March 1934: A new version of a memorandum by Laithwaite (India Office), revised up to 5 March 1934, on "The Southern Boundary of Qatar and the Connected Problems" (Memo B.430) is issued. This concludes *inter alia* that:

"... the pre-war boundary ran roughly south-east across the base of the [Qatar] Peninsula, from Dohat-as-Salwa, or a point slightly north of it, to a point north of the Khor-al-'Odeid"<sup>138</sup>.

This revised memorandum by Laithwaite should be read in conjunction with the letter from Rendel (Foreign Office) to Laithwaite of 16 March 1934<sup>139</sup>. This letter puts important glosses on the revised memorandum, which were accepted by the India Office and other interested Government Departments and were duly integrated into the British negotiating position *vis-à-vis* Saudi Arabia.

(6) 9 May 1934: In consequence of the events described under point 4 above, the British authorities in the Gulf and in London began to give consideration to offering the Ruler of Qatar a guarantee of protection against serious and unprovoked armed attack on his land territories (*semble*, from Saudi Arabia) in return for his granting the Qatar oil concession to APOC. Air Headquarters in Iraq and the Air Ministry in London wished to carry out a reconnaissance of Qatar by flying-boat in order to examine suitable landing sites in the context of the proposed guarantee. Approval was given to this proposal in London. The

consent of the Ruler of Qatar (but *not* of the Ruler of Bahrain) was sought for this reconnaissance "over his territory", and was duly given. The Ruler of Qatar undertook to give instructions to his tribesmen to give every help in the event of a forced landing; the only request which he made in return was that the aircraft keep far away from camels and other animals so as not to frighten them<sup>140</sup>. Loch (PAB) accompanied the aerial reconnaissance on 9 May 1934, and subsequently reported to Fowle on 12 May 1934 that Group Captain Saul in his flying boat had:

"... left Bahrain at 0630 hours and proceeded over Hawar Island and thence across to just east of Zakhnuniyah Island. Studious care was taken not to cross the Sa'udi Arab frontier and the Flying Boat did not fly over either the island or over the Gulf to the south of it"<sup>141</sup>.

This is eloquent testimony to the fact that, as late as May 1934, Loch was clearly of the view that Hawar was an integral part of the territories of the Ruler of Qatar since only *his* permission (and *not* that of the Ruler of Bahrain) had been sought for overflight of the island. The Court will also note the "studious care" which was taken not to overfly Saudi Arabian territory.

(7) 17 May 1935: This was the date of signature of the Qatar Oil Concession by the Ruler of Qatar and Mr. Mylles on behalf of APOC. The *travaux pr\_paratoires* of the Qatar Oil Concession add little to our knowledge. Article 2 of the Concession Agreement as signed of course defines the State of Qatar as:

"... the whole area over which the Shaikh rules and which is marked on the north of the line drawn on the map attached to this Agreement"<sup>142</sup>.

There had been some discussion of the map to be annexed to the Concession Agreement at a meeting held between APOC representatives and India Office officials on 10 January 1935<sup>143</sup>. Paragraph 7 of the record of this meeting shows that APOC was anxious to know whether the southern boundary of Qatar which had been indicated to the IPC/APOC geologists on the ground by the Ruler of Qatar personally (and which had subsequently been shown on the map prepared by the IPC/APOC geologists and circulated in February 1934)<sup>144</sup> was satisfactory to HMG for the purposes of the map to be attached to the Concession. The APOC representatives explained at the meeting that they understood there had been considerable recent discussion between the Ruler of Qatar and Ibn Saud over the southern boundary of Qatar, with Ibn Saud anxious to include in his territory the whole of the Jebel Dukhan and the Ruler of Qatar opposing this by claiming the boundary as shown on the IPC/APOC map or a line south of it running to Salwa. Following this meeting, Laithwaite (India Office), after consultation with Rendel (Foreign Office), informed Lefroy (APOC) on 22 January 1935, that no objection was seen to the Company's accepting as the southern limit of its concession the line marked on the IPC/APOC map of Qatar (which was in the event marginally modified to conceal its provenance)<sup>145</sup>. In conjunction with the grant of the Qatar Oil Concession to APOC, there entered into force the British Government assurance of protection to the Ruler of Qatar against serious and unprovoked attacks on his land territory (undefined)<sup>146</sup>.

(8) 28 April 1936: Belgrave's letter to Loch (PAB) laying formal claim to the Hawar islands on behalf of the Ruler of Bahrain.

(9) 29 April 1936: Skliros (PCL) writes to India Office (Walton) drawing attention to the Qatar Oil Concession of 1935, stating that, in PCL's negotiations with the Ruler of Bahrain

over the "unallotted area", the latter had laid claim to Hawar as part of his dominions, and enquiring to which of the two sheikhdoms (Bahrain or Qatar), in the opinion of the Government of India, Hawar belonged<sup>147</sup>.

(10) 6 May 1936: Loch (PAB) writes to Fowle (PRPG) cautiously supporting Ruler of Bahrain's claim to Hawar, despite his letter of 31 July 1933 (item 3 above) and his participation in the RAF's aerial reconnaissance of Qatar (item 6 above)<sup>148</sup>.

(11) 25 May 1936: Fowle (PRPG) recommends to Secretary of State for India in London 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". Fowle appears to have relied heavily on the (untested) assertions by Belgrave that Hawar had long been occupied "by the Dowasir tribe of Bahrain" and that the present Ruler of Bahrain and his predecessor as Ruler had exercised active jurisdiction in Hawar "down to the present day"<sup>149</sup>.

(12) 10 July 1936: Walton and Clauson (both India Office) inform Belgrave (at this time in London) of HMG's "provisional decision" supporting the Ruler of Bahrain's claim to Hawar and putting burden of disproving this claim on the Ruler of Qatar<sup>150</sup>.

(13) 14 July 1936: Walton (India Office) writes to Skliros (PCL), in response to item 9 above, informing him that, on the basis of the evidence at present before HMG, it appears to them that Hawar belongs to the Sheikh of Bahrain, and that the burden of disproving his claim would lie on any other potential claimant<sup>151</sup>.

3.73 Against this background, PCL obviously took the hard commercial decision to pursue directly with the Ruler of Bahrain its negotiations for an oil concession covering Hawar, on the assumption that, in due course, a formal decision would be forthcoming which definitively awarded Hawar to Bahrain. In these circumstances, it would have been unwise (and indeed contrary to their interests as Qatar's exclusive oil concessionaire) for PCL to inform the Ruler of Qatar that the Ruler of Bahrain had laid formal claim to the Hawar islands and that the British Government had provisionally decided in favour of the Bahrain claim. There is indeed no evidence that the Ruler of Qatar was made aware of these significant events in 1936. He was deliberately kept in ignorance of them by the British authorities in the Gulf and in London, and also by the oil companies concerned.

3.74 In discussing the events of 1936, Qatar would wish to take the opportunity to respond to the argument advanced in paragraphs 375 and 376 of the Bahrain Memorial. The Court will of course understand that PCL, through Major Holmes, was already in direct negotiation with the Ruler of Bahrain in the spring of 1936 with a view to offering terms for a new concession covering the "unallotted area". The Ruler of Bahrain had clearly indicated to Major Holmes that he claimed Hawar as part of his dominions and Major Holmes had so reported to his principals in London. This provoked Skliros (PCL in London) to write to Walton (India Office) on 29 April 1936<sup>152</sup>, enquiring whether Hawar island belonged to Qatar or Bahrain. There is annexed to the Bahrain Memorial<sup>153</sup> a copy of Walton's reply to this letter, but not of Skliros' letter itself. This is no doubt because Skliros' letter puts forward a number of facts which are wholly at variance with the Bahrain thesis. Thus, apart from referring to the map annexed to the Qatar concession, Skliros states in his letter of 29 April 1936, which is fortunately annexed to the Qatar Memorial:

"The island [Hawar] is about 10 miles long, about 2 miles wide at its widest and *is believed to be uninhabited. It is said to be sometimes visited in the winter* and to have had in the past some degree of connection with Bahrain subjects, if not, (as the Shaikh of Bahrain now claims) with the Khalifa family itself"<sup>154</sup>.

### **E. The map attached to the Qatar oil concession of 1935**

3.75 It is true that the Foreign Office had been concerned that the definition in the Concession of the southern boundary of Qatar with Saudi Arabia might lead to conflict with Ibn Saud, but there is no suggestion in any of the *travaux préparatoires* of the Concession that neither the Hawar islands nor Zubarah would be included within the Concession area. Item 7 in paragraph 3.72 above embodies a brief summary of the *travaux préparatoires* of the Concession Agreement so far as they relate to this point and indeed to the map attached to the Concession Agreement. This map clearly depicts the Hawar islands as lying on the north of the line representing the southern boundary of the Concession area. North of that line was the area over which the Sheikh of Qatar ruled. The area indubitably included the main Hawar islands, the main island being indeed specifically named ("Jezirat Howar"). It is inconceivable that the Government departments in London would have accepted this definition of the State of Qatar for the purposes of the 1935 Concession had they (or indeed any of them) seriously thought that either the Hawar islands or Zubarah, or indeed both, appertained to the Ruler of Bahrain. At the very least, one would expect to find some reference in the records to the exceptional position of those features had that been the case.

3.76 The nearest one can find to any reservation of this kind is a letter from the PAB (Loch) to the PRPG (Fowle) of 25 June 1933, in which he reports on a conversation which he had had with Mr. Sampson of APOC. Loch reports that he had advised:

"... Mr. Sampson to keep clear of the Western coast of Qatar, so far as might be. He asked me about the Bahrain claims, but I said that I could tell him little except that they were considered locally to be live claims, and I thought that, unless they found that they definitely required to operate there, it would be best, at any rate at this stage, to let sleeping dogs lie. I appreciate, however, that they may find it necessary to raise the question later on to prevent another Company from interfering with their operations by drilling draining wells on the coast"<sup>155</sup>.

This is hardly the voice of an official who is convinced that the authority of the Ruler of Qatar in June 1933 did not extend to either the Hawar islands or Zubarah. Loch clearly regarded these two parcels of territory as being within the area over which the Sheikh of Qatar ruled. What he was conveying to Sampson was a delicate diplomatic hint that it might be advisable for APOC not immediately to exercise the plenitude of their rights on the western coast of Qatar because of the potential claims of Bahrain in relation to that part of Qatar. In no way was he expressing any reservation to the effect that the Hawar islands (or indeed Zubarah) appertained to the Ruler of Bahrain. Indeed, the clear implication of his warning to Sampson is that APOC would be fully entitled under the Concession, if it were awarded to them, to operate on the western coast of Qatar (including Hawar), but that it might be prudent for the Company not to do so for the time being in view of the Bahrain claims. It will in any event be recalled that some five weeks later, Loch stated that Hawar was clearly not one of the Bahrain group of islands<sup>156</sup>.

3.77 It was only at a much later stage (in mid-1936), when the Ruler of Bahrain had already advanced a formal claim in writing to the Hawar islands which both Loch and Fowle, for no

objectively convincing reason, thought to have substance, that the India Office sought to explain away the Qatar concession and the map attached to it by asserting that the object of the map was simply to define the southern boundary of the Concession. Even assuming that there might be some truth in this comment, it does not sufficiently explain away the shift of position of the British Government from acceptance (in 1935) that the Qatar Concession extended to the whole of the western coast of Qatar, including the Hawar islands, to a provisional decision (in mid-1936) that the Hawar islands belonged to the Ruler of Bahrain.

3.78 It is accordingly quite wrong, and indeed contrary to the evidence, to seek to interpret Walton's reply of 14 May 1936 in the sense suggested in paragraph 376 of the Bahrain Memorial, namely, that the *sole* purpose of the line drawn on the map attached to the Qatar concession was to define the southern boundary of the concession<sup>157</sup>. Even if it were, Walton's view is totally contradicted by the view expressed by another India Office official (Symons) on 19 April 1938, in a marginal note to the record of the informal meeting held on 12 April 1938, between India Office officials and PCL representatives<sup>158</sup>. In this marginal note, Symons is in fact agreeing with a point made by Longrigg for PCL that if enquiries showed that the Hawar islands belonged to the Ruler of Qatar, they would be included in the concession which PCL already held from the Ruler by virtue of Article 2 of that concession.

3.79 Against this background, it is perhaps not altogether surprising that the Bahrain Memorial maintains such a discreet (indeed pregnant) silence over the crucial events of 1936 resulting in the making of a "provisional decision" on the Hawar islands in favour of Bahrain in July 1936, following upon the presentation of Bahrain's formal claim of title to the islands on 28 April 1936.

### **Section 5. Activities of Bahrain in or in relation to the Hawar islands cannot be invoked to establish title if they were motivated by an intent to deceive or occurred after the dispute between Bahrain and Qatar on this issue had become apparent**

3.80 Under this heading Qatar proposes to analyse three procedural (more specifically, evidentiary) issues, which are closely linked and yet require separate analysis.

#### **~~A. Bahrain's "evidence" in relation to Hawar~~**

~~3.81 The first issue concerns the alleged "evidence" of Bahrain activities in or in relation to Hawar produced by Bahrain in 1938, and now repeated in the Bahrain Memorial, which Qatar contends was manufactured by Belgrave and others in his employ in the 1930s in order to sustain an otherwise very flimsy claim by the Ruler of Bahrain to title over the Hawar islands. Qatar has, in paragraphs 6.51 to 6.70, 6.100 to 6.109, 6.155 to 6.162, 6.165 to 6.177, and 6.191 of the Qatar Memorial, read in conjunction with the many annexes referred to in those paragraphs, produced overwhelming evidence of the steps taken by Belgrave, sometimes in collusion with others, to fabricate documents deliberately designed to deceive any impartial authority called upon to decide which of the two sheikhdoms—Qatar or Bahrain—had title to the Hawar islands.~~

#### **B. Status and allegiance of the Dowasir**

3.82 It will be recalled that, prior to the forced deposition of Sheikh Isa of Bahrain by the British in 1923, the Dowasir, as Sunnis, enjoyed a largely independent position in Bahrain. The tension and potential conflict between Sunnis and Shiahs in Bahrain in the early 1920's

gave rise to social unrest. Sheikh Isa and most other members of the ruling family, as Sunnis, tended to favour the *status quo*. But Daly, who succeeded as Political Agent in early 1921, was persuaded that some reforms must be initiated in Bahrain to reduce the plight of the down-trodden Shiah. He succeeded in persuading Sheikh Isa, who was now in his dotage, to appoint Sheikh Hamad as his assistant in the administration in June 1921, effectively ousting his younger brother and rival, Sheikh Abdullah. Daly subsequently reported on the position as it was when he took over as Political Agent:

"It is evident from the files in this Agency, that no improvement as regards the internal administration of Bahrain has been effected, and several Political Agents have left on record notes concerning the unsatisfactory state of affairs. There is evidence on all sides that oppression has much increased of quite recent years, whereas the population is more enlightened and less inclined to submit to such treatment"<sup>159</sup>.

There were many grievances among the Bahrainis against discriminatory taxes which were imposed upon, or collected from, Shiah only. The Political Agent was eventually asked to propose a package of tax reforms, which he duly did. In June 1922, a reconciliation was effected between Sheikh Abdullah and Hamad to the dismay of disaffected tribal elements such as the Dowasir who opposed Sheikh Hamad's administration. This led to the first attempt by the Dowasir to obtain support from Ibn Saud:

"During July [1922], Abdullah ad-Dosari, Chief of the Najdi Dowasir, and Ahmed ben Lahej, head of a smaller group of Najdis, visited Ibn Saud, hoping to enlist his support in their stand against Shaikh Hamad's plan for tax reforms - a plan which was envisaged as placing Shiah and Sunnis on an equal footing. After the visit news of Ibn Saud pledging them support circulated in Bahrain"<sup>160</sup>.

3.83 There then followed the enforced retirement of Sheikh Isa as Ruler of Bahrain in May 1923, to be succeeded by Sheikh Hamad who enjoyed British support. It was in consequence of this development, and the many reforms which Sheikh Hamad began immediately to set in train that the greater part of the Dowasir - about two thousand - fearing a threat to their position in Bahrain, departed to Dammam in July 1923, where they hoped to enlist the sympathy and active support of Ibn Saud<sup>161</sup>. The rest of the tribe - about one thousand - remained in Budayya. The division of the Dowasir into two factions, one living in Bahrain and the other in Dammam, was rightly regarded as a threat to the safety of Bahrain. The Dowasir could raid Bahrain and retreat to the mainland overnight. The threat was more serious in view of the Wahhabi ambition to subdue Bahrain. The Ruler of Bahrain therefore issued an ultimatum warning the Dowasir either to return to their base or leave Bahrain altogether as a body. A little before the deadline set for 18 July 1923 had expired, the rest of the Dowasir left Budayya<sup>162</sup>. Far from being loyal subjects of the Ruler of Bahrain, the Dowasir were a threat to the security of Bahrain. In fact, a Levy Corps of one hundred Baluchis commanded by a British Officer was recruited from Muscat essentially to reinforce Bahraini defence against possible aggression from mainland Arabia waged by the Dowasir<sup>163</sup>.

3.84 In a significant communication of 4 January 1924 from the Political Resident (Trevor), the Secretary of State for Colonies in London was advised:

"... Now that the whole Dawasir tribe has left, I may remark that Shaikh is greatly relieved and does not want them back at any price. In this I think he is right and that he is well rid of them"<sup>164</sup>.

3.85 A few additional pieces of evidence relate to the treatment of the Dowasir between 1923 and 1929. It was explained in paragraph 6.55 of the Qatar Memorial, read in conjunction with the letter from the Political Resident (Haworth) to the Foreign Secretary of the Government of India of 27 March 1927<sup>165</sup>, that by 1927 the Ruler of Bahrain was anxious that the property confiscated from the Dowasir at the time of their departure from Bahrain in 1923 should be returned to them<sup>166</sup>. The Ruler was under pressure from Ibn Saud to permit this to be done, and he was anxious to appease Ibn Saud who exercised at that time a powerful influence over the Rulers of all the Gulf sheikhdoms. It will be noted from Annex III.73 to the Qatar Memorial that, when the Dowasir were forced to leave Bahrain in 1923 and the town of Budayya had been forfeited, an attempt had been made to populate it with Bahrainis (note the contrast expressed in this letter between the Dowasir and Bahrainis) and to sell the houses and land at very cheap prices<sup>167</sup>.

3.86 This additional evidence lends verisimilitude to the implied suggestion in paragraph 6.57 of the Qatar Memorial that the Dowasir who were beginning to drift back to Bahrain, in straitened circumstances, in 1928/29 were still highly reluctant to accept the Ruler of Bahrain's authority over them<sup>168</sup>. The extent to which Ibn Saud was giving support to the Dowasir in their attempts to extract concessions from the Ruler of Bahrain and the British authorities in the Gulf is attested to by a letter of 22 April 1928, from the Political Agent in Bahrain to the Secretary to the Political Resident, with its enclosed translation of a letter dated 6 April 1928, from the King of Hijaz, Nejd and Dependencies (Ibn Saud), to the Political Agent<sup>169</sup>. What is of particular interest in the letter of 6 April 1928 is that the King's representations are made on behalf of "our Duwasir subjects who are residing in Damman". This claim by Ibn Saud is of course wholly inconsistent with the assertions in paragraphs 36, 38, 346 and 351 of the Bahrain Memorial that the Dowasir had owed uninterrupted and unswerving allegiance to successive Rulers of Bahrain since about 1800. In this context it will of course be recalled that all the leading authorities (including Lorimer) place the date of the arrival of the Dowasir in Bahrain as 1845. Qatar had already, in its Memorial, drawn attention to the uncertain and fluctuating relations of the Dowasir with the Al-Khalifah, and indeed to the claim recorded in paragraph 7 of the letter from the Political Agent (Prideaux) to the Political Resident of 4 April 1909:

"... that the Dowasir regarded Hawar as their own independent territory..."<sup>170</sup>.

3.87 The evidence also provides strong support for the view expressed by Alban (Political Agent, Bahrain), in his note on the "Ownership of Hawar" prepared in October 1941:

"4. The Dowasir are rather independent as can be seen from the way they deserted their town of Budaya in Bahrain for the mainland. They are not true inhabitants of Bahrain and are able to change their allegiance at will if displeased. Their settlement in any spot does not therefore mean much more than the settlement of a migratory tribe in a neighbouring state"<sup>171</sup>.

3.88 Indeed, the author of the "Administration Report for the Bahrain Political Agency for the year 1911" can be credited with unusual prescience in stating:

"The only generally hostile feeling in the island [Bahrain] is, I think, to be sought among the Dosiris, with whom there is frequent trouble over the questions of pearling accounts and slaves. They are not readily amenable to Shaikh Isa's authority... There will probably be serious trouble with them some day"<sup>172</sup>.

3.89 The somewhat schizophrenic attitude of Fowle (Political Resident in the Gulf between 1932 and 1939) towards the Dowasir is also worth noting. It will be recalled that, on 29 April 1939, Fowle forwarded to the Secretary of State for India a copy of Weightman's report of 22 April 1939 (with supporting documentation) on the relative merits of the claims to title over Hawar advanced by the Rulers of Qatar and Bahrain. In doing so, Fowle commended Weightman's report as "a very clear statement of the case"<sup>173</sup>. It will be recalled that Weightman's report states *inter alia*:

"On the Bahrain side there is evidence that the original occupation of Hawar by the Dawasir [*sic*] was effected under the authority of the Al Khalifah, [and] that the Zellaq Dawasir have frequented these islands for a great number of years... 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"<sup>174</sup>.

3.90 The clear implication of statements such as these (on which the British Government relied in making their decision on Hawar of 11 July 1939) is that the Dowasir had occupied Hawar regularly over a period of 150 years for much of the year. But Fowle for one seems to have forgotten in 1939 the view which he had expressed less than two years previously in the context of the Bahrain claim to Zubarah based on the continuing allegiance of the Naim tribe. In denying the Bahrain claim to Zubarah, Fowle argues as follows in his letter to the Secretary of State for India of 5 May 1937:

"The Bahrain Dowasir tribe, for instance, some years ago being on bad terms with the Ruler of Bahrain, emigrated to Hasa. While there they doubtless received messages from the Ruler of Bahrain and evidently considered themselves as owing some allegiance to him, since finally they asked his permission to return to Bahrain. *But this sort of allegiance on the part of the Dowasir naturally gives no claim to the Shaikh of Bahrain to the part of Hasa occupied by them*"<sup>175</sup>.

And yet it seems (and this appears to be the logic of Fowle's view, difficult as it may be to follow) to have given a valid claim to the Sheikh of Bahrain to the Hawar islands intermittently and irregularly "occupied" by the same Dowasir. It will, in any event, be recalled that Ibn Saud claimed the Dowasir as his own subjects when they were living on the Damman peninsula in the late 1920s.

3.91 There is the further consideration that Bahrain produced no evidence in 1938/39, and has produced no evidence in the Bahrain Memorial, to establish that the Dowasir regularly paid taxes in respect of the income generated by the economic activities which they claim to have performed on Hawar prior to the unlawful occupation of the islands by Bahrain in 1936/37. There is clear evidence that, in the 1920s and 1930s, successive Rulers of Bahrain did not seek to tax the Dowasir in respect of their economic activities in Bahrain, far less in respect of such economic activities as they may have engaged in on their winter visits to the Hawar islands. For example, in a report of 13 July 1922, from the Political Agent in Bahrain (Daly) to the then Political Resident, on a visit by the chief of the Dowasir to Ibn Saud, it is stated:

"It would appear that Bin Saud offered to assist them to resist any efforts of the Bahrain Rulers to tax them or to bring them under their effective control"<sup>176</sup>.

The same report continues:

"Though nominally acknowledging the overlordship of Sheik Easa [Isa], they have always in the past declined to acknowledge Shaik Hamad as his definite successor. It is believed that they entertained some hopes of getting control of the islands [the Bahrain islands] into their own hands in the future. Bin Saud may be not unaware of these designs. Some years ago they used to pay a small diving tax in a commuted form. Even then they resisted direct taxation. For several years they have ceased even these payments and the Ruler is afraid to insist on payment"<sup>177</sup>.

3.92 If, as these reports establish, the Dowasir had not, prior to their departure to the Dammam peninsula in 1923, been accustomed to pay any taxes in respect of their economic activities in Bahrain itself, they would self-evidently not have been paying any taxes to the Ruler of Bahrain in respect of such economic activities (if any) as they may have engaged in during their winter visits to Hawar. The Court will, of course, recall that one of the conditions laid down in 1927 for the return of the Dowasir to Bahrain was that "they must pay the same taxes as other agriculturists and traders"<sup>178</sup>. There is no evidence that they did pay such taxes in respect of such economic activities as they may have engaged in on Hawar in the early 1930s.

~~3.93 By way of contrast, Qatar has already produced documentary evidence dating from 1887 and 1891 of tax-collecting expeditions to Hawar engaged in by agents of the Ruler of Qatar and designed to secure the payment of taxes from fishermen using Hawar as a temporary base in winter for their fishing activities in the surrounding waters<sup>179</sup>.~~

3.94 The Court will also wish to note that, on 5 April 1923, the Political Resident wrote directly to the Rulers of Qatar and Kuwait drawing attention to "the recent contumacious behaviour of Dawasir tribe in leaving Bahrain without reason". The Political Resident's letter continues:

"I write to request you, in the event of tribes wishing to come to your territory not to encourage them or to harbour them should they come without previous instruction. I have been instructed by the High Govt. to inform you that they would view with disfavour the harbouring by you of malcontents from Bahrain who would abuse your hospitality by making your dominions a base for intrigues against the Ruler of Bahrain who has the full support of HMG"<sup>180</sup>.

The interest of this letter is that the only territory in Qatar which the Dowasir regularly frequented, at least during the winter months, was the Hawar islands, and the Ruler of Qatar was in fact being asked to exclude them from there. There is no evidence in the entire documentation in the British archives regarding the behaviour of the Dowasir between 1923 and 1928 of any member of the tribe being permanently resident in the Hawar islands as an integral part of Bahrain territory; nor is there any evidence in that documentation of any members of the Dowasir tribe leaving or being expelled from the Hawar islands. Similarly there is not a word in that documentation of any members of the tribe returning or seeking to return directly to the Hawar islands in 1928/29 (notwithstanding the Bahraini claim that they were "permanent residents" of Hawar). Qatar submits that this entire episode and the circumstances surrounding the departure of the Dowasir from Bahrain in 1923 demonstrates the falsity of the Bahrain assertions: (a) that the Dowasir were permanent residents of the Hawar islands and (b) that they owed unwavering allegiance to the Ruler of Bahrain so as to make them subjects of the Ruler of Bahrain. At most, the evidence shows only that members

of the Dowasir tribe may have been accustomed to pay winter visits to the Hawar islands as itinerant fishermen (but not between 1923 and 1928).

~~3.95 The crude distortion in the Bahrain Memorial of the status and supposed allegiance of the opportunistic Dowasir is outweighed only by the manifest and repeated instances cited in the Qatar Memorial of the "manufacture" of "evidence" on Hawar by Belgrave in the 1930s. As a matter of law, Qatar naturally submits that no credence can be given by the Court to documents proved to have been "manufactured" or "fabricated" for the purpose of influencing the British Government in making its decision as to which of the two sheikhdoms—Qatar or Bahrain—had title to Hawar.~~

### **C. The relevance of the date of the first formal claim by Bahrain to the Hawar islands**

3.96 The third issue which Qatar wishes to analyse under this heading is the significance in law of the date in 1936, when Belgrave, on behalf of the Ruler of Bahrain, submitted to the Political Agent a formal claim in writing to the Hawar islands. So far as Bahrain is concerned, this can be said to be the date on which the dispute over title to the Hawar islands "crystallised". Bahrain already seeks impliedly to deny this by placing stress on the date of 27 May 1938, when, in response to an invitation from the then Political Agent (Weightman), Qatar submitted its formal claim to the Hawar islands<sup>181</sup>. But this cannot conceivably be right. It ignores entirely the crucial events of 1936 discussed in Section 4 of this Chapter<sup>182</sup>. The British authorities failed to notify the Ruler of Qatar that Bahrain had already submitted a formal claim to the Hawar islands in April 1936; they also failed to notify him of the "provisional decision" which they had taken in July 1936 that the Hawar islands should be regarded as belonging to the Ruler of Bahrain and that the burden of disproving his claim should lie on the Ruler of Qatar. And yet they well knew that the Ruler of Qatar asserted title to the Hawar islands. They may have hoped that, by keeping the Ruler of Qatar in ignorance of these highly significant developments, they would indirectly be providing quiet support for the Bahrain claim since, as the Political Agent (Loch) was to admit on 6 May 1936, with commendable, if somewhat dangerous, frankness, "... it might in certain circumstances suit us politically to have as large an area as possible included under Bahrain"<sup>183</sup>.

3.97 The primary reason why this would suit the British politically is of course that the Ruler of Bahrain was relying on increasing revenues from oil. These were not yet forthcoming despite confident forecasts from BAPCO. The inclusion of the Hawar islands (thought at this time to be oil rich) within the "unallotted area" to be covered by a new concession from the Ruler of Bahrain would inevitably provide a new source of income for Bahrain. A secondary reason may have been that Bahrain seemed to be a more reliable stopping-off point than Qatar on the air route from the UK to India in the run-up to the Second World War.

3.98 Qatar deliberately refrains from positing the notion of a specific "critical date" for the crystallisation of the dispute between Bahrain and Qatar over Hawar, although being well aware of the judgment of the Court in the *Minquiers and Ecrehos* case. The Court will recall that, in that case, the United Kingdom and France argued in favour of radically differing dates (29 December 1950 and 2 August 1839, respectively) as being the dates on which the dispute over title to the Minquiers and Ecrehos groups had crystallised, with both parties maintaining that evidence of activities performed by one party or the other after the so-called "critical date" should be regarded as inadmissible. The Court, in its judgment in that case, took an intermediate position:

"A dispute as to sovereignty over the groups did not arise before the years 1886 and 1888, when France for the first time claimed sovereignty over the Ecrehos and Minquiers respectively. But in view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned"<sup>184</sup>.

3.99 Qatar is content to rely on this statement of the position. Indeed, it does not ask the Court to reject any evidence put forward by Bahrain as being inadmissible *in limine* only by reason of the fact that it relates to activities carried out by or on behalf of Bahrain after April 1936. ~~It does however ask the Court to reject as totally inadmissible any evidence put forward by Bahrain in support of its claim to Hawar (or indeed to Zubarah) which it is satisfied was "manufactured" by Bahrain to strengthen its case.~~ Likewise, it respectfully requests the Court, relying on this passage in its judgment in the *Minquiers and Ecrehos* case, not to take into consideration any evidence tendered by Bahrain in support of its claim to Hawar if the evidence relates to activities carried out by or on behalf of Bahrain after April 1936 (when a formal claim to Hawar was first advanced to the British authorities on behalf of the Ruler of Bahrain), and the Court is satisfied that these activities were undertaken with a view to improving Bahrain's legal position. Some activities undertaken by or on behalf of Bahrain in relation to Hawar in the late 1930's clearly fall within the scope of this principle, for example, the "beaconing" or marking of islets or other maritime features<sup>185</sup>, ~~the covert "occupation" of the main Hawar island by members of the Dowasir tribe<sup>186</sup>~~; the despatch by Bahrain of a garrison to Hawar<sup>187</sup>, and the building of a fort and mosque on the main Hawar island.<sup>188</sup> Activities of this kind clearly cannot be accepted as evidence confirming Bahrain's claim of title to the Hawar islands, even if their evidential value might have to be excluded for other unrelated reasons, for example, because the beaconing of islets and fashts would not in any event constitute evidence of title, ~~or because the alleged "settlement" of the Dowasir on Hawar was artificially contrived by Belgrave in the mid-1930s.~~

3.100 Qatar is indeed inclined to the view that, in this particular case, the Court should not seek to pick out any specific date as the date when the dispute between Bahrain and Qatar as regards sovereignty over Hawar crystallised. The whole period between 1930 and 1939 could be said to have been a critical period when Bahrain was in the process of reviving or seeking to assert claims concerning Zubarah and Hawar at the expense of Qatar. The Court will indeed recall that the Court of Arbitration in the *Taba* arbitration between Egypt and Israel was content to decide the location of the fourteen boundary pillars in dispute between the Parties on the basis of the boundary between Egypt and the former mandated territory of Palestine as it was demarcated, consolidated and commonly understood during the period of the Mandate (which it termed the "critical period"). But, in determining that the period of the Mandate was the critical period, the Court of Arbitration in the *Taba* case did not exclude evidence (particularly documentary evidence) relating to events that had occurred both before and after the critical period. As regards events that had occurred prior to the critical period, the Court of Arbitration said in its award:

"In so far as there are doubts as to where the boundary pillars stood during the period of the Mandate or for confirmation of its findings, the Tribunal, for its part, will also consider the 1906 Agreement, but merely as an indice among others, as to what was the situation on the ground during the critical period. In the same way, the Tribunal will consider any relevant evolution with regard to the delimited and demarcated boundary prior to the critical period"<sup>189</sup>.

The Court of Arbitration also stated:

"Events subsequent to the critical period can in principle also be relevant, not in terms of a change of the situation, but only to the extent that they may reveal or illustrate the understanding of the situation as it was during the critical period..."<sup>190</sup>.

~~3.101 The present case is of course complicated by the consideration that Qatar has felt bound to draw to the attention of the Court the evidence in its possession demonstrating that, during the critical period between 1930 and 1939, Belgrave deliberately "manufactured" and falsified evidence in order to buttress the Bahraini claim to Hawar. Accordingly, Qatar's primary contention, on this evidential issue, is that the Court must reject as being totally inadmissible any evidence tendered by Bahrain which it is satisfied was "manufactured" or fabricated by or on behalf of Bahrain during the critical period from 1930 to 1939. Additionally, or alternatively, Qatar contends that the Court must, in any event, refrain from taking into consideration any evidence of activities undertaken by or on behalf of Bahrain during the critical period or later with a view to improving Bahrain's legal position in relation to Hawar.~~

### **Section 6. Inadequacy of Bahrain's evidence to sustain a claim of title to the Hawar islands prior to 1936**

3.102 As indicated above, Bahrain claims sovereignty over the Hawar islands by virtue of the British decision of 11 July 1939 which, it contends, is *res judicata*. This contention is dealt with elsewhere in this Counter-Memorial<sup>191</sup>. Bahrain's alternative contention is that its title to the Hawar islands is also supported by a series of other considerations. This alternative contention will now be examined.

3.103 Bahrain claims that "the historical genesis of Bahrain's title to the Hawar Islands is Bahrain's original dominance and authority over all the territories in the Gulf of Bahrain and the Qatar peninsula"<sup>192</sup>. It has already been demonstrated above that Bahrain had no such dominance and authority over the Qatar peninsula. Even assuming that Bahrain had some apparent (and not real) rights in any part of the Qatar peninsula or its adjoining islands, these were permanently ended by virtue of the Agreements of 1868 whereby Qatar and Bahrain were obliged to maintain maritime peace and therefore necessarily had no rights that either could assert across the waters that separated them. The territorial integrity of the peninsula of Qatar and its adjoining islands was confirmed by numerous events<sup>193</sup>.

3.104 The other aspects of Bahrain's alternative contention are: (i) that there is evidence of the exercise of sovereign authority in the Hawar islands by or *on behalf of* the Ruler of Bahrain; and (ii) that Bahrain's title was recognised by the "inhabitants" of the islands. Before dealing with these aspects of Bahrain's alternative contention, Qatar considers it most important to recall a vital fact. Bahrain makes no claim that its so-called sovereignty or "authority and control" over the Hawar islands was at any time recognised or acknowledged by any of the other rulers or powers in the region - a fact in sharp contrast to the recognition of Qatar's ownership of Hawar by the British (until 1936), the Ottomans ~~and a number of regional authorities as shown in Qatar's Memorial.~~

#### **A. Bahrain's contentions as to the Dowasir tribe are without any substance**

3.105 Bahrain further claims that its sovereignty over the Hawar islands is supported by "the continuous peaceful presence of a population subject to Bahrain"<sup>194</sup>. As is apparent from what

is stated later in the Bahrain Memorial, this is a reference to the Dowasir tribe which, Bahrain seems to claim, have permanently occupied the Hawar islands for some 200 years, during which time a branch of the tribe has continued to be Bahraini subjects.

3.106 As has already been seen, this is a wholly inadequate basis to sustain Bahrain's claim to title to the Hawar islands both because it is legally untenable and also because it is factually incorrect<sup>195</sup>. Bahrain cites no evidence at all of any exercise of its political authority over, or even its acceptance by, the Dowasir temporarily present in the Hawar islands on winter visits. At best it cites instances of individual activities or ownership of huts and fish traps of those who happened to belong to the Dowasir tribe. It is relevant to mention that the Court of Arbitration in the *Dubai/Sharjah* case dealt with a similar contention and rejected the evidence of the activities of private individuals and of their property rights as demonstrating effective control<sup>196</sup>. It stated that effective control of a territory depended only on the actions of public authorities or individuals acting on their behalf.

3.107 There is no evidence in Bahrain's Memorial or elsewhere to show that the Dowasir was the only tribe that had a presence in the Hawar islands nor that such presence was continuous or permanent. Although Bahrain alleges that the "Occupation of the Islands by Bahraini subjects has ever since [1800] been open and continuous..."<sup>197</sup>, in fact Bahrain itself admits 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>198</sup>.

A more accurate description is given by Prideaux who stated in his letter of 20 March 1909 after a visit to Hawar that:

"The facts are that Dowasir of Budaiya & Zallaq on the north-west coast of Bahrain are in the habit of *every winter* partially migrating to Zakhnuniya & Hawar Islands for fishing (sharks as well as edible fish) & hawking"<sup>199</sup>.

3.108 There are other clear indications that such of the Dowasir as went to Hawar only did so in the short period of winter months for fishing and that otherwise they were engaged in the principal Dowasir activity of pearl fishing from the north-west coast of Bahrain where they had their permanent establishment. Thus the Ruler of Qatar, in his letter to the Political Agent Bahrain of 30 March 1939, rightly pointed out that those of the Dowasir who signed the petition in support of Bahrain's case were only fishermen who frequently came to Hawar in the fishing season and stated:

"As to their real dwellings and places and their pearl-fishing boats, these all are at Bahrain and its districts as you will find confirmation of this statement in the enclosed documents"<sup>200</sup>.

It may further be noted that the translation into English from the original Arabic of the comments enclosed with the Ruler of Qatar's letter was incomplete, the following two sentences having been omitted from the translation at the end of the penultimate subparagraph of paragraph 5 and in continuation thereof<sup>201</sup>:

"It is possible that they have lately sought refuge there from the cold weather in the fishing season; this is a common practice on all islands, Hawar included. This does not constitute a permanent settlement as presented by the Bahrain Government".

3.109 The petitioners who supported the Ruler of Qatar's submission of 30 March 1939 also focussed on this point and commented with regard to the statements of those submitted by Bahrain:

"... The allegations made by the signatories of the document respecting Hawar are untrue. If they are really of those who frequent Hawar then they cannot be any other than those fishermen *who settle in Hawar and other islands during the winter for fishing when they are free from the pearl fishing season*. They are permanently settled in Bahrain, their boats, their houses and immovables are all in Bahrain"<sup>202</sup>.

3.110 In his separate statement, Muhammad bin Abdulla el-Ghurari testified that he personally knew some of the individuals who had signed the petition in support of Bahrain and stated:

"These persons are inhabitants of al-Zulaq a district of the island of Awal; their boats, houses and properties are there. They have no any connection with Hawar other than their being fishermen who come to it during the fishing season and then they leave for their own places at Zalaq, they have nothing at Hawar except shelters which they have set up because of necessity for sheltering them during the fishing season"<sup>203</sup>.

3.111 It may be noted that the translation into English from the original Arabic of the comments enclosed with the Ruler of Qatar's letter to Weightman of 30 March 1939<sup>204</sup> was incomplete, and that the following two sentences were omitted from the translation at the end of the penultimate sub-paragraph of paragraph 5 and in continuation thereof<sup>205</sup>:

"It is possible that they have lately sought refuge there from the cold weather in the fishing season; this is a common practice on all islands, Hawar included. This does not constitute a permanent settlement as presented by the Bahrain Government"<sup>206</sup>.

3.112 These statements and those by Bahrain mentioned above to the same effect<sup>207</sup> clearly corroborate each other. Furthermore, Qatar has already shown that apart from Qatari fishermen, Hawar was frequented by fishermen from a number of countries of the Gulf including Bahrain. ~~An Ottoman map of the Hawar islands of 1876 and 1883 indicates not only the various tribes that visited Hawar but also the locations where they had their seasonal dwellings~~<sup>208</sup>.

3.113 In his letter of 4 April 1909, Major Prideaux reported his conversation with an individual representing "the tribal principal Shaikh" who stated to him 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"<sup>209</sup>.

Bahrain appears to base its whole claim of ownership of the Hawar islands for 200 years on this one sentence in Prideaux's letter. Qatar submits that this basis of claim (for which there has never been any real evidence since the "written decision" was never produced to any British or other authority) is as fanciful as Bahrain's claim in its Memorial that because the Dowasir sought and obtained the award of Hawar or permission to live there from a Kazi of Zubarah "in about 1800", they became "Bahraini subjects"<sup>210</sup>.

3.114 One obvious question is the following: how can there be any question of Bahrain today asserting a claim to sovereignty over the Hawar islands based upon occupation by its so-called "subjects" (the Dowasir), who claimed the island to be their own and thus acknowledged no political authority of Bahrain?

3.115 There is, in any event, no basis for Bahrain's claim that the Dowasir were its subjects and that their occupation therefore converted the Hawar islands into Bahraini territory. This claim ignores the well-known fact that the Dowasir, one of the most independent and strong-willed tribes in the Gulf, lived in or visited many coastal parts in the Gulf area for pearling or fishing activities. Dowasir fishermen spent short spells in winter on various islands including Hawar and Zakhnuniya together with fishermen from a number of other Gulf countries to engage in fishing. The make-up and history of the Dowasir tribe make it clear that its members were not subjects of the Ruler of Bahrain in the sense claimed by Bahrain in its Memorial but that they formed an autonomous tribal unit. Writing about the Dowasir in Bahrain, Fuad I. Khuri points out:

"Coordination between... autonomous tribal domains and Al-Khalifa ruler of the country was achieved by mutual consultations carried out in the latter's council, attended regularly by tribal chiefs. Failing to attend these meetings consistently was construed as refusing to submit to Al-Khalifa authority. Such was the case with al-Dawasir chiefs, who attended only when officially invited"<sup>211</sup>.

Similarly, Lorimer, writing in 1908, points out that the Dowasir are "An important Arab tribe of Southern Najd, having settlements also on the coasts of the Persian Gulf" and 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>212</sup>.

This account tells us a number of things. The Dowasir did not even arrive in Bahrain until 1845. Some of them settled at Doha in Qatar as well as in Kuwait and others on the Persian Coast. There has never been any claim, for the simple reason that it could never be sustained, that any of these settlements of the Dowasir conferred any rights of sovereignty on Bahrain in Qatar, Kuwait or Persia. Finally, there is not a word in Lorimer about any permanent Dowasir settlement on Hawar.

3.116 Khuri further notes:

"Al-Dawasir of Budayya and Zallaq... were the most powerful, influential, and autonomous of all tribal groups because they were relatively numerous, wealthy, and, above all, able to mobilize a wide variety of tribal alliances on the mainland. Other tribes exercised autonomy as granted them by the Al-Khalifa ruler"<sup>213</sup>.

And Lorimer notes that:

"The Dawasir of Bahrain are a practically independent community; they pay no revenue to the Shaikh of Bahrain on account either of their pearl boats or their date gardens..."<sup>214</sup>.

The Ruler of Bahrain did not have much faith in the Dowasir either. When Colonel Ross, the Political Resident, met the Ruler of Bahrain in March 1879, the Ruler:

"... referred to an intention on his own part of chastising the Dawasir of Bahrain, whom he suspected of treason and of collusion with the Bani Hajir"<sup>215</sup>.

3.117 A particularly significant incident which demonstrated the independence of the Dowasir in Bahrain and the fact that its members were in no sense subjects of the Ruler of Bahrain, was the departure of the Dowasir from Bahrain in 1923, as discussed above, when certain reforms were sought to be introduced which included taxation. Again, Khuri notes:

"... Tribal chiefs and pilots considered the reforms an encroachment on their sovereignty and a limitation of their 'freedom in pearl production'. To them the sovereignty of tribal groups was synonymous with that of independent states. They abhorred the idea of being treated like other subjects in the country, as the reforms proposed to treat them with reference to taxes and courts of justice.

...

Being the strongest tribal group in Bahrain, the Dawasir never recognized Shaikh Hamad as successor, nor did they pay taxes to the Al-Khalifa regime, on the grounds that such payment implied a submissive status in tribal politics"<sup>216</sup>.

3.118 The description of events leading to the departure of the Dowasir from Bahrain in 1923, the glaring absence of any reference to any so-called Dowasir "subjects" continuing to be "permanent residents" of Hawar for five years from 1923 to 1928, Bahrain's admission that the Dowasir only spent the winter months in the Hawar islands, and the absence of any evidence of exercise of Bahrain authority over the Dowasir in the islands, establish that there never was such a permanent population but at most only itinerant fishermen never subject to any Bahraini authority. Bahrain's contention of ownership of Hawar based on the Dowasir occupying it as Bahraini subjects must therefore fail for this reason alone.

## **B. Bahrain's other grounds in support of its claim to the Hawar islands are equally without substance**

3.119 Bahrain sets out a number of other grounds in support of its claim of title to the Hawar islands<sup>217</sup>. Qatar proposes to examine immediately some of these other grounds (the 1878 Ottoman map, the Zakhnuniya parallel, the Brucks survey, the incident of the Ottoman soldiers supposedly shipwrecked in 1873 and the alleged service of summonses on Hawar "inhabitants"), while dealing with the remainder, under the heading "Miscellaneous Bahraini arguments", in Section 7.C of this Chapter below<sup>218</sup>.

### **1. The 1878 Ottoman map**

3.120 It has already been shown that Bahrain's account of the historical evolution of the States of Qatar and Bahrain and some of the other facts regarding the nature of Bahrain's influence in territories other than the Bahrain islands does not in any way support its claim to the Hawar

islands. ~~Qatar has also shown in its Memorial that Ottoman surveys confirmed that Hawar appertained to Qatar; indeed the Ottomans surveyed the Hawar islands themselves, and raised their flag there in November 1873. The Ottoman map of Hawar previously referred to provides further evidence that fishermen from a number of countries including Bahrain were continuing to visit the Hawar islands<sup>219</sup>. In the face of all this clear evidence, Bahrain's contention that "there is compelling evidence that the Ottoman Empire recognised that the Hawar Islands belonged to Bahrain"<sup>220</sup>, is obviously shown to be false. In fact the only evidence that Bahrain invokes<sup>221</sup> is the so-called Ottoman Army Survey of 1878, *i.e.* the map opposite page 6 of the Bahraini Memorial. Qatar submits that this general map on the face of it does not in any way demonstrate Bahrain's ownership of the Hawar islands; that the map shows the Hawar islands to be closely (indeed almost indissolubly) linked with the mainland of the peninsula of Qatar; and that the Ottoman surveys and maps submitted by Qatar and referred to above are, by comparison, clear and express evidence of Qatar's ownership of the Hawar islands.~~

## **2. The Zakhnuniya parallel**

3.121 It is then contended by Bahrain that merely because Zakhnuniya was also frequented by the Dowasir, in the same way as the Hawar islands, Bahrain had sovereignty over both Zakhnuniya and Hawar; and that merely because it was paid compensation for renouncing its claims to Zakhnuniya, this also amounts to acknowledgement of Bahrain's rights over the Hawar islands. This is an extraordinary argument without any factual basis, and Qatar has dealt with it fully elsewhere in this Counter-Memorial<sup>222</sup>. For the present, it is sufficient to remind the Court, as stated in Qatar's Memorial, that when, after Major Prideaux visited Zakhnuniya and the Hawar islands in 1909, he had hoped that the Ruler of Bahrain would lay claim to both Zakhnuniya and the Hawar islands so that the British could resist any Ottoman claim to them, the Ruler in fact wrote to the British to press his claims only to Zakhnuniya but significantly refrained from doing so in respect of Hawar<sup>223</sup>. Furthermore, his claim to Zakhnuniya was eventually not accepted; and while the proximity principle was given full effect in favour of Saudi Arabia in the case of Zakhnuniya, Qatar was denied the benefit of similar reasoning in the case of the Hawar islands in 1939.

## **3. The Brucks survey**

3.122 Bahrain also relies on a description of the Hawar islands (in this case referred to as "Warden's Islands") by a British Indian Navy Officer (Capt. George Brucks) on the basis of his survey between 1821 and 1829, to the effect that the principal island "is about four miles long. It has two fishing villages on it, and belongs to Bahrain"<sup>224</sup>. Apart from the fact that many of the British surveys (including those in the "Gulf Pilot") carried out at that time have been shown to be imprecise if not inaccurate<sup>225</sup>, Capt. Brucks' description takes no account of the fact that the Ruler of Bahrain's so-called "suzerainty" outside the main Bahrain islands was more apparent than real<sup>226</sup>; his description was, in any event, compiled long before the Agreements of 1868; and finally, it is contradicted ~~not only~~ by the independent descriptions of the Hawar islands by Lorimer and other British authorities set out in Qatar's Memorial and this Counter-Memorial, ~~but also by the numerous Ottoman surveys.~~

## **4. The shipwrecked Ottoman soldiers of 1873**

3.123 Bahrain refers to an occasion when it claims that in 1873, while the Ruler of Bahrain "was staying on the Hawar Islands" and some passing Ottoman soldiers were ship-wrecked

there, he caused the soldiers to be helped by being transferred to the main island of Bahrain and onwards<sup>227</sup>. There is no evidence tendered to support this statement except a letter dated 22 December 1938 written about 65 years later by Belgrave to the British Political Agent. The quality of this particular piece of evidence and other evidence tendered in the course of the British examination leading to the decision of 11 July 1939 has already been dealt with in Qatar's Memorial<sup>228</sup> and elsewhere in this Counter-Memorial to show its total unreliability.

## **5. The Ruler of Bahrain's jurisdiction to serve summons on inhabitants of Hawar islands**

3.124 Qatar has similarly demonstrated the wholly unreliable nature of the other evidence tendered by Bahrain to the British in 1938 and 1939 ~~including the so-called judgments in cases allegedly decided in Bahrain in 1909 and 1910 showing the involvement of individuals portrayed as "residents" of the Hawar islands<sup>229</sup>~~. Qatar further submits that the letter of 15 January 1911 from the Ruler of Bahrain to the British Political Agent<sup>230</sup> provides no support for Bahrain's claim that its Ruler had sufficient authority over the Hawar islands to compel the "residents" of those islands to appear before its civil courts. It merely refers to the Political Agent requiring an individual to come from Hawar. It is in no sense proof of any service of summons on someone in Hawar. The letter also indicates that the individual in question may only have been in Hawar temporarily for fishing as he was also carrying on pearl diving activities which he could only have done from Bahrain.

## **6. Bahrain's post-1936 evidence**

3.125 Bahrain has presented an elaborate Section citing evidence of Bahrain's authority over the Hawar islands since 1916 which it characterises as "overwhelming"<sup>231</sup>. Qatar will demonstrate in Section 7.C below, under the heading "Miscellaneous Bahraini arguments", how most of this supposed "overwhelming" Bahraini "evidence" relating to fishing, pearling, animal husbandry, gypsum quarrying, permanent settlement and acts of administration or authority is thoroughly unreliable, or relates to Bahraini activities engaged in subsequent to the assertion of the Bahraini claim to the Hawar islands in April 1936 and designed to improve Bahrain's legal position<sup>232</sup>.

3.126 However, before concluding the submissions regarding the inadequacy of Bahrain's evidence to sustain its claim of title to the Hawar islands, Qatar wishes to draw attention to two instances where Bahrain's arguments appear to be based on inaccurate translations of documents<sup>233</sup>.

3.127 In paragraph 468 of the Bahrain Memorial, Bahrain seeks to argue that Qatar had recognised the jurisdiction of Bahrain over the Hawar islands by reference to a passage from the English translation of a letter from the Ruler of Qatar to Weightman of 8 July 1938. Again, there appears to have been a mistranslation of this crucial passage, which occurs in the second sentence of the English translation of Annex 265 to the Bahrain Memorial<sup>234</sup>. The English text of this second sentence should read:

"When the time for sea work started, he went to Hawar with the intention of removing and using his boat as usual without knowing of the interferences of the Bahrain Government there, but *they* [*i.e. the Bahrain Government*] arrested and assaulted him and took him to Bahrain where he was kept in prison for one day"<sup>235</sup>.

This letter accordingly contains no admission that any such category of persons as "residents of Hawar" existed at the time. Furthermore, the reference to the Bahrain Government having arrested and assaulted the Qatari victim on Hawar island constitutes no admission whatsoever that they were entitled to do so, given that the purpose of the Ruler's letter was precisely to protest against this action by the Bahrain Government.

3.128 Again, the argument advanced in paragraph 469 of the Bahrain Memorial appears to be based, at least in part, on a less than fully accurate translation into English of the Ruler of Qatar's letter to Weightman of 12 July 1938, that English translation constituting Annex 266 to the Bahrain Memorial<sup>236</sup>. The translator utilised by Qatar suggests that the last sentence of the first paragraph, and from thence to the end of the letter, should be translated as follows:

"Some people on Hawar suddenly arrested them in an inhuman manner, without hearing their statements or enquiring into their business, and took them to Bahrain.

They had also arrested Isa Bin Atiq referred to in my letter dated 10th Jamadi I, 1357. In reality, I am extremely aggrieved by this happening. The continuance of the high-handed action of the people who are on Hawar to the poor who pass that side without any bad intention is a matter which cannot be tolerated as it will injure the feelings and give rise to disturbances. The boats of Bahraini people frequently visit many places of Qatar when they are forced by circumstances owing to rough sea or shortage of water. If we treat them in the same manner as those who are on Hawar do, a field for trouble will be opened, and the principles governing humanity, whose observance is essential, will be violated.

I trust that you will pay your full attention to this matter and put a stop to it. The high-handed action of those who are on Hawar to people who are compelled to go to the island and who consider it to be one of their own, is disgusting and is contrary to the principles of peace and dignity. Moreover, these men were sent by the Company to do their work and there was no reason for not questioning them and enquiring into their business. I would be grateful if you would kindly give your full consideration to this matter".

How Bahrain can interpret this dignified protest against the inhumanity displayed towards two Qatari fishermen, landing in distressed circumstances on Hawar to take on water or to make enquiries, as a recognition of Bahrain's right to exercise jurisdiction over Hawar entirely escapes the understanding of Qatar. The fact that the Ruler of Qatar expressed himself in polite terms is in no way to be taken as an admission that those who were on Hawar at the time (~~presumably those Dowasir suddenly and clandestinely introduced into Hawar by Belgrave in 1936~~) were entitled to be there. The reference to the consideration that Qataris visiting Hawar consider it "to be one of their own [islands]" is a quite sufficient denial of the Bahrain pretension to exercise jurisdiction in and over Hawar. There is accordingly no substance in this Bahrain argument.

3.129 In its Memorial, Qatar, apart from asserting its original title to the Hawar islands and citing evidence of the consolidation of this ~~title through recognition by other States, has also cited evidence of its own exercise of authority over the Hawar islands. It is Qatar's submission that it has accordingly demonstrated the existence of a prior Qatari title to the Hawar islands and that the evidence adduced by Bahrain in an attempt to sustain its own claim to the Hawar islands is either inaccurate or unreliable and in any event is wholly inadequate to displace Qatar's prior title.~~

## Section 7. The British decision of 11 July 1939

3.130 Under this heading, Qatar proposes to analyse the account given in Chapter 3 of the Bahrain Memorial of the events leading up to the British decision of 1939 and various items of evidence adduced by Bahrain in support of its claim of title to the Hawar islands, both in 1939 and again in 1996. Thereafter, Qatar will consider the Bahrain submission that Bahrain's sovereignty over the Hawar islands has been *res judicata* since the British decision of 11 July 1939, and cannot now be challenged.

### A. Bahrain's account of events omits many significant facts and embodies a number of misleading statements

3.131 One of the most serious misleading statements in the Bahrain Memorial is the constant repetition of the statement that the British Government "adjudicated" the respective claims of Bahrain and Qatar to the Hawar islands in 1939. The word "adjudication" is used at least 26 times in the Bahrain Memorial to refer to the processes leading up to the British decision of 11 July 1939<sup>237</sup>; and the verb "adjudicated" or the adjectives "adjudicative" or "adjudicatory" are used 5 times in the Bahrain Memorial to refer to these processes<sup>238</sup>. The use of inflated language of this kind is clearly designed to mislead the Court by conveying the impression that the British decision of 11 July 1939 was the result of a careful and impartial legal process embodying all necessary guarantees against bias, prejudice and other procedural defects and irregularities on the part of the decision-maker. The Court will now be in a position, having studied the respective Memorials of the Parties, to form a view as to whether the British Government's decision of 11 July 1939 can properly be described as an "adjudication" embodying all the necessary procedural guarantees which the use of that term embraces. Qatar, for its part, entertains no doubt that the British decision of 11 July 1939 was flawed from the outset for all the reasons developed in Chapter VI of the Qatar Memorial and conveniently summarised in paragraphs 6.249 to 6.255 thereof. In no way can a process suffering from the defects already identified by Qatar be termed an "adjudication"<sup>239</sup>.

