DISSENTING OPINION OF JUDGE TORRES BERNÁRDEZ

Introduction: Territorial and maritime aspects of the case — Applicability of general international law — Bahrain's reference to quieta non movere *and its contradictions — Determination of the elements of fact — Historical facts as source of original title — Facts alleged to generate a title of* effectivités *— Failure to define a critical date for admissibility of* effectivités *— Observations on the evidence submitted by the Parties — The definition by Qatar of the "State of Qatar" and by Bahrain of the "State of Bahrain".*

I. Territorial questions: Qatar's original title to the entire peninsula through historical consolidation and general recognition — The fundamental distinction between original and derivative title to territory — The distinction between title and mode of acquisition — Primacy of original title over effectivités *— Origins of the ruling families of Qatar and of Bahrain — Settlement of the Al-Khalifah in the Bahrain islands in 1783 —* Animus possidendi *of the Al-Khalifah Rulers — Lack of respective* corpus possessionis *between 1783 and 1868 — Presence of Great Britain in the Gulf — Maintenance of peace at sea in the Gulf — Termination of the political connection between the Al-Khalifah Rulers of Bahrain and Qatar (1868-1871) — The 1861 Agreement between Great Britain and Bahrain — The period of historical consolidation and recognition of the Al-Thani Rulers' original title to the territory of the entire Qatar peninsula and its adjoining islands (1868-1915) — The 1867 Ruler of Bahrain's acts of war across the sea — British intervention in the conflict — Agreements concluded in 1868 by Great Britain with the new Al-Khalifah Ruler of Bahrain and with the Al-Thani Chief of Gutter, respectively — The 1868 undertaking of the Qatari tribal chiefs on payment of "tribute"* (zakat) *to the Wahhabi Amir — Arrival in Qatar of the Ottomans in 1871 and related conduct of Great Britain and Bahrain — Qatar as a* kaza *of the Ottoman Empire and the appointment of the Al-Thani Chief of Qatar as* kaimakam *— Conduct of Great Britain vis-à-vis the Al-Thani Chief of Qatar during the Ottoman period — Development of the effective authority of the Al-Thani Chief of Qatar over Qatari tribes and territory during the Ottoman period.*

Bahrain's unfounded claim of 1873 to Zubarah *and its rejection by the British — Zubarah as a part of the Ottoman* kaza *of Qatar — The effective exercise of authority in Zubarah by the Ottomans and by the Chief of Qatar — Recognition of such exercise by the British and by the Rulers of Bahrain — British concern to ensure the security of the Bahrain islands — Critical date for ascertaining the original title of Qatar over Zubarah — The 1937 events and the alleged "ties of allegiance" of the Naim with Bahrain's Al-Khalifah Rulers — Judicial irrelevance of the related Bahraini argument — British conduct and conduct of the Parties subsequent to the events of 1937.*

Bahrain's late claim on the Hawar Islands *and* Janan Island *— Legal effects of Bahrain's silence during the period of historical consolidation of Qatar's*

original title — Recognition of Qatar's original title to territory — The 1889 definition of "Bahrain" by Bent — Other definitions — Lorimer's authoritative testimony of 1908 — Prideaux's approval of that testimony — The 1909 Prideaux letters — Presumption under international law that islands within the territorial sea of a given country are to be regarded as part of that country — The role of proximity or contiguity in the establishment of title to islands — The 1913 and 1914 Anglo-Ottoman Conventions — The 1915 Anglo-Saudi Treaty — The 1916 Treaty between Great Britain and Qatar — Maps as confirmatory or corroborative evidence of recognition, general opinion or repute — Exercise of authority over the islands by the Ruler of Qatar in the 1920s and 1930s.

Conclusion that Qatar is the holder of original title to the entire peninsula, including Zubarah, the Hawar Islands and Janan Island.

Question of whether Bahrain has a derivative title to the Hawar Islands, *or to some of them, which is superior to Qatar's original title to those islands — Bahrain's search for derivative titles thereto — The 1939 British "decision" on the Hawar Islands — The "decision" is not an arbitral award with the force of* res judicata *— Events to be taken into account in determining the legal effect of the 1939 "decision" — Competence of the British Government in 1938 to make a "decision" with legally binding effects under international law for Qatar and Bahrain — Consent of the Ruler of Qatar and the Ruler of Bahrain as only possible basis for such authority — The Ruler of Qatar did not accept the 1939 "decision" as legally binding for him under international law — There was no informed and free consent of the Ruler of Qatar to the 1938-1939 British procedure — The 1939 British "decision" is not a valid decision in international law — The defects of the 1938-1939 British procedure as a ground for the formal invalidity of the 1939 British "decision" — The internal contradiction and arbitrariness of the 1939 Weightman Report as a ground for the essential invalidity of the 1939 British "decision".*

The effectivités *alleged by Bahrain as a possible source of derived title over the Hawar Islands — Definition of* effectivités *in international law — The Hawar Islands were not* terra nullius *— Occupation of the Hawar Islands was not the result of a peaceful and continuous unchallenged exercise of State authority by the Ruler of Bahrain — Consent as possible basis of derivative title to territory — No consent of Qatar in this respect — The role of the Dowasir — The Hawar Islands were unfit for permanent habitation — Poor evidence of alleged instances of recognition — Miscellaneous general arguments put forward by Bahrain — Alleged Bahraini judicial activities relating to the Hawar Islands — Bahrain has not proved the intentional display of authority over the Hawar Islands at the relevant time.*

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Final remarks of the opinion.

* * *

I have voted for subparagraphs 1, 2 *(b)*, 3 and 5 of the operative part of the Judgment, but regret being unable to support the conclusions of the majority regarding the Hawar Islands and Qit'at Jaradah. As I will explain below in this opinion, my judicial conclusions on these two latter questions are exactly the opposite of those of the majority.

Furthermore, I am also bound to vote against subparagraph 6 of the operative part for reasons of procedure. No vote by division was allowed on any section or segment of the single maritime boundary line adopted. This is my second regret. I cannot accept the whole of that line, but I would have voted for the course of the single maritime boundary line as from Qita'a el Erge up to its terminal point in the Parties' northern sector, because of the Judgment's findings on sovereignty and also because the said part