3.132 It bears repeating here that among the numerous glaring omissions in the account in the Bahrain Memorial of events leading up to the British decision of 11 July 1939 is the total failure even to mention the claim to the Hawar islands on behalf of the Ruler of Bahrain first formally put forward by Belgrave on 28 April 1936<sup>240</sup>, and the "provisional decision" in favour of the Bahrain claim to Hawar made by the British Government as early as July 1936. The effect of this slanted presentation is to convey the wholly false impression that Qatar was advancing a claim to the Hawar islands *for the first time* in May 1938<sup>241</sup>. ~~But there is strong evidence, set out in detail in Chapter V of the Qatar Memorial, that, during the period from approximately 1867 to 1915 when the Ottoman Turks were present in the area, the Ottoman authorities recognised that the Hawar islands constituted an integral part of Qatar<sup>242</sup>. Itinerant fishermen from Bahrain, Qatar and the Hasa coast did no doubt make occasional visits to the islands during the winter months, as Prideaux (Political Agent) reported to the Political Resident in 1909, but these intermittent visits were not regarded by the Ruler of Bahrain at the time as justifying a claim by him to sovereignty over the islands. He would in any event have found it somewhat embarrassing to put forward such a claim, since he had already requested, in a letter of 7 July 1907 to Sheikh Saeed Al-Mutawwa Al-Binhajer (Sheikh of the Western Ports of Qatar), permission for Bahrainis to anchor at Hawar, acknowledging his responsibility for any misbehaviour by Bahrainis "on your island and in your country"<sup>243</sup>. Similar requests to anchor at Hawar were made to the Sheikh of the Western Ports of Qatar (acting on behalf of the Ruler of Qatar) by other prominent members of the ruling family in~~

~~Bahrain or by members of the Dowasir tribe during the years 1907 and 1908<sup>244</sup>. So here is more evidence of recognition in 1907 by the then Ruler of Bahrain of Qatari title to the Hawar islands, this necessarily implying a disclaimer of Bahraini title.~~

## **B. The true significance of Annex 292 to the Bahrain Memorial**

3.133 Qatar is now obliged to draw to the attention of the Court a strange but highly revealing feature of the Bahrain Memorial. In studying the annexes to that Memorial, Qatar has uncovered materials which, far from buttressing Bahrain's case, in fact provide striking confirmation of the evidence in the Qatar Memorial showing the lengths to which the Ruler of Bahrain and the other sheikhs of Bahrain were prepared to go in the 1930s to destabilise and undermine the authority of the Ruler of Qatar in his own country. Annex 292 to the Bahrain Memorial<sup>245</sup>, which is given the heading "Report entitled 'Qatar' by H. Weightman, 5 December 1939" is a remarkably indiscreet account of the continuous efforts of the leading Bahraini families to sow disaffection and discord among those tribes in Qatar professing loyalty to the Ruler of Qatar. Qatar can reveal (and the internal evidence of what is said in the Report confirms this) that this Report was *not* in fact prepared by Weightman, but was rather a confidential Report submitted by Packer (PCL) to Weightman in the latter's capacity as Political Agent<sup>246</sup>. In paragraph 372 of the Bahrain Memorial, the Packer Report of 1939 on Qatar is cited as authority for the proposition that, in the 1930s, Qatar experienced widespread poverty, hunger and disease. Qatar does not dispute this; nor is it seriously disputed that Qatar was concerned to stop the flow of emigration from Qatar to Bahrain which, during the latter half of the 1930s, was much wealthier than Qatar. In paragraphs 378 and 379 of the Bahrain Memorial, the causes of dissatisfaction in Qatar are stated to be (citing from the Packer Report) "poverty due to the pearl slump and lack of employment" and "the Ruler's and his son Hamed's greed which makes them not only... retain all the oil money but also control for their own benefit employment in the oil Co." There is certainly much truth in the first of these asserted causes of dissatisfaction. Qatar would submit that the second is somewhat exaggerated, this rumour being spread abroad by Weightman and by the Bahraini sheikhs anxious to undermine the authority of the Ruler of Qatar; indeed, footnote 444 to paragraph 379 of the Bahrain Memorial very fairly concedes that "oil revenues in Qatar in this period were limited to exploration fees".

3.134 Accordingly, it is not so much the content of those passages in the Packer Report relied upon in paragraphs 372, 378 and 379 of the Bahrain Memorial which Qatar wishes to challenge. It is rather the very selective use which Bahrain makes of Annex 292 to the Bahrain Memorial. What Qatar wishes to draw to the attention of the Court are those passages in that Annex which testify to the unremitting efforts of the Ruler of Bahrain and other leading Bahraini sheikhs in the late 1930s to spread discord and dissension in Qatar, thereby hoping to secure the overthrow of the Ruler of Qatar<sup>247</sup>.

3.135 Thus, the Bahrain Memorial, having cited in paragraph 378 two of the three causes of dissatisfaction in Qatar mentioned in the 1939 Report, singularly fails to mention the third cause of dissatisfaction, namely "intrigues from Bahrain". It also fails to draw attention to the examples of such intrigues given in the 1939 Report. Thus, on the very first page of Annex 292 appears the following passage:

"(The Bahrain Shaikhs who were responsible for the departure, last year, of the Ruler of Qatar's strongest adherent in western Qatar Mansur bin Khalil of the Bani-Hajir, who was

very active on the Qatar side in the Naim clash, never lose an opportunity of spreading discord in the west and north)".

3.136 More details of these "intrigues from Bahrain" are given later in Annex 292 to the Bahrain Memorial<sup>248</sup>. After referring to the defeat of the Naim tribesmen at Zubarah in 1937, the 1939 Report continues:

"The loss of prestige was felt very deeply by the Bahrain ruling family. Since then the majority of the Naim have been subsidized by Bahrain and live in Bahrain or Arabia. A section of the Bani-Hajir under Mansur bin Khalil formerly a staunch adherent of Shaikh Abdulla of Qatar were next alienated by money and presents. Shaikh Mansur draws Rs 60p.m. [per month] and 25 of his followers Rs.11 each"<sup>249</sup>.

3.137 Further details of efforts by the Bahraini ruling family to suborn leading Qataris are also given in the Packer Report<sup>250</sup>:

"Dis-gruntled members of Shaikh Abdulla's family were also encouraged to leave Qatar and reside in Bahrain where they were given presents & salaries (including a motor car or its use). Two of them were taken to India with H.H. Shaikh Hamad.

Dohah's most reputed merchant was recently invited to sever his connections in Qatar & settle in Bahrain<sup>251</sup>. The inability of the Ruler of Qatar to move with the times is exploited to the full by Bahrain".

Tribal sections stated to have been "slightly affected" by Bahraini attempts to suborn them from their allegiance to the Ruler of Qatar are the El-Sulta, some of whose leading men "were recently in Bahrain and received cash presents from the Ruler"; the Beni Hajir whose move from Qatar to Arabia was "brought about by the Bahrain Shaikhs"; the Naim who, following the Zubarah clash, are reported to have been "bought over by Bahrain" practically to a man, though some were rumoured to be drifting back to Qatar; and the Mehanda, said to be closely allied to the Beni Hajir.

3.138 Perhaps the most telling omission from the summary, in paragraphs 372, 378 and 379 of the Bahrain Memorial, of the contents of the Packer Report of 1939 on Qatar is the failure to mention what is said in that Report about the Hawar islands. The key passage in the 1939 Report is the following:

"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>252</sup>.*

3.139 The underlined passage is *prima facie* puzzling, even if illuminating. The puzzling feature is that, if the 1939 Report had been prepared by Weightman (as Bahrain professes), he above all would have been aware on 5 December 1939 (the date of the Report) of the "authority" and the "documents" relied on for the "annexation" of the Hawar islands by Bahrain. It will be recalled that it was the analysis made by Weightman himself, in his letter

of 22 April 1939 to the Political Resident<sup>253</sup>, of the documentation submitted to him by or on behalf of the Rulers of Bahrain and Qatar with reference to their claims of title to Hawar which was relied upon so heavily by the British Government in reaching a decision on Hawar favourable to Bahrain. Read in this light, and even if Qatar had not discovered a copy of Weightman's covering letter to Prior of 5 December 1939, the underlined passage confirms that the Report was not in fact written by Weightman personally.

3.140 The illuminating feature of the underlined passage is the reference made in it to "the document held by one Mohd. bin Ahmad bin Shahin Dausari". This is probably a reference to the petition enclosed with Belgrave's letter of 22 December 1938/3 January 1939 to Weightman constituting the so-called counter-claim of Bahrain<sup>254</sup>. It will be seen that this petition is subscribed to *inter alios* by "Mohamad b. Ahmad b. Shahin", presumably the person to whom reference is made in the underlined passage from Annex 292. If this is correct, the consequences are serious from Bahrain's point of view, for the underlined passage states not only (a) that the document was given to him by Shaikh Isa (the Ruler of Bahrain), thus destroying its credibility as a spontaneous petition, but (b) that only nine names had been quoted by him, whereas fourteen thumb impressions, three signatures and two seals appear on the face of the petition. ~~In the light of the evidence which Qatar had produced in its Memorial, including the evidence of the written confessions of Yousuf bin Ahmed, Ahmed bin Ali Al-Ghatam and Irhama bin Ahmed Al-Dosari<sup>255</sup>, Qatar had already confidently submitted that the reliability of the statements made in the petition had been wholly undermined<sup>e</sup>.~~

3.141 The new evidence contained in the underlined passage of Packer's 1939 Report provides independent confirmation, *from a document put in evidence by Bahrain itself*, that no credence *whatsoever* can be attached to the petition annexed to the Bahrain "counter-claim" of 23 December 1938/3 January 1939. A document given to one of its signatories by the Ruler of Bahrain himself can hardly be accounted an objective statement of the facts, even if there were no independent evidence to prove that the document had been drafted by Belgrave.

3.142 The Court will be aware that Qatar has consistently charged Weightman with having a deep-seated anti-Qatar bias in the context of the dispute over the Hawar islands. How deep-seated this bias was can be judged by a study of Weightman's covering letter of 5 December 1939 to Prior, where Weightman almost welcomes an eventual attempt on the life of Sheikh Hamad as and when he becomes Ruler of Qatar<sup>1</sup>.

### **C. Miscellaneous Bahraini arguments**

3.143 Qatar would now like to respond to some miscellaneous arguments advanced by Bahrain in its Memorial. Not all of these arguments are strictly related to the British decision of 11 July 1939, or to the evidence adduced by Bahrain in support of its claim of title to the Hawar islands, both in 1939 and again in 1996; but it is convenient to deal with them here.

~~3.144 Qatar rejects as utterly false the statements made in the last three sentences of paragraph 39 of the Bahrain Memorial about the lack of Al-Thani, Ottoman or Qatari authority in or over the Hawar islands. Both in the Qatar Memorial and in this Counter-Memorial, Qatar has produced a mass of cogent evidence totally contradicting the charges made in these sentences.~~

3.145 The ridiculous assertions made in paragraphs 360 and 361 of the Bahrain Memorial that the Ruler of Qatar, in his letter to Weightman of 30 March 1939<sup>2</sup>, was ignorant of the location

of the Hawar islands, or was claiming a *different* group of islands, hardly merit a reply. It is possible that the Ruler was misinformed of the surface area of the main Hawar island, but it is clear that he was referring to the Hawar islands located immediately off the west coast of the mainland of Qatar. The citation from paragraph 9 of the comments enclosed with that letter in paragraph 361 of the Bahrain Memorial is explicable if one looks at paragraph 8 of those comments where the rhetorical question is posed:

"... we ask the Bahrain Government whether the Hawar Islands, from a geographical point of view, comprise of a part of Bahrain completing it from the south or a part of Qatar completing it from the north?"<sup>3</sup>

The first sub-paragraph of paragraph 9 of the comments then convincingly refutes the assertion that the Ruler of Bahrain knows more about Hawar than the Ruler of Qatar by pointing to the undisputed fact that, at least at low tide, it is possible to wade from the mainland of Qatar to Hawar island.

3.146 It is instructive to compare the version of the Ruler of Qatar's letter to Weightman of 30 March 1939 with attached comments, which is reproduced as Annex 279 to the Bahrain Memorial<sup>4</sup>, with the version of the same letter reproduced as Annex III.192 to the Qatar Memorial<sup>5</sup>. It will be seen that the version reproduced as Annex 279 to the Bahrain Memorial incorporates typed-up versions of the marginal notes made by Weightman which are illegible in the version reproduced as Annex III.192 to the Qatar Memorial. A close study of these marginal notes reveals again the anti-Qatar prejudice of Weightman and his pronounced pro-Bahrain bias. Thus, opposite paragraph 3 of the comments where the Ruler of Qatar has queried why the Hawar islands have remained so long unoccupied by a Bahraini military detachment when it is claimed that they have been owned by Bahrain and occupied by Bahraini nationals for over a century, Weightman puts the marginal comment:

"But Shaikh Abdullah [of Qatar] does not claim that *Qatar* detachments or representatives were in Hawar"<sup>6</sup>.

By way of contrast, when the Ruler of Qatar asks why, if Bahrain has had sovereignty over the Hawar islands for more than a century, no security detachment or representative of the Ruler of Bahrain was sent to Hawar, Weightman's marginal note, opposite paragraph 6 of the comments<sup>7</sup>, is simply "Why?". Weightman stigmatises as "Untrue" the statement made by the Ruler of Qatar in paragraph 12 of the comments that some of the Dowasir who signed the petition enclosed with the Bahrain "counter-claim" had no real connections with Hawar, although it is now clear that this statement was fully justified. All of Weightman's marginal comments reflect his pro-Bahrain and anti-Qatar bias, in relation to the conflicting claims of title to Hawar.

## 1. Fishing

3.147 If we turn to the positive evidence which Bahrain invokes of Bahrain's continuous authority over the Hawar islands since 1916, we find a number of curious paradoxes. With respect to fishing, it is said in paragraph 439 of the Bahrain Memorial, citing as authority the (uninvited) "preliminary statement" forwarded by Belgrave to Weightman on 29 May 1938,<sup>8</sup> that fishing rights off the shores of Hawar were originally granted to the people of Hawar by the Ruler of Bahrain. Belgrave's "preliminary statement" goes on immediately to say:

"If these documents are available they will be forwarded"<sup>9</sup>.

Needless to say, they were not forwarded. Qatar would suggest that as much credence can be attached to this claim as could have been attached to the other claim made in the same paragraph of Belgrave's "preliminary statement" that the Hawar fish traps were registered in the Land Department of the Bahrain Government (this latter claim having to be withdrawn unreservedly by Belgrave at a later stage). Qatar does not dispute that other itinerant fishermen from Oman and the Hasa coast, as well as from Bahrain, may have been present on Hawar during the winter fishing seasons in the early 1930s. But their presence was no more evidence of Bahraini title than it was evidence of Omani or Saudi title; ~~and the supposed "settlement" of the Dowasir on Hawar in the mid-1930s was, as we have seen, contrived by Belgrave so that its value as evidence can be totally discounted~~<sup>10</sup>.

## 2. Pearling

3.148 The next item of "evidence" of title invoked by Bahrain relates to pearling. In paragraphs 444 to 447 of the Bahrain Memorial, much attention is devoted to the strong links of the Dowasir tribe with the pearling industry. Qatar does not dispute that many of the Dowasir did engage in pearling in the 1920s and early 1930s. But Qatar *does* dispute the accuracy of many other assertions in these paragraphs of the Bahrain Memorial which, taken together, convey a wholly false picture of the position. No doubt, as is stated in paragraph 444 of the Bahrain Memorial, the pearling industry at this time did occupy many Bahrainis; but it also occupied many Qataris, Kuwaitis and indeed other Arabs living along the southern littoral of the Gulf. As the Law Officers' Opinion of 19 October 1904 rightly says:

"Apparently all the tribes fish for pearls wherever they are to be found, and no tribe has exercised a right excluding the other tribes from any part of the fishery"<sup>11</sup>.

What Qatar does however strongly challenge is the assertion that "a permanent pearling fleet" was moored at Hawar. There is no real or indeed plausible evidence for this assertion. The Bahrain Memorial cites Weightman's letter of 22 April 1939 for this assertion, but all that Weightman says is that he saw four Dowasir pearling boats drawn up on the beach at Hawar during his visit on 18 April 1939, and that:

"Were the Dawasir purely temporary visitors to the island, with their permanent habitations in Zellaq, their pearling boats would not be beached in Hawar"<sup>12</sup>.

3.149 Qatar is in any event highly sceptical of the accuracy of Weightman's evidence on this point. The main pearling season in this part of the Gulf runs from June to September. Why would pearling boats be at Hawar in April? Moreover, pearling boats are normally about 60 feet long and would find it difficult, if not impossible, to navigate in the very shallow waters surrounding the main Hawar island<sup>13</sup>. A pearling boat of this length would be incapable of beaching in the Hawar islands. In any event, there is no evidence of pearl fishing from Hawar or in any part of the waters between Bahrain and Qatar, so that it would have been pointless (and hazardous) for anyone to bring his pearling boat to Hawar.

3.150 The Bahrain Memorial also cites the statement made by Hamoud bin Muhanna al Dosari as authority for the assertion that pearl diving on a significant scale took place from Hawar<sup>14</sup>. Even if this statement may seem to lend some support to the implied suggestion that the Dowasir went on pearling expeditions *from Hawar*, that implied suggestion is in fact

wholly denied by the other three statements made by Nasr bin Makki bin Ali al Dosari<sup>15</sup>, Salman bin Isa bin Ahmad bin Saad al Dosari<sup>16</sup> and Ibrahim bin Salman bin Ahmed Al Ghattam<sup>17</sup>, all of whom without exception speak of leaving Hawar to return to Zellaq to go pearl diving in the summer. This in itself indicates that pearling activities were in fact undertaken from the main Bahrain island and not from Hawar. Qatar would in fact suggest that the recollections of Hamoud bin Muhanna bin Hamad al Dosari on this and many other points are faulty. His evidence about pearling expeditions from Hawar and the mooring of pearling dhows at Hawar (paragraph 20 of his statement) is suspect and is in any event inconsistent with what he says (in paragraph 5 of his statement) about the Dowasir coming to Hawar every year "*after the summer pearling season*". As already indicated, the main pearling season in this part of the Gulf runs from June to September. The pearling banks were in the open sea to the north of Bahrain, and not in the shallow confined waters between Bahrain and Hawar. The Dowasir pearling boats would accordingly have operated from Bahrain itself when setting out on pearling expeditions; and the implied suggestion that some of the Dowasir permanently moored "three or four large dhows with 150 to 250 men" on Hawar island is utterly fanciful. All in all, the recollections of Hamoud bin Muhanna bin Hamad al Dosari about the pearling activities of the Dowasir suggest a very rich community on Hawar in stark contrast to the picture he paints of their fishing activities where he claims (in paragraph 18 of his statement) that, if fish traders did not come from Muharraq to buy the fresh fish, he and his companions had to take the fish "and sell it in Muharraq for one or two rupees", remarking that "even in those days, that was not much money". The inconsistency is striking.

3.151 Accordingly, what is said in paragraphs 444 to 447 of the Bahrain Memorial provides no real evidence that the Dowasir were permanently resident on Hawar (even if their activities could be regarded as activities of Bahraini subjects - which Qatar strongly denies in view of their shifting allegiances). The false and misleading nature of the Bahraini evidence on the significance of pearling to the Dowasir in Hawar is further evidenced by two additional points. The first is that there is no *independent* evidence of pearling activities on Hawar in any of the books written on pearling in the Gulf in the 1920s and 1930s, some by Bahraini writers. The second is the total lack of mention in the narrative in Volume I of the Bahrain Memorial of the punishments imposed on the Dowasir tribe by the Ruler of Bahrain as a consequence of their voluntary settlement in Dammam from 1924 to 1928/29. The Political Agent's memorandum to the Political Resident of 24 May 1924 recalls the Ruler of Bahrain's statement that the action which would be taken to punish the Dowasir for their contumacious behaviour would be:

"1. Their divers who are domiciled in Bahrain would be freed from indebtedness to them & allowed to contract with new nakhudas. This has been done & all such divers were given 'Barwahs' and have found jobs elsewhere.

2. Their property in Bahrain would be confiscated by the Bahrain Government & sold. It has been confiscated. Its disposal was sanctioned by the Colonial Office & Govt. of India, actual sale of their property & particularly of the sites at Budaiyeh has been delayed until the arrival of the levy corps in order that steps may be taken to adequately protect the new owners from possible petty raids, although the danger of such raids is now considered to be very remote, the Dowasir being now convinced that they can expect no active support from Bin Saud, who was warned by H.M.G.

3. They would be forbidden to dive on the Bahrain pearl banks"<sup>18</sup>.

The remainder of this memorandum is devoted largely to the practical arrangements for ensuring the implementation of point 3, although there is an interesting explanation of the reasons for points 1 and 2.

3.152 The memorandum states that most of the acute feeling between Sunnis and Shiah had been due to oppression of Shiah divers and cultivators by the Dowasir. It was felt that if they continued to own property in Bahrain and to have Shiah divers, oppression would continue and the perpetrators would be able to run off to Dammam and escape justice and in all probability claim the protection of Ibn Saud, resulting in constant friction and providing the Sultan with a convenient pretext for interference in the internal affairs of Bahrain. This part of the memorandum tellingly concludes:

"The Shaik had never been able to control them [the Dowasir] & they would oppose all efforts at reform, so that on the whole Bahrain was well rid of them"<sup>19</sup>.

3.153 This is the tribe which Bahrain professes to consist of loyal adherents to the Ruler of Bahrain, permanently resident in the Hawar islands. It is hardly surprising that Qatar is obliged to express astonishment at these efforts to mislead the Court.

### **3. Animal husbandry**

3.154 To the extent that the Dowasir may have engaged in animal husbandry by grazing cattle, sheep and goats on the main Hawar island during the early 1930s<sup>20</sup>, this could only have been in the winter months due to the semi-nomadic nature of their sporadic presence on the island, and the number of animals involved must have been very limited in view of the perennial shortage of water. They would only have been for the personal use of those present on Hawar during their winter visits.

### **4. Gypsum quarrying**

3.155 Qatar does not dispute that some gypsum quarrying may have been carried out by those temporarily resident on Hawar during the winter months in the early 1930s<sup>21</sup>, although there is no real proof of this. The Costa Report, introduced into evidence by Bahrain, suggests that the gypsum extracted from the two smaller quarries was mainly for local use but that the gypsum from the third quarry was not for local use, but presumably for use elsewhere, for which no evidence has been presented. The other main source of evidence for gypsum quarrying, the statement of Ibrahim bin Salman bin Ahmed Al Ghattam<sup>22</sup>, is unreliable. He says:

"Men from the main island of Bahrain would also come to cut the gypsum from the centre of the main Hawar Island. They came in many dhows with permits from the Bahrain Government"<sup>23</sup>.

This statement is repeated in very similar language by Hamoud bin Muhanna bin Hamad al Dosari<sup>24</sup>. But this last goes on to say:

"The permits [for gypsum cutting] were issued by the Bahrain Chief of Police, Sheikh Khalifa bin Mohammed. He used to stay on the main Hawar Island in the police fort and meet the Dowasir"<sup>25</sup>.

If true, this would inevitably imply that the permits for gypsum extraction were being issued after the spring of 1938, since the new fort was not completed until March 1938. If so, this evidence relating to events in 1938 should be disregarded as supporting Bahrain's claim of title.

3.156 It is in any event strange that if, as Bahrain now asserts, "Hawar gypsum was quarried throughout the 19<sup>th</sup> and 20<sup>th</sup> Centuries and used as building material for construction on both the Hawar Islands themselves and on the main island of Bahrain and Muharraq Island"<sup>26</sup>, no reference was made to this activity in the Bahrain "counter-claim" of 22 December 1938/3 January 1939. In fact, the only mention of gypsum extraction in the materials submitted by Bahrain in support of its claim to Hawar in 1938/39 is in the (uninvited) "preliminary statement" prepared by Belgrave and submitted to Weightman on 29 May 1938. There it is simply said that "the island [Hawar] is rich in gypsum". This "preliminary statement" was, of course, never copied to the Ruler of Qatar. The fact that no reliance was placed by Bahrain on the activity of gypsum extraction in 1938/39 is revealing; it suggests that Bahrain well knew that no evidential value could be attached to this activity (to the extent that it was being carried out), as it was not in any event being carried out by the "Hawar Islanders" (a supposed reference to the Dowasir which Qatar totally rejects because of their semi-nomadic lifestyle), but apparently by Bahrainis from the main Bahrain island. It also suggests that such gypsum as may have been extracted before 1936 was only for local use. Whether any gypsum quarried in Hawar was ever exported to Bahrain is highly problematic. It seems *prima facie* unlikely, given the presence of good quality gypsum at places on the Hasa coast much nearer to Budaiya and Zellaq than Hawar.

## **5. Permanent settlement**

3.157 Most of the other additional "evidence" of permanent settlement adduced in paragraphs 458 to 465 of the Bahrain Memorial can also be wholly discounted because it relates to activities which occurred after the Bahraini "occupation" of Hawar in 1936/37 and which were designed to support Bahrain's claim of title. The February 1938 letter from PCL to which reference is made at paragraph 458 of the Bahrain Memorial can be ignored for this reason. In paragraph 464 of its Memorial, Bahrain admits that it built a "new" mosque on Hawar in 1939. There is no credible evidence that there existed an earlier mosque, notwithstanding the statement of Hamoud bin Muhanna bin Hamad Al-Dosari. Nor is the existence of some cemeteries on the island proof of permanent settlement by the Dowasir, given the presence of fishermen (and no doubt their families) on Hawar during the winter months. It is perhaps revealing that Bahrain can give no details of the origins of those buried in the earlier graves. Qatar is confident that not all of these were from the Dowasir tribe or originated in Bahrain but is unfortunately in no position to provide direct proof. Finally, Qatar sees no particular reason to quarrel with the passage from Dr. Costa's Report which is cited at paragraph 465 of the Bahrain Memorial; what Dr. Costa saw on Hawar may be the picture of people "settled" on the island since its unlawful occupation by Bahrain in 1936/37.

## **6. Acts of administration or authority**

3.158 Little, if any, evidential value can be given to the acts of Bahrain administration or authority referred to in paragraphs 466 to 485 of the Bahrain Memorial. Qatar has already made the point that any acts by Bahrain in or in relation to the Hawar islands occurring in connection with or subsequent to the unlawful Bahraini occupation of Hawar in 1936/37 cannot be taken as evidence establishing or confirming Bahraini title. This is sufficient to

dispose of the "evidence" adduced in paragraphs 467 to 470, 472, 473, 481, and 483 to 485 of the Bahrain Memorial. Indeed, what is said in paragraph 472 of the Bahrain Memorial is highly revealing. It is self-evident that Belgrave was doing his utmost in 1937 and 1938, immediately following the unlawful occupation of Hawar by Bahrain, to strengthen the flimsy Bahrain claim by constructing a fort on Hawar, by building a new mosque, by sinking an artesian well and by beaconing a number of islets in the vicinity<sup>27</sup>. As regards what is said in paragraph 466 of the Bahrain Memorial, Prior, the successor to Fowle as Political Resident in the Gulf, provided the answer to the point that Sheikh Isa used to make annual visits to the Hawar islands by maintaining that he equally made annual visits to places in Saudi Arabia (such as Hasa and Zakhnuniya) without advancing claims of title to those parts of Saudi Arabian territory. As regards the "evidence" adduced in paragraph 471 of the Bahrain Memorial, the statement made by Nasr bin Makki al Dosari is lacking in specificity as it gives no precise indication of the year or years when the events as to which he deposes took place; he simply says "when I was young." Was this before or after he and his family left Bahrain for the Dammam promontory in Saudi Arabia (an event to which he makes no reference whatsoever)?

### **7. *Status quo***

3.159 Qatar has dealt elsewhere in this Counter-Memorial with Bahrain's continuing breaches of the commitments to preserve the *status quo* embodied in the second point of the 1987 Agreement which the Court has itself, in its judgment of 1 July 1994, characterised as an international agreement creating rights and obligations for the Parties<sup>28</sup>. Qatar seriously questions the "entirely defensive mandate and capability" of the Bahraini military garrison currently stationed on Hawar, and notes the blatant Bahraini admission (in paragraph 489 of the Bahrain Memorial) that there has been "a significant reinforcement of the Hawar Islands' defences" in recent years, in clear breach of the second point of the 1987 Agreement. The other matters to which reference is made in paragraphs 486 to 498 of the Bahrain Memorial provide no confirmation of Bahraini title to the Hawar islands, being activities engaged in by Bahrain subsequent to the crystallisation of the dispute between Qatar and Bahrain and designed to strengthen Bahrain's legal position.

### **8. General traverse**

3.160 Qatar has already, in Section 2 of Chapter VI of the Qatar Memorial<sup>29</sup>, set out in very considerable detail the defects in the procedure followed by the British Government in reaching the "decision" of 11 July 1939, giving the Hawar islands to Bahrain. There are so many omissions and mis-statements in the corresponding account given in the Bahrain Memorial (paragraphs 354 to 403) that Qatar is obliged to contest everything stated in the Bahrain Memorial on this aspect of the dispute where it is inconsistent with the account given in the Qatar Memorial, even if particular assertions made in these paragraphs of the Bahrain Memorial have not been specifically denied or commented on in this Counter-Memorial. Qatar would simply ask the Court to compare the two accounts, together with the evidence adduced to support them by each of the Parties. Qatar would particularly wish the Court to pay attention to the omissions in the Bahraini account of events, not only in the description of the procedure followed by the British authorities in the Gulf in 1938/39, but also in the deliberate failure to mention the crucial events of 1936 and (possibly even more striking) the deliberate failure to mention the reactions of Prior and Alban (the successors to Fowle and Weightman respectively) in the immediate aftermath of the 1939 decision.

#### **D. Further evidence of pre-judgment by the British authorities in the Gulf**

3.161 Qatar would wish to take this opportunity to submit to the Court further evidence of pre-judgment by the British authorities in the Gulf of the question of title to the Hawar islands in the period immediately prior to the rendering of the British decision of 11 July 1939. This should be considered as supplementary to the evidence of pre-judgment already analysed in paragraphs 6.138 to 6.140 of the Qatar Memorial. The Court will recall that, in the early months of 1939 (*before* the British Government reached its decision in favour of the Bahrain claim to sovereignty over Hawar), the oil concession negotiations were coming to a head<sup>30</sup>. As part of the process of assessment by the British Government of the financial and other advantages and disadvantages of the respective bids put in by BAPCO and PCL (the two rival oil companies), Weightman (PAB) set out his views in some detail in a letter which he sent to Fowle (PRPG) on 12 February 1939. That letter concentrates in the main on the financial advantages of the BAPCO bid for the whole of the unallotted area (including Hawar) when compared with the PCL bid for a concession covering only the Hawar islands and their territorial waters. Although Qatar considers that the financial arguments deployed by Weightman in favour of the BAPCO offer are exaggerated, it would particularly wish to draw the attention of the Court to two passages in this letter which provide startling evidence of Weightman's bias in favour of Bahrain in the matter of the dispute over title to Hawar. Paragraph 8 of the letter rehearses the reasons why the British Government had in principle favoured the grant to PCL of an oil concession for the Hawar islands. Among these reasons is (b):

"There are obvious disadvantages in an American Oil Company [BAPCO] operating a concession granted by the Shaikh of Bahrain in an area so closely adjacent to Qatar, and particularly inasmuch as that area is under formal dispute at the moment between Bahrain and Qatar (*even though there can be little genuine doubt that sovereignty rests with Bahrain*)"<sup>31</sup>.

Paragraph 9 of the letter purports to provide a "rejoinder" to these considerations. Attention is again directed to sub-paragraph (b):

"*When once His Majesty's Government award Hawar to Bahrain, the Shaikh of Qatar is no longer concerned. If by any chance he were to attempt to contest the award by force he could presumably be dissuaded without undue difficulty*"<sup>32</sup>.

3.162 The Court will of course recall that, not much more than two months after despatching this letter to his superior, Weightman was called upon to undertake the onerous and responsible task of assessing the merits of the conflicting claims of the Rulers of Bahrain and Qatar to title to the Hawar islands. In the circumstances, there could hardly be a more glaring instance of pre-judgment than is afforded by this calm assumption on the part of Weightman, *the* central figure in the decision-making process on the part of the British Government, that sovereignty over Hawar rested with Bahrain, that assumption being expressed two months or more before Weightman was supposed to be assessing *objectively* the opposed claims of the two Rulers.

#### **E. The decision of 11 July 1939 is not *res judicata***

3.163 This proposition requires little further elaboration. Qatar has already drawn attention to the wholly erroneous description of the processes leading up to the British "decision" of 1939 and their false characterisation as an "adjudication". Bahrain's suggestion that, in 1939, the

British Government was judicially examining and determining issues of fact and law relating to the Hawar islands is absurd<sup>33</sup>. Any notion that the process was one of "adjudication" must be discarded as soon as it is understood:

(a) that the formal claim to the Hawar islands made on behalf of the Ruler of Bahrain on 20 April 1936 was never notified to the Ruler of Qatar;

(b) that the "provisional decision" by the British Government in early July 1936 in favour of the Bahrain claim was equally never notified to the Ruler of Qatar;

(c) that neither Ruler accepted in advance that the "decision" to be taken by the British Government would be binding on him; and

(d) that the Ruler of Qatar was never shown a copy of the (uninvited) "preliminary statement" of Bahrain's case put in by Belgrave on 29 May 1938, and subsequently treated and relied upon by Weightman as one of the documents in the case; and was likewise never shown other evidence relied upon by Weightman in his report to Fowle of 22 April 1939<sup>34</sup>.

3.164 The British Government's decision of 11 July 1939 on Hawar must be regarded as amounting at most to a non-binding administrative decision in view of the lack of real consent by both Rulers to the making of a binding award by the British Government on the respective claims of Bahrain and Qatar to title over the Hawar islands. And this is quite apart from the evidence presented to the Court by Qatar to show that, in 1939, the British authorities in the Gulf were presented with false evidence by Belgrave.

3.165 Qatar submits in addition that the "decision" of 11 July 1939 must be regarded as a nullity on the following grounds:

(a) evident bias on the part of certain British officials closely involved in the decision-making process;

(b) the failure of the British authorities in the Gulf to give full effect to the principle *audi alteram partem* in that process; and

(c) the failure to give reasons for the decision reached.

In this context, the Court will recall that, in the *Dubai/Sharjah* case, the validity of the Tripp decisions of 1956 and 1957 purporting to establish a land boundary between the sheikhdoms of Sharjah and Dubai, was a central feature of the award of the Court of Arbitration<sup>35</sup>.

3.166 Indeed, it is another astonishing feature of the Bahrain Memorial that, although it seeks to argue that the British decision on the Hawar islands of 11 July 1939 is *res judicata*, it singularly omits to mention that the Court of Arbitration in the *Dubai/Sharjah* case refused to accept an argument advanced by Sharjah that the Tripp decisions of 1956 and 1957 (made by the then Political Agent in the Trucial States) were arbitral awards. The Court of Arbitration in the *Dubai/Sharjah* case reached this conclusion for reasons corresponding closely to those summarized at (b) and (c) above:

"For these two reasons, the lack of opportunity for the Parties to present their arguments and the absence of reasoning for the decisions, the Court has come to the conclusion that the Tripp decisions cannot be said to have constituted arbitral awards"<sup>36</sup>.

In the *Dubai/Sharjah* case, the two Rulers had of course specifically undertaken in advance to respect the boundary decisions that would be made by the Political Agent. No such undertaking from the Rulers of Qatar and Bahrain was given nor indeed requested in the present case prior to the making of the decision of 11 July 1939 on Hawar by the British Government. There is here a vital distinction between the present case and the *Dubai/Sharjah* case.

3.167 In the *Dubai/Sharjah* case, the Court of Arbitration made a general pronouncement (needless to say, again not mentioned in the Bahrain Memorial) which is directly relevant to the present case:

"In the view of the Court one cannot attribute the same value to a boundary which has been settled under a treaty, or as the result of an arbitral or judicial proceeding, in which independent interested Parties have had a full opportunity to present their arguments, as to a boundary which has been established by way of an administrative decision emanating from an authority which could have failed to take account of the Parties' views and arising in a... situation of inherent inequality. In the first hypothesis, except in a case of nullity, the principles of *pacta sunt servanda* or of *res judicata* could be invoked to prevent the boundary so settled being called again into question. *In the second hypothesis, the boundary would have been established in the majority of cases, in the interests of the administering authority, on the basis of other than legal criteria, and according to the needs of a particular political or economic context*"<sup>37</sup>.

Although this *dictum* relates specifically to boundaries, Qatar is of the view that the reasoning of the Court of Arbitration is just as much applicable to an administrative decision on the attribution of territory as it is to an administrative decision on a boundary.

3.168 Qatar submits that this citation from the award in the *Dubai/Sharjah* arbitration provides a remarkably exact description of the circumstances surrounding and underlying the British decision of 11 July 1939 on Hawar. In the present case, the decision purporting to attribute the Hawar islands to Bahrain was not "... the result of an arbitral or judicial proceeding..." nor indeed of a proceeding "... in which independent interested Parties have had a full opportunity to present their arguments...". It was rather "... an administrative decision emanating from an authority which could have failed<sup>38</sup> to take account of the Parties' views and arising in a situation of inherent inequality". Thus, we are in the present case confronted with the second hypothesis; and, having regard to the materials which Qatar has invoked in the Qatar Memorial and also in this Counter-Memorial about the defective nature of the British decision of 1939, the Court should have no hesitation in concluding:

(i) that that decision attributing the Hawar islands to Bahrain was "... in the interests of the administering authority" (as Loch, Gibson and Hemingway were all happy to argue<sup>39</sup>);

(ii) that it was reached "... on the basis of other than legal criteria"<sup>40</sup>; and

(iii) that it was responsive "... to the needs of a particular political or economic context" (in the case of the Hawar islands, the strategic importance of Bahrain to Britain at the time, and

the pernicious influence of the false expectation that the islands would provide the Ruler of Bahrain with a new source of oil revenues).

3.169 In the circumstances, it is perhaps not altogether surprising that no reference is made in the Bahrain Memorial to this highly significant aspect of the award in the *Dubai/Sharjah* arbitration. What is surprising, however, is the audacious Bahraini contention, in the face of all the evidence, that the British decision of 11 July 1939 is *res judicata* for the Parties.

3.170 Bahrain must of course be fully aware of the glaring weakness of the argument that the 1939 "decision" on Hawar is *res judicata*, given the refusal of the Court of Arbitration in the *Dubai/Sharjah* case to accept the Sharjah submission that the Tripp decisions of 1956 and 1957 had to be treated as arbitral awards. The attempt by Bahrain, in paragraphs 354 to 357 of the Bahrain Memorial, to characterise what was done by the British authorities in the Gulf and in London as a process of "adjudication" resulting in a binding award by Britain falls down lamentably on the facts and the law, as Qatar has demonstrated in the Qatar Memorial and again in the present Counter-Memorial. Even if the 1939 "decision" on Hawar had to be regarded as an award binding on Bahrain and Qatar (which Qatar vigorously denies), the procedure followed by the British authorities in assessing the respective claims of title of Bahrain and Qatar was so demonstrably flawed, and so clearly unfair to Qatar, that the award would have to be regarded as invalid by any court of law. Qatar has produced evidence:

(a) of the crucial events of 1936, including the formal Bahrain claim to Hawar on 20 April 1936 and the British Government's "provisional decision" of July 1936 in favour of the Bahrain claim, neither of which developments were notified to the Ruler of Qatar;

(b) of the disparity in the length of time accorded to the two Rulers to prepare their written materials;

(c) of the fact that none of the so-called evidence tendered by Belgrave to Weightman on behalf of Bahrain was subjected at the time to critical scrutiny;

(d) of the evident bias of Weightman against Qatar and in favour of Bahrain on this issue during this period; and

(e) of the failure of the British Government to provide reasons for "awarding" the Hawar islands to Bahrain.

All these items of evidence in combination are wholly destructive of the argument that the "decision" of the British Government on the Hawar islands of 11 July 1939 is *res judicata* for the Parties to the present proceedings, Qatar and Bahrain.

3.171 That Bahrain itself seems to have little confidence in its *res judicata* argument is confirmed by the fact that Bahrain advances, in the alternative, the argument that, even if the merits were reopened and a *de novo* examination were undertaken, Bahrain would still have a valid title to the Hawar islands<sup>41</sup>. In the present Counter-Memorial, Qatar has demonstrated that there is little or no substance to any of the three considerations invoked by Bahrain in this context; it has equally demonstrated the existence of a prior title to the Hawar islands inhering in Qatar, that title having been widely recognised ~~inter alia by other Rulers in the Gulf~~, by the Ottoman authorities, by the British at least until 1936, and even by the Ruler of Bahrain himself ~~in 1907~~. Qatar's title has never been displaced.

## Section 8. Qatar has never acquiesced in Bahrain's *de facto* control of the Hawar islands

3.172 Strictly speaking, Bahrain does not seek to argue in the Bahrain Memorial that Qatar has acquiesced in Bahrain's unlawful occupation of the Hawar islands since 1936/37. The nearest approach to an argument founded on acquiescence is to be found in paragraphs 499 to 504 of the Bahrain Memorial. However, the argument put forward in these paragraphs breaks down because it is based on palpably false premises.

3.173 Thus, it is stated in paragraph 499 of the Bahrain Memorial that:

"After its initial protests about the substance (not the procedure) of the British adjudication in 1939-1941, Qatar did not raise the issue of Bahrain's sovereignty over the Hawar Islands again until 1960".

This is on at least two counts, and leaving aside the provocative use of the word "adjudication", a falsification of the facts. In the first place, the Ruler of Qatar constantly protested to the Political Agent (Weightman) throughout the course of the formal procedure in 1938/39 against the short time limits within which he was required to submit his evidence or observations, when compared with the much longer time limits enjoyed by Bahrain. Thus, when the Ruler of Qatar was requested by Weightman on 20 May 1938 to submit his formal claim to the Hawar islands, accompanied by supporting evidence, "at the earliest possible moment"<sup>42</sup>, he took this injunction very seriously and responded on 27 May 1938<sup>43</sup>. However, no corresponding time-limit was put on the request to the Bahrain authorities of 14 August 1938, to:

"... submit a full and detailed statement of their counter-claim to Hawar, covering the Shaikh of Qatar's claim as well as any other point they wish to make"<sup>44</sup>.

In the event, it took Belgrave and his subordinates some four to five *months* before they submitted the Bahraini "counter-claim" which is dated 22 December 1938/3 January 1939<sup>45</sup>; and this despite the fact that Belgrave had submitted to Weightman an (uninvited) "preliminary statement" of Bahrain's case on 29 May 1938<sup>46</sup>. It hardly needs repeating that this "preliminary statement" (in the form of a memorandum) was *not* copied to the Ruler of Qatar, who therefore had no opportunity to challenge or comment on the assertions made in it; and that it was nevertheless, in gross violation of the *audi alteram partem* rule, taken into account as a relevant document in the decision-making process.

3.174 On 5 January 1939, a copy of the Bahrain "counter-claim" was transmitted to the Ruler of Qatar who was again requested to provide any further arguments or evidence "as soon as it may be possible"<sup>47</sup>. In reply to a reminder from Weightman of 17 March 1939, demanding a response to his earlier letter of 5 January within a period of 14 days<sup>48</sup>, the Ruler of Qatar protested, in his letter to Weightman of 19 March 1939 that:

"As yet I did not get even half of the time taken by the Bahrain Government in preparing their reply to you about what we have maintained..."<sup>49</sup>.

Again, in his further letter to Weightman of 24 March 1939, the Ruler of Qatar protests at the treatment meted out to him in the wake of the unlawful occupation of the Hawar islands by Bahrain. He protests against the refusal of the British authorities in the Gulf to let him have a sight of the arguments advanced by Bahrain in support of its claim to the Hawar islands; he

protests against being treated as a claimant; and he protests against the refusal of the British Government to ensure that the Bahrainis withdraw from Hawar<sup>50</sup>.

3.175 So it is a gross distortion of the truth to imply that Qatar did not protest about the procedure followed by the British authorities in the Gulf in 1938/39 in conducting their assessment of the conflicting claims of Qatar and Bahrain to the Hawar islands. It goes without saying that the Ruler of Qatar's protests against these procedures would have been magnified a hundredfold had he been aware at the time of what was carefully being concealed from him:

(a) that a "provisional decision" in favour of the Bahrain claim to Hawar had already been taken by the British Government in July 1936, and not disclosed to him, in response to the formal claim to Hawar advanced on behalf of the Ruler of Bahrain on 20 April 1936, itself not disclosed to him; and

(b) that Belgrave was feeding to Weightman additional information on Hawar, which was likewise being withheld from him<sup>51</sup>.

Indeed, it is more than likely that the Ruler of Qatar, had he been aware of these facts at the time, would have insisted at the very least that any assessment of the conflicting claims of Qatar and Bahrain to the Hawar islands should be conducted by a British official other than the incumbent of the post of Political Agent in Bahrain (Weightman) or, indeed, his immediate predecessor (Loch).

3.176 In the second place, it is quite wrong of Bahrain to suggest that Qatar did not, after its initial protests, raise again the issue of Bahrain's wrongful occupation of Hawar by Bahrain until 1960. In paragraphs 6.239 to 6.243 of the Qatar Memorial, a full account is given of the protests lodged by the Ruler of Qatar against the wrongful occupation of Hawar by Bahrain. Specific protests were made by the Ruler of Qatar against the British decision of 11 July 1939 on the Hawar islands on 4 August 1939<sup>52</sup>, on 18 November 1939<sup>53</sup>, and again on 7 June 1940<sup>54</sup>. But, contrary to what is falsely stated in paragraph 499 of the Bahrain Memorial, the Ruler of Qatar did not thereafter remain silent on Bahrain's unlawful seizure of the Hawar islands until 1960. On the contrary, the Ruler of Qatar repeated his protest against the British decision of 1939 on Hawar in a letter of 13 July 1946 to the PAB<sup>55</sup>. In that letter, the Ruler of Qatar states *inter alia*:

"You see that Qatar has been treated unjustly in her clear right in the question of Hawar islands which I am still tenacious to claim their ownership..."

3.177 Nor did matters stop there. The Ruler of Qatar renewed his protest against the injustice of the British decision of 1939 on Hawar in a letter to the Political Agent of 21 February 1948<sup>56</sup>. In that letter, the Ruler was responding to the British decision, notified to him on 23 December 1947, on the course of the line which, the British Government considered, divided in accordance with equitable principles the seabed lying between Qatar and Bahrain<sup>57</sup>. Yet, in his response of 21 February 1948, the Ruler of Qatar renewed his dignified protest against the British decision of 1939 on Hawar:

"However, I like to invite Your Excellency's attention to the correspondence exchanged some ten years ago on the subject of Hawar (Island) and the clear representation I made regarding its position in my letter submitted to His Excellency the Political Agent, Bahrain, at the time,

in which I expounded my points of view in regard to this Island which is a part of Qatar and in which I expressed my protest against the behaviours of Bahrain Government. But H.M.'s Government acted as they wished, and I had nothing but to submit, reserving in the meantime to myself my own rights"<sup>58</sup>.

In the same letter, the Ruler of Qatar gave a renewed exposition of the Qatar case:

"Huwar [*sic*] is directly attached to the coast of Qatar with a piece of shallow water disconnecting, which recedes at ebb tide, thus establishing access for pedestrians. If this is its natural position and geographical aspect, how can it be separated from its motherland Qatar and made the domain of other than its ruler?"<sup>59</sup>

3.178 In paragraph 501 of the Bahrain Memorial, there is cited a very short extract from a letter written by Mr. M.C.G. Man (PAB) to Mr. R.A. Beaumont, Head of the Arabian Department in the Foreign Office, on 21 February 1961. This extract is pure hearsay evidence and has to be read in context. In addition, it must be understood that, for the sake of his own peace and quiet, Mr. Man did *not* wish to see a combination of the disputes over Zubarah and Hawar:

"(It would be wiser not to mention Shaikh Ahmad's threat to take both Hawar and Zubara to international arbitration - Shaikh Salman [of Bahrain] might be tempted to take up this challenge and we should then have not only Zubara but Hawar on our hands and the latter is at least one problem we managed to get settled...)"<sup>60</sup>.

The final phrase of this citation is pure wishful thinking on the part of Mr. Man. The Rulers of Qatar may not have made such a continuous fuss about their genuine grievance over Hawar as the Rulers of Bahrain did about their flimsy claims concerning Zubarah. This does not however mean that the Rulers of Qatar were content with what they considered even then was the disgraceful treatment accorded to Qatar in 1938/39 in the context of the assessment by the British authorities of the strength of the respective claims of the two sheikhdoms to sovereignty over the Hawar islands.

3.179 Successive Rulers of Qatar may not have been aware in 1960 of the full details of the manoeuvres engaged in by Bahrain in the 1930s to secure recognition from the British authorities of the Bahraini claim to the Hawar islands. But the sense of grievance which they felt about the treatment accorded to them over Hawar by the British authorities in 1938/39 had certainly not diminished by the early 1960s.

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### **CHAPTER III THE HAWAR ISLANDS 43**

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1 *See*, QM, Chap. V.

2 *See*, QM, Chap. VI.

3 *See*, paras. 1.31, *et seq.* and 2.51, *et seq.*, above.

4 BM, paras. 16-17.

5 BM, para. 22.

6 BM, para. 23.

7 *See*, BM, para. 11.

8 QM, Chap. VI.

9 *See*, paras. 3.163, *et seq.*, below.

10 *See*, paras. 3.102, *et seq.*, below.

11 *See*, paras. 3.17, *et seq.*, below.

12 *See*, paras. 3.40, *et seq.* and 3.44, *et seq.*, below.

13 *See*, QM, Chap. V.

14 QCM, Annex III.35, Vol. 3, p. 183; *see*, also, para. 3.72(7), below.

15 QM, Annex III.94, Vol. 6, p. 479.

16 QCM, Annex III.43, Vol. 3, p. 237.

17 Loch also states "Studious care was taken not to cross the Saudi Arab frontier and the Flying Boat did not fly over either the island (Zakhnuniya) or over the Gulf to the south of it" (*ibid.*, at p. 240) but no mention was made at the time of any Bahraini interest in Hawar either in the report or in the discussions held with the Ruler of Qatar in connection with the reconnaissance. It is also noteworthy that the British authorities neither sought nor obtained permission of the Ruler of Bahrain for this reconnaissance. In view of this, Loch's role two years later in supporting Bahrain's claim contrary to the earlier British position which is dealt with in the next Section, is all the more surprising and intriguing. *See*, also, para. 3.72(6), below.

18 BM, para. 345; emphasis added.

19 BM, para. 20.

20 BM, para. 346.

21 *See*, QM, paras. 3.17-3.18.

22 *See*, the list that Bahrain itself provides in BM, para. 120 of the occasions when various members of the Al-Khalifah family took refuge on the Qatari coast or planned attacks on Bahrain to be able to return there. This list is in no sense evidence of exercise of Bahrain's authority over any part of the coast of the Qatar peninsula which Bahrain attempts to claim, but is mainly evidence of the use of the Qatar coast as a refuge or to launch attacks on Bahrain in order to be able to return there. It is significant that the Hawar islands are not mentioned as a location even for such use.

23 See, Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, pp. 197-198.

24 See, paras. 2.5-2.6, above.

25 See, BM, Annex 83, Vol. 3, p. 445.

26 Based presumably on a report compiled between 1821 and 1829 by Captain Brucks of the Indian Navy. Bahrain makes the remarkable claim that "By 1829, Britain had determined and accepted that the Rulers of Bahrain held authority in the Qatar peninsula" (BM, para. 116). Subsequent and more accurate sources referred to hereafter clearly contradict this claim.

27 QM, Annex II.15, Vol. 5, p. 17.

28 By Captain Hennel in 1839 as noted in Lt. Kemball's Memoranda of 1845 (BM, Annex 6, Vol. 2, p. 78 at page 88) where he states:

"The power of the Bahrein Chief has of late years been much weakened, by the contumacious conduct of his sons, and the divisions which have arisen among his other relations". Kemball himself adds: "Since that period, owing to the increased dissensions, and subsequent hostilities between the members and relatives of the ruling family, the population, prosperity, and commerce of the island have gradually declined".

Kemball describes Bahrain as "lying between "Ras Reccan and Ras Timoor" (*ibid.*, at p. 86) and that the "only towns of any size in Bahrain are Munama and Muharag" (*ibid.*, at p. 87) and notes -

"... The bulk of the population of Bahrein, which is entirely distinct from the Uttoobees, who are Soonees, consists of the aboriginal inhabitants, professing for the most part the Sheea tenets of the Mahomedan faith. These are greatly oppressed, and held in a most degraded state of vassalage by their Uttoobee masters, of which some conception may be formed from a remark by the same authority [a former Political Resident, Major Wilson] in 1829 that 'the enormities practised by the Uttoobees towards the original inhabitants of Bahrein far exceed what I have ever heard of tyranny in any part of the world'" (*ibid.*, at p. 89).

29 QCM, Annex III.11, Vol. 3, p. 73.

30 Lorimer, *op. cit.*, QM, Annex II.4, Vol. 3, p. 141. Bahrain cites and relies upon the Persian Gulf Pilot of 1864 to suggest that the Qatar peninsula was at that time some kind of vague dependency of Bahrain. However, this source is inaccurate to a significant extent and therefore unreliable in this respect. Thus it will be seen that the Persian Gulf Pilot of 1883 (after the Ottomans had occupied Al Bida in 1872) still refers to it as being "under Bahrain" (QCM, Annex III.14, Vol. 3, p. 85). It is not until the edition of 1890 that a reference is made to "Bar al Katr, which name applies to the whole of the peninsula. It is now claimed by the Turkish Government" (QCM, Annex III.15, Vol. 3, p. 89). In fact, the next edition of 1898 again erroneously states that "the Katar Peninsula has recently been declared a Protectorate by the British Resident at Bushire" (QCM, Annex III.17, Vol. 3, p. 99). It will thus be seen that these descriptions are often wrong and inconsistent with those of Lorimer (1908) or the British Admiralty Survey (1915).

31 ~~QM, Annex II.17, Vol. 5, p. 33.~~

32 QM, paras. 5.2, *et seq.*

33 QM, para. 5.5.

34 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, pp. 269-273, 288-89 and 294.

35 *See*, BM, para. 20 and BM, Annex 8, Vol. 2, p. 110.

36 BM, para. 131. In fact they also levied and collected taxes on pearl fishing as shown in the Ottoman document of 8 June 1871 (BM, Annex 16(a), Vol. 2, p. 165) - a document which Bahrain misconstrues by referring to the Al-Thani as mere "tax collectors". Such taxes were clearly not collected for Bahrain. *See*, also the report of the Ottoman Office of the Assistant to the Government of Katar of 7 November 1891 referring to "... the revenue from pearlings for the Kaza of Qatar in the pearl fishing season is 2,540,000.00 Kirans and all the taxes received including those from the divers are collected on behalf of Jasim...", BM, Annex 48(a), Vol. 2, p. 243.

37 BM, paras. 126-129.

38 QCM, Annex III.1, Vol. 3, p. 1; emphasis added.

39 *See*, Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 301 where he states:

"... the affair having quickly come to be regarded throughout the Gulf as a test of British preparedness to maintain peace at sea, it was resolved to inflict an exemplary punishment upon the offending chiefs and not to accept the excuse, which would probably be tendered by Shaikh Muhammad, that he was entitled to punish by any and every means his refractory subjects in Qatar".

40 QCM, Annex III.2, Vol. 3, p. 9; emphasis added.

41 QCM, Annex III.3, Vol. 3, p. 13.

42 *See, ibid.*

43 QCM, Annex III.4, Vol. 3, p. 25; emphasis added.

44 QCM, Annex III.5, Vol. 3, p. 35.

45 QCM, Annex III.6, Vol. 3, p. 45.

46 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 208.

47 QCM, Annex III.7, Vol. 3, p. 53.

48 BM, Annex 13, Vol. 2, p. 159.

49 QM, Annex III.11, Vol. 6, p. 57.

50 BM, Annex 12, Vol. 2, p. 156.

51 The fourth agreement, signed between the British and the Sheikh of Abu Dhabi on 16 September 1868, is of less significance for the present case (BM, Annex 14, Vol. 2, p. 161).

52 *See*, BM, para. 127.

53 QM, Annex II.27, Vol. 5, p. 79.

54 Lorimer, *op. cit.*, QM, Annex II.4, Vol. 3, p. 141.

55 *Ibid.*, p. 113.

56 BM, Annex 71, Vol. 3, p. 355, at p. 358.

57 Bahrain's attempt (BM, para. 134) to show that in 1870 Mohamed bin Thani was still declaring himself to be a "subject" of the Ruler of Bahrain relies only on the "translated purport of a letter" which is obviously quoted without showing the context or producing the Arabic original. After the events of two years earlier involving devastation of his homeland, imprisonment of his son and the savage cruelties inflicted on his followers, the statement is not credible.

58 *See*, paras. 5.17, *et seq.*, below.

59 *See*, BM, para. 129.

60 *Treaties and Engagements relating to Arabia and the Persian Gulf*, compiled by C.U. Aitchison, Vol. XI, Archive Editions, 1987.

61 BM, Annex 84, Vol. 3, p. 512. *See*, paras. 3.44, *et seq.*, below.

62 QCM, Annex III.8, Vol. 3, p. 57.

63 QCM, Annex III.9, Vol. 3, p. 63; emphasis added. This letter is also evidence of the fact that Bahrain itself paid a portion on its own behalf to the Wahhabis and the Naim to secure protection against molestation. Bahrain was only a channel for the consolidated payment and was in no sense paying for the protection of the Ruler's "subjects" in the Qatar peninsula (as claimed in the BM, para. 125). Furthermore, interestingly, this letter also makes it clear that a part of the "tribute" was payable to the Naim for protection of both Bahrain and Qatar from molestation by that tribe during the pearl-diving season when other tribes were away. *See*, also, para. 5.19(1), below.

64 BM, para. 192.

65 QCM, Annex III.20, Vol. 3, p. 111.

66 BM, Annex 81, Vol. 3, p. 425.

67 For an account of the difference between Bahrain and Saudi Arabia over Zakhnuniya, *see*, paras. 2.67, *et seq.*, above and QCM, Appendix 2, Vol. 5, p. 145.

68 BM, para. 194.

69 *See*, paras. 2.8, *et seq.* and 2.28, *et seq.*, above.

70 *See*, QM, para. 3.58.

71 *See*, QM, paras. 5.39-5.40.

72 *See*, BM, para. 430.

73 *See*, QM, para. 3.56.

74 Or to Zubarah, despite the reference in a British *draft* memorandum of July 1911, as pointed out by Bahrain (BM, para. 192), to "El Katr, where the Sheikh of Bahrein has important rights". Any such rights were clearly considered without substance and ignored.

75 QCM, Annex III.21, Vol. 3, p. 115.

76 QCM, Annex III.22, Vol. 3, p. 119.

77 QCM, Annex III.23, Vol. 3, p. 123.

78 *See*, QCM, Annex III.19, Vol. 3, p. 107.

79 QCM, Annex III.24, Vol. 3, p. 127.

80 BM, para. 217.

81 BM, paras. 220, *et seq.*

82 BM, para. 154, and BM, Annex 70, Vol. 2, p. 285, at p. 343.

83 BM, Annex 70, Vol. 2, p. 285, at p. 344.

84 *Ibid.*, at p. 345.

85 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 232.

86 QM, Annex II.44, Vol. 5, p. 151.

87 QCM, Annex III.25, Vol. 3, p. 131.

88 QM, Annex II.47, Vol. 5, p. 181.

89 As already noted, no such reservation in favour of Bahrain was made in respect of the Hawar islands.

90 QCM, Annex III.57, Vol. 3, p. 335; emphasis added.

91 BM, paras. 193-194.

92 QM, para. 5.38.

93 QM, para. 5.44.

94 QM, paras. 5.48 and 6.18, *et seq.*

95 Paras. 3.60, *et seq.*, below.

96 QM, ~~Chapter V.~~

97 QM, ~~paras. 5.49, et seq.~~

98 QM, paras. 6.31, *et seq.*

99 QM, Annex III.103, Vol. 7, p. 15.

100 Paras. 3.60, *et seq.*, below.

101 QM, paras. 5.58-5.59.

102 QM, paras. 6.16, *et seq.*

103 BM, para. 349.

104 QM, Annex III.157, Vol. 7, p. 285.

105 BM, Annex 158, Vol. 4, pp. 729.

106 BM, Annex 249, Vol. 5, p. 1077.

107 BM, Annex 251, Vol. 5, p. 1079.

108 BM, Annex 252, Vol. 5, p. 1080.

109 *Ibid.*; emphasis added.

110 BM, Annex 253, Vol. 5, p. 1081.

111 BM, Annex 259, Vol. 5, p. 1101.

112 QM, Annex III.157, Vol. 7, p. 285.

113 BM, Annex 262, Vol. 5, p. 1112; emphasis added.

114 QM, Annex III.156, Vol. 7, p. 279; emphasis added.

115 With respect to the expression "the residents of Hawar", *see*, para. 3.127, below, showing that this is a mistranslation. The correct translation is "they", *i.e.* the Government of Bahrain.

116 BM, Annex 265, Vol. 5, p. 1118; emphasis added.

117 BM, Annex 268, Vol. 5, p. 1122.

118 BM, Annex 266, Vol. 5, p. 1119. Here again, *see*, para. 3.128, below, demonstrating the mistranslation of the Ruler of Qatar's letter and Bahrain's attempt to misuse it.

119 BM, Annex 246, Vol. 5, p. 1071. The only reference to this letter in the narrative of events in Vol. 1 of the BM is in footnote 399 to para. 338, where the letter is cited solely for its reference to "Mahagwarah" as an alternative spelling of "Umm Haswarah", one of the Hawar islands to which the Ruler of Bahrain was laying claim at the time; but no mention is made of the fact that this letter constituted the first formal claim in writing to the Hawar islands advanced on behalf of the Ruler of Bahrain.

120 *See*, BM, paras. 356-357, 373 and 382.

121 Of Saudi Arabia.

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

123 QM, Annex III.88, Vol. 6, p. 449.

124 QM, Annex III.106, Vol. 7, p. 27.

125 QM, Annex III.107, Vol. 7, p. 31; *see*, especially, para. 8 of that letter.

126 This record is at QM, Annex III.148, Vol. 7, p. 241.

127 *See*, QCM, Annex III.36, Vol. 3, p. 187.

128 QM, Annex III.148, Vol. 7, p. 241, at p. 245; emphasis added.

129 QM, Annex III.104, Vol. 7, p. 19.

130 QM, Annex III.110, Vol. 7, p. 47. A temporising reply had been sent by Walton to Skliros on 14 May 1936, which sought *inter alia* to claim that the sole purpose of the line on the map annexed to the Qatar Oil Concession of 1935 was to define the *southern* boundary of the Concession. *See*, BM, Annex 248, Vol. 5, p. 1076; but *see*, also, item 7 in the Chronology of Significant Events relating to Hawar, 1933-36, at paragraph 3.72, below, together with paragraphs 3.75, *et seq.*, below, for a radically different explanation.

131 QM, Annex III.106, Vol. 7, p. 27.

132 QM, Annex III.107, Vol. 7, p. 31.

133 QM, Annex III.110, Vol. 7, p. 47.

134 *See*, para. 3.64, above.

135 QCM, Annex III.39, Vol. 3, p. 209.

136 QCM, Annex III.37, Vol. 3, p. 191; emphasis added. The reference to "drilling draining wells on the coast" would make little sense unless Zubarah (on the mainland) were being

referred to; and with regard to Zubarah, *see*, para. 5.38 below, recording Bahrain's renunciation of any such claims.

137 QM, Annex III.88, Vol. 6, p. 449.

138 QCM, Annex III.40, Vol. 3, p. 213.

139 QCM, Annex III.41, Vol. 3, p. 225.

140 QCM, Annex III.43, Vol. 3, p. 237.

141 *Ibid.* *See*, also, QM, para. 6.27 and QM, Annex III.94, Vol. 6, p. 479.

142 QM, Annex III.99, Vol. 6, p. 507, at p. 511.

143 QCM, Annex III.44, Vol. 3, p. 247 (in particular para. 7).

144 QCM, Annex III.39, Vol. 3, p. 209.

145 QCM, Annex III.45, Vol. 3, p. 257.

146 QM, Annex III.98, Vol. 6, p. 501.

147 QM, Annex III.104, Vol. 7, p. 19.

148 QM, Annex III.106, Vol. 7, p. 27.

149 QM, Annex III.107, Vol. 7, p. 31.

150 QM, Annex III.111, Vol. 7, p. 51.

151 QM, Annex III.110, Vol. 7, p. 47.

152 *See*, item 9 in paragraph 3.72, above.

153 BM, Annex 248, Vol. 5, p. 1076.

154 QM, Annex III.104, Vol. 7, p. 19; emphasis added.

155 QCM, Annex III.37, Vol. 3, p. 191. *See*, also, item 2 in paragraph 3.72, above.

156 *See*, item 3 in para. 3.72, above.

157 That may have been one of its purposes, but it was certainly not the sole purpose. The map attached to the Qatar concession was, as has been shown, based on the results of a geological survey carried out in 1933 by IPC/APOC geologists.

158 QM, Annex III.148, Vol. 7, p. 241.

159 *See*, Report by Major Daly: Note on the political situation in Bahrain, November 1921, cited in Al-Tajir, *Bahrain 1920-1945 : Britain, the Shaikh and the Administration*, 1987, QCM, Annex III.54, Vol. 3, p. 313, at p. 315.

160 *Ibid.*, at p. 316.

161 *See*, QM, paras 6.52, *et seq.* *See*, also, paras. 3.115, *et seq.*, below.

162 Khuri, *op. cit.*, QCM, Annex III.55, Vol. 3, p. 319, at pp. 327-328.

163 *Ibid.*, at p. 330.

164 QCM, Annex III.28, Vol. 3, p. 147.

165 QM, Annex III.73, Vol. 6, p. 383.

166 *Ibid.*, at p. 386; emphasis added; *see*, also, QCM, Annexes III.29, III.30, III.31 and III.32, Vol. 3, pp. 151, 157, 163 and 169.

167 QM, Annex III.73, Vol. 6, p. 383.

168 *See*, QCM, Annex III.33, Vol. 3, p. 173.

169 QCM, Annex III.34, Vol. 3, p. 179.

170 QM, Annex III.53, Vol. 6, p. 245.

171 QM, Annex III.228, Vol. 8, p. 123.

172 BM, Annex 240, Vol. 5, p. 1052, at pp. 1056-1057.

173 QM, Annex III.199, Vol. 7, p. 519.

174 QM, Annex III.195, Vol. 7, p. 497, at pp. 505-506.

175 QM, Annex III.126, Vol. 7, p. 125, at pp. 131-132; emphasis added.

176 QCM, Annex III.26, Vol. 3, p. 135.

177 *Ibid.*

178 *See*, QM, para. 6.54, and Annex III.72, Vol. 6, p. 379.

179 ~~*See*, QM, Annexes III.36, III.39 and III.40, Vol. 6, pp. 169, 181 and 185.~~

180 QCM, Annex III.27, Vol. 3, p. 141.

181 *See*, BM, paras. 349, 356 and 357 (i).

182 *See*, paras. 3.60, *et seq.*, above.

183 QM, Annex III.106, Vol. 7, p. 27.

184 *I.C.J. Reports 1953*, pp. 59-60.

185 *See*, QM, paras. 6.41, *et seq.*, and 6.152 and Annexes referred to therein.

186 ~~*See*, QM, paras. 6.57, *et seq.*, and Annexes referred to therein.~~

187 *See*, QM, para. 5.58 and Annexes referred to therein.

188 *See*, paras. 3.52, *et seq.*, above; *see*, also, QM, para. 6.160 and Annexes referred to therein.

189 QCM, Annex III.53, Vol. 3, p. 309, para. 173.

190 *Ibid.*, para. 175.

191 *See*, paras. 3.163, *et seq.*, below.

192 BM, para. 345.

193 *See*, paras. 3.7, *et seq.*, above.

194 BM, para. 345.

195 *See*, paras. 3.82, *et seq.*, above; *see*, also, QM, paras. 5.38-5.39 and 6.52, *et seq.*

196 91 *International Law Reports*, p. 606.

197 BM, para. 36. To similar effect are statements in Belgrave's "Counter claim" of 22 December 1938 that "... the inhabitants of Hawar reside there permanently..." (BM, Annex 274, p. 1129, at p. 1134).

198 BM, para. 419. This repeats and confirms an earlier statement in BM, para. 52 that the Dowasir "would spend the summer at Zellaq and Budaiya on the main island of Bahrain and the winter on the Hawar Islands...".

199 BM, Annex 235, Vol. 5, pp. 1034-1035; emphasis added. *See*, also, para. 3.42, above.

200 BM, Annex 279, Vol. 5, p. 1146, at p. 1156.

201 *Ibid.*, at p. 1149. The omission has been pointed out to Qatar by a qualified translator from Arabic into English.

202 *Ibid.*, at p. 1161; emphasis added.

203 *Ibid.*, at p. 1162.

204 QM, Annex III.192, Vol. 7, p. 453.

205 *Ibid.*, at p. 460. *See*, in connection with winter visits of fishermen to Hawar, paras. 3.91, *et seq.*, above.

206 This has been pointed out to Qatar by a qualified translator from Arabic into English.

207 *See*, BM, paras. 52 and 419.

208 ~~QCM, Annex III.12, Vol. 3, p. 77.~~

209 QM, Annex III.53, Vol. 6, p. 245.

210 BM, para. 36.

211 Khuri, *op. cit.*, QCM, Annex III.55, Vol. 3, p. 319, at p. 323.

212 BM, Annex 74, Vol. 3, p. 371, at pp. 378-379.

213 Khuri, *op. cit.*, QCM, Annex III.55, Vol. 3, p. 319, at p. 324.

214 BM, Annex 74, Vol. 3, p. 371, at pp. 382-383.

215 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 143, at p. 316.

216 Khuri, *op. cit.*, QCM, Annex III.55, Vol. 3, p. 319, at pp. 325-326. For a detailed account of the circumstances in which the Dowasir departed from Bahrain from 1923 to settle in Dammam (Saudi Arabia), returning only in 1928/9, *see*, paras. 3.82, *et seq.*, above, elaborating on what is said in paras. 6.51, *et seq.* of the QM.

217 BM, paras. 412, *et seq.*

218 Paras. 3.143, *et seq.*, below.

219 ~~QCM, Annex III.12, Vol. 3, p. 77.~~

220 BM, para. 410.

221 BM, para. 425.

222 *See*, paras. 2.67, *et seq.*, above, and QCM, Appendix 2, Vol. 5, p. 145.

223 QM, para. 5.40.

224 BM, para. 415.

225 *See*, para. 3.14, fn. 30, above.

226 *See*, para. 3.14, above.

227 BM, para. 432.

228 QM, Chapter VI.

~~229 The unreliability of the 1909/10 "judgments" of a Bahrain court to which reference is made in paras. 434-435 of the BM is demonstrated in para. 6.173 of the QM.~~

230 Cited in BM, para. 436.

231 BM, paras. 438, *et seq.*

232 *See*, paras. 3.143, *et seq.*, below.

233 These have been pointed out to Qatar by a qualified translator from Arabic into English.

234 BM, Vol. 5, p. 1118.

235 Emphasis added.

236 BM, Vol. 5, p. 1119.

237 In paragraphs 11, 40, 41, 341, 344, 345, 352 (twice), between 353 and 354 (title), 354, 356, 357 (nine times), between 358 and 359 (title), 359, between 380 and 381 (title), 384, between 403 and 404 (title), 499 and 534.

238 In paragraphs 39, 352, 354 ("adjudicated"), 355 ("adjudicative") and 385 ("adjudicatory").

239 The omissions and misleading statements in Bahrain's account of events relating to the *nature* of the British decision of 11 July, 1939 are further developed in sub-section E of this Section (paras. 3.163, *et seq.*, below), which deals with the *res judicata* argument advanced by Bahrain.

240 *See*, paras. 3.60, *et seq.*, above.

241 *See*, BM, paras. 355, *et seq.*

~~242 *See*, QM, Map 4, Vol. 17. *See*, also, QM, paras. 3.13-3.14 and 5.15, *et seq.*, and the survey maps referred to therein.~~

~~243 QM, Annex III.49, Vol. 6, p. 225; *see*, also, QM, para. 5.49.~~

~~244 QM, Annexes III.48 and III.50, Vol. 6, pp. 221 and 229; *see*, also, QM, paras. 6.180, *et seq.*~~

245 BM, Vol. 5, p. 1190.

246 Indeed, Qatar has now discovered, and attaches as QCM, Annex III.48, Vol. 3, p. 275, a copy of Weightman's letter to Prior of 5 December 1939, covering the Packer Report of the same date which constitutes Annex 292 to the BM. The Court will note that the various marginal comments on Packer's note are, according to Weightman, "largely designed to tone

down the impression that the Bahrain Shaikhs are organising a secret campaign in Qatar to knock down the Al Thani family".

247 The device of selective quotation utilised so frequently by Bahrain in the BM is of course one that is frequently utilised by theatrical managements in the Western world. A recent example is afforded by a review of Shakespeare's "Hamlet" which, as reported in the London newspaper *The Independent* of 20 November 1996, read as follows:

"This production of Hamlet is one to see at your peril. In thirty years watching Shakespeare I have experienced nothing to equal it for crassness, banality and subversion of the text".

The management of the theatre indulged in some creative misinformation by summarizing this review as follows:

"This production of Hamlet is one to see... I have experienced nothing to equal it...".

248 BM, Vol. 5, p. 1190, at pp. 1191-1192.

249 Later in the 1939 Report (*ibid.*, at p. 1192), it is however stated: "Mansur [bin Khalil] who held a lucrative job in the oil Co. in Qatar is considering a return to the oil Co. and his old grazing grounds". The reliability of this statement is obviously enhanced if, as Qatar has now been able to establish, the 1939 Report was prepared by Packer of PCL.

250 *Ibid.*

251 This may well be a reference to Abdullah bin Darwish, who was the leading merchant in Doha in the late 1930s. Reference is made to him in QM, para. 6.198 and QM, Annexes III.175, Vol. 7, p. 385, and III.286, Vol. 8, p. 421.

252 BM, Annex 292, Vol. 5, p. 1190, at p. 1194; emphasis added. Incidentally, Mohamed bin Ahmad bin Shahin was, according to evidence submitted by Belgrave out of time on 20 April 1939, also party to a case concerning property in Bahrain which had begun in 1932, at which time the judges in the case before the Bahrain courts (Case No. 264) had been the Ruler of Bahrain and Belgrave; so he had every reason to carry out their instructions. *See*, QM, Annex III.193, Vol. 7, p. 489, at para. 6; *see*, also, QM, para. 6.191.

253 QM, Annex III.195, Vol. 7, p. 497.

254 BM, Annex 274, Vol. 5, p. 1129.

~~255 QM, Annexes III.77 and III.79, Vol. 6, p. 401 and p. 409.~~

~~0 QM, paras. 6.59, *et seq.*, and 6.165.~~

1 QCM, Annex III.48, Vol. 3, p. 275.

2 Which Bahrain wrongly refers to as the "Qatar Rejoinder".

3 BM, Annex 279, Vol. 5, p. 1146, at p. 1152.

4 BM, Vol. 5, p. 1146.

5 QM, Vol. 7, p. 453.

6 BM, Vol. 5, p. 1146.

7 *Ibid.*, at p.1150.

8 BM, Annex 261, Vol. 5, p.1106.

9 *Ibid.*, at p.1109.

10 ~~See, QM, Annex III.140, Vol. 7, p. 199 and Annex III.223, Vol. 8, p. 103.~~

11 BM, Annex 321, Vol. 6, p. 1431.

12 BM, para. 445 and BM, Annex 281, Vol. 5, p. 1165, at pp. 1169-1170.

13 A photograph of a typical pearling boat utilised around this time by the tribes inhabiting the southern littoral of the Gulf taken from A.M. Abu-Hakima, *Eastern Arabia - Qatar - Historic photographs 1921-1950*, Vol. III, London, 1995, p. 16, is reproduced opposite this page. This shows how suspect is Weightman's "evidence" on this point.

14 BM, Annex 313(a), Vol. 6, p. 1363, at p. 1367.

15 BM, Annex 314(a), Vol. 6, p. 1379, at p. 1384.

16 BM, Annex 315(a), Vol. 6, p. 1392, at p. 1394.

17 BM, Annex 316(a), Vol. 6, p. 1400, at p. 1405.

18 BM, Annex 325, Vol. 6, p. 1439.

19 *Ibid.*, at p. 1440. *See*, also, paras. 3.82, *et seq.*, above.

20 BM, paras. 448, *et seq.*

21 BM, paras. 454, *et seq.*

22 BM, Annex 316(a), Vol. 6, p. 1400.

23 *Ibid.*, at p. 1403.

24 BM, Annex 313(a), Vol. 6, p. 1363, at pp. 1367-1368.

25 *Ibid.*, at p. 1368. He also states (at p. 1367) that he and his companions would cook fish in "an oven on the beach by digging a large hole and lining it with gypsum". Such an elaborate method of cooking was not known in the Gulf at the time.

26 BM, para. 454.

27 It is again revealing how Bahrain no longer seeks to rely in 1996, as it did in 1939, on the evidential value of beaconing of islets and fashts.

28 *See*, para. 1.37, above, and QCM, Appendix 1, Vol. 5, p. 1.

29 QM, paras. 6.46, *et seq.*

30 *See*, QM, para. 6.87.

31 QCM, Annex III.47, Vol. 3, p. 265, at p. 271; emphasis added.

32 *Ibid.*

33 *See*, BM, para. 532.

34 *See*, QM, para. 6.93.

35 Extracts from the award of the Court of Arbitration in this case are at QM, Annex III.295, Vol. 8, p. 475 and at QCM, Annex III.51, Vol. 3, p. 297. The full text of the award is at 91 *International Law Reports*, 1993, p. 543.

36 QM, Annex III.295, Vol. 8, p. 475, at p. 480.

37 QCM, Annex III.51, Vol. 3, p. 297, at p. 299; emphasis added.

38 In Qatar's submission, Britain *had* failed.

39 *See*, QM, paras. 6.35, 6.81 and 6.97.

40 The Court will also recall the views expressed by Loch (PAB) in 1936 that "it might in certain circumstances suit [Britain] politically to have as large an area as possible included under Bahrain" and by Hemingway (India Office) in 1939 that a decision on Hawar in favour of Bahrain might "... mollify any resentment" which Bahrain may feel at the treatment by the British authorities of the Zubarah question in 1937.

41 BM, para. 344.

42 QM, Annex III.156, Vol. 7, p. 279.

43 QM, Annex III.157, Vol. 7, p. 285.

44 QM, Annex III.168, Vol. 7, p. 343.

45 QM, Annex III.174, Vol. 7, p. 371.

46 QM, Annex III.158, Vol. 7, p. 291.

47 QM, Annex III.177, Vol. 7, p. 393.

48 QM, Annex III.188, Vol. 7, p. 437.

49 QM, Annex III.189, Vol. 7, p. 441.

50 QM, Annex III.191, Vol. 7, p. 449.

51 *See*, QM, paras. 6.92-6.93.

52 QM, Annex III.211, Vol. 8, p. 49.

53 QM, Annex III.213, Vol. 8, p. 59.

54 QM, Annex III.219, Vol. 8, p. 85.

55 QM, Annex III.245, Vol. 8, p. 203.

56 QM, Annex III.259, Vol. 8, p. 277.

57 QM, Annex III.256, Vol. 8, p. 265.

58 QM, Annex III.259, Vol. 8, p. 277, at p. 279. The significance of the final sentence of this citation is explained in QM, para. 6.242.

59 *Ibid.*

60 BM, Annex 299, Vol. 5, p. 1212. The half-sentence cited in para. 501 of the BM is a continuation of this bracketed sentence.

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## CHAPTER IV

### JANAN ISLAND

#### Section 1. The geography

4.1 The geographical description of the island of Janan in Bahrain's Memorial could hardly be more cursory. It will be recalled that, at Bahrain's insistence, the subject of "the island of Janan" was included among the issues submitted to the Court. Bahrain, however, now contends that the name Janan "refers to two islands", and that there is a second "island", which Bahrain refers to as "Hadd Janan", located 2.2 kilometres or 1.2 nautical miles to the south of Janan. Bahrain also contends that that "island" is part and parcel of Janan<sup>1</sup>. It may however be noted that the name "Hadd Janan" is not used on the marine charts of the area, including Bahrain's own marine charts.

4.2 The word "hadd" as used in the Gulf region means a sand spit or low sandy point. On the other hand, a small island would not be referred to as a "hadd". It is true that the feature<sup>2</sup> now identified as "Hadd Janan" in the Bahrain Memorial does appear on Bahrain's marine charts as a small island at high tide, merging into Janan island at low tide. A recent hydrographical inspection performed in the area around Janan island has however demonstrated that this

attribution is wrong. It emerges from that inspection that at the location of "Hadd Janan" as indicated on the Bahraini charts, there is a small area of sandy bottom which is below water at low tide<sup>3</sup>. Therefore, leaving aside the question of whether Bahrain's claim to two islands would be 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.

4.3 As for Janan itself, Bahrain has made no attempt to show why, geographically speaking, this island should be considered as part of Bahrain. Qatar, however, has shown in its Memorial that Janan 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<sup>4</sup> and is a component of the offshore topography and the nearshore dynamic system associated with the Qatar coast<sup>5</sup>.

## **Section 2. Bahrain's claim is unfounded**

4.4 No credible evidence is produced in the Bahrain Memorial to sustain Bahrain's claim to Janan island or the feature it identifies as Hadd Janan<sup>6</sup>. The only argument advanced by Bahrain is that "there is no reason to exclude Janan from the Hawar Islands", the more particularly as it "was used by Hawar residents and other Bahraini fishermen"<sup>7</sup>.

4.5 The Bahrain Memorial is totally silent as to the history of the matter, which is set out in some detail in paragraphs 7.5 to 7.11 of the Qatar Memorial. It will be recalled that, in the 1930s, Bahrain was notably uncertain about the composition of the Hawar islands and advanced three different lists. The first list was contained in Belgrave's letter to the PAB (Loch) of 28 April 1936<sup>8</sup>. Among the seven named islands claimed to be included in the "Hawar group" was "Ginan". But this list only serves to demonstrate the ignorance of Bahrain at the time as to the composition of the Hawar islands. It includes the islands of Noon, Meshtaan and Al-Materrad, whose appurtenance to Bahrain has never been contested. But it omits the islands of Suwad al Janubiyah and Suwad ash Shamaliyah, the second and third largest islands in the Hawar "group" of islands; and this despite the fact that, in his letter to the PAB of 28 April 1936, Belgrave had asserted that "at least four of the larger islands are permanently occupied by [the Ruler of Bahrain's] subjects". Qatar has of course always denied that any of the Hawar islands were "permanently occupied" by anybody before 1936, and the failure of Belgrave even to mention in his 1936 list two of the three largest islands in the Hawar "group" provides eloquent testimony of the extent of Bahrain's knowledge of the Hawar islands at the time. Nor does there appear to be any improvement in the extent of Bahrain's knowledge by 14 August 1937 when, in a memorandum to the Political Agent, Belgrave claims that the Hawar "archipelago" consists of 9 (unnamed) islands near the Qatar coast<sup>9</sup>.

4.6 Although Janan appeared on the 1936 list presented by Bahrain, it did *not* appear in the more considered "preliminary statement" of Bahrain's case on the Hawar islands submitted irregularly by Belgrave to Weightman on 29 May 1938<sup>10</sup>. The memorandum and accompanying documentation constituting this "preliminary statement" list 16 islands and islets as being comprised in the Hawar "group", but pointedly exclude Janan from the named features<sup>11</sup>.

4.7 By July 1946, Belgrave was asserting on behalf of the Ruler of Bahrain that the Hawar "group" of islands consisted of 18 islands and islets. Al-Materrad and Meshtaan (which had rightly, together with Noon, been omitted from the 1938 list) are re-introduced into the 1946 list but the main Hawar island is somehow dropped, presumably because the list consists only of those islands, islets, reefs and other features on which cairns were erected by Bahrain in 1937/38<sup>12</sup>.

4.8 It is hardly surprising, therefore, that the Secretary of State for India, in a letter of 3 August 1946, to the Political Resident, should have remarked somewhat caustically that "the exact extent of the Hawar Islands (*i.e.* the off-lying islets and their territorial waters) never seems to have been accurately defined"<sup>13</sup>.

4.9 The then Political Agent in Bahrain (Galloway) was thus confronted with a very difficult problem when instructed in August 1946 "to suggest a simple and equitable division of the sea-bed to be based on the configuration of the main Bahrain Island(s), the Hawar Islands, and the Qatar peninsula with their respective territorial waters"<sup>14</sup>. That problem had its origin in the careless and misguided manner in which the British authorities in the Gulf (and indeed in London) had made their assessment in 1939 of the conflicting claims of title to the Hawar islands by the Rulers of Bahrain and Qatar. That Galloway took his mandate very seriously is evidenced by the content of his 33-paragraph letter to the Political Resident of 31 December 1946, which embodies his recommendations as to the division of the sea-bed. Naturally, he had no authority to disregard the British decision of 11 July 1939, which had "awarded" the Hawar islands to Bahrain, having to base his recommendations "on the hypothesis that Hawar and 'its islands' have been awarded to Bahrain"<sup>15</sup>. Qatar does not of course accept all the views expressed by Galloway, particularly on the attribution of Fasht Dibal and Qit'at Jaradah, but it is interesting to note his clear conclusion that Janan island must be considered to appertain to Qatar for the following reasons:

(a) there was no justification for the Bahrain claim to ownership beyond the erection of a cairn, which should however be disregarded;

(b) Janan was not included in Bahrain's 1938 list; and

(c) the eastern half of Janan lies within the territorial waters of Qatar and south of the deep water channel between Hawar and Janan, that channel running close to Janan<sup>16</sup>.

4.10 Galloway's recommendation that Janan island must be considered to appertain to Qatar was accepted by his superiors, both in the Gulf and in London. Consequently, it was specifically stated in the letters of 23 December 1947:

"It should be noted that Janan Island is not regarded as being included in the islands of the Hawar group"<sup>17</sup>.

4.11 The Ruler of Bahrain immediately disputed this conclusion. In paragraph 5 of his letter to Pelly (PAB) of 31 December 1947, the Ruler asserts:

"We are unable to understand why our island of Jinan, which, owing to the rich fishing grounds around it, is an island of value, has been excluded from the Hawar group. Jinan is used as a base by our fishermen who are accustomed, with our permission, to erect huts on the island in the fishing season"<sup>18</sup>.

On the basis of instructions from London, the PAB returned a negative reply to this complaint on 30 April 1949, relying in part on the arguments put forward by Galloway, as set out in the passage from his letter of 31 December 1946, cited at paragraph 7.9 of the Qatar Memorial<sup>19</sup>.

4.12 Qatar of course denies totally the claim in paragraph 405 of the Bahrain Memorial that Janan was used by "Hawar residents", since it denies that there were any "permanent residents" of Hawar ~~before some members of the Dowasir tribe were "settled" in Hawar as a result of the secret machinations of Belgrave~~. Janan may of course have been used from time to time by Bahrain fishermen but, as is well-known, at that time there was freedom of fishing for all Arab tribes in the region, including Qataris, who also used Janan. Galloway's reasons for concluding that Janan island was not one of the "Hawar group" and must in any event be regarded as appertaining to Qatar rather than Bahrain are eminently sound.

4.13 Accordingly, there is no substance in the Bahraini contention that Janan must be regarded as one of the Hawar islands falling within the scope of the British "decision" of 1939 and therefore appertaining to Bahrain.

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1 BM, para. 404.

2 This feature also appears on Qatar's Maps 5 and 9, QM, Vol. 17. However, those maps were, as can be seen, prepared on the basis of the erroneous Bahraini charts.

3 *See*, QCM, Annex III.50, Vol. 3, p. 289.

4 *See*, QM, Maps 5 and 9, Vol. 17.

5 *See*, QM, paras. 7.1, *et seq.*

6 *See*, paras. 4.1-4.2, above.

7 *See*, BM, para. 405.

8 QM, Annex III.103, Vol. 7, p. 15.

9 BM, Annex 335, Vol. 6, p. 1456. It is worth noting, incidentally, that, in this memorandum, Belgrave makes a clear distinction between the "Bahrain archipelago" and the "Howar [*sic*] archipelago", thereby implicitly accepting that the Hawar islands do not form part of what is styled the "Bahrain archipelago".

10 BM, Annex 261, Vol. 5, p. 1106.

11 *Ibid.*, at p. 1110.

12 QM, Annex III.243, Vol. 8, p. 195.

13 QM, Annex III.246, Vol. 8, p. 207.

14 QM, Annex III.249, Vol. 8, p. 219, at p. 221.

15 *Ibid.*

16 *See*, citation at QM, para. 7.9.

17 QM, Annexes III.256 and III.257, Vol. 8, p. 265 and p. 269.

18 QM, Annex IV.118, Vol. 10, p. 83, at p. 86.

19 QM, Annex III.249, Vol. 8, p. 219.

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## **CHAPTER V**

### **ZUBARAH**

#### **Section 1. Introduction**

5.1 Having regard to the failure of Bahrain to inform Qatar completely of its claims and submissions, Qatar presented its case in its Memorial "without prejudice... to the position that it may take once it has been informed of the claims and submissions of Bahrain"<sup>1</sup>. This precaution has proved to be wise in the light of Bahrain's claim to sovereignty over "Zubarah" as presented in the Bahrain Memorial. The examination in this Counter-Memorial of that claim shows that it is without any substance. It is even doubtful whether the claim now presented in Bahrain's Memorial is the subject of an existing dispute within the Court's Judgments on Jurisdiction and Admissibility. Qatar, however, does not consider it appropriate to pursue this question at the present stage of the proceedings, but it may arise when all the evidence and arguments of both Parties are before the Court.

5.2 In an extensive "review" and recitation of historical events in Chapter 2 of its Memorial, Bahrain has provided the Court with an indigestible mass of selective quotations and distorted facts in order to try to establish, by its misrepresentation of circumstances, that it has a full and internationally recognised title to what it calls "the Zubarah region". Qatar must point out that there has never been any question of a Bahraini claim to any "Zubarah region" or "area of Zubarah". In fact, the Court will recall that what has been referred to the Court for its decision is simply the question of "Zubarah". It is in any event Qatar's submission that Bahrain is fully aware that its so-called claim to sovereignty over Zubarah (however that term is interpreted) is historically and legally unsustainable. In the words of one British official, it might at one time have been considered that Bahrain had a "historical interest" in Zubarah, but no more<sup>2</sup>. Qatar submits that Bahrain has only raked up this so-called claim to Zubarah by way of a counterblast to the legitimate claims raised by Qatar in its Application and its Memorial.

5.3 Qatar intends in this Chapter to correct the historical account of events relating to Zubarah as well as demonstrate its historic title to Zubarah.

5.4 As in the case of the Hawar islands, so also in relation to Zubarah, Bahrain attempts to show that at one time it exercised "control and authority" over the entire Qatar peninsula as well as "all the waters" between Bahrain and the peninsula of Qatar; and that its authority receded from only a part of the peninsula after the arrival of the Ottomans in Qatar in 1871, but that it continued always to exercise control and authority over the Zubarah region until the Al-Khalifah were forcibly expelled from Zubarah by the Ruler of Qatar in 1937<sup>3</sup>.

5.5 A detailed account has been given earlier in this Counter-Memorial<sup>4</sup> demonstrating that after the particularly violent and destructive attack by the Al-Khalifah on Qatar tribes in 1867, the British took action to secure compensation from Bahrain for the Qatari losses as well as undertakings through the Agreements of 1868 from the Chiefs of both Bahrain and Qatar to maintain the maritime peace. It has been shown in detail, in dealing with Qatar's title to the Hawar islands, how Bahrain and Qatar were effectively separated by virtue of these Agreements of 1868 and that Qatar's territorial integrity, by which is meant the territorial integrity of the peninsula as a whole together with its coast and its immediately adjoining islands, has been recognised and respected ever since ~~not only~~ by the British, the Ottomans ~~and other rulers in the region, but even by the rulers of Bahrain from time to time~~. The evidence and submissions in this connection advanced in Chapter III apply with equal force in the case of Qatar's title to the entire peninsula and its coasts, including Zubarah.

## **Section 2. The history corrected: Qatar's title to Zubarah**

### **A. Early history**

5.6 In dealing with the early history of Zubarah, Qatar has shown in its Memorial<sup>5</sup> that at least by the beginning of the 17th century, Zubarah was already a ~~fortified town, with its own Sheikh and administration. Evidence has been tendered of the inhabitants, the houses, the boats and livestock in Zubarah in 1638, and of the prevention of a first attempt by members of the Al-Utub tribe early in the 17th century to enter Zubarah~~<sup>6</sup>.

5.7 Qatar has further shown that even when in 1766, two sections of the Al-Utub tribe (the Bin Khalifah and the Al-Jalahma) made their way to Zubarah and the local Sheikhs laid down conditions for their settlement, they refused to accept these conditions but instead built a fort at Murair outside the walls of Zubarah; and that after the Al-Utub attacked and occupied Bahrain in 1783, they moved their headquarters from Murair to Bahrain<sup>7</sup>. There is no evidence thereafter of any "control or authority" exercised by the Al-Khalifah in Zubarah.

### **B. The period from 1868-1937**

#### **1. British rejection of Bahrain's claim to Zubarah at its inception**

5.8 Qatar has shown in its Memorial and in this Counter-Memorial that at least from the time of the British action of 1868 and the Agreements of that year with the Chiefs of Qatar and Bahrain, the British recognised the integrity of the entire territory of Qatar comprised of the peninsula of Qatar (including Zubarah) and the adjoining islands<sup>8</sup>; and that whatever hesitation some British officials might have had in this regard was finally dissipated by the Anglo-Ottoman Convention of 1913 and the British-Qatar Treaty of 1916<sup>9</sup>.

5.9 Bahrain's alleged claim to Zubarah was presented to the British for the first time in 1873 and in effect amounted to an attempt to alter the position achieved by the 1868 Agreements,

whereby Bahrain and Qatar were effectively separated. As Qatar has already shown in its Memorial, the British never accepted this claim. However, in the light of Bahrain's present claim to Zubarah, it is instructive to examine the basis of the claim at its inception and to correct the "historical" account given by Bahrain<sup>10</sup>.

5.10 During a conversation between Major Grant (First Assistant Resident) and the Chief of Bahrain on 16 August 1873, Major Grant was informed that a Turkish officer from a ship visiting Zubarah had asked the Chief of the Naim why he did not declare himself a Turkish subject and that the latter had come to Bahrain for help<sup>11</sup>. The Chief of Bahrain claimed that the Naim were his subjects and that this was acknowledged in Colonel Pelly's presence at the time of the signing of the 1868 Agreement. He desired to know whether he should give the Chief of the Naim the Bahrain flag. Upon Major Grant's advice, the Chief of Bahrain addressed a communication to the Political Resident on 2 September 1873 claiming that "Zobareh is a property under the rule of Bahrein..." and that "on referring to the Treaty you will perceive that Zobareh is a dependency of this Island...". He further requested that the records of Colonel Pelly of 1868 be examined and went on to seek advice as to whether, in the event nothing were found out, "... *I am to relinquish the Naim or allow them to remain as they are*"<sup>12</sup>. It will be seen therefore that the Chief of Bahrain was uncertain as to the strength of his claim to Zubarah at its very inception.

5.11 After his conversation with the Ruler of Bahrain, Major Grant immediately had the position investigated and obtained a report which shows that, apart from the Naim, there were a number of other tribes living in Zubarah. This report states:

"The tribes living in Zobareh are as follows:

1. The Chibisa, who were lately living in Khorassan; they possess about 25 fishing boats.
2. The Manamaneh tribe, who were lately living in Aboo Zuroof; they have about eight boats.
3. The Sadeh tribe, who were lately settled in Rowais; they possess about five boats.
4. The Hamadal who were lately living in Jumail; they possess about seven boats.
5. The Naim, who are Bedoos and possess flocks which they graze in the neighbourhood of the town of Zobareh.

The Chief of the Chibisa is Esaw bin Khulefah; the Chief of Naim is Nassir bin Jubbar.

The Chibisa were living in Khorassan until about two months ago, when they migrated to Zobareh; their reason for so doing was that they were friends with the Naim, and their cattle used to graze with the cattle of the Naim, so when it was known that Rui Sani the head of the Beddah people, and the tribe of Beni Hajir intended to attack the Naim the two above mentioned Chiefs Nassir bin Jubbar, and Esaw bin Khulefah, agreed to live together in Zobareh for the purpose of aiding one another against the enemy. They also invited the tribe of the Manamaneh to come from Aboo Zuroof to join them in Zobareh, as also the tribe of Sadeh, living in Rowais, and the Hamadal living in Jumail. The tribe of Naim live in Zobareh and graze their cattle in the surrounding pasture lands. The Chibisa many years ago lived in Biddeh; some quarrels arose between them and the tribe of Uair; for this reason they left Biddeh and settled in Khorassan"<sup>13</sup>.

Major Grant himself added the following comment on the report:

*"This sketch of the tribes at present inhabiting Zobareh was shown by me to the Chief of Bahrein, who pronounced it to be correct"<sup>14</sup>.*

5.12 It will be noticed that there is no reference in this report to any connection between the Naim and the Al-Khalifah or their alleged allegiance to the Chief of Bahrain. What is of particular importance of course is that as numerous tribes lived in Zubarah, there could not be any legal basis for Bahrain to claim sovereignty over Zubarah on the ground of the alleged allegiance of only *one* of those tribes (or a section of it) even if such allegiance did in fact exist<sup>15</sup>.

5.13 Major Grant forwarded the above report to the Political Resident with his letter of 16 August 1873 in which he noted that with regard to Sheikh Isa's claim in respect of the Naim, any power exercised by the Chiefs of Bahrain of late years over that tribe had been merely nominal, if it existed at all<sup>16</sup>. He wrote to the Political Resident again on 11 September 1873 that after consulting various treaties he had arrived at the conclusion "that there is no special mention made in the treaties either of the el Naim or of Zobareh..."<sup>17</sup>.

5.14 In the intervening period, the Political Resident, Colonel Ross, in his reply of 28 August 1873 to Major Grant, asked him to advise the Bahrain Chief "to keep aloof from all complications on the mainland with the Turks, Wahabis, etc."<sup>18</sup>.

5.15 Furthermore, in view of the Bahrain Chief's contention that his claim had been acknowledged in Colonel Pelly's presence in 1868, inquiries were made from Colonel Pelly. He advised in his letter of 27 October 1873 that the Chief of Bahrain should adhere to the arrangements already made, and while he was acknowledged to possess certain rights in regard to pasturage, etc., on the Qatar coast he should not be held to be empowered to put to sea for the purpose of coercing any port in Qatar<sup>19</sup>. The Government of India concurred with the views expressed by Colonel Ross in his letter of 28 August and of Colonel Pelly in his letter of 27 October 1873<sup>20</sup>.

5.16 This official British position never changed for more than a century thereafter except to the extent that in later years, as will be shown below, the British decided that the Ruler of Bahrain had no rights at all in Zubarah, and informed him accordingly from time to time.

## **2. Bahrain claim of resistance to Ottoman/Al-Thani control of Zubarah**

5.17 Bahrain attempts to sustain its present claim to Zubarah by trying to show in somewhat dramatic language that from 1874 to 1903, the Ottomans and the Al-Thani were "rebuffed in six attempts to exercise authority over the Zubarah region" and that these attempts failed "in the face of Britain's and Bahrain's opposition"<sup>21</sup>. Qatar will show how Bahrain, by a selective use of historical facts and references, has presented a grossly inaccurate and distorted account of these six incidents:

(1) In 1874, Nasir bin Mubarak (a dissident member of the Al-Khalifah family), and the Beni Hajir threatened to attack the Naim in Zubarah. Bahrain characterises this incident as demonstrating a first attempt by the Ottoman Empire and the Al-Thani to expand northward into Zubarah. The facts, however, show a very different situation. Colonel Ross, the British

Resident, referred to this incident in a telegram of 5 September 1874 to the Government of India, stating:

"A Bedouin tribe of Nejd have been making serious attempt to cross from mainland on a piratical raid against Bahrein..."<sup>22</sup>.

In a subsequent letter of 19 December 1874, he described the incident as follows:

"It was a notorious, undisguised fact, that the primary object of the Beni Hajir was, as on former occasions, the attack and plunder of Bahrein. Else why should they have seized boats and put to sea and plundered Bahrein craft?..."<sup>23</sup>

As the British interest was only the protection of Bahrain, the Government of India therefore asked the Resident to "take effective steps to defend Bahrein against aggression by any Chiefs or tribes of the Gulf..."<sup>24</sup>. This was not therefore an "attempt to exercise authority over the Zubarah region" which was rebuffed<sup>25</sup>. The Sheikh of Bahrain sought nevertheless to take advantage of the situation by seeking leave from the British Resident to reinforce the Naim at Zubarah, whom he considered to be in great danger. Although he was initially allowed by the Resident to despatch reinforcements "as a purely defensive measure"<sup>26</sup>, the Government of India disapproved the Resident's action. The Government of India in a letter later confirmed, *inter alia*, that:

"...The Chief of Bahrain had no possessions on the mainland of Katar, and... his rights there were of a very uncertain character..."<sup>27</sup>

and that:

"... His Excellency in Council... considers that the Chief of Bahrein should not have been encouraged to despatch troops to the mainland for the reinforcement of his allies, the Naim tribe"<sup>28</sup>.

Contrary to what Bahrain now contends, Colonel Ross also reported to the Government in his communication of 19 December 1874 that the Chief of Bahrain had stated that:

"The object of his sending help to Zobarah *was to defend his own island*, not to encroach on his neighbours, and intimated his readiness to be guided by the policy of Government"<sup>29</sup>.

When there were again remonstrances from the British in 1877, the Ruler of Bahrain did not, as might have been expected, state that he was fully entitled to defend Zubarah in view of his sovereignty over the area. Instead, he simply provided the excuse that:

"... the only people, who left Bahrein for Zobarah, were those of the Naim tribe who habitually visit Bahrein for gifts, and who returned of their own accord upon hearing that a hostile force had come to attack Zobarah, but that he furnished them with no arms"<sup>30</sup>.

(2) In September 1878, a very serious act of piracy, accompanied by the murder of four persons, was committed by the inhabitants of Zubarah upon a passing boat; and Colonel Ross 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. Before he could fully carry out his instructions, he received a report that Zubarah, of which the inhabitants had

made themselves obnoxious to all their neighbours by raids and piracies, had been attacked by a large force under Sheikh Jassim bin Thani and Nasir bin Mubarak. The Naim besieged in Murair surrendered and Zubarah as a populated place ceased to exist. Thus, the British authorities, far from seeking to rebuff the Turks and the Al-Thani from exercising authority in Zubarah, in fact held the Turks responsible for restraining piracies from Zubarah, and *were actually in the process of inviting the Turks to punish its inhabitants for their crimes*. This event is also a clear instance of Al-Thani exercise of authority in Zubarah and this action of Sheikh Jassim was accepted by the British without question. In fact it was considered at this time, both by the British Resident and by the Sheikh of Bahrain, that, for the future, the best solution to the Zubarah difficulty, in so far as the security of Bahrain was concerned, would be the permanent occupation of the place by the Turks<sup>31</sup>.

(3) Bahrain attempts to show that the British opposition in 1888-89 to Ottoman plans for the rebuilding of Zubarah amounted to recognition of "the Ruler of Bahrain's title to sovereignty over the region". But on Bahrain's own showing, by that time, it was British policy generally to oppose any extension of Turkish jurisdiction in Qatar<sup>32</sup>. The only other consideration was the security of Bahrain and not its sovereignty over Zubarah. This is clearly demonstrated by the terms of the telegram from Colonel Ross which is quoted by Bahrain and which it is appropriate to repeat here:

"In view to opposing further extension Turkish jurisdiction, safety of Bahrain, and security of seas, I consider important that any settlement at Zobarah should be forbidden and prevented by us"<sup>33</sup>.

Bahrain however fails to cite the following extract from a letter of Colonel Ross dated five days later, where he states, *inter alia*, that the Chief of Bahrain:

"apprehends that Nasir-bin-Mubarik, the refugee from Bahrain, will be instigated to settle at Zobarah with his followers of the Beni Hajir tribe, and supported in doing so by the Turks, either directly or indirectly.

2. There can be no doubt that if this measure were carried out it would constitute a *menace and standing danger* to Bahrain, and the objection raised by the chief of Bahrain is, *assuming his information correct*, reasonable"<sup>34</sup>.

It will thus be clear that the episode in 1888 had nothing whatsoever to do with any Bahraini claim to sovereignty over Zubarah. To the British, it was purely a question of ensuring the security of Bahrain island by protecting it from the threat of attack from Zubarah.

(4) The reference by Lorimer above to the rumours of the Ottoman plans in 1890/1891 relates to the fourth incident cited by Bahrain where Ottoman/Al-Thani attempts to exercise authority in Zubarah were allegedly "rebuffed". As Lorimer points out, these plans were abandoned. It is also apparent from the India Office letter of 2 October 1890 and Saldanha's account<sup>35</sup> that the British intervened with the Porte and prevented the implementation of Ottoman plans to rebuild Zubarah in 1891 because they had declined to admit the claim of Turkey over the Qatar coast where Zubarah was located. Their intervention was not dictated by any recognition of Bahraini rights in Zubarah or any denial of Al-Thani authority in that region.

(5) It may be noted that Lorimer's observations on the above events involve no suggestion that there was any recognition of Bahrain's sovereignty over Zubarah. He states:

"In 1888 it was reported that the Turks intended to rebuild Zubarah and, as it was feared that the agent selected would be the Bahrain outlaw Nasir-bin-Mubarak, the British Resident was instructed by the Government of India to inform that individual and Shaikh Jasim of Dohah, who was his father-in-law, that a settlement at Zubarah would not be permitted. No actual attempt to re-occupy the place was observed. In 1890 and 1891 there were rumours of the appointment of a Turkish Mudir to Zubarah, and the post was at first offered to Muhammad-bin-'Abdul Wahhab of Darin, who declined it; but the project, after a Mudir designate had arrived in Bahrain, was apparently abandoned"<sup>36</sup>.

(6) Again, Bahrain's account of the events of 1895 is severely distorted. In that year, the threat which Bahrain "rebuffed" was not *to* Zubarah but *from* Zubarah *to* Bahrain<sup>37</sup>. The British intervention whereby Turkish and Qatari vessels were destroyed in Zubarah harbour was, as shown below, to prevent an attack on Bahrain<sup>38</sup>.

(7) Once again in 1903, the British opposed and prevented an Ottoman plan to appoint Mudirs in Zubarah and Wakrah because of the British position expressed by the Political Resident, Colonel Kemball, that it was "absolutely essential for the security of the Bahrain islands that Zobara should not be occupied by the Turks"<sup>39</sup>. In addition to his concern for the security of Bahrain, in this letter, the Political Resident was clearly concerned about the increased prestige which the Turks would gain from a Turkish "occupation" of Zubarah. It is also important to note that at about the same time, *i.e.*, in 1903, the British were in fact contemplating a closer relationship with the Sheikhs of Qatar. Lorimer notes that:

"It was generally admitted at this time that an Agreement with the Shaikhs of Qatar would be advantageous, inasmuch as it would invest the British Government with a special position in regard to the maintenance of maritime peace off the coasts of the promontory, and would increase the weight of British opinion in any international question that might arise concerning the use of the adjacent pearl banks; but it was held expedient to defer a final decision until the British position in the Persian Gulf should have been examined by the Committee of Imperial Defence, and until tension at the moment prevailing between Great Britain and Turkey in Arabia should have subsided"<sup>40</sup>.

Lorimer also notes:

"It was decided by His Majesty's Government that the *status quo* in Qatar, which the Porte on its side had recognised by the withdrawal of Mudirs appointed to Wakrah and Zubarah... - ought not to be disturbed by the conclusion of any fresh Agreement between the Shaikhs of Qatar and the British Government; but that the Shaikh might be assured of the friendship of the British Government being continued, so long as he should abstain from entering into engagements with another power"<sup>41</sup>.

5.18 It will therefore be seen that while some of the six incidents analysed above show British opposition to an Ottoman presence in Zubarah or British concern for Bahrain's security, none of them indicates that the British ever questioned the territorial integrity of Qatar; equally, none can be interpreted as attempts that were "rebuffed" by Bahrain and Britain because the British in any way recognised any Bahraini rights in Zubarah.

### **3. Bahrain's "claim" relating to Zubarah and concern for the security of Bahrain**

5.19 It is Qatar's submission that in fact the *real* reason why Bahrain came to advance a "claim" relating to Zubarah in 1873 was the concern of the Ruler of Bahrain for the security of Bahrain. The so-called "allegiance" of the Naim was "purchased" and nourished with gifts over a long period, having regard to the same concern for the security of Bahrain. The Ruler of Bahrain was anxious that the Naim should not aid anyone in attacking Bahrain. Consistent with this, the British authorities also from time to time expressed the view that for the security of Bahrain it was necessary that Zubarah was either kept uninhabited or peopled only by those friendly to the Ruler of Bahrain, a view amply exploited by Bahrain. This submission is supported by the following:

(1) The British had rejected Bahrain's claims on the Qatar mainland based on the supposed Naim "allegiance" to the Chief of Bahrain after Major Grant's investigation in 1873 and the Government of India's firm decision of 1875 referred to above<sup>42</sup>. The British were clearly aware of the history and true nature of the relationship of the Naim with others in the Gulf area, described by Lorimer in the following terms:

*"... 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. 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. In Bahrain and Qatar the Na'im are Maliki Sunnis"*<sup>43</sup>.

(2) When the British Government ordered the Chief of Bahrain to desist from any interference or intervention in Zubarah on the mainland in 1875, in a Memorandum of 22 June 1875 to the Political Resident on behalf of the Chief of Bahrain, it was pointed out:

*"... in respect to our agreeing to abstain from interference in the affairs of Zobarah and the consequences which will ensue, that we have frequently represented to you that our connection with Zobarah and the Naeem tribe, whom we have ordered to dwell there, was, for various reasons, an imperative obligation and necessity, as you are aware. When we waive this obligation in respect to that quarter, it behoves us to devise other plans for the protection of Bahrein..."*<sup>44</sup>.

(3) In a letter of 7 October 1876<sup>45</sup>, Captain Prideaux, the officiating Political Resident, reported that he had communicated to Sheikh Isa of Bahrain the instructions of the Government of India that he should keep aloof from all intertribal disputes upon the mainland and discontinue the custom of providing any of the tribes with provisions when they moved from one quarter to another. When it was later found that the Chief of Bahrain was not complying with these instructions and when he was asked for an explanation, the then officiating Political Resident, Major Grant, reported in his letter of 3 November 1877 to the Government of India that the Chief of Bahrain:

*"... admits having had dealings with the Naim tribe, though he states that in making them presents and receiving them in Bahrein he has no choice but to act as he does, for fear of the tribe leaguering with his enemy, Nasir bin Mobarek, and others, and making Zobarah a stand-point from which to harass and attack his islands..."*.

He went on to state:

"The propinquity of Zobarah to Bahrein makes it a constant source of danger to Sheikh Eesau, and were he to offend the Naim tribe, who live there, by closing his islands against them, and by withholding the presents he has hitherto given them, they would certainly coalesce with the Beni-Hajer, in which case it would probably not be long before an invasion of Bahrein would be attempted"<sup>46</sup>.

This was based on the Chief of Bahrain's own letter of 12 October 1877 to Major Grant where he stated:

"... the Naim come here on their own account, and when I give them presents it is necessary for me to do so to prevent them doing mischief, as otherwise I fear that they would stir up strife and ally themselves with my enemies, Nasir bin Mobarek and others; and having united in Zobarah make matters very difficult for me, because the distance from there is but short"<sup>47</sup>.

(4) In a letter to the Secretary of State for India of 22 May 1879 from the Foreign Department, Government of India, it was stated:

"It may, also, be necessary to protect the islands of Bahrein by special arrangements which should provide -

i. - For the maintenance of the territories of the Chief of Bahrein under the protection of Great Britain.

ii. - For the fulfilment by the Chief of his treaty obligations including abstention from all interference with the mainland..."<sup>48</sup>.

(5) Lorimer, reviewing the events of 1886, observes:

"... the Na'im of Qatar continued friendly, but their friendship was dearly purchased by the sacrifice of a large portion of the public revenues of Bahrain, for which it did not appear that any adequate *quid pro quo* was obtained from the tribe"<sup>49</sup>.

(6) As already shown above, there was apprehension in 1888 about the security of Bahrain<sup>50</sup>. This apprehension stemmed from the possibility that the Turks might instigate Nasir bin Mubarak to settle in Zubarah. The British therefore opposed and prevented this. In his letter of 17 March 1888 to the Government of India, the Political Resident, Colonel Ross, stated, *inter alia*:

"If Zobarah is to be rebuilt and peopled, this should be, I think, in justice, done only in a manner acceptable to the Chief of Bahrain. The settlers should be people friendly to him and not his enemies.

5. In view, firstly, of opposing the further extension of Turkish authority; secondly, for the due safety of the Islands of Bahrain; and thirdly, for the preservation of tranquillity and security in the seas, and prevention of piracy, it appears to me highly important that the settlement of Nasir-bin-Mubarak and his dependents at Zobarah should be forbidden and prevented..."<sup>51</sup>.

(7) As already shown by Qatar, the British intervention off Zubarah in 1895 was clearly intended to prevent an invasion of Bahrain from Zubarah<sup>52</sup>. This is confirmed in the report

made by Colonel Wilson, PRPG, on 13 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>53</sup>.

(8) Another instance of the concern for Bahrain's security and therefore the need to prevent any potential invaders having a base in Zubarah is a Memorandum of Lt. Col. Kemball of 23 March 1903 to the Government of India stating:

"It is, in my opinion, absolutely essential for the security of the Bahrein islands that Zobara should not be occupied by the Turks..."<sup>54</sup>.

(9) In a report of July 1905, Prideaux expressed the view:

"Under no circumstances would I permit any now uninhabited portions of the west coast, including Zubara, to be re-colonized, as its soil is unfertile and the pearl-banks being difficult of access from this tract, there can be no inducements except unlawful ones for people to settle there"<sup>55</sup>.

(10) Even during the events of 1937, referred to hereafter, when the Ruler of Qatar took action to stop smuggling activities in Zubarah, the Naim were simply concerned with their own interest and not with their relationship with the Ruler of Bahrain. In a telegram of 23 April 1937 to the Political Resident, the Political Agent stated:

"Serious point if true is that Naim are reported to have said that if they do not get support from Bahrain they will adhere to Bin Sa'ud"<sup>56</sup>.

5.20 It will be seen from the foregoing that the only concern of Bahrain and the British as regards Zubarah was the security of Bahrain; and that Bahrain's relations with some of the Naim consisted essentially of the Ruler of Bahrain periodically making gifts to them to keep them in good humour in the interests of the security of Bahrain. There was nothing in this relationship to support any Bahraini territorial claim to Zubarah.

#### **4. Recognition of Zubarah as part of Qatar**

5.21 Qatar has already referred to evidence which clearly shows that the British and the Ottomans considered Zubarah as part of the peninsula of Qatar<sup>57</sup>. This recognition was later incorporated in the Anglo-Ottoman Convention of 1913 which provided in Article 11:

"it is understood by the two Governments that the peninsula will be governed as in the past by shaykh Jasim-bin-Sami [*sic*] and his successors"<sup>58</sup>.

Bahrain brushes this Convention aside on the ground that it was never ratified; but Bahrain fails to acknowledge that the reason for non-ratification was the outbreak of war between Britain and Turkey, and not dissatisfaction with the terms of the Convention. Bahrain also

does not take into account the fact that Qatar, as did the British, relies on the provisions of this Convention for their undeniable evidentiary value. Furthermore, as already shown, Article 11 of the Convention was referred to in the 1914 Treaty which was ratified<sup>59</sup>.

5.22 Bahrain makes an unconvincing attempt to show that during the period of the Ottoman presence in Qatar, Zubarah was separate from the Doha area and was somehow under Bahrain's influence. It alleges in its Memorial that even the Ottomans considered Doha to be a "*Kaza*" (district) distinct from the sub-districts of Zubarah and Odaid (said to be referred to by the Ottomans as "*Nahiye*")<sup>60</sup>. This contention of Bahrain is based on an Ottoman document, the last paragraph of which is translated by Bahrain itself as follows:

"... There are c.150 sweetwater wells in the *kaza* of Katar: if wells are dug... between Zubara *nahiyesi*, which is the border of the *kaza* of Katar, and Odeid *nahiyesi*..."<sup>61</sup>.

Bahrain completely misreads the above document which in fact refers to Zubarah as "the border of the *kaza* of Katar". Any ambiguity that there may be is dispelled by the letter from the Ottoman Minister of the Interior to the Grand Vezir of 6 April 1902 referring to "... the Zubarah and Udaid coasts of the *Kaza* of Qatar..."<sup>62</sup>. This is therefore further evidence, if any were needed, of the Ottoman recognition of Zubarah as part of Qatar.

~~5.23 Qatar has already cited numerous documents to demonstrate the recognition of Qatar's ownership of Zubarah by the rulers of the Gulf region, in particular Sheikh Zayed bin Khalifah of Abu Dhabi<sup>63</sup>.~~

5.24 It is Qatar's submission that in signing the Agreement of 1868 Bahrain expressly undertook not to interfere on the Qatar peninsula by any action from the sea, particularly by way of enforcement of any rights it claimed on the Qatar peninsula. This was reinforced by Bahrain's continued acceptance of the condition laid down by Britain for providing its protection to Bahrain, namely that Bahrain should not interfere on the Qatar mainland<sup>64</sup>. Indeed, Bahrain has admitted on several occasions that it neither had nor seriously desired any rights in Zubarah<sup>65</sup>. Bahrain states that it sent its Crown Prince to London after the First World War "to inform the British Government of the Ruler's intention to build a port in Zubarah and re-develop the region"<sup>66</sup>. But a report dated 17 January 1920 of a conversation of the then Political Agent (Dickson) with Crown Prince Sheikh Abdullah of Bahrain in fact shows Bahrain's continuing doubts as to its claim concerning Zubarah. The report states:

"(e) *Regarding proposal III. - 'Zubarah.'* I pointed out the unlikelihood of His Majesty's Government's ever even considering such a question. I showed Abdullah how such a course would at once result in trouble with the ruler of Qatar and Nejd, and would not only be looked upon as a piece of great injustice by those two rulers, but would be most vigorously opposed on the score of justice, treaty and trade. To my surprise Abdullah admitted the entire force of my remarks, and then calmly turned round and said 'we do not really want 'Zubarah' so very much, but we do want to stake our claim on the mainland, and get a port there in order that should Bin Saud open a port at Al Jubail (north of Qatif) we may not be entirely ruined'. He further explained that Shaikh Isa was very nervous on this point and feared that Bin Saud had something of this sort in mind for Al Jubail was an ideal place for a port, there being good deep water at all tides close in to the shore. That should such port be opened, then Bahrein was doomed, for all its present trade with the mainland would go direct by steamer to the new port and leave Bahrain out. If, on the other hand, Zubarah were in Shaikh Isa's hands this could not happen. Shaikh Isa would gladly never mention Zubarah again, if His Majesty's

Government promised not to allow Bin Saud to open a port at Al Jubail. This statement of the case came as a surprise to me. Abdullah clearly showed that Zubarah was not after all so very much sought after by Shaikh Isa, but was only asked for as a means of bargaining with Bin Saud, should the latter attempt to develop Al Jubail. The point is very *interesting* and gives us a reasonably powerful weapon, should we ever want to bring pressure on to the Ruler of Bahrain"<sup>67</sup>.

## 5. Zubarah and the discovery of oil

5.25 As Qatar has shown in its Memorial, discussions relating to the granting and then to the extension of Bahrain's petroleum concession in the 1920s and 1930s showed that Bahrain did not consider Zubarah as part of its territory to be covered by the concession. Furthermore, the 1916 Treaty provided that the Ruler of Qatar would not grant an oil concession over his territory without British consent. In 1935 a concession was finally signed by the Ruler of Qatar and representatives of APOC (with British approval), which clearly included the whole of the peninsula including Zubarah, as was also confirmed by the map attached to the concession"<sup>68</sup>.

5.26 Despite this, Bahrain seeks to suggest that it was the Ruler of Qatar who, after granting an oil concession over his territories in 1935, saw the great attraction of expanding the territory under his authority in order to maximise his potential revenue from hydrocarbon deposits"<sup>69</sup>. This assertion is made in a feeble attempt to show that the Ruler of Qatar, after 1935, began to covet Bahrain territory, namely, Zubarah.

5.27 Bahrain alleges that, since an American company (BAPCO) had the oil concession in Bahrain and a British company (PCL) came to be granted the oil concession in Qatar, the British authorities began to favour Qatar in the controversy relating to Bahrain's claim over Zubarah. Bahrain argues that:

"Britain struggled to give its own oil companies a competitive advantage over the United States oil companies by exploiting Britain's historical political influence in the region. The struggle influenced events in the Zubarah region and underlay Qatar's invasion of Zubarah in 1937"<sup>70</sup>.

This statement appears to contradict Bahrain's earlier assertion that:

"Britain continued publicly to support the Ruler of Bahrain's claim to the Zubarah region"<sup>71</sup>.

Or perhaps it is intended to imply that privately (as against publicly), Britain started supporting Qatar. There is no foundation whatsoever for Bahrain's suggestion that the British changed their attitude with respect to Zubarah because of their oil interests. As Qatar has already shown, the British had consistently rejected Bahrain's claims concerning Zubarah from 1873 onwards"<sup>72</sup> and in fact, on 10 August 1957, the Political Resident wrote to the Ruler of Bahrain and reminded him that:

"Her Majesty's Government have never supported any claim by Bahrain to sovereignty in Zubarah"<sup>73</sup>.

5.28 Bahrain next falsely asserts that when Bahrain's "unallotted area" was left to be negotiated between the Ruler of Bahrain and the prospective concessionaires:

"It was understood by these prospective concessionaires that the Zubarah region could be included in Bahrain's oil concessions"<sup>74</sup>.

The only evidence which Bahrain cites in support of this assertion is one passage from a letter of 5 December 1936 from the local representative of BAPCO (Skinner) stating that:

"The Khalifa family at one time lived in Zubara and still have some claim to that town and its environs"<sup>75</sup>.

However, in what appears to be a deliberate omission, Bahrain fails to reproduce another passage in the same letter which makes it clear that the writer had serious doubts whether the Ruler of Bahrain had any sustainable rights in Zubarah. The penultimate paragraph of the letter states:

"... It appears advisable to start negotiations for the whole of the Sheikh's territories, but if such negotiations become prolonged and we find:-

(1) That the Sheikh has no chance of making good his claim to Zobara or its environs, or

(2) That the Sheikh can only claim Hawar Islands which are definitely uninteresting geologically,

then would it not be well to use these Islands as a trading point? We would then ask the Sheikh only for the additional area in Bahrain Islands proper, including, of course, the territorial waters. It is admitted that this acquisition is being made entirely for its nuisance value and I should think our purpose would be accomplished if we keep other companies from securing concessions in Bahrain Islands proper. It might be well to point out that the Hawar Islands are geographically a part of the Katar Peninsula and any company operating in Katar would certainly operate Hawar from Katar and not from Bahrain"<sup>76</sup>.

The only other possible prospective concessionaire was PCL which was also negotiating with the Ruler of Bahrain for a concession over the "unallotted area". Bahrain itself states that:

"PCL took the view that its Qatar concession included the Zubarah region, but it was concerned about how Bahrain's view of its sovereignty over the Zubarah region might affect both PCL's chances of obtaining the unallotted area and PCL's ability to develop the Zubarah region under the Qatar concession"<sup>77</sup>.

5.29 Bahrain then contends that Britain entered into an agreement (in 1935) with the Ruler of Qatar offering protection for his land territories for the sole purpose of ensuring that the Qatar oil concession was granted to APOC<sup>78</sup>. While it is correct to say that Britain agreed to accept the Ruler of Qatar's persistent requests for protection for his land territories, it saw nothing improper (nor was there anything improper) or unfair in securing, at the same time, the Qatar concession for APOC. This was particularly so, since it was in no way inconsistent with the firm British position, taken since 1873, that Bahrain in any event had no rights on the Qatar peninsula, and since the concession was therefore in no way prejudicial to Bahrain. It is obviously wrong for Bahrain to contend that:

"In order to extend further the British economic interest in Qatar, Britain had reached an understanding with the Ruler of Qatar about his territories that purported to transfer thereby Bahrain territory to Qatar and consequently to British oil companies"<sup>79</sup>.

It is important in this context to note that APOC and later PCL, though British registered companies, had an equal ownership by four shareholders, namely, British, American, French and Dutch companies. Therefore, any notion that Britain was seeking to protect "the British economic interest" as opposed to a shared economic interest is exaggerated.

5.30 The Bahrain Memorial then goes on to assert that in 1937 "Britain wanted to assure the integrity of the Qatar Peninsula was not threatened"<sup>80</sup>. Bahrain quotes as evidence of this assertion a statement of a Foreign Office official in London to a PCL representative on 25 June 1937 to the effect that the British Government would not be at all likely to recognise any claims by the Sheikh of Bahrain over the Zubarah area. Bahrain, however, ignores the fact that this statement was made after completion of a careful examination, in the preceding months, of the Zubarah situation (before and after the incident involving the intransigence of the Al Jabr faction of the Naim tribe).

5.31 This examination began with what Bahrain refers to as an official note dated 13 March 1937<sup>81</sup> and which stated *inter alia* that:

"[Zubarah] is going to be the subject matter of a tensible feeling... owing to the development of petroleum"<sup>82</sup>.

It resulted in the report and recommendations of 5 May 1937 of the Political Resident (Fowle) to the Secretary of State for India<sup>83</sup>. These documents do not in any way support the contention that, for reasons connected with oil, the Ruler of Qatar was suddenly trying to expand his territories or, more importantly, that for the same reasons, the British Government was somehow unfairly supporting the Ruler of Qatar and not Bahrain's claim to Zubarah. In fact Bahrain itself notes the British position as being that, if Bahrain had any credible evidence to support its claim to Zubarah, then Zubarah would not be covered by the Qatar Oil Concession<sup>84</sup>.

5.32 In any event Bahrain had itself made it known that it did not seek to interfere in any way with the rights of Qatar's concessionaire (PCL). This was made clear in the Political Resident's letter of 5 May 1937, which stated:

"Mr. Belgrave informed me, unofficially of course, that the Shaikh would be quite willing to give us an assurance that his claim to Zubarah would not in any way interfere with the rights of the Qatar Oil Company nor their operations. This is of course a point of some practical importance"<sup>85</sup>.

In the same letter, it was also stated:

"From another and practical point of view His Majesty's Government, by their endorsement of the Qatar Oil Concession, would seem to be committed both to the Shaikh of Qatar and to Petroleum Development (Qatar) Limited, to the recognition of the ownership of Zubarah by the Shaikh of Qatar. It may be possible to surmount this difficulty in view of the Shaikh of Bahrain's readiness to give the assurance referred to in paragraph 4 above"<sup>86</sup>.

5.33 The Political Resident also noted in the same letter Loch's view that "the Al Khalifah are our best friends on the Arab Coast" and his own view that "from the political point of view, Bahrain is of considerably more importance to us than Qatar". In spite of these feelings and after reviewing the entire history of the Zubarah question from as far back as 1871, the Political Resident noted, *inter alia*, that "since about (1871)... the Al-Thani... have held Qatar, including Zubarah". He went on to state that in 1895:

"the Bahrain Government, far from having any control over Zubarah, were actually threatened by invasion from that place".

For this and the other reasons given in his report, and in spite of his friendly feelings for Bahrain, he took the view that "juridically, the Bahrain claim to Zubarah must fail". In the light of this clear expression of view by the Political Resident, Qatar fails to understand how Bahrain can have the temerity to argue, on the basis of the very same report, that "once the negotiations between the representatives of the two Rulers had started it became rapidly evident to Britain that the better legal claim lay with Bahrain"<sup>87</sup>.

5.34 Accordingly, the British took the view that Zubarah was part of peninsular Qatar, and there can be no basis for the false charge that British "support" for Qatar in this matter was motivated by any need to protect the interests of a British oil company.

## 6. The events of 1937

5.35 Qatar has already shown in its Memorial that despite Bahrain's recognition during the discussions relating to the granting of its oil concession in the 1920s and 1930s that it had no claim of sovereignty over Zubarah, ~~there is evidence that at least by 1936 Bahrain was seeking to manufacture a basis for such a claim~~<sup>88</sup>. Furthermore, by early 1937, the Ruler of Qatar was aware that a part of the Naim tribe under Rashid bin Jabr - who was in the official pay of the Ruler of Bahrain - appeared to be engaged in smuggling from Bahrain into Qatar<sup>89</sup>. The Ruler of Qatar took various steps to impose his authority over the dissenting Naim by force and put an end to the smuggling and other unlawful activities. As a result, the dissenting Naim not only surrendered, as they had done in 1878<sup>90</sup>, but also entered into an agreement to obey the laws of Qatar while residing in Qatar<sup>91</sup>.

5.36 Bahrain describes these events of 1937 by stating that "...Qatar mounted an armed expedition against the Zubarah region and expelled the Bahraini subjects who then inhabited it"<sup>92</sup>. It also describes this as an "act of aggression" which resulted in a large number of Naim and adherents reported killed and in fact states "it is impossible to know exactly how many casualties were suffered throughout the Zubarah region"<sup>93</sup>. It is interesting to note however that one of Bahrain's own documents, a report dated 5 December 1939 wrongly attributed to Weightman but in fact written by Packer of PCL<sup>94</sup>, describes the 1937 incident by stating "Naim tribesmen 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"<sup>95</sup>.

5.37 It is Qatar's submission that the action of the Ruler of Qatar in 1937 was no more than an assertion of his authority over Zubarah similar to the actions taken in 1878 and on other occasions.

## C. The period after 1937

5.38 It is Qatar's further submission that in the years following 1937, Bahrain on several occasions acknowledged Qatar's sovereignty over Zubarah either directly or by disclaiming any sovereignty of its own. This is evidenced by the following incidents and documents.

(1) As a consequence of Qatar's actions in Zubarah in 1937, the Ruler of Bahrain imposed restrictions on the circulation of persons and goods between Qatar and Bahrain, with Qatar taking similar action. The strain in the relationship between the two sheikhdoms was sought to be remedied by various British efforts in 1944, 1950 and 1954 but with only limited success. However, in the course of such efforts, the Ruler of Bahrain, while continuing to insist that he had certain private rights in Zubarah, on several occasions expressly disclaimed sovereignty over the area:

(i) The Political Resident recorded in a Memorandum the details of an interview on 9 December 1943 with the Ruler of Bahrain who spoke to him about his claims in Zubarah. The Political Resident noted:

"I could not follow all His Highness' arguments, as I had not the details of this case at my fingers' ends, but he made it clear that they were much more disturbed by the loss of face than the loss of property and said that he was certain *some* arrangement could be made and that he relied on us to make it"<sup>96</sup>.

(ii) When the British succeeded in their efforts to bring about a limited agreement between the Rulers of Qatar and Bahrain in June 1944, the agreement only provided that:

"The Ruler of Bahrain and the Ruler of Qatar agree to the restoration of friendly relations between them as they were in the past. The Ruler of Qatar undertakes that Zubarah will remain without anything being done in it which did not exist in the past. This is from consideration and reverence to Al Khalifah. The Ruler of Bahrain, also, on his part undertakes not to do anything that might harm the interest of the Ruler of Qatar. This agreement does not affect the agreement with the Oil Company operating in Qatar whose rights are protected"<sup>97</sup>.

By this agreement, all that the Ruler of Qatar agreed to was "that Zubarah will remain without anything being done in it which did not exist in the past". In other words, he was content to leave Zubarah as the archaeological site that it continues to be until today. On the other hand, the agreement was further evidence of Bahrain's recognition of Qatari sovereignty in Zubarah in that the rights of Qatar's concessionaire were to be fully protected and respected by both parties.

This agreement further illustrates that the issue between the Parties concerned only some interests in the town of Zubarah and not in any "region of Zubarah" or "area of Zubarah"<sup>98</sup>. This was clearly the understanding of both the Ruler of Qatar and the then Political Resident, as is apparent from the following extract from the letter from the Political Resident of 14 July 1948 to Mr. Ernest Bevin, the British Foreign Secretary:

"The Shaikh of Qatar claims that the agreement [of 1944] only provides that nothing new should be done in Zubarah subsequent to its date and that 'Zubarah' means Zubarah town only. On a strict interpretation of the letter of the agreement it is difficult to read into it more than the Shaikh of Qatar does, and there was little doubt when he signed it he did not intend to concede anything else"<sup>99</sup>.

(iii) The consideration that Bahrain's claim to Zubarah was primarily a matter of prestige and not of sovereignty was again expressed by the Ruler in 1946. In a note of 4 September 1946 to the Political Agent Bahrain, the Political Resident referred to a conversation with the Ruler of Bahrain and recorded:

"If I understood him rightly *he stated that he did not claim sovereignty over Zubarah* but only wanted his grass and water. When I remarked that there was no profit for him in Zubarah he replied that it was not a matter of profit as he knew that *there was nothing of value in Zubarah but one of prestige*. He said that Zubarah was of more importance to him than anything else in the world and that so long as the present position existed he would continue to remain in a state of anguish. He finally said that he could not bear the present uncertainty and wanted a decision one way or the other even though it was unfavourable"<sup>100</sup>.

(iv) Again, in another note dated 1 October 1946, the Political Resident recorded that the Ruler of Bahrain had indicated to him that *he did not claim sovereignty over Zubarah* but only the restoration of the situation prior to 1936<sup>101</sup>.

(v) In a note dated 18 February 1948 the Political Resident recorded that the Sheikh of Bahrain had come to see him on that day and noted that:

"The Shaikh did however definitely state that the rights he claimed were of a private nature and he emphasised the point that he was only claiming for himself and his subjects in Qatar private property such as might be owned by any foreigner in Bahrain"<sup>102</sup>.

(vi) In his letter of 24 June 1948 addressed to the British Foreign Secretary, Mr. Ernest Bevin, the Ruler of Bahrain defined his claim as being only to certain lands in Zubarah and "to hold the land so defined as in private ownership for ever". He further confirmed that he neither claimed nor had any claim in oil rights in Zubarah and that all benefits therefrom entirely belonged to the Sheikh of Qatar<sup>103</sup>.

(vii) On 25 January 1950, the Political Agent Bahrain confirmed in a letter to the Ruler of Qatar that:

"His Highness the Shaikh of Bahrain *does not claim sovereignty over Zubarah* or any other part of Qatar territory, nor does he claim rights to oil or any other material therein. He merely wishes to send his dependents with their flocks for grazing to the Zubarah area without supervision from anyone and without the imposition of Customs or other controls on such people, as was the custom in the past"<sup>104</sup>.

(2) When the British in December 1947 notified the Rulers of Qatar and Bahrain of the division of the sea-bed boundary between the two sheikhdoms, the British clearly proceeded on the basis that Zubarah was part of Qatar in determining the line of delimitation. While Bahrain rejected the decision on various grounds, it made no reservation or protest with regard to any alleged rights in Zubarah or in the sea-bed appertaining to Zubarah<sup>105</sup>. When it proposed a variation of the 1947 line in 1961, Bahrain itself proceeded on the basis that Zubarah was part of the coast of Qatar<sup>106</sup>.

5.39 As already shown in Qatar's Memorial, the British, particularly after the events of 1937 leading to tension between the two Rulers, tried from time to time to see if an arrangement acceptable to them could be put in place regarding Zubarah (without prejudice to Qatar's

sovereignty). These efforts led to the Agreement of 1944 and other certain revised arrangements in 1950 and again in 1954. None of these worked and on 4 June 1957, the Ruler of Bahrain unilaterally asked the British Political Resident that if the British Government did not regard the above Agreements as having any validity, he should be so informed in writing whereupon he would drop the whole matter<sup>107</sup>. The British therefore informed him by a letter of 10 August 1957 that:

"Her Majesty's Government have never supported any claim by Bahrain to sovereignty in Zubarah. They have in the past been able to bring about by negotiation arrangements for certain special facilities for Bahrainis in the area, and certain limitations on the exercise of sovereignty by the Ruler of Qatar. In present circumstances however it does not seem possible for these arrangements and limitations to be continued as they were before"<sup>108</sup>.

This position was reiterated in another letter of 29 July 1961 from the Political Agent to the Ruler of Bahrain<sup>109</sup>.

5.40 It is Qatar's submission that in the light of all these numerous instances of Bahrain's express or implied recognition of Qatar's sovereignty over Zubarah and all the other facts set out above, there is no basis whatsoever for Bahrain's claim that from 1783 until 1937, "it had full and internationally recognised title" to the "Zubarah region"<sup>110</sup>. On the contrary, the wealth of material referred to above in this Chapter and also in the Qatar Memorial establishes that since at least 1868 Qatar has had title to Zubarah. Qatar's title has been internationally acknowledged as well as recognised by Bahrain itself from time to time.

### **Section 3. Bahrain has no legal basis for its claim to sovereignty over Zubarah**

#### **A. Absence of acts of sovereignty performed by Bahrain in or in relation to Zubarah**

5.41 If the Bahrain Memorial is examined closely in the light of Section 2 of this Chapter, it becomes apparent that Bahrain has not produced any evidence that it performed any official acts in or in relation to Zubarah at any time during the period of 120 years from 1868 to 1988 (when Bahrain again raised a claim concerning Zubarah as an artificial counter-weight to Qatar's well-founded claim to Hawar). Qatar will therefore now move to consideration of what is essentially the only remaining argument presented by Bahrain in support of its claim to sovereignty over Zubarah, namely, the argument based on the supposed allegiance of the Naim.

#### **B. There is no factual or legal basis for Bahrain's argument based on the supposed allegiance of the Naim**

5.42 It is useful to begin by considering the thoughtful view expressed by Dr. Al-Baharna, the former Minister of Legal Affairs and Agent of Bahrain in the present case. Writing in his personal capacity, Dr. Al-Baharna states:

"... the question of Zubarah, as it stands today, cannot be fitted in any legal classification. It is not, in reality, a claim to the territory; it is a claim to jurisdiction over the subjects of a State in another territory"<sup>111</sup>.

If Dr. Al-Baharna is right, the Bahraini claim to jurisdiction over its "subjects" located "in another territory" falls far short of a claim to sovereignty. Even as a claim to jurisdiction

based upon the nationality principle, it must *prima facie* yield to a claim to jurisdiction based upon the territorial principle, *i.e.*, in the present case, Qatari jurisdiction.

5.43 Of course, Bahrain does not put forward its claim to sovereignty over Zubarah on this basis. Its argument is rather more sophisticated. Significantly, Section 1 of Chapter II of the Bahrain Memorial devoted to Zubarah is entitled:

"The geographical extent of the Zubarah region claimed by Bahrain is based on the tribal territory inhabited by the Naim tribe, who recognised the authority of the Ruler of Bahrain"<sup>112</sup>.

The essence of Bahrain's argument is that the question of title to Zubarah:

"... is closely linked to the character of tribal allegiances in the region... Sovereignty over such land is a reflection of the relationship between the Ruler and the tribe living as exclusive users within a given area, called the tribal *dirah*"<sup>113</sup>.

In the present case, it will be seen from what follows that the allegiance argument has no foundation in fact or in law.

### **1. The lack of foundation of the allegiance argument in fact and in law**

5.44 The alleged allegiance of the Naim towards the Ruler of Bahrain cannot provide a foundation for Bahrain's claim to Zubarah since these links of allegiance are not proved; and even if such links existed, they could not found a claim to a territory which is not occupied on a permanent or regular basis or which is frequented by other tribes.

#### **a) The links of allegiance of the Naim towards the Ruler of Bahrain are not proved**

5.45 Bahrain asserts that the Naim are long-standing followers of the Ruler of Bahrain. In this regard, Bahrain affirms that the Naim:

"... were first invited to the Qatar peninsula by the Al-Khalifa family and assisted the Al-Khalifa in the conquest of the islands of Bahrain in 1783"<sup>114</sup>.

The implied suggestion here is that the conquest of Bahrain was achieved only by the Al-Khalifah and the Naim. In order to substantiate it, Bahrain refers to various extracts from Lorimer<sup>115</sup>. However, what Lorimer actually states is that Bahrain was conquered by the Utubs of Zubarah with the help of

"... contingents from *various tribes* of Qatar, among them Al Musallam from Huwailah, Al Bin'-Ali from Fuwairat, Sudan from Dohah, Al Bu Ainain from Wakrah, Kibisah from Khor Hassan, Sulutah from Dohah, Manana'ah from Abu Dhaluf, Sadah from Ruwais, Al Bu Kuwarah from Sumaismah, and Nai'm Bedouins from the *interior* of the promontory"<sup>116</sup>.

5.46 Bahrain then states:

"The Rulers of Bahrain exercised their sovereignty over Zubarah, and for a time over much of the Qatar peninsula, through the tribe known as the Naim"<sup>117</sup>.

Significantly, no evidence is provided for the wholly false assertion that the Naim exercised authority over Zubarah, still less "for a time over much of the Qatar peninsula".

5.47 Quite apart from the lack of evidence to support these extravagant assertions, there is no real evidence of the allegiance of the Naim towards the Ruler of Bahrain. On the contrary, as has been seen above, the evidence shows that the Ruler of Bahrain sought from time to time to purchase their support in order to dissuade them from entering into hostile alliances against him<sup>118</sup>. This evidence shows that the links between the Ruler of Bahrain and the Naim were more akin to the relationship between a mercenary and his client than to the relationship between a vassal and his suzerain. The Court will recall Lorimer's view 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. 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>119</sup>.

**b) The territory claimed by Bahrain was not occupied permanently or regularly by the Naim**

5.48 Bahrain states that:

"Naim settlements remained in the region after the decline of the town of Zubarah in the first part of the 19<sup>th</sup> Century; the Naim inhabited the Zubarah region until 1937"<sup>120</sup>.

This is a bare assertion without any supporting evidence, and for a very good reason. In fact, Zubarah was destroyed in 1811<sup>121</sup>, and Bahrain admits that "the town of Zubarah was largely abandoned" after that year<sup>122</sup>.

5.49 Even if there is some evidence of the Naim being present in Zubarah in the early 1870s, it has been shown above that in 1873 there were numerous other tribes also present in the area<sup>123</sup>. It has also been shown above that Zubarah was again deserted after 1878<sup>124</sup>.

5.50 Early in the twentieth century, Lorimer observed that the site of Zubarah was "still frequented by the Na'im of Bahrain *and* Qatar" and that "10 or 12 forts" which "stood within a radius of 7 miles round" Zubarah were "*now ruinous and deserted*, except Thaghab, which the people of Khor Hassan visit to draw water"<sup>125</sup>.

5.51 According to Lorimer, the *bedouin* Naim lived "[i]n winter... chiefly in the neighbourhood of Zubarah", but "in the hot weather most of them remove to Bahrain" while "some take up their summer quarters near Dohah"<sup>126</sup>. As to the *settled* Naim, Lorimer wrote "There are now *no* settled Na'im in Qatar"<sup>127</sup>.

5.52 In 1937, the incident between the dissenting Naim and the Ruler of Qatar shows that at *that* time, there may have been Naim in the vicinity of Zubarah<sup>128</sup>. However, as has been shown, it is completely untrue that the Naim "inhabited the Zubarah region" from the beginning of the 19th century to 1937. In fact, there is evidence of some Naim presence in Zubarah from 1873 to 1878, thereafter around 1908 and again in 1937; that is all.

**c) The territory claimed by Bahrain was frequented by sections of the Naim tribe other than the Al-Jabr**

5.53 According to Bahrain, the Naim tribe consists of several branches, the two main branches being the Al-Jabr and the Al-Ramzan. Bahrain asserts that "[b]y 1937, the Al-Ramzan branch had switched its allegiance to the Al-Thani Rulers of Qatar" while the Al-Jabr branch "maintained its allegiance to the Ruler of Bahrain"<sup>129</sup>.

5.54 Bahrain has thus confined its claim to the territory (*dirah*) said to be occupied only by the Al-Jabr branch of the Naim tribe. Bahrain argues that the tribal *dirah* of the Al-Jabr was situated "in and around the ruined town of Zubarah" whereas the tribal *dirah* of the Al-Ramzan branch was located "far to the south of Zubarah".

5.55 However, according to Lorimer, there were twelve sections of the Naim<sup>130</sup>. Moreover, he states:

"These sections... are here much intermingled; but all the [Naim] tribesmen in Bahrain and Qatar are followers of one of two Shaikhs who belong to the Al Haiyi and Al Ramadhan sections respectively"<sup>131</sup>.

This citation demonstrates the following: (i) that the Al-Ramzan (Lorimer writes "Al Ramadhan") but not the Al-Jabr, as Bahrain contends, were one of the main sections; and (ii) that the intermingling of the tribal sections establishes that there was no exclusive *dirah* for any one section.

5.56 In any event, a branch or fraction of a tribe cannot have a tribal *dirah* of its own. Furthermore, Bahrain does not provide any convincing evidence of the geographical location of the Al-Jabr section and how it could be distinguished from the location of the other sections of the tribe, including the Al-Ramzan. In fact, according to the only purported evidence that Bahrain does provide, the Al-Jabr were present in three undefined areas, the Al-Ramzan in four, the Al-Jafali in three, the Al-Hiyyeh in two, and the Al-Mjedem and the Al-Jama'an in one each<sup>132</sup>. Furthermore, the sketch map relied upon by Bahrain in this respect shows that the branches of the Naim tribe located nearest to Zubarah town were the Al-Hiyyeh and the Al-Mujedem and not the Al-Jabr<sup>133</sup>. It also shows that some of the places mentioned in the statements produced by Bahrain<sup>134</sup> as being part of the *dirah* of the Al-Jabr were frequented by branches other than the Al-Jabr, such as the Al-Ramzan<sup>135</sup>. Thus, the evidence produced by Bahrain shows the intermingling of the various branches of the Naim and the consequent impossibility of defining the area frequented by any one branch.

5.57 On this ground alone, there can be no justification for Bahrain's claim of title to territory based on links of allegiance of one section of a tribe.

**2. The absence of any legal basis for the Bahraini claim to sovereignty over Zubarah**

5.58 Even if there were any substance in Bahrain's claim that the Al-Jabr section of the Naim were its subjects or owed undivided and constant allegiance to its Ruler, that would only sustain a possible claim of personal authority over that section and cannot, in the absence of evidence of exercise of political and public authority by the Ruler of Bahrain in and over the territory in which the section might be living, sustain a claim in international law to sovereignty over that territory.

5.59 As explained in *Oppenheim's International Law*, independence, and territorial and personal authority, are the three main aspects of the sovereignty of a State:

"Inasmuch as it excludes subjection to any other authority, and in particular the authority of another state, sovereignty is *independence*. It is *external* independence with regard to the liberty of action outside its borders. It is *internal* independence with regard to the liberty of action of a state inside its borders. As comprising the power of a state to exercise supreme authority over all persons and things within its territory, sovereignty involves *territorial* authority (*dominium, territorial sovereignty*). As comprising the power of a state to exercise supreme authority over its citizens at home and abroad, it involves *personal* authority (*imperium, political sovereignty*)"<sup>136</sup>.

5.60 The Court itself, while describing the characteristics of the territory in the *Western Sahara* case, observed that:

"Not infrequently one tribe had ties with another, either of dependence or of alliance, which were essentially tribal rather than territorial, ties of allegiance or vassalage"<sup>137</sup>.

The Court also noted:

"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>138</sup>.

5.61 In considering the Moroccan claim in the *Western Sahara* case, the Court observed that Morocco had never exercised any real act of authority over the people of Western Sahara, and that it had provided no clear evidence of the suzerainty of the Sultan of Morocco over the Reghebat tribe nor of the levying of Moroccan taxes with respect to the territory<sup>139</sup>. The Court concluded, in the final paragraph of its Advisory Opinion, that:

"The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of *allegiance* between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted *legal ties* between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of *territorial sovereignty* between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity"<sup>140</sup>.

In the present case, the evidence shows that there are no relevant legal ties of allegiance between the Ruler of Bahrain and the Naim tribe or any section thereof, let alone of any such ties as would establish territorial sovereignty.

5.62 Paragraph 530 of the Bahrain Memorial embodies a lengthy citation from the award in the *Dubai/Sharjah* arbitration, upon which it relies in arguing its case that title to territory may be acquired through the exercise of effective personal jurisdiction in areas of low habitability. The Court will of course appreciate that what is said in the *Dubai/Sharjah* arbitration about the allegiance of the Bani Qitab to the Ruler of Sharjah is wholly dependent

upon the facts of that particular case. The region in which the Bani Qitab lived was largely desert and sparsely populated, as the Court of Arbitration in that case itself acknowledged. By way of contrast, the tribal elements from time to time present in the area in and around Zubarah were closely intermingled as Qatar has already shown. Bahrain cannot rely upon the claimed allegiance of a single section of a particular tribe to found title to a territory frequented by many other sections of the same tribe and also by other tribes.

5.63 For all these reasons of fact and of law, there is no substance in the Bahrain claim to sovereignty over "Zubarah".

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1 QM, para. 1.15.

2 BM, Annex 191, Vol. 4, p. 825.

3 BM, para. 19.

4 *See*, paras. 3.27, *et seq.*, above.

5 QM, Chap. VIII.

6 ~~*See*, QM, paras. 8.7-8.8.~~

7 QM, paras. 8.9-8.10.

8 *See*, QM, paras. 3.30, *et seq.* and 8.12; and paras. 3.20, *et seq.*, above.

9 *See*, para. 3.45, above and QCM, Annex III.57, Vol. 3, p. 335.

10 BM, paras. 76, *et seq.*

11 BM, Annex 17, Vol. 2, p. 171.

12 BM, Annex 19, Vol. 2, p. 173; emphasis added. It is most important to note that after the 1868 Agreements, the allegiance of the Naim, if any, was the only basis of claim in relation to Qatar invoked by the Ruler of Bahrain until the claim to the Hawar islands 65 years later in 1936!

13 QCM, Annex III.10, Vol. 3, p. 69.

14 *Ibid.*; emphasis added.

15 For a description of the contemporary tribal system, *see*, paras. 2.13, *et seq.*, above.

16 QCM, Annex III.10, Vol. 3, p. 69.

17 QCM, Annex III.11, Vol. 3, p. 73.

18 Saldanha, *op. cit.*, QM, Annex II.7, Vol. 4, p. 9, at p. 53.

19 This is a further illustration of the object of the 1868 agreements which was, *inter alia*, to secure an effective separation between Qatar and Bahrain to ensure maritime peace.

- 20 Saldanha, *op. cit.*, QM, Annex II.7, Vol. 4, p. 9, at p. 54.
- 21 BM, paras. 167, *et seq.*
- 22 BM, Annex 70, Vol. 2, p. 285, at p. 292.
- 23 *Ibid.*, at p. 295.
- 24 *Ibid.*, at p. 292.
- 25 Al-Thani authority already existed over the whole peninsula, at least after 1868.
- 26 BM, Annex 70, Vol. 2, p. 285, at p. 293.
- 27 *Ibid.*, at p. 294.
- 28 *Ibid.*
- 29 *Ibid.*, at p. 295; emphasis added.
- 30 Saldanha, *op. cit.*, QM, Annex II.8, Vol. 4, p. 181, at p. 195.
- 31 BM, Annex 83, Vol. 3, p. 439, at pp. 470-71.
- 32 BM, para. 174.
- 33 BM, Annex 40, Vol. 2, p. 227.
- 34 BM, Annex 41, Vol. 2, p. 228; emphasis added.
- 35 BM, Annex 70, Vol. 2, p. 285, at p. 325.
- 36 BM, Annex 83, Vol. 3, p. 439, at p. 471.
- 37 *See*, QM, Annex III.126, Vol. 7, p. 125, at p. 131.
- 38 *See*, para. 5.19(7), below. *See*, also, QM, para. 8.24.
- 39 BM, Annex 67, Vol. 2, p. 281 - in the same letter which is cited in BM, para. 183.
- 40 BM, Annex 83, Vol. 3, p. 439, at p. 483.
- 41 *Ibid.*
- 42 *See*, paras. 5.11, *et seq.*, and 5.17(1), above.
- 43 BM, Annex 74, Vol. 3, p. 371, at p. 397; emphasis added.
- 44 BM, Annex 33A, Vol. 2, p. 202a.

45 BM, Annex 34, Vol. 2, p. 203.

46 BM, Annex 35, Vol. 2, p. 204 (text crossed out by Bahrain).

47 *Ibid.*, at p. 205 (text crossed out by Bahrain).

48 BM, Annex 36, Vol. 2, p. 206, at p. 211.

49 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 143, at p. 318.

50 *See*, para. 5.17(3), above.

51 *See*, BM, Annex 41, Vol. 2, p. 228.

52 QM, para. 8.24 and footnote 27.

53 BM, Annex 62, Vol. 2, p. 268.

54 BM, Annex 67, Vol. 2, p. 281.

55 BM, Annex 71, Vol. 3, p. 355, at p. 358. If the pearl banks were difficult of access from Zubarah, they were surely even more difficult of access from Hawar (*see*, the discussion of pearling in paras. 3.148, *et seq.*, above).

56 BM, Annex 119, Vol. 3, p. 642.

57 *See*, paras. 2.9, 2.28, *et seq.*, and 5.8, *et seq.*, above.

58 QM, Annex III.58, Vol. 6, p. 273, at p. 281; emphasis added.

59 *See*, QM, para. 3.58, and para. 3.41, above.

60 BM, para. 65.

61 BM, Annex 49(a), Vol. 2, p. 245.

62 BM, Annex 66a, Vol. 2, p. 279.

63 ~~*See*, QM, paras. 5.20, *et seq.*~~

64 *See*, paras. 5.13, *et seq.*, above.

65 *See*, also, paras. 5.38, *et seq.*, below and QM, paras. 8.47, *et seq.*

66 BM, para. 224.

67 BM, Annex 87, Vol. 3, p. 522, at pp. 523-524.

68 *See*, QM, paras. 8.29-8.30.

69 BM, para. 233.

70 BM, para. 234.

71 BM, para. 187.

72 QM, Chap. VIII.

73 QM, Annex III.284, Vol. 8, p. 409.

74 BM, para. 239.

75 BM, Annex 108, Vol. 3, p. 627.

76 *Ibid.*

77 BM, para. 249.

78 BM, para. 242.

79 BM, para. 246.

80 *Ibid.*

81 BM, para. 254. Bahrain wrongly ascribes this comment to the Political Agent and omits to make any mention of some other significant hand-written remarks on the face of this document. It will be noticed that the document is in fact an internal minute addressed to Loch, the British Political Agent, by one of his subordinates upon which a number of remarks are made by Loch, two of which are as follows: "Please find a letter to Sh. 'Isa informing him that Zubara cd. not be regarded as Bahrain territory. Issue telegram. - Initial/19.3.37." and "Please see if a letter was not written in 1919 or 1920 after Sh. Abdullah bin 'Isa went to England and raised the question (among others) of Zubarah. - Initial/20.3.37". Loch was clearly referring to the Memorandum of 6 December 1919 from the Political Agent, Major Dickson, to the Deputy Political Resident which, after an extensive study, suggested that any attempt by the Ruler of Bahrain to revive the controversy over Zubarah "should be nipped in the bud", BM, Annex 86, Vol. 3, p. 518.

82 BM, Annex 109, Vol. 3, p. 629.

83 BM, Annex 127, Vol. 3, p. 666 and QM, Annex III.126, Vol. 7, p. 125. *See*, also, paras. 5.32-5.33, below.

84 BM, para. 252.

85 QM, Annex III.126, Vol. 7, p. 125, at p. 128. *See*, also, BM, paras. 312, 314, 319 (where Bahrain also records the British conclusion that the Ruler disclaimed sovereignty over Zubarah) and 322.

86 QM, Annex III.126, Vol. 7, p. 125, at p. 132.

87 *See*, BM, para. 272.

88 ~~QM, paras. 8.31, *et seq.*~~

89 *See*, QM, Annex III.120, Vol. 7, p. 89.

90 *See*, para. 5.17(2), above.

91 QM, para. 8.43.

92 BM, para. 31.

93 BM, paras. 31, 287, 288.

94 *See*, para. 3.133, above.

95 BM, Annex 292, Vol. 5, p. 1190, at p. 1191.

96 QM, Annex III.232, Vol. 8, p. 143, at p. 147.

97 QM, Annex III.240, Vol. 8, p. 183.

98 *See*, para. 5.2, above.

99 QM, Annex III.261, Vol. 8, p. 295, at p. 297.

100 QM, Annex III.247, Vol. 8, p. 211, at p. 214; emphasis added.

101 QM, Annex III.248, Vol. 8, p. 215.

102 QM, Annex III.258, Vol. 8, p. 273.

103 QM, Annex III.260, Vol. 8, p. 283.

104 QM, Annex III.266, Vol. 8, p. 317, at pp. 320-321; emphasis added.

105 QM, Annex IV.118, Vol. 10, p. 83.

106 QCM, Annex III.49, Vol. 3, p. 279.

107 *See*, letter from the Political Resident to the British Foreign Secretary of 13 June 1957 (QM, Annex III.283, Vol. 8, p. 401, at p. 407), where the Political Resident also reported that the present Ruler of Bahrain had admitted that he "had no... right [to exercise sovereignty] over Zubarah" (*ibid.*, at p. 405).

108 BM, Annex 213, Vol. 4, p. 896.

109 BM, Annex 223, Vol. 4, p. 931.

110 BM, para. 10.

111 QM, Annex III.297, Vol. 8, p. 487, at p. 491.

112 BM, p. 27.

113 BM, para. 74.

114 BM, para. 75.

115 BM, Annexes 74 and 83, Vol. 3, p. 371, at p. 397 and p. 439, at pp. 492-493.

116 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 143, at p. 247; emphasis added.

117 BM, para. 75.

118 *See*, paras. 3.14 and 5.19, above.

119 BM, Annex 74, Vol. 3, p. 371, at p. 397.

120 BM, para. 75.

121 Lorimer, *op. cit.*, QM, Annex II.5, Vol. 3, p. 143, at pp. 198 and 250.

122 BM, para. 113.

123 *See*, para. 5.11, above.

124 *See*, para. 5.17(2), above.

125 BM, Annex 74, Vol. 3, p. 371, at p. 398; emphasis added.

126 *Ibid.*, at p. 396.

127 *Ibid.*, at p. 395; emphasis added.

128 *See*, paras. 5.35-5.36, above.

129 Bahrain thus implicitly acknowledges that it is prepared to give up any claim to a territory occupied by a tribe which switches its allegiance to the Ruler of Qatar.

130 BM, Annex 74, Vol. 3, p. 371, at p. 396.

131 *Ibid.*

132 BM, Annex 229, Vol. 4, p. 981, at p. 983 a.

133 *Ibid.*

134 BM, paras. 91, *et seq.*

135 *See*, also, para. 5.11, above, which provides evidence that tribes other than the Naim were also present in the region of Zubarah.

136 Sir R. Jennings and Sir A. Watts, (eds.), 9<sup>th</sup> ed., Harlow, 1992, QCM, Annex III.56, Vol. 3, p. 331.

137 *I.C.J. Reports 1975*, p. 42, para. 88.

138 *Ibid.*, p. 44, para. 95.

139 *Ibid.*, pp. 47-48, paras. 103-104.

140 *I.C.J. Reports 1975*, p. 68, para. 162; emphasis added.

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## **PART IV**

### **MARITIME DELIMITATION**

#### **CHAPTER VI**

#### **GENERAL ASSESSMENT OF BAHRAIN'S POSITION**

##### **Section 1. Main points of agreement and disagreement between the Parties**

###### **A. Points of agreement between the Parties**

6.1 A reading of the Bahrain Memorial shows that there is a measure of agreement between the Parties at least on certain points.

6.2 Thus, it is agreed that the Court is requested to draw a single maritime boundary. It also does not appear to be in dispute that in the southern sector of the area to be delimited the Court is asked to define the respective territorial seas of the Parties and that these territorial seas overlap<sup>1</sup>, and that in the northern sector the delimitation involves essentially a division of continental shelves and fishing zones<sup>2</sup>.

6.3 The Parties also seem to agree on the law to be applied to the maritime delimitation: they both call for a decision of the Court "in accordance with international law"<sup>3</sup>. Nor does there seem to be a difference of opinion as to the relevance of the 1958 Geneva Conventions or the 1982 Convention on the Law of the Sea. Since Qatar is not a party to those Conventions, they are relevant only to the extent that some of their provisions may be declaratory of customary international law or have been generally accepted as customary international law<sup>4</sup>. The Parties also agree that a fundamental principle of that law is the search for an equitable result. They both consider that in order to achieve such an equitable result, the principle of equidistance combined with special or relevant circumstances is to be applied. Furthermore, the Parties agree that their delimitation agreements with Iran constitute a relevant circumstance for the

maritime delimitation. The Parties also share the view that no third State has sovereignty or sovereign rights over the maritime areas to be delimited<sup>5</sup>.

6.4 The agreement between the Parties appears to stop there. As will be seen, the agreement on the applicable law hides deep divergences on its implementation in the present case.

## **B. Points of disagreement between the Parties**

6.5 There are indeed many points upon which the Parties are in disagreement. At this juncture Qatar can only list a few of the more significant of these points, leaving more detailed treatment to later sections or chapters.

6.6 There is disagreement as to the determination and selection of basepoints for the drawing of the delimitation line. Bahrain has drawn baselines which take into account all the maritime features which it claims are above water at low tide<sup>6</sup>. On the contrary, Qatar's view is that in the particular circumstances of the present case, the delimitation line has to be drawn by taking exclusively into consideration the two main opposite coasts, without regard to the numerous particular features existing in the area<sup>7</sup>.

6.7 Further, while Bahrain has put forward an alternative claim to archipelagic status<sup>8</sup>, Qatar has shown that an archipelagic claim by Bahrain is irrelevant<sup>9</sup>.

6.8 The Parties also disagree on the special circumstances to be taken into account as regards the delimitation in the southern sector. Qatar considers that one such special circumstance is the line resulting from the British decision of 1947<sup>10</sup>. On the other hand, Bahrain asserts that there are no special circumstances<sup>11</sup>; to all intents and purposes, it remains silent over the 1947 decision as if it did not exist.

6.9 The status of Dibal and Qit'at Jaradah is a further point of disagreement between the Parties. Bahrain, while vacillating somewhat as to whether these features are islands or low-tide elevations, asserts that it has acquired title over them by the performance of acts of sovereignty<sup>12</sup>. For Qatar, on the contrary, they are low-tide elevations and their status is therefore governed by the law of the sea<sup>13</sup>.

6.10 The Parties also disagree about Bahrain's claims concerning the existence or relevance of alleged historic rights over pearl banks.

6.11 In the following sub-sections Qatar will examine in greater detail some of the issues upon which the Parties have disagreed.

## **Section 2. Bahrain's sovereignty argument**

### **A. The falsity of Bahrain's argumentation concerning acquisition of rights over maritime features**

6.12 As a starting hypothesis for the maritime delimitation, the Bahrain Memorial takes the alleged sovereignty of Bahrain over the Hawar islands, Janan island and Zubarah. However, as has already been demonstrated, sovereignty over the Hawar islands, Janan and Zubarah lies with Qatar and not with Bahrain. Accordingly, no claim to maritime areas can accrue to Bahrain from land territory to which it does not have title.

6.13 The basic structure of the Bahraini claim to maritime areas relies on two conflicting premises which appear to create a circular reasoning. On the one hand Bahrain appears to live in a fantasy world, claiming from time to time that it has sovereignty over all the sea areas between Bahrain and Qatar (and indeed all the sea areas between Bahrain and Saudi Arabia); the sea areas between Bahrain and Qatar are, from this point of view, a *mare clausum* over which Bahrain exercises exclusive sovereignty<sup>14</sup>. The Court will no doubt readily accept that any idea that the open sea, let alone the territorial sea of a neighbour State, could be under the sovereignty of a State has been considered to be outmoded for nearly three hundred years.

6.14 On the other hand the claim of Bahrain at times takes another form, according to which Bahraini sovereignty extends over all the islands and low-tide elevations in the maritime area lying between the two States. Consequently, in Bahrain's view, ownership of these features confers rights over the surrounding seas. This claim is just one example of Bahrain's expansionist policies, which have never been accepted by any of Bahrain's neighbours<sup>15</sup>.

6.15 The arguments presented by Bahrain in support of this second contention stem from a false analogy between acquisition of land territory and acquisition of sovereign rights over maritime areas<sup>16</sup>. The rules asserted by Bahrain are taken from the law on acquisition of *land* territories. These rules do not in principle apply to maritime features other than islands (and in particular do not apply to low-tide elevations). Thus Bahrain tries to show that it has acquired sovereignty over maritime features such as shoals by evidence of acts such as markings or the erection of beacons or "monuments"<sup>17</sup>; granting of oil concessions and surveys made in the area<sup>18</sup>; fishing; use of pearling banks<sup>19</sup>; and acts of administration over Dibal and Qit'at Jaradah<sup>20</sup> such as lighting or buoying<sup>21</sup>.

6.16 As Qatar has already shown in its Memorial, sovereign rights over low-tide elevations entirely depend on the law of the sea and not on the law governing acquisition of land territory<sup>22</sup>. In its judgment of 11 September 1992, in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, the Chamber of the Court drew a sharp distinction between an island and a low-tide elevation, remarking about the island of Meanguerita:

"That Meanguerita is 'capable of appropriation', to use the wording of the *dispositif* of the *Minquiers et Ecrehos* case is undoubted; *it is not a low-tide elevation*, and is covered by vegetation, although it lacks fresh water"<sup>23</sup>.

Furthermore, the rules governing the status and legal effect of low-tide elevations vary according to the location of such features. The law of the sea does not permit a State to acquire sovereignty over low-tide elevations beyond the outer limits of its territorial sea.

6.17 Even before the adoption of the Geneva Convention of 1958 on the Continental Shelf, the British Government had recognized that position, for instance in 1937 with regard to Fasht Jarim and other shoals of the region<sup>24</sup> or in 1951 during the London talks with Saudi Arabia concerning the maritime boundary between Bahrain and Saudi Arabia<sup>25</sup>.

6.18 As has been seen elsewhere in the present Counter-Memorial<sup>26</sup>, the Bahrain/Saudi Arabia agreement of 1958 is a good example of the practice followed in the Gulf. In that agreement, all the islands and shoals that had been discussed during the negotiations were allocated on the basis that shoals or submerged banks should belong to the State on whose side of the median line dividing the Bahrain/Saudi Arabia sea-bed area they lay<sup>27</sup>.

6.19 In this context the decision of the British Government in 1947 to allocate sovereign rights over the Dibal and Qit'at Jaradah shoals to Bahrain appears to have been mistaken. At the time of the 1947 decision, Dibal and Qit'at Jaradah, being low-tide elevations, located in an area then beyond the outer limits of the Parties' territorial seas, should have been allocated to Qatar because they were on the Qatari side of the median line.

## **B. The so-called evidence of Bahraini "acts of sovereignty"**

6.20 Bahrain claims that various acts are to be considered as evidence of Bahraini sovereignty:

- erection of beacons or cairns
- activities in the area by oil companies operating in Bahrain
- aids to fishermen provided by the Bahraini Government on some fashts
- exclusive use of the fashts by Bahraini fishing boats
- navigational safety and police

### **1. Erection of beacons or cairns**

6.21 According to the Bahrain Memorial:

"Bahrain's acts of sovereignty in relation to these maritime features have taken several forms. In the first place, Bahraini monuments or markers have been erected on all of these maritime features since the 1930s"<sup>28</sup>.

Bahrain has however provided no basis for this proposition, either in fact or in law. Qatar has already in its Memorial dealt in some detail with the significance of the erection of markers and beacons by Bahrain<sup>29</sup>. In any event, the erection of markers or beacons has never been recognised as a means of acquisition of territory; and this was recognised by British officials at the time<sup>30</sup>.

### **2. Activities of oil companies operating in Bahrain**

6.22 In this regard Bahrain seeks to rely on activities carried out on some shoals by private oil companies operating in Bahrain<sup>31</sup>. In this respect, documents in the British archives show that structure holes were drilled between June and August 1940 by or on the orders of BAPCO. Thus, in a letter of 20 July 1940 to the Political Resident, the Political Agent Bahrain stated:

"I understand that a local contractor is drilling a structure hole for the Bahrain Petroleum Company on the Fisht [*sic*] al Jibal [*sic*] as part of their general exploration programme"<sup>32</sup>.

Bahrain fails to say, however, that these activities met with strong protests from the British authorities. The Political Resident considered that Belgrave had acted improperly in giving BAPCO permission to drill without consulting the Political Agent. In a letter to Peel of the India Office, dated 18 October 1941, Prior wrote:

"I cannot explain why Belgrave took it upon himself to sanction drilling which he must have realised was beyond his powers and trenching on international politics, and I have sent him an official reprimand through Alban"<sup>33</sup>.

6.23 After the war, BAPCO applied on 13 May 1946 for permission to carry out structural drilling at locations "E" (lying southeast of Dibal) and "F" (southeast of Qit'at Jaradah)<sup>34</sup>, but permission was refused<sup>35</sup>.

6.24 Contrary to what might be inferred from Bahrain's contentions, Qatar has also been active in the area. On 5 August 1949 Qatar awarded its first off-shore concession to CMIC/Superior Oil Co. At the same time, in order to avoid interstate problems, the British authorities decided to initiate a policy of safe areas. Thus in 1950, while acknowledging that the CMIC/Superior Oil concession ended on the Bahraini side with the 1947 line, the British Government imposed restrictions in a triangular area in the north of the concession area (BLV - 27° N 51° 20' E - territorial waters of Qatar North of Ras Rakan). To the south of that area a rectangular zone was described where exploration. The Qatari concessionaire surveyed the area around Dibal and Qit'at Jaradah shoals between 1950-1952.

6.25 As there was a gap between the northern end of the 1947 line (BLV) and the median line with Iran in the Gulf, the British authorities in July 1950 authorized CMIC/Superior to survey in the triangular area BLV - 27° N 51° E - territorial waters north of Ras Rakan.

6.26 In 1952 the same concession limits were recognized and the same safe areas imposed on Shell Overseas Exploration Company Limited.

6.27 The same position was taken with Bahrain. BAPCO was notified in 1952 that it had to respect the 1947 line. The same was confirmed in 1965 with BAPCO's successor, Continental Oil Co. of Bahrain.

6.28 Since 1970 (for Superior Oil (Bahrain) Inc.) and since 1973 (for Wintershall in Qatar) the concession agreements on both sides have adopted as operating limits the 1947 line prolonged to the north, up to the median line in the Gulf. The same line has been respected on both sides since then. Qatari concessionaires surveyed the whole zone of their concession (in 1973-1974). The concessionaires on both sides have respected that line in their drilling operations.

6.29 It is therefore submitted that survey work by private oil companies operating out of Bahrain, and even the drilling of structure holes on a low-tide elevation, particularly when carried out in the circumstances just described, constitutes no evidence of "acts of sovereignty" by Bahrain over Dibal and Qit'at Jaradah.

### **3. Aids to fishermen provided by the Bahrain Government**

6.30 Bahrain also relies on alleged aids to fishermen on some fashts. Thus Bahrain invokes as an "act of sovereignty" the building by the Bahraini Government of artesian wells on Dibal<sup>36</sup> and on Qit'at Jaradah<sup>37</sup>.

6.31 This presentation of the facts is highly misleading. First, Dibal has traditionally been known as a low-tide elevation where fishermen could find fresh underwater springs. This gift of nature was therefore certainly not a creation of Bahrain. Second, it appears from a

confidential BAPCO memorandum dated 10 September 1950 that the so-called "artesian well" on Dibal was in fact a structure-hole bored by or on behalf of the Company for its own purposes, which happened to strike water. It was therefore not built as an artesian well on behalf of the Bahrain Government:

"This structure-hole was drilled... and the final depth of 490' was reached on August 27<sup>th</sup>, 1940.

The hole was plugged back... with a bull plug for conversion to a water well, if required, at the request of the Bahrain Government. I understand that the bull plug has been removed from this well by some unauthorized person and that it is flowing a small stream of water which is used by the local fishing dhows etc."<sup>38</sup>.

As to the alleged artesian well on Qit'at Jaradah, there is no evidence either of an authorisation given by the Government to drill it, or of any sign of water having either been sought or found. The so-called Bahraini aids to fishermen were therefore provided by nature or BAPCO, and not by the Government of Bahrain.

#### **4. Exclusive use of fashts by Bahraini boats**

6.32 This allegation is without substance. When Belgrave, by a letter to the Political Agent Bahrain of 18 August 1941 mentioned among the diving anchorages Fasht Abu Sa'afa, Fasht Al Jarim and Fasht al Dibal<sup>39</sup>, Prior in a letter of 18 October 1941 to Peel, of the India Office, remarked:

"Fasht al Dibal is not in any sense peculiarly a Bahrain anchorage and is freely utilised by all pearlers in this neighbourhood. When I was Political Agent at Bahrain [*i.e.* April 1929 - November 1932] neither the shaikhs nor Belgrave had any idea of claiming it, or pretended that it was theirs, and if their present claim were to be known it would certainly be challenged"<sup>40</sup>.

#### **5. Navigational safety and police**

6.33 A last argument concerns navigational safety<sup>41</sup> and police in the sea between the two countries. Here again, Bahrain alleges that it has exercised exclusive jurisdiction as regards these matters. This again is a false claim.

6.34 As to buoying, lighting, and marking for safety purposes, etc. this was never a special responsibility of Bahrain. The matter was until 1949 in the hands of a special service of the Government of India based in Basrah. After that date the British Government relinquished responsibility for the service and passed the task to a newly formed international company known as the Persian Gulf Lighting Service (PGLS), with a base in Bahrain. Its name was changed in 1966 to the Middle East Navigation Aids Service (MENAS).

6.35 There is no substance whatsoever to the Bahraini allegations that the sea is under the unchallenged authority of the Bahraini coast guards<sup>42</sup>. Qatar would like to emphasise, first, that such patrols are not necessarily by themselves evidence of sovereignty and, second, that Qatari coastguard boats are also patrolling in that area.

6.36 It follows from the foregoing that the various arguments used to support a claim by Bahrain to sovereignty over shoals based on concepts relating to the acquisition of land territory are totally unconvincing and unsound both as a matter of law and as a matter of fact. They have no more force here than they had in relation to Saudi Arabia or elsewhere in the Gulf.

### **Section 3. The Bahrain claim relating to pearling and fishing**

6.37 As usual Bahrain proceeds by way of unsupported assertions which bear little or no relation to either the facts or the law. Let us examine in turn these two sectors of activity.

#### **A. Pearl fishing**

6.38 According to the Bahrain Memorial the pearling banks "have appertained to Bahrain since time immemorial"<sup>43</sup> and Bahrain has consistently exercised "jurisdiction and control over them"<sup>44</sup>. However, pearl fishing - like fishing for swimming fish - was traditionally a right exercised in common by all tribes throughout the Gulf<sup>45</sup>.

6.39 The sea-bed proclamations issued by Gulf States did not affect traditional pearling and fishing rights. The Bahraini sea-bed proclamation of 5 June 1949 stated that:

"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 fishing and traditional pearling rights in such waters"<sup>46</sup>.

Similarly, the Qatari proclamation of 8 June 1949 stated that:

"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 fishing and traditional pearling rights in such waters"<sup>47</sup>.

6.40 Conversely, when continental shelf rights for the riparian State emerged, it was clear that alleged historic rights of third States to sedentary species would not alter the sovereign rights of the riparian State. This is why the attempt by Bahrain to obtain a modification of the delimitation line between itself and Saudi Arabia on account of its alleged historic pearling rights over Fasht Bu Saafa was unsuccessful. Fasht Bu Saafa was eventually recognised as being a part of the continental shelf appertaining to Saudi Arabia by virtue of paragraph 16 of Article 1 of the offshore boundary agreement concluded between Bahrain and Saudi Arabia on 22 February 1958<sup>48</sup>.

6.41 Similarly, it will be recalled that in 1962 the British Government did not accept Bahrain's attempt to obtain a revision of the 1947 line based on such alleged historic rights to pearling banks<sup>49</sup>.

6.42 It is important to recall that there were no pearling banks in the southern sector where Bahrain and Qatar are opposite. The pearling banks were mainly located in the northern sector and it is mainly in that sector that Bahrain's present claim seeks further to modify, radically in Bahrain's favour, a notional equidistance line between the two States. Bahrain's account of its own claim is however marked by factual inaccuracies<sup>50</sup>.

6.43 The first inaccuracy concerns the location of the twelve "principal pearling banks" claimed by Bahrain, which are listed at paragraph 647 of Bahrain's Memorial and illustrated on Maps 9 and 10<sup>51</sup>. Bahrain has indicated no source for its maps, and Qatar has therefore attempted to verify the information they contain by referring to the Persian Gulf Pilot and various marine charts<sup>52</sup>. However, while some banks are mentioned by the Persian Gulf Pilot and indicated on the charts, such as Shutayah<sup>53</sup>, Hayr Abu Ath Thamah<sup>54</sup>, Shiquitah<sup>55</sup> or Bu Sa'afa<sup>56</sup>, these are shown on Bahrain's Maps 9 and 10 as not appertaining to Bahrain. On the other hand, only one of the banks claimed by Bahrain - Fasht Naywah (Al Amari) - is mentioned in the Persian Gulf Pilot<sup>57</sup> and appears on two of the marine charts<sup>58</sup>. In other words, 11 out of the 12 pearling banks which are relied upon by Bahrain, for purposes of drawing a part of the line of delimitation in the northern sector, appear to have no significance as far as navigation and fishing are concerned, and cannot be verified on the basis of the available documentation.

6.44 Furthermore, Bahrain's Maps 9 and 10 are puzzling in that, while "Bahrain pearling banks" are indicated in red and "Other pearling banks" in blue, several banks indicated in blue, such as Shutayah and Hayr Abu Ath Thama, lie to the north of Bahrain in an area bounded by Bahrain's maritime boundaries with Saudi Arabia and Iran and by the line from N to NSLB, BLV and 2(2B) claimed by Qatar in the northern sector. In other words, Bahrain appears to be saying that it has no jurisdiction over such banks, despite the fact that they lie within its own undisputed maritime area.

6.45 Qatar does not propose to enter into a detailed legal discussion here concerning the location of the various pearling banks which are claimed by Bahrain. However, it feels obliged to point out a glaring inconsistency in relation to the bank named Fasht Naywah (Al Amari), which is indicated in red on Bahrain's Maps 9 and 10 and thus as appertaining to Bahrain. This bank can clearly be of no relevance to the maritime delimitation between Qatar and Bahrain, since it is situated well to the west of the delimitation area in the northern sector. Indeed, it lies to the south of the continental shelf boundary established in 1968 between Saudi Arabia and Iran<sup>59</sup>, to the west of the maritime boundary laid down in the agreement of 22 February 1958 between Saudi Arabia and Bahrain, and to the north-east of the northern limit of the joint petroleum development zone established under Article 2 of the same agreement<sup>60</sup>. In other words, the bank clearly falls within the exclusive jurisdiction of Saudi Arabia, as is admitted by Bahrain itself in its agreement with Saudi Arabia. Such inconsistency must surely also cast severe doubts upon the reliability of Bahrain's purported claims to other pearling banks.

6.46 A second inaccuracy concerns the names given by Bahrain to the various pearling banks it claims. Thus, while it may be surmised that the bank referred to by Bahrain as "Fasht Naywah (Al Amari)" is the same bank as is shown on various charts as "Fasht an Najwah"<sup>61</sup>, the documentation available to Qatar does not identify by name any of the other pearling banks claimed by Bahrain, and verification is impossible because of the lack of indication of any source for Bahrain's maps.

6.47 Finally, a third inaccuracy concerns the shape of the pearling banks depicted on Bahrain's Maps 9 and 10. Here again, the absence of any indication of a source for Bahrain's maps means that proper verification is impossible. However, an inconsistency is apparent in Bahrain's own position with respect to the bank indicated as Khrais Al Thayr, the eastern edge of which Bahrain uses in order to determine the location of turning point S on its proposed maritime boundary<sup>62</sup>. Thus, if one compares Bahrain's present depiction of this bank with its

map attached to its letters dated 2 and 10 March 1964<sup>63</sup>, it becomes apparent that neither the location nor the shape of the bank is the same on the two maps.

6.48 In view of these various inaccuracies relating to certain purely factual aspects of Bahrain's presentation of the pearling banks, it is clear that all of Bahrain's evidence and assertions in this respect must be treated with the utmost caution.

6.49 In any event, pearl fishing has progressively disappeared throughout the whole region. A few figures are self-explanatory. In 1930, 500 Bahraini boats with 20 000 men were engaged in the pearling industry. These figures had fallen to 11 boats and 500 men in 1954<sup>64</sup>. The activity was considered as moribund in 1948<sup>65</sup>, was "rapidly declining" in Bahrain and Qatar in 1949<sup>66</sup> and was defunct by 1972:

"... in recent years the competition of cultured pearls and the lure of better and easier jobs in the oil industry have reduced this once major activity to negligible proportions. For practical commercial purposes pearling in the Gulf must now be regarded as defunct"<sup>67</sup>.

Bahrain itself acknowledges that

"In the 1930s, however, cultured pearls were developed in Japan and threw the Bahraini pearling industry into a depression from which it has yet to recover. However, as late as the 1960s the industry still continued. Feasibility studies are under way in order to determine how to revive it"<sup>68</sup>.

This is an understated way of recognizing that pearl fishing is now defunct. It is difficult to understand how an activity which has ceased could now have any consequences on the delimitation of the single maritime boundary between Qatar and Bahrain.

## **B. Swimming fish**

6.50 According to the Bahrain Memorial:

"The entire area between Bahrain's main island and the Qatar coast is an area of traditional Bahrain fishing"<sup>69</sup>.

However, what has been said above about pearl fisheries applies in general to swimming fish. Until very recent times, fishing has traditionally been common to all tribes in the Gulf.

6.51 The British decision of 23 December 1947 provided that the seabed delimitation did not affect the waters above the sea-bed. This was confirmed by letters of 17 February 1948 to the two Rulers stating that the said decision:

"... is not intended to and does 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 Qatar/Bahrain nationals of similar rights in the waters on the Bahrain/Qatar side of the line"<sup>70</sup>.

6.52 Freedom of fishing continued to be the common practice locally until the 1970's, when various Gulf States adopted unilateral legislation concerning fishing zones. In particular,

Qatar enacted a Proclamation on 2 June 1974, concerning the rights of the State of Qatar to the natural and marine resources of the areas adjacent to its territorial waters<sup>71</sup>. On 3 March 1983 a further law was enacted in Qatar on exploitation and conservation of the maritime living resources in Qatar<sup>72</sup>. These enactments met with no protest from Bahrain.

6.53 As to the importance of actual fishing activities in the waters of the northern and southern sectors, information is fragmentary on both sides. Bahrain puts forward figures in its Memorial designed to show that its economy depends heavily on fishing<sup>73</sup>. Quite apart from the consideration that economic factors of this nature are irrelevant to a maritime delimitation, Bahrain has not provided any evidence to demonstrate that these fishing activities constitute a significant part of its overall economy. Similar general statistics could be provided by Qatar, but would be equally irrelevant and could not prove more than the Bahraini figures prove<sup>74</sup>.

6.54 In this regard, it is worth recalling that the waters between the two States in the southern sector are shallow and full of shoals, rocks and reefs. They are not easily accessible to large boats. In any event, the Bahraini fishing ports are located in the north (Muharraq, Sitrah, etc.). The Fasht al-Azm shoal constitutes a natural obstacle of reefs<sup>75</sup> (most of them under water at low tide) posing a real danger for navigation towards the south. Only small fishing boats are able to operate there.

6.55 Since 1986, a number of arrests of fishing boats have taken place in the maritime area lying between Qatar and Bahrain, leading to protests on both sides. There have also been many incidents since 1991 between Bahraini and Qatari coastguard boats, the Bahraini boats trying to prevent Qatari boats from patrolling in Qatari waters. Some of these incidents have already been notified by Qatar to the Registrar of the Court<sup>76</sup>.

6.56 The incidents mentioned in the previous paragraph demonstrate that the allegations of Bahrain that the maritime area between the two States has always been an exclusive fishing ground for Bahrain are without foundation. The disputed maritime area was used by the fishermen of both countries without incident up to 1986. It is only since that date that Qatar has taken a firmer stand against Bahraini infringements of its territorial waters or its fishing zone outside territorial waters.

#### **Section 4. The Bahraini claim to archipelagic status**

6.57 At this stage of the written proceedings, Qatar must draw attention to the strange way in which Bahrain has presented its archipelagic claim in its Memorial. Not only is the Bahraini claim based on certain disputable assumptions, which will be dealt with in this section of the Counter-Memorial, but the claim itself is quite irrelevant for the purpose of the delimitation of the single maritime boundary that the Court has been asked to draw in the present case<sup>77</sup>.

##### **A. The extraordinary presentation of the Bahraini claim**

6.58 In its Memorial, Bahrain has chosen to develop complex and obscure reasoning in order to sustain its ill-founded proposition that in drawing the maritime boundary, all the insular and other maritime features in the relevant area would have to be taken into account, whatever might be the "status" of Bahrain, either "as a continental and multiple island State", or "as a multiple island State", or "as an archipelago", in the international legal denotation of this term<sup>78</sup>. As a matter of fact, according to the geographical description given in the Bahrain Memorial, nearly all of the sea area which separates Bahrain and Qatar has for a long time

been "a Bahraini lake"<sup>79</sup> and even "a protected maritime enclave"<sup>80</sup>, a situation then summarized by asserting "Bahrain's control over the entire maritime area between its main island and Qatar"<sup>81</sup>. In the view of Bahrain, it is obvious that such control over the sea area necessarily includes Bahrain's control and rights over all the maritime features lying in that area<sup>82</sup>. And it is also self-evident from Bahrain's point of view that its rights over those features generate by themselves rights over the whole of the maritime area. Carrying this perverted logic to its conclusion, Bahrain does not hesitate to state that "[t]he area of sea to the west of the Hawar islands, between these islands and the main Bahrain island, is comprised of internal waters of Bahrain"<sup>83</sup>.

6.59 It is in such a context that the Bahraini archipelagic claim is presented as part of an "alternative claim", together with a claim to normal baselines, on the hypothesis that the Court were to decide that Bahrain has no sovereignty over Zubarah<sup>84</sup>. However, curiously enough, that so-called alternative claim relating to archipelagic baselines appears also to be part of the Bahraini "principal claim". While the Bahraini Memorial leads up to this in a roundabout manner, there is a first hint of it when Bahrain characterises itself as being "an insular and archipelagic ensemble, together with the continental territory of Zubarah"<sup>85</sup>. But a few pages further on, it is clearly stated:

"Even in the event that the Zubarah region was deemed to appertain to Bahrain... the concept of an archipelagic State might still be applied to characterise the State of Bahrain"<sup>86</sup>.

Such a proposition is wholly incompatible with the relevant provisions of the 1982 Convention on the Law of the Sea, on which Bahrain bases its archipelagic claim. Moreover, it contradicts what Bahrain calls the "contingency" on which its alternative claim is based and the assumption made in that connection, namely "that Bahrain is composed wholly of islands"<sup>87</sup>.

## **B. The concept of a geographical archipelago**

6.60 The traditional concept of an archipelago, in geographical terms, is that it is a group of islands. In that respect, Qatar agrees with the idea that Bahrain has been regarded as a *de facto* archipelago<sup>88</sup> and that "[t]he description of Bahrain as an archipelago - using that term in a geographical sense - is long-established and well-documented"<sup>89</sup>. However, in its Memorial, Bahrain confines itself to drawing attention to different publications where the word "archipelago" has been used in relation to the Bahrain islands. But, in doing so, Bahrain refrains from mentioning the extent assigned to the "Bahrain archipelago" in those publications. Thus, in his *Gazetteer of the Persian Gulf*, Lorimer not only used the term but indicated precisely the geographical extent of the Bahrain archipelago:

"The present Shaikhdome 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... form a compact group almost in the middle of the gulf which divides the promontory of Qatar from the coast of Qatif..."<sup>90</sup>.

The same list has been reproduced in more recent descriptions of the "Bahrain archipelago", such as that given, for example, in a 1933 letter from the India Office<sup>91</sup> or in a Military Report on the Arabian Shores of the Persian Gulf<sup>92</sup>. The latter again noted, as did Lorimer at the beginning of this century, that the Bahrain islands as a whole form a compact group<sup>93</sup>.

6.61 It is noteworthy that none of those descriptions listed the Hawar islands as a component of the "Bahrain archipelago". On the contrary, there is considerable documentation showing that "Hawar Island is clearly not one of the Bahrain group"<sup>94</sup>. Thus, in a letter sent on 9 August 1933 by the India Office to the Board of Trade, it was expressly stated that:

"Hawar... 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>95</sup>.

The reason is that the Hawar islands, previously defined by Qatar as "a flanking offshore island group"<sup>96</sup> characterised by its "compact nature"<sup>97</sup>, appear as an archipelago entirely distinct from the Bahrain island group, in fact a Qatari coastal archipelago. Therefore, from a geographical point of view, contrary to what is said in Bahrain's Memorial<sup>98</sup>, it is not possible to include the Hawar islands in the "Bahrain archipelago".

6.62 Moreover, Bahrain has not provided the Court with a detailed and precise list of the different islands comprising the "Bahrain archipelago". When characterising that archipelago as "an intrinsic geographical entity", the Bahrain Memorial is content to enumerate "the main Bahrain island, the immediately adjacent islands of Sitrah and Al Muharraq, approximately 50 other islands (including the Hawar Islands) and 22 low-tide elevations"<sup>99</sup>. As has just been demonstrated, the Hawar islands do not constitute, geographically, part of the entity known as the Bahrain islands. And perhaps that is why Bahrain has tried to advance some muddled arguments, mixing the geographical concept and the legal notion of an archipelago. Thus, the Bahrain Memorial argues unconvincingly that "there does not need to be historical evidence that the entire group was considered to be an archipelago"<sup>100</sup>, and "(i)t could not be expected... that in 1939 the British Government would recognise that the Hawar group of islands formed part of the Bahrain archipelago"<sup>101</sup>; for "in 1939 such a concept had not been established"<sup>102</sup> and, prior to the 1982 Convention, "the geographical extent of a legal archipelago was not defined"<sup>103</sup>. Qatar would in any event submit that the inclusion of low-tide elevations cannot be justified insofar as, geographically speaking, they are not *per se* to be regarded as part of an archipelago defined as an island group<sup>104</sup>.

6.63 From the mere fact that the Bahrain islands were generally described in the past as an archipelago, now Bahrain seeks, by means of some incidental remarks, to give the false impression that as early as 1947, and even 1937, it was claiming some kind of archipelagic status<sup>105</sup>, while recognising however that: "the translation of this claim... into actual archipelagic baselines... had to await the stage at which a clear international consensus emerged over the whole concept of the archipelagic State"<sup>106</sup>. And then, relying on a general statement made by the Bahraini Representative during the second session of the Third Law of the Sea Conference in Caracas<sup>107</sup>, it does not hesitate to state explicitly that its claim "was clearly expressed as early as 1974, without objection from Qatar"<sup>108</sup>. But if one looks closely at the Bahrain statement to which reference is being made, it will be seen that it does *not* amount to the expression of a claim to archipelagic status on the part of Bahrain. In fact, according to the summary records of the 40th plenary meeting, as printed in the *Official Records* of the Conference, the relevant passage of that statement reads as follows:

"Consisting as it did of an archipelago, Bahrain supported the right of archipelagic States to draw straight baselines which safeguarded their territorial, political, economic and national unity and within which they might exercise their sovereignty, subject to the right of innocent passage"<sup>109</sup>.

That wording differed noticeably from the clear and unambiguous position taken up during the same session of the Conference by other delegations claiming recognition of their archipelagic status<sup>110</sup>. It would be wrong to construe the words used by Bahrain's representative as if the general "support" given to the notion of archipelagic status were equivalent to a claim of such status by Bahrain itself. Furthermore, when the item "Archipelagoes" was later discussed in the Second Committee of the Conference, on 12 and 13 August 1974, Bahrain did not make any further official statement. It is also noteworthy that there was not a single word about any archipelagic claim by Bahrain in the statement made by Dr. Al-Baharna on 8 December 1982 at the final session of the Conference held at Montego Bay, Jamaica<sup>111</sup>.

6.64 Whatever might be Bahrain's possible legal entitlement to claim archipelagic status or to draw archipelagic baselines after it ratified the 1982 Convention in May 1985 and since the entry into force of the Convention in November 1994, the fact remains that no formal claim was presented by Bahrain prior to the filing of its Memorial in the present case on 30 September 1996. In its Memorial, Bahrain acknowledges that its claim to archipelagic status has been delayed until the filing of the first written pleadings, allegedly "because of Bahrain's commitment under the principles of mediation of 1982-83 'not to change the current situation in respect of the disputed issue'"<sup>112</sup>. But as will now be seen, Qatar submits that such a claim is irrelevant and that the Court should take no account of it in the present case.

### **C. Irrelevance of any Bahraini archipelagic claim for the present maritime delimitation**

6.65 First of all, it must be underlined that Qatar and Bahrain agree on the law applicable to the maritime delimitation in the present case, which is to be effected in accordance with customary international law<sup>113</sup>. They also agree that, notwithstanding the fact that the 1958 and 1982 Conventions are not in force between them, the delimitation rules embodied in those Conventions generally reflect the state of customary international law and are therefore applicable to the present case. In addition, Bahrain assumes that the provisions contained in Part IV of the 1982 Convention, dealing with archipelagic States, "can properly be said to reflect the current, generally accepted rules of international law on the matter"<sup>114</sup>. Insofar as "generally accepted rules of international law" may be regarded as amounting to "rules of customary international law", Qatar disagrees. The rules enunciated in the provisions of Part IV of the Convention cannot be considered to be an expression of present-day customary international law. Accordingly, Bahrain cannot invoke them in the present case. The consequence is that any Bahraini archipelagic claim based on those rules is irrelevant in relation to the present case between Qatar and Bahrain.

### **D. Irrelevance of archipelagic baselines in State practice**

6.66 In maritime delimitation agreements involving archipelagic States, it seems that it has only been on a very few occasions that the agreed boundary has been affected by straight archipelagic baselines. From this point of view, a distinction has to be made, depending on whether the delimitation has taken place between two archipelagic States or between an archipelagic State and another coastal State.

6.67 In the first situation, the boundary line has been drawn with some effect given to archipelagic baselines. But there are only two agreements of this type: one concluded on 13 December 1980 between Indonesia and Papua New Guinea, where some basepoints on the respective archipelagic baselines affected the lateral delimitation line<sup>115</sup>; the other one signed

on 25 January 1989 between Papua New Guinea and the Solomon Islands, where the boundary line was drawn by taking into account most of the segments of the archipelagic baselines<sup>116</sup>. Although it does not involve two archipelagic States, the agreement signed on 19 January 1983 between Fiji and France may be compared with the two previous agreements, insofar as it affects two French overseas territories (New Caledonia, Wallis and Futuna) formed by geographical archipelagoes. One segment of the boundary line dividing the respective exclusive economic zones of Fiji and the French Wallis and Futuna islands seems to have been slightly affected by one of Fiji's archipelagic baselines<sup>117</sup>.

6.68 The situation appears to be quite different when the delimitation involves an archipelagic State and another coastal State (or States). The archipelagic baselines drawn by the former have, as a matter of consistent State practice, played no part in determining the location of the maritime boundary with the latter. This was the case in the following delimitation agreements:

- Australia-Indonesia, 18 May 1971<sup>118</sup>, 9 October 1972<sup>119</sup>, and 12 February 1973<sup>120</sup>;
- Australia-Papua New Guinea, 18 December 1978<sup>121</sup>;
- India-Indonesia, 8 August 1974<sup>122</sup>;
- India-Indonesia-Thailand, 22 June 1978<sup>123</sup>;
- Indonesia-Malaysia-Thailand, 21 December 1971<sup>124</sup>;
- Indonesia-Thailand, 17 December 1971<sup>125</sup>.

The agreement stipulating the territorial sea boundary lines between Indonesia and the Republic of Singapore in the Strait of Singapore, signed on 25 May 1973, is of particular relevance here, for the archipelagic baselines of Indonesia were not given full consideration in drawing the boundary. They were even disregarded in determining a portion of the maritime boundary, with one turning point being located within the Indonesian archipelagic baseline, so that a small area of Singapore's territorial waters cuts into Indonesia's straight archipelagic baselines<sup>126</sup>.

6.69 These elements of State practice demonstrate the existence of a trend according to which, in a maritime delimitation involving an archipelagic State and another coastal State, no effect is given to archipelagic baselines in the drawing of the boundary line. Such a trend is apparently broadly accepted by the different archipelagic States which have entered into delimitation agreements. This is a factor that would have to be taken into account in the present case, if it were admitted, contrary to Qatar's submission, that Bahrain would be entitled to claim archipelagic baselines. For this reason also, Qatar submits that archipelagic baselines are irrelevant for the purpose of drawing the Qatar-Bahrain maritime boundary<sup>127</sup>.

6.70 In any event, in Qatar's view Bahrain does not meet the requirements set out in the 1982 Convention on the Law of the Sea, and is thus precluded from validly claiming archipelagic baselines. However, the irrelevance of the Bahraini archipelagic claim, as demonstrated above, renders it unnecessary to examine that claim.

## **Section 5. The division of the relevant maritime area into two sectors**

## **A. The artificial character of the Bahraini dividing line between the two sectors**

6.71 Both Parties agree on the necessary division of the maritime area relevant to the delimitation into two sectors, and they both identify a southern sector and a northern sector. But their agreement does not go beyond the recognition of such a necessary division, since they have proposed different dividing lines. The line between the two sectors as suggested by Bahrain is highly artificial insofar as it does not reflect the actual coastal geography of the area, while that consideration is fully reflected in the dividing line suggested by Qatar.

6.72 Quite surprisingly, the Bahrain Memorial restricts itself to stating that the line dividing the area into a southern sector and a northern sector is "a line from Fasht ad Dibal to Ra's Rakan (on the northern point of Qatar)"<sup>128</sup>. No explanation is given for the choice of that line. Furthermore, as will be seen below, the line suggested by Bahrain does not reflect the geographical realities in the relevant maritime area<sup>129</sup>.

### **1. The distortion by Bahrain of the geographical relationship between the two States**

6.73 Bahrain's distinction between the two sectors does not really start with the geographical configuration of the area, but is based on the different legal nature of the zones to be delimited<sup>130</sup>. Qatar's submission is that the difference between the legal nature of the maritime zones to be delimited cannot really be the sole (or even primary) criterion for a division of the maritime area into two sectors. Firstly, as admitted by Bahrain itself, in a part of the northern sector, the boundary to be defined is also a territorial sea boundary as in the entire southern sector<sup>131</sup>. Secondly, the task of the Court in the present case is to draw "a single maritime boundary between the maritime areas of seabed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain"<sup>132</sup>, whatever may be the legal nature of the respective maritime areas thus delimited.

6.74 In previous maritime delimitation cases when the Court, or an international tribunal, has had to divide the relevant area into different sectors, this has always been done on the basis of purely geographical considerations. Suffice it to mention here the cases concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*<sup>133</sup> and the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*<sup>134</sup>, or the United Kingdom-France arbitration on the *Delimitation of the Continental Shelf*<sup>135</sup>. This is why Qatar has insisted, in its Memorial, on the geographical circumstances upon which it has based the division of the area into two sectors<sup>136</sup>.

6.75 It is only when examining the characteristics of the southern sector that Bahrain's Memorial enters, quite incidentally, into a brief and partly inaccurate description of the geographical relationship between the respective coasts of the two countries. It states, except with regard to the maritime area lying off the so-called "Zubarah coast" (resulting from Bahrain's extravagant claim over that region) that:

"the Court's task is to carry out a delimitation between opposite coasts which are practically parallel, whether one considers the coast of Qatar vis-à-vis that of the main Bahrain island, or ... vis-à-vis that of the insular and other legally relevant maritime features which appertain to Bahrain"<sup>137</sup>.

6.76 However, Bahrain does not rely on the coast of any of its islands in order to establish the closing line of the southern sector. Instead, it uses a non-coastal feature, namely the low-tide

elevation of Dibal, which moreover is one of the subject-matters in dispute between the two States that has been submitted to the Court in this case. It seems therefore quite illogical to use it, at the very first stage of the identification of the relevant maritime area, to divide that area into two distinct sectors. Furthermore, Dibal, being a low-tide elevation separated from Bahrain's main coast, cannot properly be considered as representing the Bahraini coast facing Qatar's coast<sup>138</sup>.

6.77 Those remarks also apply, to some extent, to the other terminal point of Bahrain's closing line, which is presented by Bahrain as "the northern point" or "the northern extremity" of Qatar<sup>139</sup>. That point is not situated on the actual coast of the Qatar peninsula but, from the different maps attached to the Bahrain Memorial, it appears to be located offshore, about 5 kilometres beyond the coastline, and presumably at the northernmost point on the low-water line of Ras Rakan islet<sup>140</sup>.

6.78 The Bahraini presentation of the closing line accordingly distorts the geographical situation, insofar as it does not really reflect the geographical relationship of opposition between the relevant coasts of the two States. And the line suggested by Bahrain for that purpose appears all the more artificial in that it has been drawn on the false presupposition that Dibal forms an integral part of the relevant coast of Bahrain<sup>141</sup>.

## **2. The treatment of what Bahrain terms "insular and other legally relevant maritime features"**

6.79 In its Memorial, Bahrain has constantly made use of the expression "insular and other legally relevant maritime features"<sup>142</sup>, with the exception of two slight variants which are used twice over<sup>143</sup>. But it has never given a precise definition of the so-called "legally relevant maritime features". It merely provides an indication of what might be meant by that phrase when, on one occasion, it refers to "islands and other maritime features to which international law assigns relevance in maritime boundary delimitation"<sup>144</sup>. Undoubtedly, for Bahrain, this was a convenient means to an end, *i.e.* it was designed to substitute different remote islets, rocks, reefs or shoals for the actual coast of Bahrain itself. The basic reason for this lies in the Bahraini view according to which the whole of the sea area between Bahrain and the Qatar peninsula is simply a "Bahraini lake"<sup>145</sup>. Two distinct lines of argument are followed to support the Bahraini position.

6.80 The first one consists in reducing to an absolute minimum the significance of the Qatari coast opposite that of Bahrain in the maritime delimitation. While Bahrain claims that it "does not contest Qatar's right to a territorial sea and does not claim the entire area of sea as far as the coast of Qatar"<sup>146</sup>, the Bahraini demonstration in reality amounts to just such a claim. As a matter of fact, arguing that "Only a negligible proportion of the population of Qatar lives on the west coast"<sup>147</sup>, Bahrain goes on to state:

"Qatar as a whole is left with open access to the high seas by virtue of its extensive east-facing coastline, along which virtually its entire population lives"<sup>148</sup>.

It must be emphasised that Bahrain seems simply to forget that what matters in the law of maritime delimitation is the coast itself, whatever the size of the population on the land behind that coast might be. The question of whether the land is sparsely or densely populated is of no relevance for the purposes of a maritime delimitation, particularly as between opposite coasts, as most recently illustrated for example in the case concerning *Maritime*

*Delimitation in the Area between Greenland and Jan Mayen*<sup>149</sup>. In fact what Bahrain is suggesting would have the consequence of ignoring more or less the western coast of Qatar because of its sparse population, while failing to mention that Bahrain's eastern coast is similarly sparsely populated.

6.81 If the western coast of Qatar were ignored in this way, this would of course leave open the way to Bahrain's second line of argument, according to which the relevant coastline of Bahrain would in effect consist of an imaginary line drawn through several "insular and other legally relevant maritime features".

**a) Features recognised as being low-tide elevations are not the relevant Bahraini coast**

6.82 As clearly shown on Map 14 annexed to Bahrain's Memorial, apart from the Hawar islands over which Bahrain is claiming sovereignty, five features are deemed to represent part of the coast of Bahrain<sup>150</sup>. Four of these features are expressly recognised by Bahrain as being low-tide elevations. This in itself would normally preclude Bahrain from arguing that these features constitute part of the Bahraini coast opposite Qatar's coast. The fifth feature, Qit'at Jaradah, is presented by Bahrain as being an island, while in fact it is also just a low-tide elevation.

6.83 Qatar takes note of Bahrain's admission that Dibal, together with Qit'at ash Shajarah, Qita'a el Erge and Fasht Bu Thur, are maritime features falling into the legal category of low-tide elevations, as defined by Article 11 of the 1958 Convention on the Territorial Sea and Article 13 of the 1982 Convention on the Law of the Sea<sup>151</sup>. Furthermore Qatar notes that, at the same time, Bahrain rightly recognises Qit'at ash Shajarah as distinct from Fasht al Azm which forms a quite different feature<sup>152</sup>, while maps appended to Bahrain's Memorial show no discontinuity between those two features<sup>153</sup>, contrary to official Bahraini nautical charts<sup>154</sup>.

6.84 All those features are distinctly detached from the eastern coast of Bahrain, as the maps presented to the Court by both States show<sup>155</sup>. Of course, they are not located at a great distance from the Bahraini coast, nor are they at a great distance from the Qatari coast. In fact, one has to take into account the narrowness of the sea area between Bahrain and the Qatar peninsula, because it is rather a question of proportion, and not of absolute distance. From that point of view, they are surely not features closely integrated with the main Bahraini coast<sup>156</sup>.

6.85 Concerning more particularly the low-tide elevation of Dibal, as already stated above<sup>157</sup>, that feature cannot be considered as the northernmost point of Bahrain's coast, of which it is not a part<sup>158</sup>. Moreover, it is closer to the shore of Qatar than to the shore of Bahrain<sup>159</sup>. Consequently, by taking account of Dibal to draw a line for dividing into two sectors the relevant maritime area, as if that shoal were the northern tip of Bahrain's territory opposite the coast of Qatar, Bahrain has falsely presented the geographical, hydrographical and legal reality in that area.

**b) Qit'at Jaradah is a low-tide elevation**

6.86 While not directly related to the question of the division of the relevant maritime area into two sectors, it is convenient at this stage to make some observations on Bahrain's treatment of Qit'at Jaradah. According to the Bahrain Memorial, "[t]he status of Qit'at Jaradah

merits special attention"<sup>160</sup>. Qatar endorses this view, the more so as Bahrain's presentation is inaccurate and renders it necessary to rectify certain distortions.

6.87 Contrary to the true facts, Bahrain contends that Qit'at Jaradah is a maritime feature which is "above water at high tide"<sup>161</sup>. Bahrain states that this feature is to "be treated as an island for the purposes of determining the single maritime boundary"<sup>162</sup>, because: (i) it had become an island some years ago as a result of natural accretion; (ii) it would still be an island today if Qatar had not intervened in 1986; and (iii) it is in the process of becoming an island again by means of an inexorable natural accretion. Bahrain even goes so far as to assert that in 1986 "Qatari bulldozers removed that part of Qit'at Jaradah which was exposed at high tide"<sup>163</sup>. It is necessary for Qatar to set the record straight.

6.88 It must first be recalled that an agreement was reached in 1978 to preserve the *status quo* in the area pending the Saudi Arabian mediation. That agreement was recorded again, when Qatar and Bahrain undertook to freeze the situation and to avoid any action that might escalate the dispute, in a Gulf Cooperation Council ("GCC") resolution of 8 March 1982<sup>164</sup>. The 1983 agreed principles of the framework for a settlement reiterated the *status quo* commitment, and the two States undertook to refrain from acting in any way that would strengthen or weaken the legal position of either of them<sup>165</sup>.

6.89 However, on 24 October 1985, the Bahrain Defence Force entered into a contract with the Dutch firm Ballast Nedam Groep N.V. in order to reclaim two "islands" and provide them with a seawall and facilities<sup>166</sup>. On 16 February 1986, the Amir of Qatar complained to the King of Saudi Arabia about encroachments performed by Bahrain on the *status quo*: "In Jaradah, Bahrain put a lighthouse, and a pontoon near it to be used... for the purpose of coast guarding"<sup>167</sup>. On 29 April 1986, a further Qatari communication complained that:

"... Bahrain has built a lighthouse on Jarada, and alongside it has placed a pontoon used by the people who are there for the purpose of guarding the coast.

With regard to Dibal Shoal, Bahrain has contracted with a foreign company to turn it into an artificial island to make it into a Bahrain coastguard station"<sup>168</sup>.

Those acts provoked a military intervention by Qatar on 26 April 1986, in order to restore the *status quo*.

6.90 In the course of the negotiations for a pacific settlement which ensued, in a letter dated 14 May to the Amir of Qatar, the King of Saudi Arabia made the following proposals:

"... One: Removal of the floating mooring in Jaradah shoal to its previous location and removal of all installations set up in the area after the landing of Qatari troops in Dibal shoal.

...

Three: The company executing the filling-in works in Dibal shoal, or any other selected company, shall completely remove all works executed there so that the shoal returns to its previous state. This should be carried out under the supervision of the commission comprising Saudi Arabia and the Secretariat of the Cooperation Council and with the participation of observers from council countries, *i.e.* the Sultanate of Oman, United Arab Emirates and the State of Kuwait<sup>169</sup>".

6.91 The conditions of the removal operations were carefully considered and agreed within the framework of GCC procedures. The programme of work provided *inter alia* that the contracting company had to take over the sites in Dibal and Qit'at Jaradah and ensure demolition and removal of the works constructed<sup>170</sup>. The task assigned to the company was to restore the *status quo*. Thus, the effect of the Qatari action was to forestall the attempts by Bahrain artificially to transform those two low-tide elevations into islands. Accordingly, the charge in the Bahrain Memorial that, in 1986, Qatari bulldozers removed that part of Qit'at Jaradah which was exposed at high tide is a complete fabrication and gross distortion of the truth. In point of fact, no Qatari bulldozers came on to the shoal. As Qatar has demonstrated, the reversion to the *status quo* was effected as an international operation under the supervision of the Gulf Cooperation Council.

6.92 As Qatar has amply demonstrated in its Memorial<sup>171</sup>, Qit'at Jaradah was in the past and still is a low-tide elevation. It may be added that descriptions of Qit'at Jaradah whether in a geographical context or as a navigational aid have never depicted this feature as above water at high tide. For example, the list of features in the Persian Gulf prepared for Aramco by Hudson and Young on 5 January 1950 (when, according to Bahrain, the accretion process had already sufficiently begun) is revealing. Hudson and Young described Qit'at Jaradah as a "reef, ... a sandbar on the southeastern side of the reef rises seven feet above the water at low tide"<sup>172</sup>. Indeed, even Bahrain admits that "for some periods prior to 1947" Qit'at Jaradah was a low-tide elevation<sup>173</sup>.

## **B. The reasons for the choice of the notional line joining points MQ and RK as defined by Qatar**

6.93 Having demonstrated the artificial character of the Bahraini line dividing the northern sector from the southern sector, Qatar will now explain the reasons for preferring the dividing line which it proposes<sup>174</sup>. In order to divide the relevant maritime area, one has to start with the geographical situation. As recalled by the Chamber of the Court formed to deal with the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, "the facts of geography are not the product of human action amenable to positive or negative judgment, but the result of natural phenomena, so that they can only be taken as they are"<sup>175</sup>. And it cannot be contested that, in the field of maritime delimitation, the primacy of geographical considerations relates to coastal geography, *i.e.* the physical characteristics of the coastal front, involved in the delimitation process. Due to the situation prevailing in the present case, where the relevant maritime area is at least in the south comprised between the opposite coasts of the two States, it is important to rely strictly on the actual coast of each of them; and to identify the point on each coast beyond which the maritime area no longer lies between opposite coasts.

### **1. The actual coast of the two States**

6.94 As the previous cases decided by the Court clearly demonstrate, coastal geography is regarded as "the leading factor in maritime delimitation"<sup>176</sup>, and coastal fronts and the physical configuration of coasts are the dominant parameters in this respect<sup>177</sup>. In particular the word "coast" has been defined by a Working Group of the International Hydrographic Organisation dealing with the technical aspects of the law of the sea as follows:

"The sea-shore. The narrow strip of land in immediate contact with any body of water including the area between high and low water lines"<sup>178</sup>.

6.95 From a technical point of view, the coast is thus the shore or the littoral, and it includes that part of the shore (foreshore, or middle shore, or strand) which is submerged at high-tide and exposed at low-tide. Consequently, there is properly speaking no shore on a maritime feature which qualifies as a low-tide elevation, and a low-tide elevation therefore is not part of the coast. That is why, in Qatar's submission, only the mainland coasts are of any relevance, in other words: Qatar's western coast and Bahrain's eastern coast.

## **2. The northernmost points of the two opposite coasts**

6.96 The map of the general area of the dispute<sup>179</sup> clearly shows that only one part of the relevant maritime area lies between the opposite coasts of the Parties. That part of the maritime area, which has been called the southern sector, may be identified by drawing a notional line between two points which are located on the respective coasts of the two States, and which constitute the ultimate reach of their respective mainland territories into the Arabian Gulf, *i.e.* the northernmost point on each coast.

### **a) The northernmost point of the coast of Qatar**

6.97 The northernmost point of the coast of Qatar has been designated in Qatar's Memorial as point RK, and is defined by its geographical coordinates: 51°15'02"E, and 26°09'25"N<sup>180</sup>. It constitutes the final point on the Qatari coast that faces both the opposite Bahraini coast and the maritime area to be delimited. From that point there is a change in the direction of the coast of the Qatar peninsula, since beyond point RK that coast begins to run in a southeasterly direction and therefore no longer has any relationship either with the Bahraini coast or with the maritime area relevant to the delimitation in this case.

6.98 Point RK, chosen by Qatar as one of the two relevant points for the drawing of the dividing line between the southern and the northern sectors, is situated on the high-water line of the coast of Qatar's mainland, of which it really represents the northern extremity. That choice has been made having regard to the necessity of relying strictly on the actual coast<sup>181</sup> and, as already explained in Qatar's Memorial, out of a desire to be consistent with Qatar's position in the present case, that no account should be taken of islets, rocks and low-tide elevations<sup>182</sup>. Thus, in Qatar's view, and contrary to what has seemingly been Bahrain's choice, the low-water line on Ras Rakan islet cannot be regarded as representing the northern tip of the Qatar peninsula and as a relevant point for that purpose<sup>183</sup>.

### **b) The northernmost point of the coast of Bahrain**

6.99 The northernmost point of the coast of Bahrain, designated by Qatar as point MQ, is likewise defined by its geographical coordinates: 50°37'54"E, and 26°17'15"N<sup>184</sup>. It is located at the northern edge of Muharraq island, where there is a change in the direction of the Bahraini coast. From that point, the coast begins to run in a south-southwesterly direction, and thus no longer has any geographical relationship with the Qatari coast for delimitation purposes. It must also be recalled that the coast of Muharraq is to be regarded as part of the main Bahraini coast insofar as Muharraq itself may be considered as part of the main Bahrain island and as forming with it one and the same territory, being connected to it by a causeway<sup>185</sup>. It must also be added that, like point RK on Qatar's coast, point MQ is situated on the high-water line<sup>186</sup>.

6.100 The location of point MQ, situated almost 8 minutes of latitude further north than the most northerly point of Qatar's mainland, involves a slightly further extension northwards of the Bahraini coast. While this could legitimately appear as insignificant in absolute terms, in the present case it is not totally unimportant, due to the relatively short distance between points MQ and RK and the relative narrowness of the maritime area in that region. As a result of this dissimilarity between the two coasts, the projection of the Bahraini coastal front towards the middle of the Gulf tends, in fact, to encroach upon the maritime area situated to seaward of the Qatari facing coast in that region, a situation which is reminiscent, to some extent, of what the Anglo-French Court of Arbitration was faced with in 1977 as regards the Atlantic region of the arbitration area<sup>187</sup>.

### **3. The resulting line dividing the relevant maritime area into two sectors**

6.101 The notional line (MQ-RK) joining the northern points of the two facing coasts may be regarded as the closing line of the area where Qatar and Bahrain have opposite coasts, as shown on Map 17 facing page 266 of Qatar's Memorial<sup>188</sup>. Up to that line, the relevant maritime area in the southern sector is confined to a relatively narrow channel between the two opposite coasts. Beyond that line, in the northern sector, the relevant maritime area extends seawards from the coasts of the two countries into the open spaces of the Arabian Gulf and lies off, rather than between, those coasts<sup>189</sup>.

## **C. The southern and the northern limits of the relevant maritime area and existing delimitations with third States**

### **1. The agreed northern limit resulting from delimitation agreements with Iran**

6.102 Both Parties agree on the relevance of the agreements signed by Qatar and Bahrain with Iran in 1969 and 1971, respectively, concerning the delimitation of the continental shelf, and they both consider it necessary to take those delimitation agreements into consideration<sup>190</sup>. Although, as will be seen in the last Chapter of the present Counter-Memorial, there may be some difference in the consequences drawn by the Parties from these existing agreements<sup>191</sup>, this does not undermine their shared perception that the lines delimited in these agreements define the northern limit of the maritime area to be delimited in the present case.

### **2. Inconsistency in the Bahraini treatment of delimitation with Saudi Arabia in the south**

6.103 The Bahrain Memorial however shows some inconsistency in its treatment of delimitation with third States. While it recognises that, in the northern sector, the delimitation between Qatar and Bahrain is to be effected "in the context of the existing agreements" concluded with Iran by each of the Parties<sup>192</sup>, and that the existence of those agreements constitutes a "special circumstance"<sup>193</sup>, it considers that the 1958 delimitation agreement between Saudi Arabia and Bahrain is "irrelevant" for the drawing of the Qatar-Bahrain maritime boundary in the southern sector<sup>194</sup>. This is all the more surprising given that the same reason is put forward in order to support the relevance of the former delimitations and the irrelevance of the latter. On both occasions, Bahrain relies on one and the same argument to reach entirely different conclusions. Thus, as regards the Qatar/Iran and Iran/Bahrain agreements, after having said that "[n]either of those agreements purports to determine a single Bahrain/Iran/Qatar tripoint", the Bahrain Memorial goes on to state: "Nevertheless, the provisions of these agreements are obviously relevant to the delimitation of the maritime boundary in the northern sector"<sup>195</sup>. On the contrary, concerning the Bahrain/Saudi Arabia

agreement, it is said that point 1 defined by that agreement is irrelevant, because "it was never intended to be a Bahrain/Qatar/Saudi Arabia tripoint"196. Therefore, according to Bahrain, "the southernmost point of the maritime boundary cannot be defined precisely at this time", and the last segment of the suggested boundary line, in the case of Bahrain's alternative claim, as in that of its principal claim, is depicted by "an arrow indicating a directional bearing"197.

6.104 If, as Bahrain acknowledges, the delimitations arrived at with Iran are to be taken into consideration in the north, there appears to be no reason for regarding the delimitation between Bahrain and Saudi Arabia in the south as irrelevant. As a matter of fact, in any maritime delimitation between two States, existing delimitation agreements concluded by one or both of them with third States have generally been considered as relevant factors or circumstances. This is so especially when the pre-existing dividing lines abut on the area where the delimitation is to be effected between the two States.

6.105 As was stated in Qatar's Memorial, at the entrance of the Dawhat Salwah, taking account of the delimitation agreement between Saudi Arabia and Bahrain, the Saudi Arabian maritime zone does not extend to the north of point 1 defined in that agreement and referred to as point S1 by Qatar198. On the other hand, on the assumption that Qatar has sovereignty over the island of Janan and the Hawar islands, the maritime zone pertaining to Bahrain cannot extend to the east of point S1. As a result, that point S1 may be regarded as representing both the southern limit of the relevant maritime area and the starting or the terminal point of the maritime boundary to be drawn by the Court in the present case199.

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1 QM, paras. 11.11, *et seq.*; BM, para. 589. In this regard Qatar is pleased to note Bahrain's acknowledgement that Qatar is entitled to a territorial sea!

2 BM, paras. 559-560.

3 BM, para. 561; QM, *inter alia*, para. 10.59.

4 BM, para. 563 and QM, para. 12.13.

5 BM, para. 562.

6 BM, paras. 619, *et seq.*

7 *See*, QM, para. 11.37 and paras. 7.24, *et seq.*, below.

8 BM, paras. 660, *et seq.*

9 *See*, QM, paras. 11.43, *et seq.*, and paras. 6.65, *et seq.*, below.

10 QM, paras. 11.19, *et seq.*

11 BM, para. 631.

12 BM, paras. 568, *et seq.*

13 QM, paras. 10.53, *et seq.* *See*, also, paras. 6.82, *et seq.*, below.

14 *See*, QM, paras. 10.27, *et seq.*, and QCM, Appendix 2, Vol. 5, p. 145.

15 *See*, paras. 2.64, *et seq.*, above, and QCM, Appendix 2, Vol. 5, p. 145.

16 BM, paras. 600 and 603 and Bahrain's formal submissions at BM, p. 301.

17 BM, paras. 575 and 582-583.

18 BM, para. 576.

19 BM, paras. 588 and 639, *et seq.*

20 BM, paras. 577, *et seq.*, and 590, *et seq.*

21 BM, para. 579.

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

23 *I.C.J. Reports 1992*, p. 570, para. 356; emphasis added.

24 Seal (Admiralty, Military Branch), in a letter to Clauson (India Office), of 29 April 1937, impliedly suggested that sovereignty over Fasht al Jarim, Dibal and other fashts of the region (also called rocks or islands) should in general be attributed according to proximity. *See*, QM, Annex IV.35, Vol. 9, p. 161.

25 Fry, (Foreign Office), dealing with the case of Fasht al Jarim wrote to Sir Rupert Hay on 3 April 1951 as follows: "We do not trace any claim to Fasht-al-Jarim... ever having been made by Ibn Saud and presume therefore that it is acknowledged to belong to Bahrain; as it will fall on the Bahrain side of the sea-bed boundary which we intend to propose, we have omitted it from our list". *See*, QM, Annex IV.191, Vol. 10, p. 465.

26 *See*, paras. 2.64, *et seq.*, above, and QCM, Appendix 2, Vol. 5, p. 145.

27 *See*, QM, Annex IV.216, Vol. 11, p. 235. *See*, also, QM, Annex IV.162, Vol. 10, p. 311: "We are glad to see from your letter EA 1276/1 of the 27<sup>th</sup> January, to Sir R. Hay that you contemplate that, where there is no clear cut title to any island it will go to the State in whose sea-bed it is situated". *See*, also, QM, Annex IV.192, Vol. 10, p. 469: "... the Rennie and Bu Sa'afah shoals... are not, to the best of my belief, strictly speaking shoals at all, in that they are never exposed at any state of the tide though they both have lights or some sort of marker on them. Their ownership should, in my opinion, be based on any decision which may be reached regarding the position of the sea-bed boundary. On the other hand, if these two shoals are taken into account in the forthcoming negotiations, we shall also probably have to take into consideration other similar shoals such as Ashira and Bu Athama".

28 BM, para. 575.

29 *See*, QM, paras. 6.41, *et seq.*

30 *See*, QM, paras. 6.101, *et seq.*

31 BM, paras. 576 and 587.

32 *See*, QM, Annex IV.65, Vol. 9, p. 319. Some more details about these structure holes were revealed by a confidential BAPCO memorandum dated 10 September 1950 (*see*, QM, Annex IV.176, Vol. 10, p. 379).

33 QM, Annex IV.69, Vol. 9, p. 335.

34 *See*, QM, Annex IV.77, Vol. 9, p. 373.

35 *See*, QM, Annexes IV.58, IV.71 and IV.85, Vol. 9, pp. 283, 345 and p. 405.

36 BM, para. 577.

37 BM, para. 584.

38 QM, Annex IV.176, Vol. 10, p. 379.

39 QM, Annex IV.68, Vol. 9, p. 331.

40 QM, Annex IV.69, Vol. 9, p. 335.

41 BM, para. 587.

42 BM, paras. 598-599.

43 BM, para. 638.

44 BM, paras. 643, *et seq.*

45 *See*, QM, paras. 10.38, *et seq.*, and QM, Appendix 4, Vol. 15, p. 111.

46 *See*, QM, Annex IV.138, Vol. 10, p. 203.

47 *See*, QM, Annex IV.139, Vol. 10, p. 207.

48 *See*, QM, Annex IV.216, Vol. 11, p. 235. *See*, also, QCM, Appendix 2, Vol. 5, p. 145.

49 *See*, QM, paras. 10.34, *et seq.*, and para. 8.85, below.

50 For ease of comprehension of the following discussion, Qatar has prepared a map showing Bahrain's location of the principal pearling banks (*Map No. 3*, facing this page).

51 BM, Vol. 7.

52 British marine charts 2837 and 2847 (scale 1:750 000), 3790 (scale 1:150 000), 3788 (scale 1:150 000) and 2886 (scale 1:350 000); French marine chart 6635D (scale 1:415 000). A copy of British charts 3790 and 3788 is being deposited with the Registry of the Court in accordance with Article 50, paragraph 2 of the Rules of Court. A copy of British chart 2886 and French chart 6635D was deposited with the Registry of the Court at the time of the filing of Qatar's Memorial.

53 QM, Annex II.1, Vol. 3, p. 1, at p. 44, para. 8.50; British charts 2847 and 3790.

54 QCM, Annex IV.52, Vol. 4, p. 401, at p. 404, para. 4.52; British chart 2847.

55 *Ibid.*, at p. 405, para. 8.78; British charts 2847 and 3790.

56 *Ibid.*, at p. 406, para. 8.96; British chart 2847 and French chart 6635D.

57 *Ibid.*, at para. 8.94 and at p. 407.

58 British chart 3788 and French chart 6635D.

59 QM, Annex IV.258, Vol. 12, p. 71.

60 According to Article 2 of the 1958 Agreement between Saudi Arabia and Bahrain, (QM, Annex IV.262, Vol. 12, p. 95) this zone, known as the "Fasht bu Saafa Hexagon" or as the

"Joint Oil Revenue Arrangement Saudi Arabia/Bahrain" (*See, Map No. 3*, facing p. 196), falls under the "sovereignty and administration of the Saudi Arabian Government", while its oil resources are shared equally between the parties.

61 *See*, French chart 6635D and British chart 2886.

62 BM, Map 10, Vol. 7.

63 *See*, QM, Map 13, Vol. 17.

64 *See*, M.G. Rumaihi, *Bahrain: Social and Political Change since the First World War*, London, 1976, QM, Annex IV.317, Vol. 13, p. 231, at p. 237. Sir Humphrey Waldock acknowledged this decline in his February 1954 opinion, QM, Annex IV.206, Vol. 11, p. 67, at p. 113.

65 *See*, QM, Annex IV.128, Vol. 10, p. 155.

66 *See*, QM Annex IV.150, Vol. 10, p. 255.

67 R. Young, "The Persian Gulf", in *New Directions in the Law of the Sea*, London, 1973, QM, Annex IV.327, Vol. 13, p. 291, at p. 297.

68 BM, para. 48.

69 BM, para. 595.

70 *See*, QCM, Annexes IV.2 and IV.3, Vol. 4, p. 9 and p. 13.

71 QM, Annex IV. 269, Vol. 12, p. 169.

72 QM, Annex IV. 276, Vol. 12, p. 223. This text was amended by Decree-Law No. 17 (1993) amending certain provisions of Law No. 4 of 1983, concerning the exploitation and protection of living marine resources in Qatar, QCM, Annex IV.31, Vol. 4, p. 253.

73 BM, paras. 595, *et seq.*

74 In this context it may be noted that the Bahraini assertion in para. 44 of its Memorial that "the eastern reaches of the Gulf of Bahrain have for many centuries effectively been a Bahraini lake" is quite without substance. It is noteworthy that Bahrain's eastern coast to the south of Ar-Rifaa al-Sharqi, opposite Sitrah island is very thinly populated. Thus, a list of towns on the eastern coast of Bahrain compiled in 1908 reveals that even at the beginning of the present century this coastal area was sparsely settled. Southwards of Ar-Rifaa al-Sharqi, the only villages described were Askar, Jau and Salbah (Lorimer, *op. cit.*, QM, Annex II.3, Vol. 3, p. 61, at pp. 69, 73 and 79). Further, a descriptive tour of Bahrain's coastal villages in 1915 mentioned along that part of the coast only the towns of Jau, Askar and Dour (*see*, map of Bahrain in Khuri, *op. cit.*, QCM, Annex IV.48, Vol. 4, p. 383, at p. 385). The tribal settlements on the eastern coast of Bahrain which were drained of their population when pearl fishing lost its economic supremacy in favour of oil were the same three: Jau, Askar and Dour (*ibid.*, at p. 387), the land beyond Dour being described as "barren and absolutely uninhabited" (T.A. Anthony, "Documentation of the Modern History of Bahrain from

American sources (1900-1938)" in *Bahrain through the ages, the History*, Shaikh Abdullah bin Khalid Al-Khalifa and M. Rice (eds.), QCM, Annex IV.76, Vol. 4, p. 303). The absence of any significant population on this eastern coast of Bahrain is quite simply explained by the extreme barrenness of the area, the fertile land fringing only the northern and western parts of the island (*see*, para. 2.62, above).

75 There is of course a very narrow fishermen's channel. *See*, para. 8.48, below.

76 *See*, QM, Appendix 1, Vol. 14, p. 1, and QCM, Appendix 1, Vol. 5, p. 1.

77 *See*, QM, paras. 9.14 and 11.43, *et seq.*

78 BM, para. 657.

79 BM, para. 44.

80 BM, para. 47.

81 BM, para. 588.

82 According to Bahrain, the "large number of insular and other legally relevant maritime features, from Janan in the south to Fasht ad Dibal in the north... are all, without exception, subject to the sovereignty of Bahrain" (BM, para. 567).

83 BM, para. 621.

84 BM, paras. 657, *et seq.*

85 BM, para. 606.

86 BM, para. 657(3), fn. 731.

87 BM, para. 666.

88 BM, para. 680.

89 BM, para. 661.

90 Lorimer, *op. cit.*, QM, Annex II.3, Vol. 3, p. 61, at p. 88.

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

92 BM, Annex 330, Vol. 6, p. 1446.

93 *See*, also, QMJA, Annex I.18, Vol. II, p. 101.

94 *See*, QM, Annex III.88, Vol. 6, p. 449.

95 QM, Annex III.91, Vol. 6, p. 461.

96 QM, para. 4.7.

97 QM, para. 4.5.

98 BM, paras. 606, 619, and 669.

99 BM, para. 669.

100 BM, para. 680.

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *See*, H.W. Jayewardene, *The Regime of Islands in International Law*, Dordrecht/Boston/London, 1990, QCM, Annex IV.47, Vol. 4, p. 379.

105 BM, para. 661.

106 BM, para. 662.

107 The statement of Mr. Al-Nimer was made at the 40th plenary meeting, on 12 July 1974, and not at the 37<sup>th</sup> meeting, on 11 July 1974, as wrongly stated in BM, para. 662, fn. 737.

108 BM, para. 662. This assertion is inconsistent with what Bahrain has written in another paragraph, where it is said that "the legal claim to archipelagic status... in Bahrain's case could not have been reasonably expected prior to the 1982 Convention" (BM, para. 680).

109 BM, Annex 352, Vol. 6, p. 1529.

110 *See*, for example, the statements made on 8 July 1974 by the representatives of the Philippines (QCM, Annex IV.18, Vol. 4, p. 123) and the Bahamas (QCM, Annex IV.19, Vol. 4, p. 127).

111 *See*, the verbatim records of the 190<sup>th</sup> plenary meeting, *Official Records*, Vol. XVII, pp. 87-88, paras. 61-74. *See*, also, *The Law of the Sea. Archipelagic States. Legislative History of Part IV of the United Nations Convention on the Law of the Sea*, United Nations, New York, 1990 (E.90.V.2).

112 BM, para. 680.

113 QM, paras. 11.36 and 12.13; BM, para. 563.

114 BM, para. 664.

115 J.I. Charney & L.M. Alexander, *International Maritime Boundaries*, Martinus Nijhoff, Dordrecht/Boston/London, 1993, Vol. I, pp. 1039-1048.

116 *Ibid.*, pp. 1155-1165. Referring to State practice, Bahrain has mentioned the national practice of Indonesia and the Philippines concerning archipelagic baselines; but its presentation is somewhat partial and inaccurate (BM, para. 673). It must therefore be emphasized: (a) that there is no delimitation agreement between these two archipelagic States; (b) that the Indonesian Miangas Island is located approximately 60 nautical miles from the nearest principal Indonesian island, and the main island of Celebes is 245 miles to the south; and (c) that the Philippines have never accepted or recognised Miangas Island as a basepoint in the 1960 Indonesian straight baseline system.

117 J.I. Charney & L.M. Alexander, *op. cit.*, Vol. I, pp. 995-1001.

118 *Ibid.*, Vol. II, pp. 1195-1205.

119 *Ibid.*, pp. 1207-1218.

120 *Ibid.*, pp. 1219-1228.

121 *Ibid.*, Vol. I, pp. 929-975.

122 *Ibid.*, Vol. II, pp. 1363-1370.

123 *Ibid.*, pp. 1379-1388.

124 *Ibid.*, pp. 1443-1454.

125 *Ibid.*, pp. 1455-1463.

126 *Ibid.*, Vol. I, pp. 1049-1056. When the boundary line established by the 1973 Indonesia-Singapore agreement is compared to the median line claimed by Bahrain as depicted on Map 13 appended to its Memorial (BM, Vol. 7), it will be seen that Bahrain has shown a great sense of black humour when it states that its claimed archipelagic baselines do not cut off the Qatari territorial waters from the high seas: "In relation to the area of Qatari territorial sea to the south-west of the Qatar peninsula, access from this territorial sea to Qatar's exclusive economic zone and the high seas is possible *via* the band of Qatari territorial sea situated between the Hawar Islands and the Qatar peninsula" (BM, para. 685). But Bahrain has refrained from indicating that *navigational access* would surely not be possible (*see*, QM, Map 5, Vol. 17).

127 On a more general level, it will be remembered that the irrelevance of any newly claimed baselines may also be deduced from the Agreement between the Government of Bahrain and the Kingdom of Saudi Arabia concerning the Delimitation of the Continental Shelf. As a matter of fact, Saudi Arabia's Decree No. 33 of 16 February 1958 among other things provided for the drawing of possible straight baselines by using in particular low-tide elevations situated not more than 12 nautical miles from the mainland or from a Saudi Arabian island (*Supplement to Laws and Regulations on the Regime of the High Seas (volumes I and II) and Laws concerning the Nationality of Ships*, ST/LEG/SER.B/8, U.N. Publication, Sales N° 59.V.2, p. 29). But the baselines claimed by Saudi Arabia very shortly before the signature of the delimitation agreement with Bahrain, on 22 February 1958, did not affect the location of the maritime boundary between the two countries (*see*, J.I. Charney & L.M. Alexander, *op. cit.*, Vol. II, pp.1489-1497).

128 BM, para. 559.

129 *See*, paras. 6.76, *et seq.*, below.

130 Such a position is taken in the framework of Bahrain's principal claim but is not modified within its alternative claim. *See*, BM, paras. 559 and 690.

131 BM, para. 636.

132 Para. 41, II, of Qatar's Application.

133 *I.C.J. Reports 1982*, p. 18.

134 *I.C.J. Reports 1984*, p. 246.

135 *International Legal Materials*, Vol. XVIII, No. 2, March 1979, p. 397.

136 *See*, QM, paras. 9.2, *et seq.*, and 12.23, *et seq.*

137 BM, para. 566.

138 *See*, paras. 6.82, *et seq.*, below.

139 BM, paras. 559, 564 and 633.

140 *See*, BM, Maps 8, 10 and 14, Vol. 7.

141 In fact Dibal cannot "be said to be comprised within the coastline of the mainland itself" to use the words of the Anglo-French Court of Arbitration decision dated 30 June 1977 when it described the situation of the Isle of Wight at the entrance of the Port of Southampton (QCM, Annex IV.34, Vol. 4, p. 273, at p. 275).

142 BM, paras. 566, 567, 568, 606 and 688.

143 The first variant is: "other legally relevant formations" (BM, para. 568); the second one: "other legally relevant features" (BM, para. 608).

144 BM, para. 603.

145 BM, para. 44. *See*, para. 6.58, above.

146 BM, para. 589.

147 BM, para. 68.

148 BM, para. 686.

149 In its Judgment of 14 June 1993, after having said: "Jan Mayen has no settled population" (*I.C.J. Reports 1993*, p. 46, para. 15), the Court stated that "the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process

based solely on the possession by the territory concerned of a coastline"; and it therefore concluded "that, in the delimitation to be effected in this case, there is no reason to consider either the limited nature of the population of Jan Mayen or socio-economic factors as circumstances to be taken into account" (*ibid.*, p. 74, para. 80).

150 BM, Map 14, Vol. 7: "Median line (southern sector) using normal baselines".

151 BM, paras. 45 and 626. *See*, also, QM, para. 10.54, and QM, Appendix 5, Vol. 15, p. 125. Concerning more particularly Dibal, it is noteworthy that there has been a significant evolution since the Bahraini claim of 16 August 1961 where it is stated that: "The Ruler contends that both Jaradah and Fasht Aldeeble are islands *i.e.* that Jaradah and a part of Fasht Aldeeble are permanently above water at high tide" (*see*, QM, Annex IV.254, Vol. 12, p. 17, at p. 26) sent under a covering letter from the Ruler of Bahrain to the PRPG (*see*, QM, Annex IV.233, Vol. 11, p. 353).

152 They are separately enumerated in the list laid down in BM, para. 626. On Fasht al Azm, *see*, paras. 7.6, *et seq.* and 8.45, *et seq.*, below.

153 *See*, BM, Maps 6, 7, 8, 9, 11, 12, 13, 14 and 15, Vol. 7.

154 *See*, in particular Chart No. 5001 "Sitrah to Tighaylib", scale 1:50,000, and Chart No. 5005 "Qit'at Jaradah to Gulf of Bahrain, scale 1:100,000, published December 1987 by the Ministry of Housing, Survey Directorate, Hydrographic Department, Bahrain. A copy of each of these charts is being deposited with the Registry of the Court, pursuant to Article 50, paragraph 2 of the Rules of Court.

155 *See*, QM, Maps 2 and 11, Vol. 17, and BM, Map 6, Vol. 7.

156 A striking example is that of Qit'at ash Shajarah which lies closer to Qatar than to Bahrain. *See*, also, para. 7.10, below; D. Bowett, "Islands, Rocks, Reefs and Low-tide Elevations in Maritime Boundary Delimitations", (QCM, Annex IV.37, Vol. 4, p. 307); and Charney and Alexander (eds.), *op. cit.*, Vol. I, pp. 131-151 (in particular pp. 147-150).

157 *See*, para. 6.76, above.

158 *See*, also, para. 8.56, below.

159 QM, para. 9.11.

160 BM, para. 622.

161 BM, para. 619.

162 BM, para. 624.

163 BM, para. 623.

164 QCM, Annex IV.25, Vol. 4, p. 203.

165 *See*, QMJA, Annex II.10, Vol. III, p. 51.

- 166 QCM, Annex IV.27, Vol. 4, p. 213.
- 167 QMJA, Annex II.11, Vol. III, p. 53, at p. 58.
- 168 QCM, Annex IV.28, Vol. 4, p. 217.
- 169 QMJA, Annex II.12, Vol. III, p. 63, at pp. 77-78.
- 170 QCM, Annex IV.30, Vol. 4, p. 243.
- 171 QM, paras. 10.44, *et seq.*, and QM, Appendix 5, Vol. 15, p. 125, at pp. 135, *et seq.*
- 172 QCM, Annex IV.6, Vol. 4, p. 47.
- 173 BM, para. 622.
- 174 *See*, also, QM, para. 12.63.
- 175 *I.C.J. Reports 1984*, p. 271, para. 37.
- 176 P. Weil, "Geographical Considerations in Maritime Delimitation", in Charney and Alexander (eds.), *op. cit.*, Vol. I, QCM, Annex IV.57, Vol. 4, p. 449.
- 177 *See*, P. Weil, *The Law of Maritime Delimitation - Reflections*, Cambridge, 1989, QCM, Annex IV.58, Vol. 4, p. 453, at p. 457.
- 178 QCM, Annex IV.46, Vol. 4, p. 375.
- 179 *See*, QM, Map 2, Vol. 17.
- 180 QM, para. 9.4, fn. 10. By a clerical error, point RK was later mistakenly indicated as being located at longitude 51°12'02" E (QM, para. 12.63).
- 181 *See*, paras. 6.93, *et seq.*, above.
- 182 *See*, QM, paras. 12.32 and 12.63.
- 183 *See*, para. 6.77, above.
- 184 *See*, QM, para. 12.63.
- 185 *See, ibid.*
- 186 *See*, QM, para. 12.7, fn. 6.
- 187 QCM, Annex IV.34, Vol. 4, p. 273, at p. 294.
- 188 *See*, also QM, Vol. 17.
- 189 *See*, QM, paras. 12.10, *et seq.*

190 QM, paras. 9.7 and 12.37, *et seq.*; BM, paras. 637, 651 and 655.

191 *See*, paras. 8.11, *et seq.*, below.

192 BM, para. 637.

193 BM, para. 651.

194 BM, para. 628.

195 BM, para. 651.

196 BM, para. 628.

197 *Ibid.*

198 QM, para. 11.32.

199 QM, para. 11.47.

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## CHAPTER VII

### THE SINGLE MARITIME BOUNDARY IN THE SOUTHERN SECTOR

#### Section 1. Geographical characteristics

7.1 As noted above, although both Parties divide the maritime delimitation area into a northern and a southern sector, they disagree on the dividing line between these two sectors<sup>1</sup>. For purposes of the present geographical discussion, Qatar will rely on its own definition of the southern sector, having dealt previously in this Counter-Memorial with the unfounded nature of Bahrain's dividing line<sup>2</sup>.

7.2 In the southern sector, the western coast of Qatar and the eastern coast of Bahrain are opposite and run roughly parallel to each other, with no notable irregularities of form. The western coast of Qatar is low and consists of sand, gravel and sabkhas. Along this coast there are numerous small bays, lagoons, and inlets. The eastern coast of Bahrain is also low and level, the northern region of Bahrain and the linked islands of Muharraq and Sitrah forming a low plateau seldom more than three metres above sea level. There are few bays or inlets, and the adjoining sea is shallow.

7.3 Between the western coast of Qatar and the eastern coast of Bahrain in the southern sector lie the Hawar islands and Janan island. In addition, there are countless islets, rocks and reefs lying between the two coasts, including Qit'at Jaradah. Dibal, on the other hand, lies almost totally in the northern sector.

7.4 Bahrain itself refers in its Memorial to "the presence, between the eastern coast of the main Bahrain island and the western coast of Qatar, of a large number of insular and other legally relevant maritime features, from Janan in the south to Fasht ad Dibal in the north" which, it sweepingly asserts, "are all, without exception, subject to the sovereignty of Bahrain"<sup>3</sup>. It thus describes itself as "an ensemble consisting of the main Bahrain island, the islands immediately adjacent to it (Sitrah and Al Muharraq), the Hawar Islands and all the other insular and other legally relevant maritime features, together with the continental Zubarah region"<sup>4</sup>.

7.5 While of course not disputing the existence of very numerous insular and other maritime features in the southern sector, Qatar does dispute both their alleged legal relevance and Bahrain's sovereignty over them, questions which have been dealt with elsewhere in this Counter-Memorial<sup>5</sup>.

7.6 As far as the geographical facts are concerned, and perhaps conscious of the weakness of its legal position in regard to its alleged appropriation of all maritime features - whether islands or not - by the performance of so-called acts of sovereignty<sup>6</sup>, Bahrain has sought as far as possible to describe maritime features in the southern sector as islands. Thus, it relies on Belgrave's letter of 14 August 1937, where it is stated, somewhat self-contradictorily, that among the "islands" belonging to Bahrain are several reefs, including Dibal, and "Qattah Jarada (an island)..."<sup>7</sup>. Similarly, while asserting that Fasht al-Azm is a low-tide elevation and is not in itself an island<sup>8</sup>, it nevertheless argues that it is an integral part of Sitrah island<sup>9</sup>.

7.7 In fact, Fasht al-Azm is a further illustration of the complexity of the southern sector: it is a large shoal, some 25 kilometres long, which dries in patches. Lying perpendicular to the general direction of Bahrain's eastern coast, it represents a considerable obstacle to navigation in the area, between the open sea to the north and the coast of Bahrain to the south of Sitrah island.

7.8 Bahrain asserts in its Memorial that this shoal is separated from Sitrah island only by a "narrow artificial channel, 3 metres deep, which was dredged in 1982"<sup>10</sup>. It may be noted however that Bahrain has not provided any evidence to show that prior to the dredging there existed no natural channel between Sitrah and Fasht al-Azm. In fact, as will be seen below, prior to that date there did exist a natural fishermen's channel which was filled in during reclamation work by Bahrain<sup>11</sup>. Consequently, Bahrain cannot argue that in its natural state Fasht al-Azm formed an integral part of Sitrah island.

7.9 Paragraph 606 of Bahrain's Memorial is quite frankly puzzling. Correctly anticipating Qatar's position, which is based on the law and State practice in the region, Bahrain asserts that:

"To describe the present delimitation as a delimitation between the coasts of two mainlands between which insular and other legally relevant maritime features are scattered would be seriously to distort the political and geographical relationship between the two countries"<sup>12</sup>.

For Bahrain, "the reality is quite different"<sup>13</sup>, yet it fails to explain why - leaving aside the question of the legal relevance of the features - such a delimitation would be a distortion of the "geographical relationship". Indeed, as has been seen, there are so many scattered islands, islets and other maritime features in the southern sector that any delimitation other than a mainland-to-mainland delimitation would be extremely difficult if not practically impossible.

Furthermore, it is in many instances extremely difficult to determine at any particular point of time whether the hydrographical characteristics of the features may or may not legally qualify them as low-tide elevations.

7.10 Finally, Qatar must point out a glaring omission in Bahrain's presentation of the southern sector. In attempting to push its baselines as close as possible to the coast of Qatar, Bahrain lists several low-tide elevations which, it claims, lie within 12 miles of the Bahraini mainland or of another feature claimed by Bahrain, the low-water lines of which "are therefore available to Bahrain for use as baselines"<sup>14</sup>. What Bahrain omits to say is that in *each* case the feature also lies within 12 miles of Qatar's mainland and that in several cases - a striking example is that of Qit'at ash Shajarah - the feature is closer to Qatar than to Bahrain.

## **Section 2. Historical circumstances**

7.11 Qatar has examined at length in its Memorial what appears as an important historical aspect of the question of maritime delimitation in the present case, namely the decision made by the British Government in 1947 concerning the delimitation and the resulting dividing line of the sea-bed between the two countries<sup>15</sup>. In contrast to this, the Bahrain Memorial contains hardly a single word about it. In Qatar's submission, that pre-existing sea-bed dividing line constitutes a highly relevant factor for the delimitation in the southern sector.

### **A. The silence of Bahrain concerning the 1947 line**

7.12 Bahrain refers directly only once in its Memorial to the British decision of 23 December 1947 when it refers to that decision as being merely a statement of Britain's "views as to the maritime delimitation between the Parties"<sup>16</sup>. Later on, there are only two other indirect references to the British decision<sup>17</sup>. Bahrain is very discreet on the subject and unwilling to mention the decision as such. Indeed, it carries its discretion so far as to refrain from even producing the text of the British Political Agent's letter dated 23 December 1947 by which the Ruler of Bahrain was informed of the decision arrived at by the British Government concerning the division of the sea-bed between Qatar and Bahrain<sup>18</sup>.

7.13 The silence of Bahrain in its Memorial concerning the 1947 line is still more surprising given that in 1961 the Ruler of Bahrain tried to obtain from the British Government a revision of the 1947 decision and suggested a new dividing line in a Memorandum dated 8 August 1961<sup>19</sup>, a suggestion that the British Government was not prepared to accept<sup>20</sup>.

### **B. The relevance of the pre-existing sea-bed dividing line**

7.14 As already indicated in Qatar's Memorial, there is evidence of a trend in State practice whereby pre-existing continental shelf boundaries are used to delimit a subsequent all-purpose single maritime boundary<sup>21</sup>. It will now be demonstrated that such a trend supports Qatar's submission according to which part of the 1947 sea-bed dividing line could be transformed into an all-purpose boundary, and more particularly into a territorial sea boundary in the southern sector of the delimitation area.

#### **1. The taking into account of a pre-existing delimitation in the drawing of an all-purpose maritime boundary**

7.15 Among several examples of delimitation agreements to be found in State practice, the Exchange of Notes between Turkey and the USSR on the Delimitation of the Exclusive Economic Zone in the Black Sea, dated 23 December 1986 and 6 February 1987, was a typical example of the trend referred to above. Through that exchange of notes, the two countries agreed that the boundary line of their continental shelf, determined by an agreement signed on 23 June 1978, should be valid for the delimitation of their respective exclusive economic zones, thus becoming a single delimitation line<sup>22</sup>. Another illustration may be found in a series of agreements concluded between Finland and the USSR: after having signed two agreements concerning the boundaries of their continental shelves in the Gulf of Finland and the North Eastern part of the Baltic Sea, dated respectively 20 May 1965 and 5 May 1967<sup>23</sup>, the two parties used those continental shelf boundaries as delimitation lines for their respective fishing zones by an agreement signed on 25 February 1980<sup>24</sup>; and finally, on 5 February 1985, they agreed to convert those previously established boundary lines into an all-purpose single maritime boundary<sup>25</sup>.

7.16 The same trend exists in the practice of the Gulf States and is regarded by both Qatar and Bahrain as applicable to the present case with respect to the previous continental shelf delimitation agreements they have each concluded with Iran<sup>26</sup>.

7.17 The trend towards single maritime boundaries coinciding with prior continental shelf delimitation lines indicates how, in general, States decide, either for practical or legal reasons, to transform what may initially have been a sea-bed dividing line into a multipurpose maritime boundary. The same reasons that induce States to transform a continental shelf boundary into a single maritime boundary apply also when it is a question of converting a pre-existing continental shelf delimitation into a territorial sea boundary. This is clearly illustrated by the United Kingdom-France agreement of 2 November 1988 modifying the status of their boundary in the Straits of Dover: following the extension of the United Kingdom's territorial sea to 12 nautical miles on 1 October 1987, they decided to transform the relevant part of the continental shelf boundary, determined by an agreement signed on 24 June 1982, into a territorial sea boundary<sup>27</sup>.

7.18 It must however be recognised that a pre-existing delimitation line is not always automatically converted into a boundary for other jurisdictional purposes, but is sometimes simply given special consideration. This was done for example in the Convention between France and Italy signed on 28 November 1986 for the Delimitation of the Maritime Boundaries in the Area of the Strait of Bonifacio<sup>28</sup>.

7.19 That is an example which Qatar submits should be followed in the present case with respect to the role to be played by the sea-bed dividing line described in the 1947 British decision<sup>29</sup>. In the southern sector of the delimitation area, where the single maritime boundary will be a territorial sea boundary, Qatar submits that the delimitation has to be made with due regard to the 1947 line.

## **2. The precedent of the maritime delimitation between Venezuela and Trinidad and Tobago, an archipelagic State**

7.20 If, contrary to Qatar's submission<sup>30</sup>, the Court were to take account of Bahrain's archipelagic claim, this would not preclude the Court from drawing the single maritime boundary with due regard being paid to the 1947 sea-bed dividing line. This conclusion is supported by the agreements signed on 4 August 1989 and 18 April 1990 between Venezuela

and Trinidad and Tobago that have determined a single maritime boundary which, in the Gulf of Paria, is partly based, with some technical changes, on the delimitation line drawn for the sea-bed by the well-known Treaty of 26 February 1942 between the United Kingdom and Venezuela relating to the submarine areas of the Gulf of Paria<sup>31</sup>. It is noteworthy that by an Act of 11 November 1986, Trinidad and Tobago declared itself an archipelagic State, with baselines drawn around the component islands, including the Dragon's Mouth islands at the northern entrance of the Gulf of Paria<sup>32</sup>, and that that archipelagic claim did not prevent the pre-existing sea-bed delimitation from being taken into consideration.

### **Section 3. The maritime boundary in the southern sector**

7.21 Qatar and Bahrain agree on the law applicable to the maritime delimitation in the southern sector. Both of them consider that the rule enunciated in Article 15 of the 1982 Convention on the Law of the Sea is at present "part of customary international law"<sup>33</sup> or "is generally accepted"<sup>34</sup>. Accordingly, they both admit that the equidistance method or the median line is the "first step"<sup>35</sup> or the "starting point"<sup>36</sup> for the drawing of the boundary dividing their respective territorial seas in that sector.

7.22 However, the Parties disagree on the practical method of applying the rule. Bahrain asserts that it is first necessary to define the baselines of the two countries' coasts for determining the points that generate the median line<sup>37</sup>, and that account has to be taken for that purpose of all the maritime features which in Bahrain's view are all under Bahrain's sovereignty<sup>38</sup>. Then, according to Bahrain, the determination of the median line would be a purely technical matter<sup>39</sup>, and "no exceptional circumstances" would justify any adjustment or modification of the median line<sup>40</sup>. In order to sustain such an assertion, Bahrain goes so far as to state that there is no disparity or disproportion between the coastal lengths and that "[t]he two States' coastlines have similar characteristics"<sup>41</sup>.

7.23 Bahrain's presentation completely distorts the geographical facts which characterise the southern sector, as well as the legal significance of factors like baselines in relation to an inter-State maritime delimitation process. In reality, having regard to the natural geographical situation in the southern sector, only a mainland-to-mainland delimitation is practically possible.

#### **A. Mainland-to-mainland delimitation: general considerations**

##### **1. The rationale of using the mainland coasts in a territorial sea delimitation between States having opposite coasts**

7.24 There are probably two situations where the delimitation line between two opposite coasts should *prima facie* be a median line calculated from mainland to mainland: either when the maritime area to be delimited does not include any island or any other similar feature, or on the contrary when that area is dotted with a great number of small islands, islets, rocks, reefs and shoals. The first situation speaks for itself and is self-explanatory. The second one renders it impossible to rely on countless maritime features for the drawing of a boundary line which would satisfy both the requirement of simplicity and the aim of arriving at an equitable result. That requirement and that aim form the basis of the security and stability of any maritime boundary. This is particularly important in a relatively restricted maritime area where there is no room to compensate, and even more so when the status of numerous maritime features is uncertain both in terms of legal characterisation as islands or low-tide

elevations and in terms of their appurtenance. In such a situation, the boundary line can only be drawn from the mainland coasts of the two States involved.

7.25 The basic reason for a mainland-to-mainland delimitation lies in the security interests of the two States concerned. That reason is reinforced in the case of a territorial sea delimitation, for the territorial sea is mainly a maritime security belt for coastal States. In fact, "security interests are most prominent in dealing with maritime boundaries close to the coast"<sup>42</sup>. Such a preoccupation generally induces State practice and the jurisprudence to avoid the drawing of the boundary line too close to the coast of one of the parties. Thus, while using a negative form, the Court stated in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*:

"the delimitation which will result from the application of the present Judgment is... not so near to the coast of either Party as to make questions of security a particular consideration in the present case"<sup>43</sup>.

It may be recalled that the Court had here noted that even though "security considerations are of course not unrelated to the concept of the continental shelf", the case submitted to it did not raise "the question whether the law at present attributes to the coastal State particular competences in the military field over its continental shelf"<sup>44</sup>. When, as here in the southern sector, the delimitation involves the territorial sea, those considerations become all the more important.

## 2. The consequences

7.26 It follows that, in the delimitation process, no account is to be taken of tiny islets, rocks and shoals scattered in a relatively restricted area of shallow sea, because they may be regarded as insignificant or unusual, if not distorting, features. These characteristics undeniably apply to numerous small features lying in the southern sector in this case. They are insignificant features as compared to islands of a larger size presenting some social, economic or political importance. They are unusual features insofar as they are not closely linked to the coast of either Party, and particularly to the main Bahrain island. They may be distorting features because of their potential effect on the course of the eventual maritime boundary. But their unusual or even extraordinary character is also obvious in the light of the short distance between the two opposite mainland coasts.

7.27 When claiming that full effect should be given to all the maritime features lying in the delimitation area<sup>45</sup>, Bahrain's attitude is based upon an approach which is inconsistent with the law of maritime delimitation as revealed in State practice and the jurisprudence. In no case has a small islet been given the same effect as the mainland coast in drawing a median line vis-à-vis an opposite mainland coast. And the taking into account of an island and the effect given to it closely depend on its location, size and importance. Even an island State such as Malta did not receive full effect vis-à-vis Libya in the Court's Judgment of 3 June 1985. Therefore, when the so-called relevant maritime features qualify only as low-tide elevations<sup>46</sup>, they are to be ignored in the delimitation process. This is all the more evident in the present case where the maritime boundary proposed by Bahrain in the southern sector, either in its principal claim or in its alternative claim, is an illustration of what surely cannot be done, as is quite clear from maps 8 and 14 appended to Bahrain's Memorial. In either circumstance, the Bahraini line is located in the immediate vicinity of Qatar's coast. It is even drawn so close to that coast that it would certainly create - if it were to be adopted - serious problems

concerning the security interests of the State of Qatar. As was said by the arbitral tribunal in the *Guinea/Guinea-Bissau* arbitration, it is essential "à assurer à chaque Etat le contrôle des territoires maritimes situés en face de ses côtes et dans leur voisinage" and in order to avoid that "pour une raison ou pour une autre, une des Parties voie s'exercer en face de ses côtes et dans leur voisinage immédiat des droits qui pourraient... compromettre sa sécurité"<sup>47</sup>. Therefore, Qatar must firmly stress its grave concern about the implications of Bahrain's claimed line in the southern sector for its national security.

## **B. Application of the mainland-to-mainland method in the present case**

7.28 The agreement between the Parties as to the drawing of a provisional median line<sup>48</sup> is more apparent than real, for they hold differing views with respect to the means of establishing that line. While Bahrain claims that such a line is to be drawn from the respective territorial sea baselines<sup>49</sup>, Qatar submits that only the two main coasts are to be taken into consideration for this purpose and that the provisional median line is to be calculated from those coasts. In addition, Qatar submits that the provisional median line thus calculated then has to be adjusted in order to take into account and to reflect the relevant circumstances of the particular case, including geographical and historical circumstances.

### **1. The provisional median line**

7.29 Bahrain relies on the rule expressed in Article 15 of the 1982 Law of the Sea Convention, which it regards as being expressive of customary international law<sup>50</sup>. It states that there exists an identity between that rule, on the one hand, and the equidistance-special circumstances rule set out in Article 6 of the 1958 Continental Shelf Convention. It also finds a similar identity between that rule and the customary rule applicable to maritime delimitations not governed by those conventions<sup>51</sup>. Qatar does not wish to challenge that statement, but it finds it necessary to make the following observation.

7.30 Under the Geneva Convention on the Continental Shelf, "the obligation to apply the equidistance principle is always one qualified by the condition 'unless another boundary line is justified by special circumstances'", as was stated by the Anglo-French Court of Arbitration in 1977 when it referred to the existence of a combined equidistance/special circumstances rule<sup>52</sup>. And the Court has recently underlined that the concept of special circumstances "was and remains linked to the equidistance method", and that it includes "those circumstances which might modify the result produced by an unqualified application of the equidistance principle"<sup>53</sup>. However, the rule in Article 15 of the 1982 Convention makes it clear that the special circumstances clause may be linked not only to the equidistance principle itself, but also to the manner of calculating the median line. As a matter of fact, the second sentence of that Article specifies that special circumstances may justify the drawing of a line "in a way which is at variance" with the first sentence as a whole, which provides for the equidistance line to be drawn "from the nearest point[s] on the baselines". Moreover, on several occasions, in applying the equidistance method the jurisprudence in the field of maritime delimitation has not used the baselines used for measuring the breadth of the territorial sea<sup>54</sup>.

7.31 In the present case, Qatar submits that the provisional median line must be drawn from relevant points on the two mainland coasts and not, as Bahrain asserts, from the baselines claimed by Bahrain<sup>55</sup>.

#### **a) The provisional median line cannot be drawn from the baselines claimed by Bahrain**

7.32 The basic reason which should lead the Court to draw a provisional median line independently of the baselines for measuring the breadth of the territorial sea is derived from the fact that basepoints used for delimiting a maritime boundary between two States with opposite coasts may well differ from the baselines for measuring the breadth of their respective territorial seas. In addition, for the delimitation of a maritime boundary effected by an international tribunal, the task of the tribunal is not to split the difference between the two extreme claims, but to arrive at an equitable solution.

#### (i) Basepoints used for delimitation purposes

7.33 According to a general trend in the jurisprudence concerning maritime delimitation since the *North Sea Continental Shelf* cases, basepoints used for delimiting maritime areas between two States do not necessarily coincide with the baselines and basepoints from which the breadth of the territorial sea is measured, and they have in fact been regularly treated as distinct from the latter<sup>56</sup>.

7.34 In the *Tunisia/Libya Continental Shelf* case, the Court did not take account of the straight baselines claimed by Tunisia and said that it was "not making any ruling as to the validity or opposability to Libya of the straight baselines"<sup>57</sup>. Furthermore, concerning the element of a reasonable degree of proportionality between the extent of the continental shelf appertaining to the coastal States involved and the length of the relevant part of their coasts, the Court stated that "the element of proportionality is related to lengths of the coasts of the States concerned, not to straight baselines drawn round those coasts"<sup>58</sup>.

7.35 In the *Gulf of Maine* case, the Chamber of the Court, when objecting to the possibility of making use of the method defined in Article 6 of the Continental Shelf Convention, pointed out that:

"a line drawn in accordance with the indications given by that provision... might well epitomize the inherent defects of a certain manner of interpreting and applying the method here considered...; inasmuch as the likely end-result would be the adoption of a line all of whose basepoints would be located on a handful of isolated rocks, some very distant from the coast, or on a few low-tide elevations: these are the very type of minor geographical features which, as the Court and the Chamber have emphasized, should be discounted..."<sup>59</sup>.

As has been made clear by one of the commentators of that decision, the position thus adopted by the Chamber was perfectly explicit:

"des accidents géographiques qui ont pu (ou pourraient) être pris légitimement, au regard du droit international, comme points de base pour la mer territoriale, peuvent ne pas être appropriés comme points de base pour une délimitation"<sup>60</sup>.

7.36 In the *Libya/Malta Continental Shelf* case, when the Court decided to proceed with the drawing of a median line as a provisional step, it considered that it could not construct that line from straight baselines on the Maltese coast, in particular those connecting the island of Malta to the uninhabited islet of Filfla, for the reason that "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>61</sup>. Therefore, although Filfla islet was used as a basepoint for the drawing of the Maltese baselines, the

Court found it equitable "not to take account of Filfla in the calculation of the provisional median line between Malta and Libya"<sup>62</sup>.

7.37 The position thus taken by the Court, according to which basepoints used for delimitation purposes are selected independently of the baselines of the territorial sea, has also been followed in the international arbitral jurisprudence. Thus the 1977 decision of the Anglo-French Court of Arbitration made a clear-cut distinction between the two categories when it stated:

"The Court does not possess any competence to determine base-points as such, but only for the purpose, and in the course, of discharging its task... of delimiting the boundary of the continental shelf as between the Parties within the arbitration area"<sup>63</sup>.

In the Guinea/Guinea-Bissau Arbitration, no reference was made to the baselines of the territorial sea. The award of 14 February 1985 stated that:

"Le problème des lignes de base nécessaires pour établir la limite de 200 milles reconnue par les Parties comme régissant leur zone économique exclusive n'intéresse pas directement le Tribunal, car ces lignes relèvent de la décision unilatérale des Etats intéressés"<sup>64</sup>.

Nevertheless, the arbitral tribunal observed that any line of equidistance would have given, "[a]u voisinage des côtes... une importance exagérée à certains accidents non significatifs du littoral... [et] produire[ait] un effet d'amputation"<sup>65</sup>.

7.38 In reviewing that jurisprudence, one author has recently considered that, from the mere fact that a straight line joining two or more points is - or might be - used legitimately as a baseline for measuring the breadth of the territorial sea and other maritime jurisdictional zones of a State, it cannot be inferred that that line must necessarily be taken by a judge or an arbitrator as a basis for drawing a maritime boundary between that State and a neighbouring State whose coasts are adjacent or opposite. Similarly, from the fact that an island, an islet, a rock, or a low-tide elevation may be regarded as generating its own territorial sea or as legally entitled to be incorporated in the baselines of the territorial sea of a State, it does not follow that, for that reason only, such an island, islet, rock, or low-tide elevation is to be considered as an appropriate basepoint for the construction of a delimitation line between the interested State and another State whose coasts are opposite or adjacent<sup>66</sup>.

**(ii) The Court's task is not "to split the difference" between the two extreme claims**

7.39 In its most recent judgment on the subject of maritime delimitation, the Court has recognized that "[t]he 'area of overlapping claims'... between the two lines representing the Parties' claims, is of obvious relevance to any case involving opposed boundary claims"<sup>67</sup>. However, the Court immediately added:

"But maritime boundary claims have the particular feature that there is an area of overlapping entitlements, in the sense of 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>68</sup>.

7.40 The southern sector of the delimitation area in the present case has some parallels with what was called "the area of overlapping potential entitlement" in the above-mentioned case<sup>69</sup>. In the southern sector, the Qatari western coast, no less than Bahrain's eastern coast, generates

a potential title to a 12-mile territorial sea. To recognize that the opposite Bahraini coast could there be represented by a series of points located on various features separate from Bahrain's mainland coast and close to Qatar's coast would run wholly counter to the rights of Qatar in that sector. As a matter of fact, it would amount to negating Qatar's entitlement to a territorial sea.

7.41 In the southern sector, where the sea area is restricted and the water shallow and where shoals and reefs are numerous, to take these features into account and particularly to use low-tide elevations scattered throughout the zone as basepoints for delimitation would give them a disproportionate and distorting effect in an area where the respective territorial waters overlap. It would deprive the concept of territorial sea belt of any effect and would achieve an unreasonable result. It would moreover be contrary to the general practice in the Gulf which has been to give preference to drawing median lines as between mainland coasts, only taking into account, where necessary, large islands forming an integral part of the coastal front<sup>70</sup>.

#### **b) The drawing of the provisional median line from relevant points on the two mainland coasts**

7.42 If it is accepted, as Qatar submits, that the provisional median line is to be drawn from appropriate points located on the mainland coasts of the two States, the only question to be solved is a technical one. It consists in selecting the relevant points on the eastern coast of Bahrain and on the western coast of Qatar (including the Hawar islands - on the assumption that the Court will recognize Qatar's sovereignty over those islands).

7.43 As indicated on *Map. No. 5* facing this page, the provisional median line in the southern sector, up to the closing line of the two sectors, is constructed by reference to 12 basepoints located on the high water line of the Bahraini coast and 14 basepoints located on the high water line of the Qatari coast. The resulting median line comprises a series of 18 turning points in that sector. However, the line is a provisional one, insofar as the geographical and historical circumstances of the area make certain adjustments to it necessary.

### **2. The adjustment of the median line**

7.44 In support of the view that its own highly questionable provisional median line<sup>71</sup> does not require any adjustment or shifting, Bahrain considers that "no exceptional circumstances - historical or of any other nature - justify modifying the median line in the southern sector"<sup>72</sup>. This statement, made in the context of Bahrain's principal claim, is repeated in the framework of its alternative claim: "in the circumstances of the present case no adjustment... is called for"<sup>73</sup>. However, Bahrain has produced no explanation or justification for this position beyond stating that "there is no 'disparity or disproportion between the coastal lengths'" and that "[t]he two States' coastlines have similar characteristics"<sup>74</sup>.

7.45 Contrary to Bahrain's assertion, there is in the present case some disparity between the lengths of the two opposite mainland coasts. As shown in the Qatar Memorial, the length of the relevant coast of Bahrain, measured in its general direction from Ras al Barr in the south to the northern tip of Muharraq, is around 29.9 nautical miles or 55.5 kilometres, while the relevant coast of Qatar, measured in its general direction from Ras Uwaynat in the south to Ras Rakan in the north, is about 47.6 nautical miles or 88.2 kilometres. Thus, the ratio between the two coastal fronts, measured following their general direction, is 1:1.59 in favour of Qatar<sup>75</sup>.

7.46 According to the jurisprudence of the Court, such a disproportion might be reflected in the location of the boundary line, as was done in the *Gulf of Maine* case, where the ratio between the coastal fronts was 1:1.38. The Chamber of the Court considered that such a disparity justified in itself the shifting of the median line<sup>76</sup>. And it made a general remark in that respect:

"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. In the Chamber's opinion, the need to take this aspect into account constitutes a valid ground for correction, more pressing even than others..."<sup>77</sup>.

The Court has recently reaffirmed that "the disparity between the lengths of coasts... constitutes a special circumstance"<sup>78</sup>.

7.47 If a significant difference between the lengths of the relevant coasts is a special circumstance which may justify the adjustment of the provisional median line, the consequence in the present case would be a shifting of that line closer to the coast of Bahrain, *i.e.* its transposition in a westward direction. And one can paraphrase here what the Court said in the *Libya/Malta Continental Shelf* case: "Once it is contemplated that the boundary requires to be shifted [westward] of the median line between [Qatar and Bahrain], it seems appropriate first to establish what might be the extreme limit of such a shift"<sup>79</sup>.

7.48 The limit of the transposition of the provisional median line in the present case is, subject to what is said in paragraph 7.49 below, provided by the pre-existing dividing line decided in 1947 by the British Government. That line is in Qatar's view another special or relevant circumstance<sup>80</sup>. It constitutes a historical circumstance which is to be combined with the geographical circumstance of the disparity between coastal lengths<sup>81</sup>.

### **C. The taking into account of the 1947 line**

7.49 As underlined in Qatar's Memorial, "the 1947 line is now certainly an important factor to be taken into account for the purpose of drawing the single maritime boundary"<sup>82</sup>. The Court will remember that, in the view of Qatar, only the part of that line extending northward from point L up to BLV is to be regarded as relevant<sup>83</sup>. Qatar does not need to repeat in the present Counter-Memorial what has been explained and demonstrated in its Memorial concerning the necessity of disregarding the portion of the 1947 line enclaving the Hawar islands, on the assumption that those islands are recognized by the Court as appertaining to Qatar<sup>84</sup>. Nor is it necessary to revert to what has been said about the southernmost segment of the 1947 line, which must equally be disregarded<sup>85</sup>.

7.50 The adjustment of the provisional median line between Qatar and Bahrain by shifting it until it meets the 1947 line, in order to draw the single maritime boundary along that line, north of point L, will generate a reasonable and equitable boundary line. The fundamental norm of any maritime delimitation is recognized today as being the norm of an equitable result, whatever may be the practical method or methods used to reach such a result, whether under customary international law or under conventional rules. This was the idea that appears to have been at the basis of the 1947 British decision. Thus, referring to the line laid down at

that time, in a letter dated 14 May 1951 to the Ruler of Bahrain, the Political Agent stated that:

"[t]his line was determined in accordance with equitable principles after careful examination of Your Highness' claims and of those of the Ruler of Qatar and is the only line recognised by His Majesty's Government"<sup>86</sup>.

As demonstrated in Qatar's Memorial, the method applied at that time was pursuant to the general aim of arriving at an equitable solution. In order to achieve that aim, the British authorities gave exclusive consideration to the two mainland coasts of Qatar and Bahrain, selected certain fixed turning points, and drew a simplified line<sup>87</sup>.

7.51 It is noteworthy that the 1947 line was drawn in such a way as to satisfy the requirement of simplicity, thus avoiding the construction of "a line which, on account of the refinements in the technical method used to determine its course, follows a complicated or even a zigzag path, made up of a succession of segments on different bearings"<sup>88</sup>. In these circumstances, the adjustment of the provisional median line and the alignment of the maritime boundary on the 1947 line north of point L would have the effect of simplifying the course of the boundary line, since between point L and NSLB the 1947 line is a straight line. And in a maritime area like the southern sector, characterized by short distances and the presence of numerous shoals and rocks, it is important to have a boundary line that is as simple as possible. The boundary line now claimed by Bahrain as a median line, using either archipelagic or normal baselines, does not fulfil the requirement of simplicity.

7.52 As shown on *Map No. 6* facing the previous page, the taking into account of the 1947 line would involve a shift westward of the provisional median line to the north of point X, which is the point of intersection of the 1947 line and the provisional median line. South of point X, and as far as point L of the 1947 line, the provisional median line would have to be shifted eastward. The adjusted line would thus be the 1947 line north of point L, while south of that point it would be the segment L-S1<sup>89</sup>. The resulting single maritime boundary requested by Qatar in the southern sector was depicted on Map 16 of the Memorial and is reproduced on *Map No. 7* facing this page.

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1 *See*, paras. 6.71, *et seq.*, above.

2 *See, ibid.*

3 BM, para. 567.

4 BM, para. 606.

5 *See*, paras. 6.12, *et seq.*, above.

6 *See*, BM, paras. 589, *et seq.*

7 BM, para. 581.

8 BM, para. 626.

9 BM, para. 620.

10 *Ibid.*

11 *See*, paras. 8.48, *et seq.*, below.

12 BM, para. 606.

13 *Ibid.*

14 BM, para. 626.

15 QM, Chaps. X and XI.

16 BM, para. 40.

17 BM, paras. 569 and 574.

18 QM, Annex IV.116, Vol. 10, p. 75.

19 *See*, QM, paras. 10.34, *et seq.*, and QM, Annex IV.254, Vol. 12, p. 17.

20 *See*, QM, Annex IV.245, Vol. 11, p. 411.

21 QM, para. 11.17; *see*, also, B. Oxman, "Political, Strategic and Historical Considerations", *in* Charney & Alexander (eds.), *op. cit.*, Vol. I, p. 4, (in particular pp. 34-36).

22 Charney & Alexander (eds.), *op. cit.*, Vol. II, pp. 1701-1707.

23 *Ibid.*, pp. 1959-1969 and 1971-1978.

24 *Ibid.*, pp. 1979-1987.

25 *Ibid.*, pp. 1989-1996.

26 QM, paras. 12.8-12.9, 12.37, *et seq.*, and 12.41-12.42; BM, paras. 637, 651 and 655.

27 Charney & Alexander (eds.), *op. cit.*, Vol. II, pp. 1752-1753.

28 *Ibid.*, pp. 1571-1580.

29 QM, para. 11.19.

30 *See*, paras. 6.57, *et seq.*, above.

31 QM, Annex IV.72, Vol. 9, p. 349. *See*, also, Charney & Alexander (eds.), *op. cit.*, Vol. I, pp. 639-689.

32 Charney & Alexander (eds.), *op. cit.*, p. 668. *See*, *Map No. 4* facing this page.

33 QM, para. 11.36.

34 BM, para. 609.

35 QM, para. 11.37.

36 BM, paras. 614 and 691 (concerning "the alternative maritime boundary" claimed by Bahrain).

37 BM, para. 615.

38 BM, para. 619.

39 BM, para. 615.

40 BM, paras. 631 and 694.

41 BM, para. 631.

42 Oxman, *op. cit.*, QCM, Annex IV.51, Vol. 4, p. 397, at p. 400.

43 *I.C.J. Reports 1985*, p. 42, para. 51.

44 *Ibid.*

45 BM, paras. 619, *et seq.*, and 689.

46 *See*, paras. 6.79, *et seq.*, above.

47 QCM, Annex IV.33, Vol. 4, p. 265, at p. 267 and p. 271.

48 *See*, para. 6.3, above.

49 *See*, para. 7.22, above.

50 BM, para. 609.

51 BM, paras. 610-611.

52 Para. 70 of the decision of 30 June 1977 (QCM, Annex IV.34, Vol. 4, p. 273, at pp. 281-282), quoted by the Court in its Judgment of 14 June 1993, *I.C.J. Reports 1993*, pp. 60-61, para. 51.

53 *I.C.J. Reports 1993*, p. 62, para. 55.

54 *See*, paras. 7.33, *et seq.*, below.

55 *See*, QM, para. 11.37.

56 *See*, 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*, Dordrecht/Boston/London, 1992, Vol. I, QCM, Annex IV.56, Vol. 4, p. 429, in particular pp. 434-442.

57 *I.C.J. Reports 1982*, p. 76, para. 104.

58 *Ibid.*

59 *I.C.J. Reports 1984*, p. 332, para. 210.

60 Weil, "A propos de la double fonction des lignes et points de base dans le droit de la mer", *op. cit.*, QCM, Annex IV.56, Vol. 4, p. 429, at p. 441.

61 *I.C.J. Reports 1985*, p. 48, para. 64.

62 *Ibid.*

63 Para. 19 of the decision, QCM, Annex IV.34, Vol. 4, p. 273, at p. 279.

64 QCM, Annex IV.33, Vol. 4, p. 265, at p. 268.

65 *Ibid.*, at p. 279.

66 Weil, "A propos de la double fonction des lignes et points de base dans le droit de la mer", *op. cit.*, QCM, Annex IV.56, Vol. 4, p. 429, at p. 442:

"Il ne suffit donc pas qu'une ligne droite reliant deux ou plusieurs points serve (ou puisse servir) légitimement de ligne de base à un calcul de la largeur de la mer territoriale et des autres juridictions maritimes d'un Etat pour que cette ligne doive nécessairement être retenue par le juge ou l'arbitre comme base pour le tracé d'une délimitation maritime entre cet Etat et un Etat voisin dont les côtes sont adjacentes aux siennes ou leur font face.

Il ne suffit pas non plus qu'un point saillant de la côte, une île, un îlot, un rocher, un haut-fond découvrant, puisse être considéré comme engendrant une mer territoriale propre ou comme susceptible juridiquement de faire partie des lignes de base de la mer territoriale d'un Etat donné pour que, pour cette seule raison, ce saillant, île, îlot, rocher, haut-fond découvrant soit à regarder comme un point de base approprié pour la construction d'une ligne de délimitation entre l'Etat intéressé et un autre Etat dont les côtes font face aux siennes ou lui sont adjacentes".

67 Case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *I.C.J. Reports 1993*, p. 64, para. 59.

68 *Ibid.*

69 *Ibid.*, p. 47, para. 19 and p. 64, para. 59.

70 *See*, QM, para. 11.37.

71 Qatar considers that the median line suggested by Bahrain is unacceptable for the reasons given in paras. 7.31, *et seq.*, above.

72 BM, para. 631.

73 BM, para. 694.

74 BM, para. 631.

75 QM, para. 12.32. *See*, also, para. 8.101, below. Due to a technical error, slightly different lengths were given in para. 9.5 of Qatar's Memorial.

76 *I.C.J. Reports 1984*, p. 336, para. 222.

77 *Ibid.*, p. 323, para. 185.

78 Case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *I.C.J. Reports 1993*, pp. 68-69, para. 68.

79 *I.C.J. Reports 1985*, p. 51, para. 72.

80 *See*, QM, paras. 11.35, *et seq.*

81 *See* QM, para. 10.21.

82 QM, para. 11.3. *See*, also, QM, para. 11.19.

83 QM, para. 11.34.

84 QM, paras. 11.21, *et seq.*

85 QM, paras. 11.27, *et seq.*

86 QM, Annex IV.193, Vol. 10, p. 473, at p. 476.

87 *See*, QM, paras. 10.16, *et seq.*

88 Judgment of 12 October 1984, *Gulf of Maine case*, *I.C.J. Reports 1984*, p. 330, para. 202.

89 *See*, QM, para. 11.33 and QM, Map 16, Vol. 17.

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## CHAPTER VIII

### THE SINGLE MARITIME BOUNDARY IN THE NORTHERN SECTOR

#### Section 1. General remarks

8.1 According to Bahrain, the maritime delimitation in the northern sector is to be made in the area lying "to the north of the line from Fasht ad Dibal to Ra's Rakan"<sup>1</sup> up to the continental shelf boundary determined by the agreement concluded on 20 September 1969 between Qatar and Iran<sup>2</sup>. Bahrain claims a dividing line linking points O, Q, R, S, T, U and Z (*see, Map No. 8, facing this page*)<sup>3</sup>. However, the superficial discussion that Bahrain devotes to an attempt to justify this line in its Memorial<sup>4</sup> suffers from two main defects: first, there are surprising omissions; and second, the result is a clearly inequitable delimitation.

## **A. The omissions in the Bahrain Memorial**

8.2 As already noted<sup>5</sup>, one of the most significant omissions is that Bahrain's Memorial contains only a few discreet allusions to the British decision of 23 December 1947<sup>6</sup>. However, it is difficult to ignore this decision as a relevant circumstance, since it is an important element in the delimitation not only in the southern sector, but also in the northern sector. As Qatar has already shown<sup>7</sup>, a large part of the maritime area lying to the north of a line drawn between the northernmost points of Al Muharraq and the Qatar peninsula has already been delimited, by that same British decision, between points N, NSLB and BLV<sup>8</sup>. This is therefore a very strange omission on the part of Bahrain, which can hardly be explained other than by a desire to disregard or forget circumstances which it finds embarrassing.

8.3 The Court will also note Bahrain's second omission concerning the Memorandum sent on 16 August 1961 by the Ruler of Bahrain to the British Government, seeking a revision of the 1947 British decision<sup>9</sup>.

8.4 Finally, although Bahrain's Memorial deals, albeit incompletely, with oil development in the southern sector where Qatar and Bahrain are opposite each other<sup>10</sup>, it remains silent as to the history of the petroleum permits granted by Qatar and Bahrain in the northern sector. This omission is no doubt largely due to the fact that Bahrain's oil activities in the northern sector have always been located to the west of the dividing line N, NSLB, BLV, 2 (2B) claimed by Qatar<sup>11</sup>, with the exception of the Athari 1 well, which lies just to the east of the BLV-2 (2B) segment of that line<sup>12</sup>. It may also be explained by the fact that the western limit of the concession granted by Qatar to Wintershall in 1973 also undermines Bahrain's claim based on alleged "historic rights to the pearling banks" in the northern sector<sup>13</sup>, and highlights the unreasonable nature of that claim.

## **B. The clearly inequitable nature of the maritime boundary claimed by Bahrain in the northern sector**

8.5 The dividing line claimed by Bahrain in the northern sector links points O, Q, R, S, T, U and Z<sup>14</sup>. *Map No. 8*, facing page 243<sup>15</sup> shows that Bahrain's claim is a maximalist claim and that its proposed delimitation would produce a wholly unreasonable and inequitable result. The method adopted by Bahrain, and the results thereof, take no account of the actual geographical situation nor, in particular, of the geographical relationship existing between the Parties to the present case. Bahrain's line makes no allowance for the normal seaward projection of Qatar's coasts, and encroaches upon the natural prolongation of Qatar in the geographical sense of the term. In this context, it is necessary to bear in mind the principle mentioned by the Arbitral Tribunal in its award of 14 February 1985 in the maritime boundary delimitation case between Guinea and Guinea-Bissau:

"Pour faire reposer une délimitation sur une base équitable et objective, il faut autant que possible chercher à assurer à chaque Etat le contrôle des territoires maritimes situés en face de ses côtes et dans leur voisinage"<sup>16</sup>.

8.6 Moreover, the first section of the maritime boundary claimed by Bahrain, linking points O, Q and R<sup>17</sup>, is untenable. The construction of the so-called "equidistance line", which rests upon a closing line between Dibal and Ras Rakan, is certainly not in conformity with the law of maritime delimitation. As has already been shown above, Dibal is not an appropriate basepoint for such a construction<sup>18</sup>. As the Parties agree<sup>19</sup>, Dibal is a low-tide elevation which,

given its geographical location, cannot be considered as an integral part of the coastline of Bahrain<sup>20</sup>.

8.7 The second section of the maritime boundary claimed by Bahrain in the northern sector, linking points R, S, T, U and Z<sup>21</sup>, is equally untenable<sup>22</sup>. Bahrain characterises this section as an adjustment made to the equidistance line on the basis of "Bahrain's historic rights to the pearling banks" lying to the north and north-east of Qatar. In fact, it is a significant modification made by Bahrain to the already unacceptable equidistance line<sup>23</sup>, to its own great advantage. This modification which, according to Bahrain, results from an allegedly relevant circumstance relating to sedentary fisheries that have not existed for more than half a century, a circumstance which has been consistently disregarded by the jurisprudence, is highly abusive. In its judgment of 12 October 1984, the Chamber strongly criticised Canada for advancing a similarly extreme modification in the *Gulf of Maine* case:

"... instead of taking into account other special circumstances which might be present in the area to be delimited and which might - with perhaps greater justification - have suggested the desirability, or even the necessity, of correcting the original line by displacing it towards the Nova Scotia coast, [Canada] only took into account a special circumstance which might operate in its favour and enable it to displace the line still more towards the opposite coast of Massachusetts"<sup>24</sup>.

Exactly the same is true of Bahrain in the present case.

8.8 Qatar will demonstrate that the maritime boundary claimed by Bahrain in the northern sector cannot be justified. Not only does it take no account of the geographical realities of the area, as will be seen in Section 3, but it has no legal basis whatsoever, as will be seen in Section 4. In Section 5 it will be shown that the delimitation proposed by Qatar is the only one to ensure an equitable result, in conformity with the applicable customary international law. However, it will first be shown, in Section 2, that there are some points of agreement between the Parties on this aspect of the case before the Court.

## **Section 2. Points of agreement between the Parties in the northern sector**

### **A. The Parties' agreement as to the nature of the dividing line to be determined by the Court**

8.9 It is hardly necessary to mention the first point upon which Qatar and Bahrain are in agreement with respect to maritime delimitation, which is that the Court is requested to draw a single maritime boundary<sup>25</sup>.

8.10 This agreement as to the necessity for a single dividing line naturally does not mean that there is agreement between the Parties as to its course nor as to the definition of the delimitation area in the northern sector. For Qatar, as already noted<sup>26</sup>, the relevant delimitation area in this sector is situated to the north of a closing line linking points RK and MQ, *i.e.* the northernmost points of the Qatar peninsula and of the island of Al Muharraq<sup>27</sup>, and the boundary has already been determined up to point BLV<sup>28</sup>; consequently, to the north of that point, the delimitation is entirely new. For Bahrain, as has also already been noted<sup>29</sup>, the delimitation area in the northern sector is quite different. From Bahrain's point of view, "[t]he northern sector... lies to the north of the line from Fasht ad Dibal to Ra's Rakan"<sup>30</sup>. It should be added that the Parties' disagreement as to the determination of the delimitation area

in the northern sector relates not only to its southern limit, corresponding to the closing line of the area where Qatar and Bahrain face each other directly, but also to the eastern and western, and even the northern limits, despite the Parties' agreement in principle that the existing delimitations between themselves and Iran<sup>31</sup> have to be taken into consideration, insofar as the determination of the points of intersection of the eastern and western limits with the northern limit is concerned<sup>32</sup>. The Court will in addition note that a large part of Bahrain's line in the northern sector is, in its most extreme segments<sup>33</sup>, to the east of the delimitation area as defined by Qatar.

## **B. The Parties' agreement to take into consideration the delimitation agreements with Iran**

8.11 The second point upon which Qatar and Bahrain are in agreement is that the continental shelf delimitation agreements concluded by them with Iran on 20 September 1969<sup>34</sup> and 17 June 1971<sup>35</sup>, respectively, must be taken into consideration. For Qatar, these agreements must be taken into account in order to achieve an equitable result in the maritime delimitation to be effected in the northern sector<sup>36</sup>. Similarly, for Bahrain, this delimitation has to be made "in the context of the existing agreements" concluded between the Parties and Iran<sup>37</sup>. Thus, for both Parties, the dividing line established by treaty with Iran in the central part of the Arabian-Persian Gulf cannot be disregarded in the present case, even though that dividing line concerns only the continental shelf<sup>38</sup>. It has an inevitable impact on the determination in the present case of the Qatar/Iran/Bahrain tripoint. Both Qatar<sup>39</sup> and Bahrain<sup>40</sup> claim, as the end-point of the maritime boundary in the northern sector, a point on the boundary established by the agreements that they concluded in 1969 and 1971 with Iran. But, naturally, this point is not the same: for Qatar, it is point 2 (2B) of the 1971 agreement between Bahrain and Iran<sup>41</sup>; for Bahrain, it is point 2 (2Q) of the 1969 agreement between Qatar and Iran<sup>42</sup>.

8.12 The Parties are also in agreement in acknowledging that these two continental shelf delimitation agreements raise a difficulty of interpretation for the determination of the segment of the dividing line where the Qatar/Iran and the Bahrain/Iran boundaries meet. In Qatar's view, these agreements of 1969 and 1971 defined neither point 1 of the Qatar/Iran boundary nor point 1 of the Bahrain/Iran boundary<sup>43</sup>. As for Bahrain, it considers that the "point of termination of the maritime boundary in each of these agreements is determined only by reference to an azimuth"<sup>44</sup>.

8.13 However, as already noted<sup>45</sup>, among the previous conventional delimitations to be taken into consideration, the Bahrain Memorial, unlike the Qatar Memorial<sup>46</sup>, does not mention the agreement on delimitation of the continental shelf concluded on 22 February 1958 between Saudi Arabia and Bahrain<sup>47</sup>. The dividing line laid down by that agreement is not, of course, as a whole a relevant circumstance for the maritime delimitation in the present case. Nevertheless, a part of it cannot be disregarded, *i.e.* the northernmost segment lying between point WB to the north of point S.14 of that boundary and point 4 of the Bahrain/Iran agreement of 1971, which coincides with the terminal point of the Saudi Arabia/Bahrain agreement of 1958, thus forming the Saudi Arabia/Bahrain/Iran tripoint<sup>48</sup>. This segment from WB to 4 (4B) is in fact the northern part of the western boundary of the area to be delimited between Qatar and Bahrain in the northern sector<sup>49</sup>. Therefore, from Qatar's point of view, it is necessary to take into consideration as a relevant circumstance the 1958 delimitation agreement between Saudi Arabia and Bahrain for the above-mentioned part of the dividing line, and in particular, as will be seen below, in order to make the proportionality calculations

which are necessary to test the equity of the maritime boundary claimed by Qatar in the northern sector<sup>50</sup>.

### C. The partial agreement of the Parties as to the law applicable to the present dispute

8.14 The third point upon which Qatar and Bahrain are in agreement, at least partially, concerns the law applicable to the maritime delimitation in the northern sector. For Qatar, it is quite clear that "the principles of customary international law relating to maritime delimitation, as identified *inter alia* by the jurisprudence, will... be applicable to the delimitation of the continental shelf and fishing zones in the northern sector"<sup>51</sup>. More precisely, Qatar has shown in its Memorial that three guidelines were naturally to be followed in delimiting the maritime areas situated to the north of point BLV. First, the delimitation must be made in accordance with the "fundamental norm" that equitable principles must be applied in drawing the dividing line and that all relevant circumstances must be taken into account in order to reach an equitable result<sup>52</sup>. Second, the principles applicable to the delimitation of maritime areas lying outside the Parties' territorial waters are the same, whether they are applied to the continental shelf, fishing zones or exclusive economic zones<sup>53</sup>. Finally, for the delimitation in the northern sector, particular attention should be paid to a principle that is constantly referred to in the jurisprudence, namely "equity does not necessarily imply equality"<sup>54</sup>.

8.15 Bahrain's position concerning the law applicable to the maritime delimitation in the northern sector is identical to Qatar's on certain essential points. First, Bahrain is in agreement with Qatar when Qatar "requests that the Court decide 'in accordance with international law'" and states that "[t]he Court is thus asked by the two parties to decide in law, and not *ex aequo et bono*"<sup>55</sup>. Bahrain is also in agreement with Qatar when it argues, like Qatar<sup>56</sup>, that neither the 1958 Geneva Conventions nor the 1982 Convention on the Law of the Sea are in force between the Parties, and when it infers from this fact that:

"The maritime delimitation in the present case therefore falls to be effected in accordance with the principles and rules of customary international law. The applicable legal principles and rules are contemporary legal principles and rules, as they are expressed in State practice, in the decisions of the Court and of international arbitral tribunals, and in provisions of international conventions which reflect the state of customary international law"<sup>57</sup>.

Finally, like Qatar<sup>58</sup>, and referring in particular to the Court's Judgment of 14 June 1993 in the *Denmark/Norway* case<sup>59</sup>, Bahrain argues that "the fundamental principle is that of the search for an equitable result"<sup>60</sup> and that it is necessary to take into consideration "the 'relevant circumstances' which customary international law requires to be taken into account in all maritime delimitations"<sup>61</sup>.

8.16 The concurrence of the Parties' positions as to the law applicable to the maritime delimitation in the northern sector is, however, not as complete as, *prima facie*, one might think. Indeed, in its discussion of this point, the Bahrain Memorial displays certain deficiencies to which Qatar must draw attention. Thus, whereas Qatar lays considerable emphasis upon the three universally acknowledged components of the "fundamental norm" concerning maritime delimitation - equitable principles, relevant circumstances and an equitable result<sup>62</sup> - and attributes equal value to them, Bahrain more or less disregards the first component, *i.e.* equitable principles, to which it refers only once, and then indirectly<sup>63</sup>. This reserve, which is quite unusual in cases of this kind, betrays a certain unease or hesitancy as

regards the basis of Bahrain's position. In fact, Bahrain is effectively ignoring certain significant considerations of equity. For example, Bahrain ignores even the most undisputed equitable principle with respect to which, as Professor Weil has stressed, "the courts are unanimous"<sup>64</sup>, namely the principle that "equity does not necessarily imply equality"<sup>65</sup>. Bahrain also ignores the equally well-established principle of non-encroachment which requires that the chosen method of delimitation must not leave one State with maritime areas extending across the coasts of the other State concerned<sup>66</sup>. Bahrain cannot, on the one hand, claim to be applying customary international law to the maritime delimitation operation in the northern sector and, on the other hand and at the same time, reject at least implicitly, or in any event disregard, certain of the most important rules of that law by its extreme claim in that same sector. Bahrain is in reality attempting, in its proposal for delimitation in the northern sector<sup>67</sup>, based upon its distorted statement of the applicable law, to "completely refashion nature" or to "totally refashion geography", contrary to the principles constantly reiterated in the jurisprudence of the Court<sup>68</sup>.

### **Section 3. The maritime boundary claimed by Bahrain in the northern sector fails to take "geographical realities" into account**

8.17 In its Memorial Bahrain gives only a superficial and incomplete picture of the geographical realities that are to be taken into consideration in making the maritime delimitation in the northern sector. This is so when it states that "the northern sector does not, unlike the southern sector, contain numerous insular and other legally relevant maritime features"<sup>69</sup>. It would have been more accurate to state that there are no islands, rocks or low-tide elevations to interrupt the uniformity of the sea-bed in the maritime areas lying off the north of Qatar and to the north of point BLV. Bahrain has omitted to mention that:

"... the sea-bed in that area is characterised by its geological and geomorphological unity. There is no fundamental discontinuity forming a sort of natural boundary to interrupt the extension of Qatar's continental shelf towards the north and north-west, or that of Bahrain's continental shelf towards the east and north-east"<sup>70</sup>.

8.18 Moreover, Bahrain's Memorial gives a one-sided and distorted picture of the geographical facts<sup>71</sup>, which are decisive for the maritime delimitation in the northern sector, and although their legal relevance has consistently been reiterated in the jurisprudence. As the Chamber recalled in its Judgment of 12 October 1984 in the case concerning maritime delimitation in the area of the Gulf of Maine, the identification of the relevant equitable principles and the choice of the practical methods of delimitation "are basically founded upon geography", and these methods must be "use[d] against a background of geography"<sup>72</sup>. This should naturally be understood to mean, as the Court noted in its Judgment of 3 June 1985 in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, "the general geographical context in which the delimitation will have to be effected"<sup>73</sup>. But above all, to use Professor Weil's words, one should be aware that "it is, of course, the physical aspect which has held the attention of the courts, to the point of becoming the most important relevant circumstance"<sup>74</sup>. And the same author expresses the same fundamental idea when he asserts that "There is... one circumstance which the courts are agreed *is* relevant: the *coastal geography*"<sup>75</sup>.

#### **A. Bahrain has wrongly characterised the delimitation to be performed in the northern sector**

8.19 In Bahrain's view, the delimitation to be performed in the northern sector "is a delimitation between adjacent, rather than opposite, coasts"<sup>76</sup>. This characterisation of the geographical situation in this area is a mere assertion made without any justification. In any event, it is not a proper analysis of the situation<sup>77</sup>. Indeed, the northern sector is quite clearly a prolongation of the southern sector, which is an obvious case of delimitation between States with opposite coasts. Nevertheless, "the delimitation in this area cannot be categorized as a delimitation relating to a situation of 'adjacent States'", yet the delimitation area in the northern sector lies off, rather than between, the area where the respective coasts of the Parties are opposite each other<sup>78</sup>. This is why Qatar, with a view to achieving as objective as possible an analysis, was determined not to be locked into the alternative between "opposite States" and "adjacent States", and maintained that it was unnecessary to make this categorisation in the northern sector, because in the final analysis, the rules expressed in both 1958 and 1982 are essentially the same in both situations, and the jurisprudence attaches no decisive importance to this distinction<sup>79</sup>.

8.20 Qatar would nevertheless observe that if, as Bahrain alleges, the delimitation in the northern sector were to be treated as a lateral delimitation between adjacent States, it would be necessary to draw all the consequences from this situation<sup>80</sup>. But this is exactly what Bahrain has failed to do in the present case.

8.21 In order to be consistent with its acknowledgment of the distinction between opposite and adjacent coasts and with its own categorisation of the northern sector, Bahrain should have applied in the present case all the legal consequences that the jurisprudence has drawn from the distinction. It should not be forgotten that the Court confirmed this distinction in its Judgment of 3 June 1985 in the Libya/Malta *Continental Shelf* case, and that in that Judgment it recalled "the precise reason" why the Court, in its Judgment of 1969, made a distinction between the effects of an equidistance line, depending on whether the coasts are opposite or adjacent:

"In the latter situation, any distorting effect of a salient feature might well extend and increase through the entire course of the boundary; whilst in the former situation, the influence of one feature is normally quickly succeeded and corrected by the influence of another, as the course of the line proceeds between more or less parallel coasts"<sup>81</sup>.

In thus endorsing the dichotomy between opposite and adjacent coasts, and in putting the maritime delimitation in the northern sector directly into the category of lateral adjacency, Bahrain should have taken into account the warning contained in the Court's *dictum* cited above, in order to achieve an equitable result. Yet by relying on the feature of Dibal, this is precisely what Bahrain has failed to do when constructing the OQR equidistance line in the northern sector<sup>82</sup>. It has not taken into account the "distorting effect of a salient feature" constituted by that low-tide elevation, an effect which not only, as the Court foresaw, "might well extend and increase through the entire course of the boundary"<sup>83</sup>, but which increases even further when Bahrain relies upon the alleged relevant circumstance of "Bahrain's historic rights to the pearling banks"<sup>84</sup> to make, from point R to point Z (2Q)<sup>85</sup>, a considerable adjustment to the equidistance line<sup>86</sup>.

**B. The course of Bahrain's line in the northern sector takes no account of the disparity or disproportion between the lengths of the relevant coasts of the Parties**

8.22 In determining the law that is applicable to this maritime dispute, Bahrain has completely ignored the equitable principle that is most frequently referred to by the jurisprudence, namely that "equity does not imply equality"<sup>87</sup>. In this context, Qatar would draw attention to the following two facts. First, Bahrain omits any reference to a geographical fact which is of decisive importance in the present dispute, namely the disparity in the lengths of the Parties' relevant coasts: thus, Bahrain has ignored the primacy in maritime delimitations of coastal geography, which has always been relied upon by the jurisprudence<sup>88</sup>. On the other hand, Bahrain has made numerous references to the kind of general economic considerations that have always been disregarded by the Court and arbitral tribunals.

### **1. Bahrain's silence with respect to coastal geography**

8.23 In its general geographical description of the area<sup>89</sup> and in the characteristics it identifies for purposes of maritime delimitation, Bahrain makes no mention of the most significant characteristic of what it calls "the geographical relationship between the respective coasts of Bahrain and Qatar"<sup>90</sup>, namely the disparity or disproportion between the respective lengths of the Parties' relevant coasts. Yet Bahrain takes no account of this factor in the line that it proposes to the Court, either in the southern<sup>91</sup> or the northern<sup>92</sup> sector, despite the proportionality ratio of 1.59 to 1 in favour of Qatar<sup>93</sup>.

8.24 Bahrain's failure to mention this disproportion in the lengths of the coasts of Qatar and Bahrain is all the more surprising in view of the fact that the jurisprudence has consistently acknowledged that coastal geography, of which the lengths of the coastal fronts are a major element, plays a fundamental role in the law of maritime delimitation. In its Memorial, Qatar has already mentioned some of the most significant *dicta* to be found in the jurisprudence<sup>94</sup>. Mention will be made here only of the most recent illustration given by the Court in its Judgment of 14 June 1993 in the *Denmark/Norway* case, when it held that:

"... 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>95</sup>.

### **2. Bahrain's use of general economic considerations that have consistently been rejected by the jurisprudence**

#### **a) Disparity of natural resources**

8.25 First, Bahrain emphasizes the disparity in the natural resources of the Parties, in particular their respective oil and natural gas resources and reserves<sup>96</sup>, with the consequences that this disparity entails for the *per capita* income of their populations<sup>97</sup>. Thus, Bahrain is adopting, at least implicitly, the strategy outlined by Professor Weil, according to whom "In certain cases, the State endowed with fewer natural resources... has argued that equity requires that the delimitation should not aggravate, indeed should correct, this imbalance"<sup>98</sup>. Yet the response of the Court and of international tribunals to this has been consistent and unanimous; as the same author has remarked:

"Here, the courts have shown themselves particularly firm. The greater wealth of the one, the more conspicuous poverty of the other, especially in energy or fishery resources, are not

factors which can have any influence on the assessment of the equity of the provisional line of equidistance, or of any other line"<sup>99</sup>.

8.26 Thus, in the *Tunisia/Libya Continental Shelf* case, Tunisia had insisted upon "its relative poverty vis-à-vis Libya in terms of absence of natural resources like agriculture and minerals, compared with the relative abundance in Libya, especially of oil and gas wealth as well as agricultural resources"<sup>100</sup>. But in its Judgment of 24 February 1982, the Court rejected this point of view, holding that:

"... these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource"<sup>101</sup>.

8.27 The Court confirmed this view in its Judgment of 3 June 1985 in the *Libya/Malta Continental Shelf* case. It rejected Malta's theory, according to which "the relevant equitable considerations... include the absence of energy resources on the island of Malta, its requirements as an island developing country, and the range of its established fishing activity"<sup>102</sup>. Indeed, it stated that:

"The Court does not... consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law"<sup>103</sup>.

8.28 In other words, Bahrain's arguments as to the relevance of the disparity between the Parties as regards natural resources are clearly contrary to the jurisprudence of the Court when, as in the present case, it has not been authorised to decide *ex aequo et bono*<sup>104</sup>.

#### **b) Traditional fishing activities**

8.29 At this stage of the Counter-Memorial, it should be stressed from a general perspective that the jurisprudence concerning maritime delimitation has consistently sought to down-play the legal consequences of economic factors taken as a whole, and particularly of traditional fishing activities in the areas concerned. Thus, in its Judgment of 12 October 1984 in the *Gulf of Maine* case (where the Chamber was also called upon to delimit a single maritime boundary), the Chamber rejected the position of the United States, which relied on its nationals' traditional fishing activities:

"... it can only confirm its decision not to ascribe any decisive weight, for the purposes of the delimitation it is charged to carry out, to the antiquity or continuity of fishing activities carried on in the past within that part of the delimitation area which lies outside the closing line of the Gulf"<sup>105</sup>.

The Chamber then added, in terms which must be repeated, since they apply precisely to the present case:

"Until very recently... these expanses were part of the high seas and as such freely open to the fishermen not only of the United States and Canada but also of other countries, and they were indeed fished by very many nationals of the latter. The Chamber of course readily allows that, during that period of free competition, the United States, as the coastal State, may have been able at certain places and times - no matter for how long - to achieve an actual predominance for its fisheries. But after the coastal States had set up exclusive 200-mile fishery zones, the situation radically altered. Third States and their nationals found themselves deprived of any right of access to the sea areas within those zones and of any position of advantage they might have been able to achieve within them. As for the United States, any mere factual predominance which it had been able to secure in the area was transformed into a situation of legal monopoly to the extent that the localities in question became legally part of its own exclusive fishery zone. Conversely, to the extent that they had become part of the exclusive fishery zone of the neighbouring State, no reliance could any longer be placed on that predominance. Clearly, whatever preferential situation the United States may previously have enjoyed, this cannot constitute in itself a valid ground for its now claiming the incorporation into its own exclusive fishery zone of any area which, in law, has become part of Canada's"<sup>106</sup>.

And the Chamber concluded:

"In any case, the purpose of the delimitation cannot conceivably be held to lie in the maintenance of such a position, or even of its restoration in the event of its having weakened in the course of time... However, there is no reason to consider *de jure* that the delimitation which the Chamber has now to carry out within the areas of overlapping apparent as between the respective exclusive fishery zones must result in each Party's enjoying an access to the regional fishing resources which will be equal to the access it previously enjoyed *de facto*"<sup>107</sup>.

### **c) The role of present-day or recent fishing activities**

8.30 It must be added that it is not only traditional but even present-day or recent fishing activities, together with access to fisheries in the disputed area, that international tribunals consider as largely irrelevant for the purposes of determination of a single maritime boundary. Thus, in the *Gulf of Maine* case, the Chamber declared that:

"It is, therefore... evident that the respective scale of activities connected with fishing... cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line"<sup>108</sup>.

8.31 The same approach may be found in the arbitral award of 10 June 1992 in the *Case concerning the Delimitation of Maritime Areas between Canada and the French Republic*. While accepting that access to the fisheries in the disputed zone lay at the centre of the case on delimitation, the arbitral tribunal confirmed that "the criteria governing delimitation are to be found primarily in the geographical facts"; it acknowledged "that it has not been requested or authorized to apportion resources on the basis of need or other economic factors", and concluded that "economic dependence and needs were not taken into account in the process of delimitation, as described above"<sup>109</sup>.

8.32 More generally still, in its Judgment of 14 June 1993 in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the Court rejected Denmark's view that significant differences in "socio-economic factors" between Greenland and Jan

Mayen were relevant for the purposes of delimitation. In particular, Denmark had asserted "the importance for Greenland of fishing and fisheries-related activities, which constitute the mainstay of its economy", whereas "Norwegian fishing interests in the waters surrounding Jan Mayen are... the interests of mainland Norway, not of Jan Mayen as such, where there are no fishermen"<sup>110</sup>. Denmark had even "relied on what it refers to as the 'cultural factor', the attachment of the people of Greenland to their land and the surrounding sea"<sup>111</sup>. Yet the Court accepted none of these arguments, since the absence of local fishing activities on Jan Mayen and, more generally, the socio-economic factors of the States concerned were not circumstances to be taken into account in the delimitation operation. Thus, in the final analysis, in the Court's opinion, "the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline"<sup>112</sup>.

8.33 In conclusion, therefore, Bahrain's position concerning maritime delimitation in the northern sector conflicts with customary international law and consistent jurisprudence. First, Bahrain cannot invoke any alleged disparity in the existing or potential natural resources of the States concerned. Second, Bahrain equally cannot invoke the fishing activities that it may have had in the past to the north of Qatar, nor the socio-economic or cultural factors that it might still invoke today, in order to obtain a deviation in the course of the maritime delimitation in the northern sector in its own favour and to Qatar's disadvantage. Finally, and above all, it must never be forgotten that an operation of this kind, performed in accordance with the international law of maritime delimitation, must be made in particular on the basis of the geographical facts and in particular the coastal geography of the States concerned. By failing to mention the geographical relationship between the Parties' respective coasts, and by disregarding completely the disproportion between the respective lengths of their coastal fronts, Bahrain has refashioned geography, or refashioned nature. It has contravened "the equitable principle that nature must be respected"<sup>113</sup>, since it is quite true that equity does not "seek to make equal what nature has made unequal"<sup>114</sup>.

### **C. The line drawn by Bahrain takes no account of the maritime projection of Qatar in the northern sector and ignores the principle of non-encroachment**

8.34 As has already been noted<sup>115</sup>, in its examination of the law applicable to the present maritime delimitation Bahrain has been curiously silent as regards one of the equitable principles that is frequently relied upon in maritime delimitation cases, namely the principle of non-encroachment, according to which the line of delimitation must not cut off the natural maritime projections of the States concerned. Indeed, it is beyond dispute that the jurisdiction of coastal States over their territorial waters is derived from their sovereignty over their land territory; as early as its Judgment of 18 December 1951 in the *Fisheries* case, the Court had proclaimed "the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts"<sup>116</sup>. Nor can it be disputed that the sovereign rights exercised by coastal States over the resources of the continental shelf and superjacent waters are derived from their sovereignty over land territory. The Court's *dictum*, in its Judgment of 20 February 1969, according to which "it is... necessary to examine closely the geographical configuration of the coastlines of the countries... since the land is the legal source of the power which a State may exercise over territorial extensions to seaward"<sup>117</sup> is just as applicable to fishing zones and the exclusive economic zone as it is to the contiguous zone and the continental shelf. But as has been noted<sup>118</sup>, a glance at the maps where Bahrain's line is shown<sup>119</sup> is sufficient to show just how

far Bahrain infringes these fundamental principles and disregards, from a third point of view, "the geographical facts" which must form the basis for the delimitation in the northern sector.

8.35 The maritime boundary claimed by Bahrain in the northern sector cuts off to a great extent Qatar's natural maritime projection towards the open sea. Bahrain's line implies that the coastal front on the north of the Qatar peninsula is not entitled to its natural extension in the direction of the central part of the Arabian-Persian Gulf which has already been delimited by the agreements concluded by Iran in 1969 and 1971 with Qatar and Bahrain, respectively. Indeed, point U, which is the easternmost point on Bahrain's line, is at longitude 51°38'E, which more or less forms a tangent with Qatar's eastern coast. In other words, Bahrain's line encroaches upon and cuts off a considerable part of Qatar's natural prolongation towards the North.

8.36 Whereas Qatar's line, constructed in accordance with the modified perpendicularity method<sup>120</sup>, makes full allowance for Bahrain's maritime projection in the northern sector, without the slightest encroachment, Bahrain's line literally separates the coast of Qatar from its natural maritime projection, because it has no normal or logical connection with Bahrain's landmass<sup>121</sup>. Bahrain's line gives an exaggerated, distorting and disproportionate effect to a minor feature, Dibal, which is not even a point of land on the coastline, but simply a low-tide elevation situated "on the wrong side of the median line" which, as will be shown, can in no event serve as a basepoint under customary international law<sup>122</sup> for the delimitation in the northern sector. Thus, Bahrain's line is incompatible with the basic geographical relationship between the Parties' respective coasts. It takes no account of the natural links between Qatar's coastal front and its projection in the northern sector. In a word, it is a clear infringement of the principle of non-encroachment.

8.37 The principle of non-encroachment has frequently been applied by international tribunals, as a clear reflection of reason and equity. A trace of it may already be found in the award of 23 October 1909 in the *Grisbadarna* case, where the arbitral tribunal ensured that the principle of non-encroachment was complied with by effecting the delimitation using the method of perpendicularity to the general direction of the coast in order to determine the maritime boundary between Sweden and Norway in the area where their coasts are adjacent "pour arriver à une détermination légitime et justifiée de la frontière"<sup>123</sup>.

8.38 The principle of non-encroachment has been confirmed in modern jurisprudence. In 1969, in the *North Sea Continental Shelf* cases, the Court referred to it in order to exclude application of the equidistance method which "would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's coastal front, cutting it off from areas situated directly before that front"<sup>124</sup>. Further, in the *Case concerning delimitation of the maritime boundary between Guinea and Guinea-Bissau*, the arbitral award of 14 February 1985 insisted forcefully, and on several occasions, upon the importance of the principle of non-encroachment:

"Pour faire reposer une délimitation sur une base équitable et objective, il faut autant que possible chercher à assurer à chaque Etat le contrôle des territoires maritimes situés en face de ses côtes et dans leur voisinage"<sup>125</sup>.

8.39 Moreover, Qatar would like to place particular emphasis on the Judgment of 3 June 1985 in the *Libya/Malta* case, where the Court identified the principle of non-encroachment as an

equitable principle and analysed it minutely. Indeed, the Court first recalled that "equitable principles are expressed in terms of general application"<sup>126</sup>, then gave a few of the most significant examples. First, the Court mentioned "the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature"<sup>127</sup>, a principle which, it may be remembered, holds a central place in the statement of Qatar's position<sup>128</sup> and is constantly infringed by Bahrain in drawing the dividing line that it puts forward for the northern sector<sup>129</sup>. Next, the Court added, as a second example of an equitable principle "of general application", "the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorised by international law in the relevant circumstances"<sup>130</sup>.

8.40 The Court will note that the line claimed by Qatar in the northern sector does not encroach upon the maritime areas lying off and in the neighbourhood of the coasts of Bahrain. By way of contrast, Bahrain's line encroaches substantially upon Qatar's maritime projection, because Bahrain's method of delimitation results in the attribution to it of maritime areas lying directly off Qatar's northern coastal front. It is obvious that in the northern sector beyond Qatar's territorial waters and even within its territorial waters to the west of segment OQ of that line, Bahrain's line would prevent Qatar from exploiting the natural resources in the maritime areas lying off its coasts, to which it is entitled under international law. And it is just as obvious that in the same maritime areas Bahrain's line would prevent Qatar from ensuring the legitimate protection of its defence and security interests<sup>131</sup>.

#### **Section 4. There is no legal basis for the single maritime boundary claimed by Bahrain in the northern sector**

8.41 The maritime boundary that Bahrain proposes to the Court in the northern sector is not only ill-founded because it fails to take any account of the geographical facts. It is also ill-founded because, as has just been seen with respect to the principle of non-encroachment, it is devoid of any legal basis. Qatar has already illustrated this proposition with reference to each of the two segments making up the line claimed by Bahrain in the northern sector<sup>132</sup>. The section OQR is clearly ill-founded because of the distorting effect of using Dibal as a basepoint for the closing line used for the construction of Bahrain's equidistance line. The section RSTUZ is also ill-founded in this case because of the unjustified corrections made by Bahrain in its own favour to the course of its equidistance line.

##### **A. Unacceptability of the first section, OQR, because of the disproportionate effect of Dibal as a basepoint for the closing line used for the construction of Bahrain's equidistance line**

8.42 Qatar does not dispute that it might be possible to have recourse to the equidistance method for the maritime delimitation in the northern sector<sup>133</sup>. However, Qatar takes issue with the selection of basepoints by Bahrain for this purpose<sup>134</sup>. As one learned commentator has stated:

"La véritable difficulté de l'équidistance n'est pas de savoir si cette méthode possède ou non une vertu intrinsèque ou est affligée de défauts inhérents, *mais de déterminer à partir de quels points la ligne d'équidistance sera construite. Equidistance entre quoi et quoi: voilà le véritable problème*"<sup>135</sup>.

The course of section OQR is based entirely upon a closing line from Ras Rakan to Dibal which, in Bahrain's view, defines the limit separating the southern sector from the northern sector<sup>136</sup>, and this closing line lacks any factual or legal basis. As has already been shown in the earlier discussion dealing with the southern sector<sup>137</sup>, the choice of Dibal as a basepoint for the construction of the equidistance line in the northern sector must be rejected for three main reasons. First, Dibal is a low-tide elevation. Second, as such, and in view of its location, it has no maritime area of its own, and cannot be used for purposes of calculating Bahrain's territorial waters. Finally, and even assuming that Dibal could be used as a basepoint for measuring the breadth of Bahrain's territorial sea, it can in no event be used as a basepoint for the purposes of a maritime delimitation involving the construction of a single maritime boundary.

### **1. Dibal falls within the category of low-tide elevations**

8.43 The Parties' analysis of the nature of Dibal is identical. According to Qatar, it is "clearly a low-tide elevation in its natural form"<sup>138</sup>, and Bahrain reaches a similar conclusion. Thus, despite the fact that it wrongly claims sovereignty over Dibal<sup>139</sup>, Bahrain does not characterise this geographical feature as "an island" but as "a low-tide elevation"<sup>140</sup>.

### **2. Dibal has no maritime areas of its own, and cannot be used for purposes of calculating the outer limit of Bahrain's territorial waters**

8.44 The first issue raised by Dibal, thus defined as a low-tide elevation, is whether it may be used as a basepoint for the purpose of measuring the breadth of Bahrain's territorial sea. According to Bahrain, there can be no doubt, since Dibal "is closer than 12 nautical miles to Fasht al'Azm (*i.e.*, to Sitrah) and to Qit'at Jaradah"<sup>141</sup>. Thus, Bahrain argues that Qit'at Jaradah is a true island<sup>142</sup> and that the low-water line of Sitrah island "is constituted by the low-water line around Fasht al'Azm, which forms an integral part of Sitrah Island"<sup>143</sup>. Therefore, in Bahrain's view, Dibal may be used as a basepoint for measuring the breadth of its territorial sea, from what it refers to as the "island" of Qit'at Jaradah and/or the "low-tide elevation" of Fasht al-Azm. In the second hypothesis, as Article 13, paragraph 1 of the 1982 Convention on the Law of the Sea provides:

"Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea"<sup>144</sup>.

8.45 As has already been noted<sup>145</sup>, Qatar disputes the line of argument advanced by Bahrain. It is indeed contrary to customary international law to rely upon the low-water line of a feature such as Fasht al-Azm, which Bahrain characterises as a low-tide elevation, in order to use Dibal (which both Parties accept is a low-tide elevation) as a basepoint for the calculation of the outer limit of Bahrain's territorial sea. Bahrain not only provides no evidence that Fasht al-Azm is a low-tide elevation which, without the slightest interruption, forms a single block with Sitrah island, but it seems to have serious doubts itself in this respect. Indeed, it refers, significantly, to "Fasht al-Azam which (should the Court decline to recognise it to be an integral part of Sitrah Island) is in any case closer than 12 nautical miles to the main Bahrain island, to Sitrah and to Umm Jalid"<sup>146</sup>. As Qatar will demonstrate, there are two reasons which turn this doubt into a certainty.

8.46 The first reason is that a simple examination of the marine charts is sufficient to show that there are evident contradictions with respect to the illustration of Fasht al-Azm between the various Bahraini charts. Indeed, on the official Bahraini marine charts<sup>147</sup> and in particular on chart No. 5001, at 1:50 000 scale, "Sitrah to Tighalib, published January 1987 by Ministry of Housing, Survey Directorate, Hydrographic Department" and on chart No. 2501, at 1:25 000 scale, "Al Manama to Umm Jalid, published August 1987 by Ministry of Housing, Survey Directorate, Hydrographic Department", how is Fasht al-Azm drawn?

(1) On both charts, Fasht al-Azm appears as a mass of scattered coral reefs, rocks and sand banks, described as "drying reefs and sand banks" (chart No. 5001) or as "numerous drying reefs and sand banks" (chart No. 2501), forming a homogeneous whole, with its outline drawn as a continuous line on both the northern and southern sides, drying completely at low tide, and being attached, apparently without the slightest interruption, to Sitrah island.

(2) However, Bahrain's official charts are not consistent. Chart No. 1502, at 1:15 000 scale, entitled "Sitrah Anchorage to Salbah, published December 1986 by Ministry of Housing, Survey Directorate, Hydrographic Department", describes in different terms the part of Fasht al-Azm that it shows. Thus, it indicates: "numerous shoals, *dries in patches*"<sup>148</sup>. Moreover, unlike charts Nos. 5001 and 2501, this chart does not allow the inference that the outer northern line of coral reefs on Fasht al-Azm is wholly uncovered at low tide, without the slightest interruption.

(3) Finally, there is a clear contradiction, in the geographical relationship between Fasht al-Azm and Qit'at ash Shajarah, between the maps produced in the Bahrain Memorial and chart No. 5001. All the relevant maps in the Bahrain Memorial show Qit'at ash Shajarah and Fasht al-Azm as a single feature<sup>149</sup>. By way of contrast, on chart No. 5001, published in January 1987, Fasht al-Azm and Qit'at ash Shajarah are clearly separated and thus do not form a single feature.

8.47 In addition to the uncertainties and inconsistencies in Bahrain's charts, there is a second and even more compelling reason that demands the rejection of Bahrain's theory that "Fasht al-Azm... forms an integral part of Sitrah Island"<sup>150</sup>. This is that such a statement is not a true reflection of the reality. While Fasht al-Azm appears on recent marine charts to be attached to Sitrah island, this is a recent phenomenon, dating from 1982, which is wholly artificial and man-made. In other words, Fasht al-Azm is not naturally attached to Sitrah, and the artificial narrow strip which, on present-day charts, seems to link these two geographical features (and on which a petrochemical plant has been constructed by Bahrain), did not exist until 1982.

8.48 In fact, the large area of land - appearing for instance on Bahraini chart No. 1502 and British chart No. 3790<sup>151</sup> - on which have been constructed a petrochemical plant, storage tanks, stocks, columns and, at its south-eastern extremity, a flare stack<sup>152</sup>, is wholly artificial. It was created by the Bahraini authorities who, in order to do so, reclaimed an area of sea. The topography of the feature on Bahraini chart No. 1502 shows that this had previously been a permanent and entirely natural maritime passage along the eastern side of Sitrah island. Before the reclamation work undertaken in 1982, there existed a navigable channel which, while it was doubtless quite shallow, was never above water and allowed fishing boats to pass, even at extreme low water. When this natural navigable channel was filled in as part of the reclamation works, the Bahraini authorities decided to dredge a new replacement channel close by and slightly to the east, designated by the Bahraini technicians as an "alternative fishermen's channel". This new navigable channel is the one shown on Bahraini chart

No. 1502 and British chart No. 3790, identified as "Dredged channel - least depth 3.0 m. (1986)" on the Bahraini chart, and as "Marked channel 3 m. (1986)" on the British chart.

8.49 A Bahraini technical document confirms this analysis and provides evidence of the existence of a natural navigable channel, traditionally used by Bahraini fishermen and separating Fasht al-Azm from Sitrah and, as a corollary, of the need to dredge an alternative fishermen's channel. This document is "Technical Circular No. 12. Dredging and land reclamation activities along Bahrain coasts", dated March 1982 and signed by a Research Officer, Zahra Sadiq Al-Alami<sup>153</sup>.

8.50 That document analyses various work, notably dredging works, performed before 1982 by firms such as Cobla, Falco, Franco Arab Dredging Co., Gulf Standard Dredging Co. or Amerad Betong Vagforbattringer. But it indicates in particular that included among the pending and future work to be performed by Gulf Petrochemical Industries Co. was the dredging of two channels, one for cooling water and one being "an alternative one to the existing fishermen's channel which is filled with the reclamation material on some part of it". Thus, it is stated at pages 15 and 18 of the Technical Circular:

"A. GULF PETROCHEMICAL INDUSTRIES CO.:

The project site (Fig. 9) is scheduled to be completed by 2<sup>nd</sup> February 1982.

Van Oord (International) have been appointed as the site reclamation and dredging Contractors.

The petrochemical site reclamation was approximately 600 metres wide by 1000 metres long, connected to Sitra by a 1250m long access causeway and to BAPCO causeway by a 500m long service causeway.

The material required for site reclamation was taken from an area situated between BAPCO and ALBA jetties.

Two channels will be dredged, one for cooling water, the depth of the water in it will be about 7m, and its length will be about 3.5km. The other channel is an alternative one to the existing fishermen's channel which is filled with the reclamation material on some parts of it (Fig. 9), it will be dredged to 3.5m as a minimum over a distance of 1,100m. The quantity of material above that depth and within the channel section is approximately 110,000m<sup>3</sup>, the marked width of the channel will be 60m. The dredged material will be located east of the channel forming one or more islands as required".

8.51 In these circumstances, Bahrain's contention that Fasht al-Azm is "an integral part of Sitrah island" and that the two features form an uninterrupted natural entity is contrary to the facts. Nor can Bahrain properly argue that the low-water line on Sitrah island is the easternmost limit of the low-water line on Fasht al-Azm. Accordingly, Article 13, paragraph 1 of the 1982 Convention, which reiterated the terms of Article 11, paragraph 1 of the 1958 Convention on the territorial sea and contiguous zone, the customary value of which is undisputed, cannot be applied in favour of Dibal.

8.52 It is also contrary to customary international law to rely on the low-water line on Qit'at Jaradah in order to give Dibal its own maritime area and to use the low-water line on Dibal to

measure the breadth of Bahrain's territorial sea. Indeed, as has been shown<sup>154</sup>, and contrary to what Bahrain alleges<sup>155</sup>, Qit'at Jaradah cannot be treated as an island within the meaning of Article 121 of the 1982 Convention on the Law of the Sea; it is simply another low-tide elevation. It should be borne in mind that, in principle, low-tide elevations have no maritime areas of their own. According to the customary law as expressed by Article 13, paragraph 1 of the 1982 Convention, it is only when low-tide elevations lie within the territorial waters of land which is permanently uncovered that they may have an influence on the course of the outer limit of the territorial sea of the land in question.

8.53 Customary international law goes no further. In order to avoid the "leap-frogging" effect, it refuses to recognise that a low-tide elevation lying within the territorial waters of a first low-tide elevation can in turn have its own territorial sea. As Sir Gerald Fitzmaurice wrote shortly after the 1958 Geneva Conference:

"... as the elevation is within what is already the territorial sea of the mainland, or of an island, the practical effect is simply to cause a bulge in the seaward direction of *that* territorial sea. On the other hand, if there is a further drying rock, situated - not within the original or basic territorial sea of the mainland or island - but within the extension of such territorial sea (bulge) caused by the presence of the 'inner' drying rock, then this 'outer' drying rock will not lead to any further extensions of the territorial sea; nor does an 'outer' drying rock, so situated, generate any territorial sea of its own. This rule is intended to prevent the practice known as 'leap-frogging', which, by making use of a series of drying rocks, banks, etc. extending seawards, might result in artificial or unjustified extensions of natural territorial waters"<sup>156</sup>.

8.54 In fact, in relying upon a low-tide elevation, Qit'at Jaradah, lying within the territorial waters of what Bahrain asserts is a first low-tide elevation, Fasht al-Azm<sup>157</sup>, in order to claim that Dibal should be entitled to its own territorial sea and serve as a basepoint for the delimitation, Bahrain has entered into a blatant "leap-frogging" exercise such as has been expressly condemned by international law.

### **3. Dibal cannot be an appropriate basepoint for the equitable delimitation of the maritime areas between Qatar and Bahrain in the northern sector**

8.55 Even if - as is not the case - Dibal could serve as a basepoint for measuring the outer limit of Bahrain's territorial sea, it could in no event be used as a basepoint for determining the course of the maritime boundary in the northern sector. A learned commentator has observed that:

"Il ne suffit pas... qu'un point saillant de la côte, une île, un îlot, un rocher, un haut-fond découvrant, puisse être considéré comme engendrant une mer territoriale propre ou comme susceptible juridiquement de faire partie des lignes de base de la mer territoriale d'un Etat donné pour que, pour cette seule raison, ce saillant, île, îlot, rocher, haut-fond découvrant soit à regarder comme un point de base approprié pour la construction d'une ligne de délimitation entre l'Etat intéressé et un autre Etat dont les côtes font face aux siennes ou lui sont adjacentes. Une caractéristique géographique peut servir de point de base à un calcul de la mer territoriale sans servir de point de base à la délimitation"<sup>158</sup>.

These observations are applicable whatever may be the method of delimitation adopted, but they are applicable in particular when the equidistance method is used. In any event, from the point of view of customary international law as defined by the international jurisprudence,

Dibal cannot serve as a basepoint for constructing the maritime boundary and, in particular, for constructing the equidistance line between Qatar and Bahrain in the northern sector, for two main reasons.

**a) First reason: Dibal is not an integral part of Bahrain's coastline**

8.56 It is quite clear from the maps<sup>159</sup> that Dibal can in no way be considered as an integral part of the coastline of Bahrain. It falls partly within the territorial waters of Qatar and lies wholly outside Bahrain's territorial waters. As Professor Bowett has rightly remarked, "the case for using features closely integrated with the mainland coast must be more compelling than the case for using more remote features"<sup>160</sup>.

**b) Second reason: Dibal is only a "minor geographical feature"**

8.57 There is a second reason why, under customary international law, Dibal cannot serve as a basepoint for the construction of an equidistance line in the northern sector. The reason is that this low-tide elevation belongs, *par excellence*, to the category of "non-essential" geographical features, which are most usually disregarded in the jurisprudence for the determination of the course of maritime boundaries<sup>161</sup>. Such geographical features, and *a fortiori* low-tide elevations such as Dibal, indeed cannot fail to lead to results that "appear on the face of them to be extraordinary, unnatural or unreasonable"<sup>162</sup>. Therefore, a delimitation performed on the basis of the equidistance method must eliminate the effects of features of this kind, which the Court has described as "incidental special feature[s]"<sup>163</sup>.

8.58 Subsequently, the jurisprudence developed this theory by not giving full effect to, or even disregarding completely, certain islands and islets<sup>164</sup>. In this context, reference may be made in particular to the Judgment in the *Gulf of Maine* case, which deals expressly with the problem of "tiny islands, uninhabited rocks or low-tide elevations"<sup>165</sup>. In that case, the Chamber refused 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"<sup>166</sup>. This is why, for each segment of the maritime boundary that it drew, the Chamber chose basepoints in the light of considerations of equity and spoke out clearly in this regard against application of the equidistance method, "as defined by geometry and by the terms of paragraph 2 of Article 6 of the 1958 Convention on the Continental Shelf"<sup>167</sup>. Indeed, for the Chamber, a line drawn in accordance with the letter of that provision:

"might well epitomize the inherent defects of a certain manner of interpreting and applying the method here considered...; inasmuch as the likely end-result would be the adoption of a line all of whose basepoints would be located on a handful of isolated rocks, some very distant from the coast, or on a few low-tide elevations: these are the very type of minor geographical features which, as the Court and the Chamber have emphasized, should be discounted"<sup>168</sup>.

8.59 Consequently, by relying upon Dibal to construct its equidistance line in the northern sector, Bahrain has done exactly what the Chamber in the *Gulf of Maine* case warned against. This is why Qatar asks the Court not to take Dibal into account as a basepoint for the delimitation in the northern sector.

## **B. The unjustified corrections made by Bahrain to section RSTUZ of its equidistance line**

8.60 Bahrain is not content merely to claim, as the second section of the dividing line in the northern sector, a so-called equidistance line, drawn in accordance with the false premises adopted by Bahrain, from point R to a point intersecting the conventionally agreed limit in the central part of the Arabian-Persian Gulf<sup>169</sup>. Consistent with its maximalist strategy, Bahrain has claimed, beyond point R, what it claims to be an equidistance line corrected entirely to its own benefit, and to the manifest detriment of Qatar. This second portion of the Bahrain line in the northern sector is composed of four segments which must now be analysed.

8.61 The three segments RS, ST and TU constitute the first modification in favour of Bahrain which has been made to Bahrain's equidistance line beyond point 2. Bahrain attempts to justify this by what it claims to be a "special circumstance"<sup>170</sup>, *i.e.* "the existence of Bahrain's rights in respect of the maritime areas where the Bahraini pearling banks are located"<sup>171</sup>. If Bahrain is to be believed, and based solely on the completely insufficient indications that it provides<sup>172</sup>, the turning points S, T and U are located "at the eastern limits of the three easternmost pearling banks appertaining to Bahrain"<sup>173</sup>. When one considers this claim which is pushed so far towards the east and which is both so distant from Bahrain and so close to the landmass of Qatar, it is extraordinary that Bahrain can dare to present these three segments, RS, ST and TU, as being "*the minimum deviation* to the equidistance line necessary to ensure that Bahrain's historic rights to the pearling banks are preserved"<sup>174</sup>.

8.62 According to Bahrain, segment UZ is a further adjustment to its equidistance line, allegedly made in Qatar's favour this time<sup>175</sup>, in order to take into account what Bahrain terms a "second special circumstance"<sup>176</sup>, namely the continental shelf delimitation agreement concluded in 1969 between Qatar and Iran. For Bahrain, this segment UZ, which terminates at point 2 (2Q) on the boundary delimited between Qatar and Iran, represents "*the minimum westward deviation* in Qatar's favour necessary to take into account the provisions of the existing agreements with Iran"<sup>177</sup>.

8.63 Bahrain is thus suggesting, if one reads its Memorial literally, that there is a sort of equivalence between the two "deviations" made to its equidistance line, one in favour of Bahrain, the other in favour of Qatar, each being based on one of the special circumstances to be taken into consideration in the area to be delimited. Such an assimilation is obviously fallacious. On the basis of the map<sup>178</sup>, the surface area thus supposedly abandoned by Bahrain to Qatar - *i.e.* the maritime areas comprised between (i) the point of intersection of the last segment (UZ) of Bahrain's line and of the extension of the first portion (OR) of the equidistance line, (ii) the point of intersection of the extension of this same equidistance line with the limit established by the 1969 Qatar/Iran Agreement, and (iii) point Z (point 2 or 2Q) - is no greater than 10.6 km<sup>2</sup>. As regards the surface area that Bahrain has granted itself - *i.e.* the maritime areas comprised between (i) points R, S, T and U, (ii) the point of intersection of segment UZ of the Bahrain line and the extension of the first portion of the equidistance line towards the north-north-east and (iii) point R - this is 1092.4 km<sup>2</sup>. This makes clear the manifest disproportion between the two adjustments made by Bahrain: the ratio is approximately 103 to 1 in Bahrain's favour.

8.64 In any event, the second segment of Bahrain's line linking points R, S, T, U and Z, that Bahrain bases essentially on its "historic rights" to the pearling banks, lacks any factual or legal basis. Qatar has already shown in its Memorial that these so-called historic rights are a

factor lacking any relevance for effecting a maritime delimitation in the present dispute<sup>179</sup>. In this respect Qatar refers to its Memorial, and will restrict itself here to the four following observations which relate to both law and fact.

### **1. Pearl fishing on the banks claimed by Bahrain came to an end long ago**

8.65 Bahrain stresses several times in its Memorial the idea that the pearl banks in the northern sector "have appertained to Bahrain since time immemorial"<sup>180</sup> and that they are "one of the oldest, and richest, pearl fisheries in the world"<sup>181</sup>. But Bahrain itself hardly seems convinced by the present-day relevance of these pearl fisheries, and indeed it cannot in all seriousness be so convinced. While it asserts that "the pearling fleet remained active at least until 1954"<sup>182</sup>, the Bahrain Memorial finally admits that "the number of vessels declined from the mid-nineteenth Century"<sup>183</sup>.

8.66 Qatar's Memorial thus made a reasonable assessment of the situation when it pointed out that "in any event, it is an acknowledged fact that, by 1960, pearling in the Gulf was defunct for practical commercial purposes"<sup>184</sup>. This is in no way contradicted by the testimony of Dr. Bhandarker, upon which Bahrain lays great emphasis<sup>185</sup>, not only because that testimony was taken on 12 October 1950, but also because the inspections carried out by Dr. Bhandarker on "the principal pearl fishing banks used by pearling fleets from Bahrain" took place, as he himself admits, during the period from 1925 to 1940<sup>186</sup>. In these circumstances, it is difficult to see how the pearl fisheries could be taken into consideration as a relevant circumstance in operating a maritime delimitation between Qatar and Bahrain at the turn of the 20<sup>th</sup> century.

### **2. Bahrain cannot claim to have exercised in the past exclusive rights over the pearling banks that it claims in the present dispute**

8.67 Bahrain asserts that it "has occupied the pearling banks"<sup>187</sup>, in the sense that before the present doctrine of the continental shelf was adopted, "the general view was that the adjacent sovereign could, upon proof of long-established 'occupation' of the beds or banks, assert ownership of the seabed and exclusive rights to the 'fructus'"<sup>188</sup>. Its whole demonstration in fact relies upon the well-known article by Sir Cecil Hurst "Whose is the bed of the sea? Sedentary fisheries outside the three-mile limit". This reference is however irrelevant to the present dispute between Qatar and Bahrain. First, as Bahrain itself admits, Sir Cecil Hurst's view was expressed before the present doctrine of the continental shelf had developed and is now out-dated. Second, in any event, Sir Cecil's article referred only to banks which "have always been *kept in occupation by the Sovereign of the adjacent land*"<sup>189</sup>. It could in no event apply, in favour of Bahrain, to the pearling banks lying within Qatar's natural northward extension, and it is obvious that Bahrain cannot be considered as the "adjacent land" in relation to the banks listed in paragraph 647 of its Memorial.

8.68 Furthermore, as will now be shown, Bahrain has adduced no evidence of any title or exclusive sovereignty over the pearling banks in question. In any event, such a claim conflicts with the traditional customary law in the region.

#### **a) Bahrain does not prove that it exercised exclusive rights over the pearling banks that it claims in the northern sector**

8.69 As evidence of its "long-established 'occupation' of the beds or banks"<sup>190</sup>, Bahrain relies primarily on various testimonies taken at different times<sup>191</sup>. The most significant evidence is

that provided by Dr. Bhandarker, both because of its date, 12 October 1950, and because of the identity of its author, who was a Bahraini resident employed by the Government as a physician, and who during the period between 1925 and 1940 made "regular trips on the Bahrain Government hospital boats" to the principal pearling banks of the region, where Bahraini fishing boats used to go<sup>192</sup>. Yet far from supporting Bahrain's position, this testimony, to which Bahrain refers at length<sup>193</sup>, supports Qatar's analysis on all salient points.

8.70 What does Dr. Bhandarker say? First, like Qatar<sup>194</sup>, he notes that throughout the inter-war period the pearl fisheries were in a process of continuous decline. While during the first years of his employment Dr. Bhandarker could reckon that there were "700 Bahrain pearling vessels"<sup>195</sup>, whose divers worked "over the banks north of Bahrain Island"<sup>196</sup>, during the later years of his activity he noted that "the total number of pearling vessels diminished"<sup>197</sup>.

8.71 The second and absolutely essential point of Dr. Bhandarker's testimony, which must be stressed here, is that unlike Bahrain, Dr. Bhandarker does not state or even imply that the various banks belonged to Bahrain<sup>198</sup>. For him, they were merely the "principal *pearl fishing banks used by pearling fleets from Bahrain*"<sup>199</sup>.

8.72 Third, Dr. Bhandarker, like Qatar<sup>200</sup>, asserts that Bahraini fishermen were not alone in frequenting the pearling banks that he visited. He noted the presence on the same pearling banks not only of Bahraini boats, but also of fishing boats from Saudi Arabia, Kuwait and Qatar<sup>201</sup>. As far as Qatari fishing was concerned, he specified that "most of the vessels from Qatar operated north and east of the Qatar peninsula and we seldom saw any west of Bu Suwar"<sup>202</sup>. The Court will in this context note that the last segment of the line claimed by Qatar, linking points BLV and 2 (2B), is situated to the west of Bu Suwar (Bu Sawr).

8.73 A final point to be noted in Dr. Bhandarker's testimony is that, unlike Bahrain, he never says that "*all* vessels, irrespective of nationality or place of registration, were subject to the jurisdiction of Bahrain whilst on the Banks"<sup>203</sup>. On the contrary, Dr. Bhandarker says no more than that:

"On these trips I visited all the Bahrain pearling vessels seen at the banks and treated all patients on these vessels regardless of nationality. Although I made no point of visiting vessels other than those from Bahrain, such vessels frequently asked my assistance and I gave it whenever requested"<sup>204</sup>.

8.74 Accordingly, Dr. Bhandarker's testimony provides no support for Bahrain's argument that the banks are subject to its jurisdiction and that they should be taken into consideration for purposes of determining the course of the dividing line in the northern sector and adjusting the second section of that line (RSTUZ) eastwards. On the contrary, it largely confirms Qatar's position, in particular as to the so-called historic rights of Bahrain over the pearling banks.

8.75 In its attempt to prove its sovereignty over the pearling banks, Bahrain does not rely solely upon Dr. Bhandarker's testimony. It also refers to a series of recent declarations which have obviously been collected purely for purposes of the present proceedings before the Court. These declarations were taken in September 1996 from persons who allegedly came from the Hawar islands or Zubarah and who, it is said, participated in their youth in pearl fishing, or knew about such fishing either directly or indirectly<sup>205</sup>.

8.76 Qatar is of the view that these statements are devoid of all evidentiary value. The location of various pearling banks that are said to have been visited is uncertain, and it would seem that very few of the banks that are mentioned are relevant to the present dispute. Furthermore, some of these Statements are ambiguous and contain striking contradictions<sup>206</sup>.

**b) Bahrain's claim that it exercised exclusive rights over the pearling banks is contrary to the traditional customary law in the region**

8.77 Bahrain cannot in any event claim to have been alone in exercising rights over the pearling banks listed in paragraph 647 of its Memorial, to the exclusion of the other Arab sheikhdoms on the coast of the Gulf. As Qatar has already demonstrated in its Memorial, the concept of a sheikh's or a tribe's exclusive rights over pearling banks has never been recognised by regional custom<sup>207</sup>. It will be sufficient here simply to recall the principle and its consequences, which all run counter to Bahrain's claims.

**(i) The principle of common ownership of the pearling banks and pearl fisheries by the tribes and sheikhs on the Arabian side of the Gulf**

8.78 Throughout the period when pearl fisheries played an important part in the economy of the region, the British authorities constantly proclaimed the principle of collective ownership of the pearling banks. Contrary to Bahrain's assertion<sup>208</sup>, the Law Officers of the Crown, Finlay and Carson, clearly stated in a note of 11 February 1905, with respect not only to pearl banks situated within the three miles of territorial waters, but to all the banks that Bahrain considers as subject to its jurisdiction<sup>209</sup>, "... we think that, as a matter of international law, they are capable of being the property of the tribes to the exclusion of all nations", adding, with respect to the British Government's relations "with the tribes on the west shore of the Persian Gulf, we think that the existence of this exclusive right may be properly maintained on their behalf by His Majesty's Government"<sup>210</sup>. The same view was confirmed in a letter of 4 May 1910 from the Foreign Office to the Board of Trade: "The rights of fishing for pearls in the Persian Gulf have been held in common from time immemorial by the Arab Chiefs upon its eastern shores, who are under Treaty obligations to the British Government"<sup>211</sup>. The same doctrine was upheld during the inter-war period, as may be seen from a note sent to the India Office on 23 April 1938 by Fowle, the Political Resident in the Persian Gulf, according to which "the pearl fisheries are the exclusive common property of all the Shaikhs, and this means that the subjects of any one Shaikh have the right at any time to fish at any place on any of the pearling banks"<sup>212</sup>. In a letter of 6 June 1940 to the Admiralty, a member of the India Office, Mr. Gibson, strikingly summarised as follows the opinion from which the British Government never departed: "the pearling banks are the exclusive property of all the Arab Sheikhs"<sup>213</sup>.

8.79 This principle of common property of tribes and sheikhs with respect to the pearling banks has moreover been confirmed by the best-recognised legal authorities of Bahrain. Thus, Dr. Al-Baharna, in his often-cited book entitled *The Arabian Gulf States, Their Legal and Political Status and Their Internal Problems*, shares the view that is universally acknowledged. In his opinion:

"... concerning rights of fishing and pearling in the Gulf, there exists no national legislation regulating them. 'The fisheries', says Auguste, 'which long antedate the growth of national states in the Gulf area, are governed by customs and usages of immemorial standing. Basic

among these is the concept that pearl banks are open equally to all the peoples of the Gulf on the common understanding that methods and standards will be observed"<sup>214</sup>.

It is therefore not surprising to find an echo of this regional custom in the work of the International Law Commission preceding the 1958 Geneva Convention on the Law of the Sea. Professor J.P.A. François, in his second report on the high seas of 10 April 1951 stated that:

"On ne connaît pas de législation nationale qui revendique le contrôle exclusif sur l'une quelconque des pêcheries de perles du Golfe Persique. Les pêcheries, qui sont bien antérieures au développement d'Etats dans la région du Golfe, sont régies par des coutumes et des usages immémoriaux. Le principe fondamental de ces coutumes et usages est que les bancs de perles sont ouverts également à tous les peuples riverains, étant entendu que les méthodes et les normes traditionnelles seront observées"<sup>215</sup>.

A whole series of legal consequences flows from this principle of common ownership of the pearling banks by the tribes and sheikhs, the most significant of which, undermining each point of Bahrain's position in the present dispute, will be recalled here.

#### **(ii) Consequences of the principle of exclusive common ownership of the pearling banks and pearl fisheries by the tribes and sheikhs on the Arabian side of the Gulf**

8.80 The first and most obvious consequence of the principle of exclusive common property is that no single tribe or sheikh owned or exercised exclusive rights over any of the pearling banks lying off the western coasts of the Gulf. Thus, in a letter which has already been mentioned above, sent on 30 June 1904 to the Under-Secretary of State at the Foreign Office by a member of the India Office, Mr. A. Godley, it is stated that, although it is true that there is a "legal right of the tribes to a monopoly", "*no tribe has exercised a right excluding the other tribes from any part of the fishery*"<sup>216</sup>. Similarly, Sir Rupert Hay, the Political Resident in Bahrain, formally stated in a letter of 21 February 1948 to the Secretary of State for Commonwealth Relations that: "Bahrain and Kuwait have no exclusive rights in any banks"<sup>217</sup>. Professor Waldock was just as direct when he stated in his opinion of 16 February 1954, on "the Sea-Bed Boundary between Bahrain and Saudi Arabia", that "the historical evidence... establishes beyond question that the fisheries on the great pearl banks were not from a legal point of view appropriated to particular tribes but were open to all the tribes", concluding that "Bahrain cannot, therefore, contend that as against Saudi Arabia she formerly possessed an exclusive legal right to the pearl banks of the North Jarim Area"<sup>218</sup>. And in a minute of 17 February 1954 entitled "Fasht Bu Sa'afa", commenting on Professor Waldock's opinion, Mr. Ewart-Biggs, a member of the Foreign Office, reiterated that:

"... pearl fishing rights in the Persian Gulf are known to be communal and... no one State or tribe can claim exclusive rights in any area. There thus seems no possibility of establishing anything of the nature of property rights or sovereignty on the basis of this 'occupation' of the Fasht bu Sa'afa by Bahraini pearl fishers"<sup>219</sup>.

This is in fact what Bahrain itself admitted in its 1961 Memorandum with respect to the "principal shoals in the area North and North East of Qatar which the Ruler is claiming to constitute the Bahrain pearl banks"<sup>220</sup>, when it explicitly declared that "it is not alleged that Bahrain has exercised exclusive user or exclusive control over the pearl banks now

claimed<sup>221</sup>. In these circumstances, Qatar finds it difficult to understand how Bahrain can now claim that it "has occupied the pearling banks"<sup>222</sup>.

8.81 The second consequence, which is just as inherent in the principle of exclusive common property, is that all the sheikhs' subjects have the right to fish on all the pearling banks lying on the Arabian side of the Gulf<sup>223</sup>. Qatar must stress in this regard that Bahrain has admitted that "under the traditional, customary law of the Gulf, neighbouring tribes apparently had the right to fish for pearls"<sup>224</sup>, and that it has provided no evidence for the restrictive condition that it attaches to this rule, according to which it applied "if their own Ruler was on terms of amity with the Ruler whose banks they were"<sup>225</sup>.

8.82 The third consequence of the principle of exclusive common property is that all the sheikhs and, in their name, the British Government, had the right to protect the Arab pearling banks against any intrusion by foreign fishermen. The letter of 10 March 1904 from several members of the Government of India to the Secretary of State for India gives a whole series of examples showing that between 1863 and 1903 the authorities "intervened to prevent the intrusion of foreigners", whether such foreigners were British, Indian or French<sup>226</sup>. More recently, on 19 June 1929, Barrett, the Political Resident in the Persian Gulf, sent the following communication to the Consul-General of the United States in Baghdad:

"I do not advise any firm of whatever nationality to send a pearl fishing ship to the Persian Gulf. The fisheries have been conducted from time immemorial by the inhabitants of the Gulf Coasts according to the ancient usages. Any interference by outsiders with their preserves would undoubtedly be strenuously resisted by the Arabs, and must be attended by very considerable risk"<sup>227</sup>.

In a letter of 6 June 1940 to the Admiralty, concerning a draft regulation for the protection of Arab pearling banks against foreign exploitation, Gibson, a member of the India Office, summarised the practice in this respect in terms which must be cited: "... *the pearling banks are the exclusive property of all the Arab Sheikhs and... the joint right of the latter to exclude outsiders is also a right enjoyed by each of them independently...*"<sup>228</sup>. In its Memorial Bahrain gives a false picture of the customary régime of pearl fisheries on the Arabian side of the Gulf when it states that "*all vessels, irrespective of nationality or place of registration, were subject to the jurisdiction of Bahrain whilst on the Banks*"<sup>229</sup>: while it is true that the Ruler of Bahrain could exclude foreign fishermen from the pearling banks off the Arabian coast, it is equally true that the other Rulers in the region, including the Ruler of Qatar, had similar powers. This was not an exclusive right of jurisdiction reserved for the Ruler of Bahrain alone, but a joint right of jurisdiction belonging to all the Rulers in the area, which could be exercised by each of them. Qatar's rights to protect the Arab pearling banks against any foreign intrusion were no less than those of Bahrain.

8.83 The fourth consequence of the principle of exclusive common property was that no sheikh had the right to grant concessions over the pearling banks to third parties<sup>230</sup>. Bahrain of course cannot dispute the existence of this practice, which was an unchanging factor of British policy in the Gulf, but it considers it as a consequence of what it claims to be Bahrain's sovereignty over the pearling banks<sup>231</sup>. Qatar disputes this view since, as the correspondence just cited demonstrates, the reason why the sheikhs did not have the right to grant concessions over the pearling banks was precisely that the banks were their exclusive common property.

8.84 The fifth and final consequence that may be drawn from the principle of exclusive common property is the absence of any delimitation of the pearling banks between the various tribes. Thus, Colonel A. B. Kemball, then British Resident in Turkish Arabia, who had been consulted "as regards the extent and ownership of the banks", noted on 15 June 1863 that "strictly speaking, no boundaries, as comprising or defining territorial rights, can be assigned to the pearl banks"<sup>232</sup>. Similarly, in the above-mentioned letter of 10 March 1904 from several members of the Government of India to the Secretary of State for India, it is stated that "*there are no definite inter-tribal limits*", even though "the external boundaries of the fisheries are well known"<sup>233</sup>. These statements are incompatible with Bahrain's claim to exercise exclusive jurisdiction and control over the pearling banks<sup>234</sup>.

8.85 In the light of the foregoing, and having regard to the custom followed in the region, Bahrain's claim that it is entitled to exercise rights over the pearling banks that it claims in the northern sector, to the exclusion of the other tribes and sheikhs in the Gulf and in particular of the Sheikh of Qatar, must surely be regarded as manifestly unfounded. Indeed, this was always the position taken by the British. It suffices to recall in this regard that, in a confidential Memorandum dated 17 May 1962, concerning the "Bahrain/Qatar Seabed Boundary", Mr. A.R. Walmsley, of the Foreign Office, commented as follows upon Bahrain's position as set forth in the Ruler of Bahrain's Memorandum of 1961:

"The claim embodied in the memorandum is extremely far reaching... The claim as it stands is quite untenable, being based on the assumption that ancient rights over pearl banks confer the right to sovereignty over the seabed"<sup>235</sup>.

And, as we know, a few days later, by letter of 5 June 1962, the Foreign Office dismissed Bahrain's claim in final terms<sup>236</sup>.

### **3. Bahrain's alleged historic rights to pearling banks are not special or relevant circumstances**

8.86 Bahrain cannot claim, as it attempts to do<sup>237</sup>, that its so-called historic rights to the banks in question allow it to draw consequences from them with respect to delimitation of the maritime areas in question. When in 1961 Bahrain claimed sovereignty over these pearling banks, it asserted that in order to make the delimitation with Qatar, Article 6 of the 1958 Convention on the continental shelf had to be applied, and that it should be considered that its historic rights to such banks were a "special circumstance" within the meaning of that article, justifying a significant adjustment of the equidistance line in its favour<sup>238</sup>. Bahrain now appears to be assimilating the concept of "special circumstances" under Article 6 of the 1958 Convention on the continental shelf to the concept of "relevant circumstances" under customary international law, relying on the Court's judgment of 14 June 1993 in the *Jan Mayen* case<sup>239</sup>.

8.87 In any event, in both its 1961 Memorandum and its 1996 Memorial, Bahrain raised the problem of the relationship between delimitation of the continental shelf and its superjacent maritime areas, on the one hand, and, on the other hand, rights to pearl fisheries, which fall into the category of sedentary fisheries within the meaning of Article 4, paragraph 2 of the 1958 Convention on the continental shelf and Article 77, paragraph 2, of the 1982 Convention on the Law of the Sea. In its Memorial, Qatar has already shown that Bahrain, in its 1961 Memorandum, misinterpreted the system established under the 1958 Convention<sup>240</sup>.

**a) The Ruler of Bahrain's argument, in his 1961 Memorandum, that "Bahrain's historic rights to the pearling banks" were a "special circumstance" within the meaning of Article 6 of the 1958 Convention on the continental shelf**

8.88 This argument was always rejected by the British authorities from 1960 onwards<sup>241</sup>. Furthermore, the theory of "Bahrain's historic rights to the pearling banks" as a "special circumstance" is undermined by the maritime delimitation agreements that Bahrain has itself concluded and by State practice. The fact that in the present case Bahrain considers that its alleged historic rights to pearling banks are a special or relevant circumstance justifying an adjustment of the equidistance line in its favour is all the more surprising in that the practice followed by Bahrain in maritime delimitation runs counter to this theory. Indeed, in the two agreements that Bahrain has concluded for delimitation of its continental shelf, with Saudi Arabia in 1958<sup>242</sup> and with Iran in 1971, its supposed historic rights to pearl fisheries were not taken into account in order to adjust in any way in its favour the course of the equidistance line.

8.89 During the negotiations with Saudi Arabia which led to the conclusion of the agreement of 22 February 1958<sup>243</sup>, Bahrain sought to rely heavily on its alleged historic rights to the pearling banks lying to the west and, above all, to the north-west of its territory. Its claims were put forward in the documents annexed to the letter of 21 March 1951 from Belgrave to Mr. C.D. Pelly, the Political Agent in Bahrain, in particular in the very extensive list of "diving and fishing banks claimed by Bahrain west of the median line between the low-water limits of Bahrain and Saudi Arabia"<sup>244</sup>. A transposition of the dividing line established by the agreement of 22 February 1958 on to the map attached to Bahrain's letter of 1951<sup>245</sup> quite clearly shows that Bahrain obtained much less than it was claiming, and that the pearling banks were not a special circumstance requiring an adjustment of the equidistance line in its favour. It appears that it was not the pearling banks that were at the heart of the negotiations, but rather the Bu Saafa oilfield, situated within the "Fasht bu Saafa Hexagon", which was placed wholly under the jurisdiction of Saudi Arabia, but in which Bahrain obtained the right to half of the oil resources<sup>246</sup>.

8.90 It appears that the pearling banks had no effect in the determination of the course of the continental shelf delimitation line between Bahrain and Iran, as laid down by the agreement of 17 June 1971<sup>247</sup>. Indeed, if reference is made to the pearling banks lying off the north and north-east of Bahrain such as Shutayah, Hayr Ath Thama and Fasht Naywah (Al Amari), the conclusion is unavoidable that these banks were in no way taken into account for the drawing of the dividing line, either as basepoints for the median line or as a special circumstance allowing the adjustment, to Bahrain's advantage, of the course of the median line. Therefore, in the Bahrain/Iran agreement of 1971, Bahrain's alleged historic rights to pearling banks were not accepted as a special circumstance justifying an adjustment of the course of the median line in favour of Bahrain.

8.91 Claims to historic rights to pearling banks seem never to have been considered, in themselves, as special circumstances leading to an adjustment of the equidistance line in the other continental shelf delimitations that have been effected in the Gulf. This is the case, in particular, of the agreement between Sharjah and Umm Al Qaywayn, signed in 1964<sup>248</sup>, the agreement between Abu Dhabi and Dubai signed on 18 February 1968<sup>249</sup>, the agreement between Iran and Saudi Arabia signed on 24 October 1968<sup>250</sup>, the agreement between Qatar and Iran signed on 20 September 1969<sup>251</sup>, the agreement between Iran and the United Arab

Emirates (Dubai) signed on 31 August 1974<sup>252</sup> and the arbitral award rendered on 19 October 1981 in the Dubai/Sharjah case<sup>253</sup>.

**b) Bahrain's argument that "Bahrain's historic rights to the pearling banks" are special or relevant circumstances within the meaning of customary international law**

8.92 Bahrain rightly argues - and thus in this respect agrees at least in principle with Qatar's view<sup>254</sup> - that the determination of a single maritime boundary in the northern sector "is governed by the rules of customary international law"<sup>255</sup>. It also argues, rightly, that such rules have been expressed "in State practice, in the decisions of the Court and of international arbitral tribunals, and in provisions of international conventions which reflect the state of customary international law"<sup>0</sup>. Yet when it contends that the course of the maritime boundary in the northern sector must take into account, as special or relevant circumstances, Bahrain's historic rights to the pearling banks lying to the north and north-west of Qatar, "which have appertained to Bahrain since time immemorial"<sup>1</sup>, Bahrain is going against not only State practice, as has just been seen, but also against the jurisprudence<sup>2</sup>. This may be seen from the *Libya/Tunisia* case and also from the *Gulf of Maine* case.

8.93 In the *Libya/Tunisia* case, Tunisia attributed a central role to its claim of historic rights, in particular with respect to sedentary fisheries, referring to the exploitation off its coastline, to depths of up to 50 metres, of sedentary species such as sponges<sup>3</sup>. According to Tunisia, such fisheries were evidence of a natural prolongation of its territory under the sea. Consequently, "the delimitation of the continental shelf between itself and Libya must not encroach at any point upon the area within which Tunisia possesses such historic rights"<sup>4</sup>. Libya contested this theory, rejecting the possibility of excluding certain areas of the sea-bed and considering that "in so far as the area claimed might overlap with the natural prolongation of Libya's land territory, a fishing practice of one State cannot in principle prevail over the inherent and *ab initio* rights of another State in respect of its natural prolongation"<sup>5</sup>. Yet in its judgment of 24 February 1982 the Court rejected Tunisia's position, in the sense that it did not include historic rights to sedentary fisheries among the relevant circumstances that were to be taken into account in that case in order to achieve an equitable delimitation.

8.94 The Chamber in the *Gulf of Maine* case adopted a similar solution, after having been requested by the Parties to draw a single maritime boundary for the continental shelf and exclusive fishing zones. In that case, the course of the dividing line concerning the part of the delimitation area lying outside the Gulf of Maine traversed areas, in particular in the Georges Bank sector, where there was a heavy concentration of sedentary species, in particular scallops, but also lobsters<sup>6</sup>. The United States tried to rely on its traditional fishing activities in order to assert its exclusive rights in this sector<sup>7</sup>. In sum, as the Chamber remarked, the United States' reasoning was "somewhat akin to the invocation of historic rights, though that expression has not been used"<sup>8</sup> and from the American point of view these traditional fishing activities were to "be regarded as a major relevant circumstance for the purpose of reaching an equitable solution to the delimitation problem"<sup>9</sup>. The Chamber decided to reject the United States' position and "not to ascribe any decisive weight, for the purposes of the delimitation it is charged to carry out, to the antiquity or continuity of fishing activities carried on in the past within that part of the delimitation area which lies outside the closing line of the Gulf"<sup>10</sup>. It also held that "the respective scale of activities connected with fishing... cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line"<sup>11</sup>.

## Section 5. Qatar's line in the northern sector leads to an equitable result

8.95 Qatar has shown in its Memorial that in order to achieve an equitable delimitation of the maritime areas in the northern sector, a single line should be drawn for the continental shelf and fishing zones, linking points N, NSLB, BLV and 2 (2B)<sup>12</sup>. More precisely, point N, whose geographical coordinates are 50°48'31" East and 26°15'02" North is situated at the intersection of two lines: the closing line between points RK and MQ, being the southern limit of the delimitation area in the northern sector, and segment L-NSLB of the line defined in the British decision of 23 December 1947<sup>13</sup>. Points NSLB (50°49'48" East and 26°21'24" North) and BLV (50°57'30" East and 26°33'35" North) are two turning points on the 1947 line<sup>14</sup>. There remains the end point put forward by Qatar, *i.e.* point 2(2B), whose geographical coordinates are 51°05'54" East and 27°02'47" North and which is one of the points defined in the delimitation agreement of 17 June 1971 between Bahrain and Iran<sup>15</sup>.

8.96 The line submitted by Qatar to the Court consists of two sections. The first, N, NSLB, BLV is the part of the line defined in the British decision of 23 December 1947 in the area beyond where the Parties have opposite coasts. BLV is a hinge-point on Qatar's line in the northern sector: it is both the end point of the 1947 line and the starting point of the second section of Qatar's line, and is thus a highly relevant circumstance for the maritime delimitation between the Parties<sup>16</sup>. As for the second section, BLV-2 (2B), this is a line perpendicular to the closing line from RK to MQ, starting at BLV and slightly adjusted in Bahrain's favour towards the east, so that the end point of the dividing line in the northern sector meets point 2 (2B) of the 1971 agreement between Bahrain and Iran. That point 2 (2B) is a reference point that is particularly significant in the maritime delimitations in the area, since it is a point which is practically equidistant from the coasts of Qatar, Iran and Bahrain and could serve as a tripoint<sup>17</sup>. The adjusted perpendicularity method which, as Qatar has stressed in its Memorial, is derived from the same rationale as the equidistance method<sup>18</sup>, has been applied in the present case as follows, as illustrated on *Map No. 11*, facing this page. The first stage of its implementation, which is the starting point of the strict perpendicular through BLV, is point R (50°52'28" East and 26°14'12" North) on the closing line from RK to MQ, the R-BLV segment forming a 90° angle with line RK-MQ; the end point of this strict perpendicular line is point S (51°05'12" East and 27°03'04" North) on the limit defined by the 1971 agreement between Bahrain and Iran<sup>19</sup>. Thus, the second stage of implementation of the perpendicularity method is to shift eastwards the end point of Qatar's line from S to point 2 (2B), both for reasons of simplicity and because the two points are so close together. The foot of the line from 2 (2B) to BLV on the closing line from RK to MQ is therefore shifted slightly towards the west, from point R to point T (50°51'59" East and 26°14'18" North). As may be seen from *Map No. 11* facing this page, and as noted in Qatar's Memorial, "The shifting effect - 800 metres at the starting point of the construction (R-T) and 1300 metres at its end point (S-2B) - is practically negligible at the scale of the construction"<sup>20</sup>.

8.97 In its Memorial Qatar concluded the discussion of the maritime delimitation in the northern sector by stressing that the extension of the 1947 line from BLV to 2 (2B) was both a technically simple and a legally appropriate line, insofar as it resulted in a reasonable and equitable delimitation<sup>21</sup>. Qatar would like briefly to recall, in closing the present discussion, that the line of maritime delimitation based on the adjusted perpendicularity method that it has submitted to the Court with respect to the northern sector, linking points N, NSLB, BLV and 2(2B), is in conformity with the customary international law that is applicable to operations of maritime delimitation and that the equitable nature of that line may be verified *a posteriori* by applying the test of proportionality.

## **A. Qatar's line is in conformity with customary international law**

8.98 The line presented to the Court by Qatar is in conformity with customary international law. It results from a strict application of the "fundamental norm" of maritime delimitation according to which the dividing line must be drawn on the basis of equitable principles, taking into consideration all the relevant circumstances, in order to achieve an equitable result<sup>22</sup>.

8.99 In this respect reference must be made to the Court's Judgment of 3 June 1985 in the *Libya/Malta* case. After having noted "the normative character of equitable principles" insofar as, in particular, they "govern... delimitation by adjudication", the Court mentioned several of the most well-known and significant of such principles, which it formulated "in terms of general application"<sup>23</sup>. Qatar has applied these principles to the line that it has submitted to the Court for the northern sector. It has taken into account all the relevant circumstances, *i.e.* the factual elements, particularly those of a geographical nature which objectively characterise the situation in the area to be delimited, and it complies with equitable principles, thus leading to a reasonable delimitation. Qatar's line complies strictly with two of the most fundamental equitable principles identified by the Court in the *Libya/Malta* case, namely the principle of non-encroachment and the principle that "equity does not necessarily imply equality".

### **1. Compliance with the principle of non-encroachment**

8.100 A first example of Qatar's compliance with equitable principles is that the N, NSLB, BLV, 2(2B) line, unlike Bahrain's line<sup>24</sup>, is scrupulously observant of the principle of non-encroachment. Qatar's line takes into account Bahrain's maritime projection, and does not in any way trespass upon its natural prolongation. It allows Bahrain fully to enjoy its rights, in accordance with international law, on its continental shelf and in its fishing zones along its coastline, in the maritime areas stretching north and north-east up to the maritime boundary resulting from the 1971 agreement between Bahrain and Iran.

### **2. Compliance with the principle that "equity does not necessarily imply equality"**

8.101 As contended by Qatar in its Memorial<sup>25</sup>, Qatar's line complies with the principle that "equity does not necessarily imply equality"<sup>26</sup>. Unlike Bahrain's line which, contrary to this equitable principle, completely disregards the inequalities of nature in the maritime areas to be delimited, Qatar's line is a reasonable reflection of the configuration of the Parties' coasts and, above all, of the disparity or disproportion in the lengths of their respective coastal fronts<sup>27</sup>. First, Bahrain's eastern coast, measured in accordance with its general direction from Al Muharraq to Ras al Barr, and disregarding islands, islets and low-tide elevations, corresponds to a straight coastal front which is about 55.5 kilometres (or 29.9 nautical miles) long. Second, Qatar's relevant western coast, measured in accordance with the same parameters from the northern extremity of the peninsula to Ras al Uwaynat, forms a straight coastal front which is approximately 88.2 kilometres (or 47.6 nautical miles) long. As a result, the proportionality ratio is 1.59 to 1 in favour of Qatar<sup>28</sup>.

8.102 The disparity in the respective lengths of the Parties' relevant coasts appears to be one of the most, if not the most, striking characteristics of the geographical relationship between Qatar and Bahrain. To disregard it in this case, as Bahrain does, is inconsistent with customary international law as reflected in the case law. Qatar has therefore taken it into consideration in constructing the dividing line that it proposes to the Court in the northern

sector, in order to reach an equitable result. As the Court stressed in its Judgment of 14 June 1993 in the *Denmark/Norway* case:

"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>29</sup>.

In a word, Qatar's line, unlike Bahrain's, does not refashion geography or nature.

### **B. The *a posteriori* verification of the equitable nature of Qatar's line, by the test of proportionality**

8.103 In its Memorial, Qatar verified the equitable nature of the line that it was submitting to the Court in the northern sector, by means of the proportionality test. In other words, while stressing the disproportion between the respective lengths of the Parties' coasts<sup>30</sup> and recalling the important role played by proportionality in the international jurisprudence<sup>31</sup>, Qatar has never suggested dividing the relevant delimitation area in proportion to the lengths of the Parties' coasts. It has used the idea of proportionality as an *a posteriori* test of the equitable nature of the delimitation, once such delimitation has been made<sup>32</sup>. For Qatar, this idea is therefore, as the Chamber remarked in the *Gulf of Maine* case, "a means of checking whether a provisional delimitation established initially on the basis of other criteria, and by the use of a method which has nothing to do with that concept, can or cannot be considered satisfactory in relation to certain geographical features of the specific case"<sup>33</sup>. Consequently, in the present case, where the delimitation area linking points RK, MQ, WB, 4, 3, 2(2B), 2(2Q), WQ and RK forms a polygon of a total surface area of about 5215.11 square kilometres<sup>34</sup>, proportionality allows a verification of the equitable nature of Qatar's line in the northern sector, *i.e.* the equitable nature of the line which, from point N, follows the course of the 1947 line up to point BLV and extends it along the BLV-2 (2B) segment on the basis of the adjusted perpendicularity method. This verification may be made by means of a proportionality test. As Qatar has already indicated in its Memorial<sup>35</sup> and as will be briefly recalled here, it may be made with regard to the relationship between the lengths of the Parties' relevant coastal fronts and the surface area of the maritime areas attributed to them.

8.104 The equitable nature of Qatar's line linking, in the northern sector, points N, NSLB, BLV and 2(2B) has already been verified in the light of the relationship between the lengths of the Parties' relevant coasts and the surface area of the maritime areas attributed to each of them in the above-mentioned delimitation area<sup>36</sup>. Indeed, on the basis of that delimitation area, the surface area of the maritime areas lying to the east of the N, NSLB, BLV, 2(2B) line and attributed to Qatar is approximately 2,978.60 square kilometres, and the surface area of the maritime areas lying to the west of that line and attributed to Bahrain is about 2,336.51 square kilometres. The ratio of the surface areas is thus 1.68 to 1 in favour of Qatar, which means that it is not far removed from the ratio of coastal lengths which is 1.59 to 1 in favour of Qatar<sup>37</sup>.

8.105 While, as Qatar has acknowledged in its Memorial<sup>38</sup>, the two ratios are not strictly identical, the difference is only in the order of 6 %, which 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 the 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>39</sup>. This proportionality test is in itself sufficient to demonstrate the equitable nature of Qatar's line in the northern sector.

## **Section 6. Conclusion**

8.106 For the maritime delimitation in the northern sector, Bahrain has put forward a line which, as Qatar has demonstrated in this chapter, is contrary to customary international law. First, Bahrain ignores the geographical facts in the region. Its line takes account of neither the configuration of the Parties' relevant coasts nor the disparity between their respective coastal lengths, and it encroaches upon the natural maritime projection of the Qatar peninsula towards the north. Second, Bahrain's construction of its equidistance line is devoid of any legal basis. It relies on Dibal, which is no more than a minor feature not forming part of Bahrain's coastline, and which is inappropriate for use as a basepoint for a maritime delimitation. Finally, Bahrain's assertion that its alleged historic rights to the pearling banks lying off the north and north-west of the Qatar peninsula may be special or relevant circumstances allowing an adjustment to its own advantage of the course of the equidistance line is wrong, and conflicts with the international jurisprudence, especially since Bahrain's claim that it exercised exclusive rights over the banks concerned is contrary to the custom and usages of the region. Consequently, the dividing line claimed by Bahrain in the northern sector leads to a result that is manifestly unreasonable and leads to an inequitable result.

8.107 By way of contrast, the line which Qatar commends to the Court as the proper line to be adopted for the delimitation in the northern sector has been prepared on the basis that it takes full account of the geographical realities, including the configuration of the relevant coasts of the Parties and the disparity between the respective lengths of their coastal fronts. It also satisfies fully the principle of non-encroachment in the sense that it does not adversely affect the natural maritime projection of the coast of either of the two Parties. By using basepoints all of which are situated on the main coasts of the Parties, and none of which is located on off-shore features such as low-tide elevations, the course of Qatar's line does not suffer from any distorting effect resulting from the use of minor geographical features. Finally, Qatar's line takes no account of the pearl banks to which Bahrain has asserted claims of sovereignty or claims of exclusive jurisdiction and control, for the reasons discussed earlier in this Chapter. For all these reasons, the dividing line proposed by Qatar in the northern sector, being in itself reasonable and in accordance with equitable principles, leads to an equitable result in conformity with the requirements of customary international law.

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2 BM, paras. 651 and 655.

3 *See*, also, BM, paras. 652, *et seq.*, and BM, Map 10, Vol. 7.

4 BM, paras. 633, *et seq.*

5 *See*, paras. 7.12-7.13 and 7.49, *et seq.*, above.

6 BM, paras. 40, 569 and 574.

7 QM, paras. 12.1-12.2, 12.5 and 12.62.

8 QM, Map 20, Vol. 17.

9 *See*, QM, paras. 10.34, *et seq.*; QM, Annex IV.254, Vol. 12, p. 17.

10 BM, paras. 570, *et seq.*, 576 and 587; *see*, also, BM, Annexes 90, 104 and 105, Vol. 3, p. 529, p. 615 and p. 621; 231, Vol. 4, p. 986; 295, 298, 302 and 303/304, Vol. 5, pp. 1204, 1211, 1222 and 1225; and 308/309 and 339, Vol. 6, p. 1286 and p. 1467.

11 QM, paras. 12.62, *et seq.*; and QM, Map 21, Vol. 17. *See*, also, *Map No. 8*, facing page 243.

12 The geographical coordinates of the Athari 1 well, which was drilled by Kuwait Foreign Petroleum Exploration Co. in 1986, are 22°55'00"N, 51°05'00"E.

13 BM, para. 653.

14 BM, paras. 652, *et seq.*

15 *See*, also, BM, Maps 10 and, in particular, 11, Vol. 7.

16 QCM, Annex IV.33, Vol. 4, p. 265, at p. 267; *see*, also, *ibid.*, p. 269. *See*, paras. 8.34, *et seq.*, below.

17 BM, Map 10, Vol. 7.

18 Paras. 6.76 and 6.82, *et seq.*, above, and paras. 8.42, *et seq.*, below.

19 QM, paras. 10.54, 10.58 and 10.73; QM, Appendix 5, Vol. 15, p. 125; BM, para. 626.

20 *See*, para. 8.43, below.

21 BM, paras. 653, *et seq.*

22 *See*, paras. 8.63, *et seq.*, below.

23 *See*, para. 8.6, above.

24 *I.C.J. Reports 1984*, p. 322, para. 182.

25 QM, Chap. XII, in particular paras. 12.6, *et seq.*; BM, paras. 636, 649, 652 and 695.

26 *See*, para. 8.2, above.

27 QM, para. 12.67; *see*, QM, Maps 17 and 22, Vol. 17.

28 QM, Chap. XI and paras. 12.4-12.5; *see*, QM, Map 22, Vol. 17.

29 *See*, para. 8.6, above.

30 BM, paras. 559 and 633; BM, Map 10, Vol. 7.

31 *See*, paras. 8.11, *et seq.*, below.

32 QM, paras. 12.66, *et seq.* and QM, Map 22, Vol. 17; for the western limit, *see*, para. 8.13, below.

33 *See*, *Map No. 8*, facing page 243.

34 QM, Annex IV.260, Vol. 12, p. 81 and QM, Map 11, Vol. 17.

35 QM, Annex IV.264, Vol. 12, p. 111 and QM, Map 11, Vol. 17.

36 QM, paras. 12.20, *et seq.* and 12.38-12.39.

37 BM, paras. 637 and 651.

38 As the Court will recall, by its Proclamation of 30 October 1973, Iran expressly acknowledged that the conventional limits of the continental shelf were to be applied to its exclusive fishing zone (QM, para. 12.8, note 11a; *see*, also, the corresponding Proclamation by Qatar of 2 June 1974, *ibid.*). Moreover, under Article 19 of its "Act on the Marine Areas... in the Persian Gulf and the Oman Sea" of 1993, Iran similarly applied those limits to its exclusive economic zone (QM, para. 12.8).

39 QM, paras. 12.41-12.42 and 12.62.

40 BM, paras. 651 and 655.

41 QM, Map 24, Vol. 17.

42 Corresponding to point Z on Bahrain's line (BM, para. 655 and BM, Map 10, Vol. 7). *See*, *Map No. 8*, facing page 243.

43 QM, para. 12.39.

44 BM, para. 651.

45 *See*, paras. 6.103-6.104, above.

46 QM, para. 12.40.

47 QM, Annex IV.262, Vol. 12, p. 95 and QM, Map 11, Vol. 17.

48 QM, Map 22, Vol. 17. *See, Map No. 8*, facing page 243.

49 QM, para. 12.68.

50 *See*, paras. 8.103, *et seq.*, below; *see*, also, QM, paras. 12.70-12.71.

51 QM, para. 12.13; *see*, Qatar's Application instituting proceedings, dated 5 July 1991, para. 25.

52 QM, paras. 12.14, *et seq.*

53 QM, para. 12.16.

54 QM, paras. 12.17, *et seq.*

55 BM, para. 561.

56 QM, para. 12.13.

57 BM, para. 563.

58 QM, paras. 12.13, *et seq.*

59 *I.C.J. Reports 1993*, p. 59, para. 48; p. 62, para. 54; p. 69, para. 70.

60 BM, para. 650.

61 *Ibid.*

62 *See*, para. 8.14, above.

63 BM, para. 638.

64 Weil, *The Law of Maritime Delimitation - Reflections*, *op. cit.*, QCM, Annex IV.58, Vol. 4, p. 453, at p. 458.

65 *See*, paras. 8.22, *et seq.*, below; *see*, also, QM, paras. 12.17, *et seq.*

66 *See*, paras. 8.34, *et seq.*, below.

67 *See*, para. 8.33, below.

68 *See*, for example, *North Sea Continental Shelf*, *I.C.J. Reports 1969*, pp. 49-50, para. 91.

69 BM, para. 638.

70 QM, para. 12.24. *See*, also, QM, para. 12.25.

71 *See*, paras. 6.75, *et seq.*, above.

72 *I.C.J. Reports 1984*, p. 329, para. 199; *see*, p. 278, para. 59. Arbitral tribunals have made similar findings. Thus, in the case concerning delimitation of the continental shelf between France and the United Kingdom (award of 30 June 1977), the Court of Arbitration declared that "it is the geographical circumstances which primarily determine the appropriateness of the equidistance or any other method of delimitation" (QCM, Annex IV.34, Vol. 4, p. 273, at p. 284). Similarly, in the case concerning the delimitation of maritime areas between Canada and France (award of 10 January 1992), the Court of Arbitration considered that "[g]eographical features are at the heart of the delimitation process" (QCM, Annex IV.35, Vol. 4, p. 299, at p. 301) and that "the criteria governing delimitation are to be found primarily in the geographical facts" (*ibid.*, at p. 302).

73 *I.C.J. Reports 1985*, p. 50, para. 69; *see*, also, *I.C.J. Reports 1982*, p. 34, para. 17. In the same decision, the Court also noted, among the relevant circumstances that might justify a certain adjustment of the median line towards the north in order to achieve an equitable result, "the general geographical context in which the islands of Malta appear as a relatively small feature in a semi-enclosed sea" (*I.C.J. Reports 1985*, p. 52, para. 73).

74 Weil, *The Law of Maritime Delimitation - Reflections*, *op. cit.*, QCM, Annex IV.58, Vol. 4, p. 453, at p. 457.

75 *Ibid.*, at p. 456 (emphasis in the original); *see*, also, *ibid.*, at p. 455, and para. 8.22, below.

76 BM, para. 635.

77 *See*, QM, paras. 12.10, *et seq.*

78 QM, para. 12.11.

79 *Ibid.* *See*, para. 8.21, below.

80 *See*, QCM, Annex IV.60, Vol. 4, p. 465 and para. 8.21, below; *see*, also, QCM, Annex IV.34, Vol. 4, p. 273, at p. 283; *I.C.J. Reports 1969*, pp. 36-37, paras. 57-58; *I.C.J. Reports 1982*, p. 63, para. 78 and p. 88, para. 126; *I.C.J. Reports 1984*, p. 331, para. 206 and pp. 333-334, paras. 216-217; *I.C.J. Reports 1985*, p. 47, para. 62.

81 *I.C.J. Reports 1985*, p. 51, para. 70.

82 BM, Map 10, Vol. 7.

83 *I.C.J. Reports 1985*, p. 51, para. 70.

84 BM, para. 653.

85 BM, Map 10, Vol. 7.

86 *See*, para. 8.7, above, and paras. 8.63, *et seq.*, below. Bahrain has also failed to mention that, whereas the jurisprudence favours use of the equidistance method in cases of delimitation between States with opposite coasts, and acknowledges that it may be presumed

to be equitable, the same is not true in cases of delimitation between States with adjacent coasts.

As early as 1969, the Court noted that "the continental shelf area off... opposite States... meet[s] and overlap[s], and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionately [*sic*] distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved... This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it..." (*I.C.J. Reports 1969*, pp. 36-37, para. 57). And the Court added: "whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other" (*ibid.*, p. 37, para. 58).

Similarly, in 1977, the Anglo-French Court of Arbitration stressed that: "Whereas in the case of 'opposite' States a median line will normally effect a broadly equitable delimitation, a lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographical features. In short, it is the combined effect of the side-by-side relationship of the two States and the prolongation of the lateral boundary for great distances to seawards which may be productive of inequity..." (QCM, Annex IV.34, Vol. 4, p. 273, at p. 284; *see, also, ibid.*, p. 295).

Finally, mention may be made not only of the Court's Judgment of 3 June 1985 in the *Libya/Malta* continental shelf case (*I.C.J. Reports 1985*, p. 51, para. 70) referred to above, but also of the Judgment of 14 June 1993 in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, where the Court declared that: "*Prima facie*, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel" (*I.C.J. Reports 1993*, p. 66, para. 64; *see, also, p. 62, para. 56 and p. 67, para. 65*).

87 QM, paras. 12.17, *et seq.*

88 *See*, para. 8.18, above.

89 BM, paras. 6, *et seq.*

90 BM, para. 566.

91 BM, Map 14, Vol. 7.

92 BM, Map 10, Vol. 7.

93 *See*, QM, paras. 12.30, *et seq.*

94 QM, paras. 12.33, *et seq.*

95 *I.C.J. Reports 1993*, p. 67, para. 65.

96 BM, paras. 55-56.

97 BM, paras. 69, *et seq.* Bahrain also mentions the disparity in landmass (BM, paras. 43 and 58) and population (BM, paras. 54 and 60) and the "dramatic" difference resulting therefrom with respect to population density: "521 Bahrainis per km<sup>2</sup>, 14 Qataris per km<sup>2</sup>" (BM, para. 61).

Yet, as is well known, the Court has refused to take into consideration the parameter of landmass, rejecting in its Judgment of 3 June 1985 in the *Libya/Malta* case Libya's theory that "the relevant geographical considerations include the landmass behind the coast [which]... provides... the factual basis and legal justification for the State's entitlement to continental shelf rights, a State with a greater landmass having a more intense natural prolongation" (*I.C.J. Reports 1985*, p. 40, para. 49). For the Court, "[t]he capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect. What distinguishes a coastal State with continental shelf rights from a landlocked State which has none, is certainly not the landmass, which both possess, but the existence of a maritime front in one State and its absence in the other. The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast" (*ibid.*, p. 41, para. 49).

Similarly, in its most recent Judgment on the subject, rendered on 14 June 1993 in the *Denmark/Norway* case, the Court dismissed the point of view of Denmark, who considered as relevant to the delimitation "the major differences between Greenland and Jan Mayen as regards population..." (*I.C.J. Reports 1993*, p. 73, para. 79). It had noted that "Jan Mayen has no settled population, as only 25 persons temporarily inhabit the island for the purposes of their employment..." whereas "the total population of Greenland is 55,000..." (*ibid.*, p. 73, para. 79). But the Court concluded that, in the delimitation to be performed in that case, it should not be considered that the low population of Jan Mayen was a circumstance to be taken into consideration (*ibid.*, p. 74, para. 80).

98 Weil, *The Law of Maritime Delimitation - Reflections*, *op. cit.*, QCM, Annex IV.58, Vol. 4, p. 453, at p. 459.

99 *Ibid.*

100 *I.C.J. Reports 1982*, p. 77, para. 106.

101 *Ibid.*, para. 107. *See*, also, the *Guinea/Guinea-Bissau* case, QCM, Annex IV.33, Vol. 4, p. 265, at p. 271.

102 *I.C.J. Reports 1985*, p. 41, para. 50.

103 *Ibid.*

104 *See*, *I.C.J. Reports 1984*, p. 278, para. 59: "It should be emphasised that these fishing aspects, and others relating to activities in the field... of oil exploration... may require an examination of valid considerations of a political and economic character. The Chamber is

however bound by its Statute, and required by the Parties, not to take a decision *ex aequo et bono*, but to achieve a result on the basis of law".

105 *Ibid.*, p. 341, para. 235.

106 *Ibid.*, pp. 341-342, para. 235.

107 *Ibid.*, p. 342, para. 236.

108 *Ibid.*, p. 342, para. 237.

109 QCM, Annex IV.35, Vol. 4, p. 299, at p. 302.

110 *I.C.J. Reports 1993*, p. 73, para. 79.

111 *Ibid.*

112 *Ibid.*, p. 74, para. 80.

113 *I.C.J. Reports 1985*, p. 44, para. 56.

114 *Ibid.*, p. 40, para. 46. *See*, also, *I.C.J. Reports 1969*, pp. 49-50, para. 91; Award of the Anglo-French Court of Arbitration, QCM, Annex IV.34, Vol. 4, p. 273, at p. 292; and *I.C.J. Reports 1985*, p. 39, para. 46.

115 *See*, para. 8.16, above.

116 *I.C.J. Reports 1951*, p. 133.

117 *I.C.J. Reports 1969*, p. 51, para. 96.

118 *See*, para. 8.5, above.

119 BM, Maps 10 and 11, Vol. 7, and *Map No. 8*, facing page 243.

120 QM, paras. 12.62, *et seq.*, and Map 21, Vol. 17; *see*, also, *Map No. 8*, facing page 243.

121 It should not be forgotten that Bahrain's relevant basepoints for the delimitation in the central part of the Arabian-Persian Gulf are used only to the west of point 2B and that, on the other hand, only Qatar's relevant basepoints are taken into account to the east of point 2B, in particular up to point 2Q or Z, which is the end point of the boundary claimed by Bahrain (*see*, *Map No. 8*, facing page 243). This has the effect of further encroaching upon the natural maritime projection of Qatar.

122 *See*, paras. 8.55, *et seq.*, below.

123 QCM, Annex IV.32, Vol. 4, p. 261.

124 *I.C.J. Reports 1969*, pp. 31-32, para. 44.

125 QCM, Annex IV.33, Vol. 4, p. 265, at p. 267; *see*, also, *ibid.*, pp. 269, 270 and 271. The President of the arbitral tribunal, Judge Lachs, in his speech delivered before the award was read, even stressed that this was the "objectif premier" of the decision.

126 *I.C.J. Reports 1985*, p. 39, para. 46.

127 *Ibid.*

128 QM, para. 12.18.

129 *See*, paras. 8.16 and 8.33, above.

130 *I.C.J. Reports 1985*, p. 39, para. 46.

131 In this regard, the Court will recall the award of 14 February 1985 in the *Guinea/Guinea-Bissau* case, where the arbitral tribunal stated that "Son objectif premier a été d'éviter que, pour une raison ou pour une autre, une des Parties voie s'exercer en face de ses côtes et dans leur voisinage immédiat des droits qui pourraient porter atteinte à son droit au développement ou compromettre sa sécurité" (QCM, Annex IV.33, Vol. 4, p. 265, at p. 271). *See*, also, the Court's judgment in the *Libya/Malta* case, *I.C.J. Reports 1985*, p. 42, para. 51.

132 *See*, paras. 8.5, *et seq.*, above.

133 *See*, para. 8.96, footnote 274, below.

134 *See*, para. 8.6, above.

135 Weil, "A propos de la double fonction des lignes et des points de base dans le droit de la mer", *op. cit.*, QCM, Annex IV.56, Vol. 4, p. 429, at p. 432; emphasis added.

136 BM, paras. 559, 564 and 633.

137 *See*, paras. 6.71, 6.76 and 8.6, above.

138 QM, paras. 10.54, 10.58 and 10.73; QM, Appendix 5, Vol. 15, p. 125.

139 BM, Submissions, p. 301, para. 3.

140 BM, para. 626.

141 *Ibid.*

142 BM, paras. 619 and 622, *et seq.*

143 BM, para. 620.

144 BM, para. 625.

145 *See*, para. 8.42, above.

146 BM, para. 626.

147 A copy of Bahraini marine charts Nos. 5001, 2501 and 1502 is being deposited with the Registry of the Court pursuant to Article 50, paragraph 2 of the Rules of Court.

148 Emphasis added.

149 BM, Maps 6, 7, 8, 9, 11, 12, 13, 14 and 15, Vol. 7.

150 BM, para. 620.

151 New edition, 26 February 1993.

152 *See, Map No. 9*, facing this page.

153 QCM, Annex IV.24, Vol. 4, p. 165. For the convenience of the Court, Qatar has reproduced, as *Map No. 9*, the sketch map appearing as Figure 9 in the Bahraini Technical Circular (*see*, the citation in para. 8.50, below). It has inserted, as an inset on that Map, Bahrain chart No. 1502 with a notation showing the closed fishermen's channel.

154 *See*, paras. 6.86, *et seq.*, above.

155 BM, paras. 619 and 624.

156 Sir G. Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea", *I.C.L.Q.*, 1959, Vol. 8, QCM, Annex IV.43, Vol. 4, p. 351.

157 *See*, paras. 8.46, *et seq.*, above.

158 Weil, "A propos de la double fonction des lignes et points de base dans le droit de la mer", *op. cit.*, QCM, Annex IV.56, Vol. 4, p. 429, at p. 442.

159 *See*, for example, QM, Map 14, Vol. 17.

160 Bowett, *op. cit.*, QCM, Annex IV.37, Vol. 4, p. 307, at p. 311. This is all the more so, since in the regional practice there are, as the same author has rightly remarked, "cases in which features forming an integral part of the coast have not been used: the Iran/Qatar agreement of 1969 is a case in point, using a mainland-to-mainland equidistance line and ignoring islands, rocks, reefs and low-tide elevations" (*ibid.*).

161 *See, I.C.J. Reports 1969*, p. 36, para. 57.

162 *Ibid.*, p. 23, para. 24.

163 *Ibid.*, p. 50, para. 91.

164 *See*, Anglo-French Arbitral Award, QCM, Annex IV.34, Vol. 4, p. 273, at p. 297; *Libya/Tunisia Continental Shelf case, I.C.J. Reports 1982*, p. 63, para. 79; p. 85, para. 120 and p. 89, paras. 128-129; and *Libya/Malta Continental Shelf case, I.C.J. Reports 1985*, p. 48, para. 64.

165 *I.C.J. Reports 1984*, p. 329, para. 201.

166 *Ibid.*, p. 330, para. 201.

167 *Ibid.*, p. 332, para. 210.

168 *Ibid.*

169 Indeed, such a line, being an extension of the first section (OQR) is shown as a red dashed line on Map 10 of the BM. It is defined in the legend as "equidistance line projected northeastward from R to agreed Iran/Qatar boundary".

170 BM, para. 651.

171 BM, para. 653.

172 The BM gives no geographical coordinates, and its maps are very approximate.

173 BM, para. 653; *see*, BM, Map 10, Vol. 7 and *Map No. 8*, facing page 243.

174 BM, para. 653; emphasis added.

175 BM, para. 655.

176 BM, para. 651.

177 BM, para. 655.

178 BM, Map 10, Vol. 7 and *Map No. 8*, facing page 243.

179 QM, paras. 9.15 and 10.37, *et seq.*; QM, Appendix 4, Vol. 15, p. 111.

180 BM, para. 638; *see*, also, para. 6.49, above.

181 BM, para. 639.

182 BM, para. 640.

183 *Ibid.*; *see*, also, para. 6.49, above, and the account given in QM, para. 10.39 and, in particular, QM, Appendix 4, Vol. 15, p. 111.

184 QM, para. 10.39.

185 BM, para. 645.

186 BM, Annex 348, Vol. 6, p. 1499.

187 BM, para. 642.

188 BM, para. 641.

189 Sir C. Hurst, "Whose is the bed of the sea? Sedentary fisheries outside the three-mile limit", *B.Y.B.I.L.*, 1923-1924, QCM, Annex IV.45, Vol. 4, p. 371; emphasis added.

190 BM, para. 641.

191 Other arguments are also relied upon in the BM, in particular the opinion given on 11 February 1905 by the Law Officers of the Crown, according to whom the British Government had recognised Bahrain's rights to such banks (BM, para. 642). As will be shown below (para. 8.78), this is an inaccurate interpretation of the opinion of 11 February 1905.

192 *See*, para. 8.66, above.

193 BM, para. 645; BM, Annex 348, Vol. 6, p. 1499; QM, Annex IV.254, Vol. 12, p. 17, at pp. 41-43.

194 *See*, paras. 8.65-8.66, above.

195 BM, Annex 348, Vol. 6, p. 1499.

196 *Ibid.*

197 *Ibid.*

198 BM, para. 642.

199 BM, Annex 348, Vol. 6, p. 1499; emphasis added.

200 QM, para. 10.39; *see*, also, para. 8.81, below.

201 BM, Annex 348, Vol. 6, p. 1499.

202 *Ibid.*

203 BM, para. 643; emphasis in original.

204 BM, Annex 348, Vol. 6, p. 1499.

205 BM, Annexes 233 and 234, Vol. 4, p. 1014 and p. 1025; and BM, Annexes 313, 314, 315 and 316, Vol. 6, pp. 1363, 1379, 1392 and 1400.

206 *See*, for example, the Statement of Salman bin Isa bin Ahmad bin Saad al Dosari (BM, Annex 315, Vol. 6, p. 1392), where it is stated on the one hand that the pearling banks mentioned were "part of Bahrain", *i.e.* that they were subject to Bahrain's exclusive jurisdiction, but on the other hand that the same banks were "open to everyone", *i.e.* that they were not reserved exclusively for Bahraini fishermen.

207 QM, para. 10.39, and in particular, QM, Appendix 4, Vol. 15, p. 111.

208 BM, para. 642.

209 BM, para. 647.

210 QM, Annex IV.20, Vol. 9, p. 96; *see*, also, BM, Annex 321, Vol. 6, p. 1431. The same principle had previously been stated in correspondence from the India Office. Thus, in a letter of 10 March 1904 from several members of the Foreign Department to the Secretary of State for India, it is stated that "The pearl banks appear from time immemorial to have been open, without distinction, to the Arabs of the entire littoral... the principal chiefs have in the past expressed the view that the fisheries are common property..." (QM, Annex IV.19, Vol. 9, p. 85, at p. 87). Similarly, on 30 June 1904, Mr. A. Godley, also of the India Office, considered that whatever may have been the location of the banks, either within or outside territorial waters, "in all these cases the tribes have exercised an exclusive right for fishing for pearls" (QM, Annex IV.20, Vol. 9, p. 91, at p. 94). The principle is stated even more precisely in a letter sent on 19 October 1904 by a member of the Foreign Office, Mr. Eldon Gorst, to the Law Officers of the Crown: "In all these cases the tribes have exercised an exclusive and concurrent right of fishing for pearls" (BM, Annex 321, Vol. 6, p. 1431). The above-mentioned opinion by Finlay and Carson was in response to this letter.

211 QM, Annex IV.24, Vol. 9, p. 111, at p. 113.

212 QM, Annex IV.41, Vol. 9, p. 199.

213 QM, Annex IV.62, Vol. 9, p. 305. It was also Gibson who, in an earlier letter of 26 October 1938, had criticised the view of a member of the Foreign Office, Lacy Baggallay, noting, with a significant sense of understatement, "in connexion with Baggallay's letter", that "it would hardly be correct to speak of the fisheries long *reserved to Bahreini* nationals when the banks are the common property of all the tribes" (QM, Annex IV.46, Vol. 9, p. 223, at p. 227; emphasis in original).

214 QM, Annex IV.289, Vol. 13, p. 43, at p. 49, fn. 3.

215 *See*, QM, Annex IV.323, Vol. 13, p. 269, at pp. 272-273.

216 QM, Annex IV.20, Vol. 9, p. 91, at p. 94; emphasis added.

217 QM, Annex IV.122, Vol. 10, p. 103.

218 QM, Annex IV.206, Vol. 11, p. 67, at p. 75.

219 QM, Annex IV.207, Vol. 11, p. 149.

220 *See*, para. 8.7, above; QM, Annex IV.254, Vol. 12, p. 17, at p. 36.

221 *Ibid.*, at p. 37.

222 BM, para. 642.

223 *See*, citations in paras. 8.78-8.79, above.

224 BM, para. 643.

225 *Ibid.*

226 QM, Annex IV.19, Vol. 9, p. 85, at p. 88.

227 QM, Annex IV.27, Vol. 9, p. 125.

228 QM, Annex IV.62, Vol. 9, p. 305; emphasis added.

229 BM, para. 643; emphasis in original.

230 *See*, QM, Annexes IV.19, IV.24 and IV.44, Vol. 9, p. 85, p. 111 and p. 213.

231 BM, para. 642.

232 QM, Annex IV.4, Vol. 9, p. 15.

233 QM, Annex IV.19, Vol. 9, p. 85; emphasis added.

234 Bahrain also claims that: "the Ruler of Bahrain levied a tax on vessels fishing for pearls from the early 19<sup>th</sup> Century, justified by the need to maintain armed vessels on the pearling banks to protect the vessels fishing there" (BM, para. 643). To justify this assertion, it refers to a text from Lorimer (BM, Annex 83, Vol. 3, p. 506), which has also been cited by Qatar (QM, Annex IV.307, Vol. 13, p. 171, at p. 174), and which runs counter to this view. Indeed, it is stated there that "The chiefs of the Arab littoral derive revenue from the pearl fisheries, but only by means of taxes imposed on their own subjects or on persons resident in their respective jurisdictions" and Lorimer cites in support of this statement not only the case of the Sheikh of Bahrain, but also "the chiefs of Trucial Oman", even specifying that "the system of taxation was maintained both by the Shaikh of Bahrain and by the other Arab chiefs". It may be added that in its Annex Bahrain has not provided p. 2240 of Lorimer's text, (QM, Annex IV.307, Vol. 13, p. 173) which states that: "On the Arabian side all the banks, whether near to or far from the coast, are free to the pearl fishers of Arabia and Persia without distinction of race or nationality". It may be noted that a more recent author, J.B. Kelly, referring to the case of Sharjah, has stressed that: "Pearling in the waters off Qatar and the Trucial Coast is free to all, but the shaikhs usually collect a pearling tax from their own subjects", QM, Annex IV.304, Vol. 13, p. 155, at p. 158.

235 QM, Annex IV.242, Vol. 11, p. 391, at p. 393.

236 QM, Annex IV.245, Vol. 11, p. 411.

237 BM, para. 651; *see*, also, BM, para. 653.

238 QM, Annex IV.254, Vol. 12, p. 17, at pp. 22-23; *see*, also, *ibid.*, pp. 24-25 and pp. 27-40.

239 BM, para. 650.

240 *See*, QM, paras. 10.34, *et seq.*; QM, Appendix 4, Vol. 15, p. 111, at pp. 121-123.

241 *See, ibid.*; *see*, also, QM, Annexes IV.229, IV.231, IV.242 and IV.244, Vol. 11, pp. 335, 343, 391 and 405.

242 See, QM, Appendix 4, Vol. 15, p. 111, at p. 123.

243 QM, Annex IV.216, Vol. 11, p. 235.

244 QM, Annex IV.190, Vol. 10, p. 457, as completed by QCM Annex IV.8, Vol. 4, p. 63, at p. 69.

245 See, *Map No. 10*, facing this page.

246 QM, Annex IV.216, Vol. 11, p. 235; Charney & Alexander, *op. cit.*, Vol. II, pp. 1489-1497.

247 QM, Annex IV.264, Vol. 12, p. 111; Charney & Alexander, *op. cit.*, Vol. II, pp. 1481-1488.

248 Charney & Alexander, *op. cit.*, Vol. II, pp. 1549-1554.

249 *Ibid.*, pp. 1475-1480.

250 QM, Annex IV.258, Vol. 12, p. 71; Charney & Alexander, *op.cit.*, Vol. II, pp. 1519-1532.

251 QM, Annex IV.260, Vol. 12, p. 81; Charney & Alexander, *op.cit.*, Vol. II, pp. 1511-1517.

252 QCM, Annex IV.21, Vol. 4, p. 135; Charney & Alexander, *op.cit.*, Vol. II, pp. 1533-1539.

253 QM, Annex III.295, Vol. 8, p. 475, at p. 477; Charney & Alexander, *op.cit.*, Vol. II, pp. 1499-1502. Moreover, it seems that outside the Gulf, historic rights to sedentary fisheries have likewise not been taken into account as special or relevant circumstances in order to adjust the course of the dividing line. Thus, the State Department Geographer remarked, concerning the agreement of 26 and 28 June 1974 between India and Sri Lanka "on the boundary in historic waters of Palk Bay", that "the delimitation reflects a selective, *i.e.* modified, application of the principle of equidistance. As noted, the maritime boundary divides the historic waters and the seabed of Palk Bay. Traditional fishing rights of both parties, however, are preserved" (QCM, Annex IV.17, Vol. 4, p. 113, at p. 121; Charney & Alexander, *op.cit.*, Vol. II, pp. 1409-1417). Similarly, a commentator on the agreement of 23 March 1976 between India and Sri Lanka in the Gulf of Manaar and the Bay of Bengal and the attached exchange of letters (QCM, Annex IV.23, Vol. 4, p. 153; Charney & Alexander, *op.cit.*, Vol. II, pp. 1419-1430) stated that: "In the case of the India-Sri Lanka boundary in the Gulf of Manaar and Bay of Bengal, Sri Lankan claims of historic fishing rights in Wedge Bank did not alter the location of the line, but did result in agreement on respect for Sri Lankan fishing rights for three years and a Sri Lankan right to purchase fish thereafter" (Oxman, *op. cit.*, QCM, Annex IV.51, Vol. 4, p. 397). But in any event, the historic rights of fishermen from Sri Lanka did not concern sedentary fisheries. As for the agreement of 18 December 1978 between Australia and Papua-New Guinea, in particular in the area of the Torres Strait (H. Burmester, "The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement", *American Journal of International Law*, Vol. 76, 1982, pp. 321-349; Charney & Alexander, *op. cit.*, Vol. I, pp. 929-975), while it took account of traditional fisheries in establishing a "Protected Zone" and making a plurilinear delimitation, like the above-

mentioned agreement of 23 March 1976 between India and Sri Lanka, it did not concern sedentary fisheries.

254 *See*, paras. 8.14-8.15, above.

255 BM, para. 649.

0 BM, para. 563.

1 BM, paras. 638 and 651.

2 Codification conventions are rather silent on the problem of sedentary fisheries and more generally on the question of historic title and its role in maritime delimitation. The only provisions really to be found in this respect are Article 12, paragraph 1 of the 1958 Convention on the territorial sea and contiguous zone and Article 15 of the 1982 Convention on the Law of the Sea which, with respect to the delimitation of the territorial sea, rules out application of the equidistance method in cases where, "by reason of historic title or other special circumstances", it is necessary to delimit the territorial sea between two States in another manner. But these provisions are inapplicable to the delimitation of maritime areas outside territorial waters.

3 *See*, the commentaries by E. Decaux, QCM, Annex IV.39, Vol. 4, p. 333; E. Zoller, QCM, Annex IV.61, Vol. 4, p. 471; M. Feldman, QCM, Annex IV.42, Vol. 4, p. 347, and Charney & Alexander, *op. cit.*, Vol. II, pp. 1663-1680, at pp. 1667-1668.

4 *I.C.J. Reports 1982*, p. 72, para. 98.

5 *Ibid.*

6 *See*, QM, paras. 12.54, *et seq.*

7 *I.C.J. Reports 1984*, p. 340, para. 233; *see*, also, D.M. McRae, "The Gulf of Maine Case: The Written Proceedings", in *The Canadian Yearbook of International Law*, 1983, Vol. XXI, QCM, Annex IV.50, Vol. 4, p. 393.

8 *I.C.J. Reports 1984*, pp. 340-341, para. 233.

9 *Ibid.*, p. 341, para. 233.

10 *Ibid.*, p. 341, para. 235.

11 *Ibid.*, p. 342, para. 237.

12 QM, Map 21, Vol. 17.

13 QM, paras. 12.62-12.63.

14 QM, paras. 12.5 and 12.62.

15 QM, paras. 12.64 and 12.72. The geographical coordinates of points NSLB, BLV and 2 (2B) are specified in the Submissions contained in Qatar's Memorial (QM, p. 307, and Map 24, Vol. 17) and in Part V, below and QCM, *Map No. 12*, facing p. 303.

16 QM, paras. 12.5 and 12.62.

17 QM, paras. 12.41, 12.64, notes 153 and 154, and 12.72.

18 QM, paras. 12.44, *et seq.* In fact the perpendicularity method is simply a variant of the equidistance method. Both the doctrine and the jurisprudence (*see*, in particular, the *Gulf of Maine* case, *I.C.J. Reports 1984*, p. 329, para. 200) consider that these two delimitation methods are based on the same philosophy, any line equidistant from two points being by definition a line perpendicular to the straight line linking those two points. Moreover, as noted above (para. 8.42), Qatar 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 (*see*, paras. 7.28, *et seq.*, above). It cannot be forgotten that this method of delimitation has played a considerable role in the area (*see*, the Boggs-Kennedy report of 16 December 1948, QM, Annex IV.127, Vol. 10, p. 123, and the conventional practice in the region).

19 QM, para. 12.64 and QM, Map 20, Vol. 17.

20 QM, para. 12.64 and QM, Maps 20 and 21, Vol. 17.

21 QM, paras. 12.64 and 12.72.

22 *See*, QM, paras. 12.14-12.15, and para. 8.14, above.

23 *See*, *I.C.J. Reports 1985*, pp. 39-40, para. 46.

24 *See*, paras. 8.34, *et seq.*, above.

25 *See*, QM, paras. 12.26, *et seq.*

26 *I.C.J. Reports 1969*, p. 49, para. 91; *I.C.J. Reports 1985*, p. 39, para. 46.

27 QM, paras. 12.26, *et seq.*

28 *See*, QM, Appendix 6, Vol. 15, p. 143.

29 *I.C.J. Reports 1993*, p. 67, para. 65.

30 QM, paras. 12.30, *et seq.*; *see*, also, para. 8.101, above.

31 QM, paras. 12.33, *et seq.*

32 QM, paras. 12.65, *et seq.*

33 *I.C.J. Reports 1984*, p. 323, para. 185.

34 QM, paras. 12.66, *et seq.*; QM, Map 22, Vol. 17.

35 QM, paras. 12.70-12.71; QM, Map 23, Vol. 17.

36 *Ibid.*

37 QM, para. 12.32, and para. 8.101, above.

38 QM, para. 12.71.

39 *See*, QM, Map 21, Vol. 17. Point EQ, the end point of the dividing line established on the basis of the ratio of 1.59 to 1 between the lengths of the respective coasts is situated about 3000 metres to the east of point 2 (2B), which is approximately 1270 metres east of point S, corresponding to the end point of the dividing line established on the basis of a strict application of the perpendicularity method.

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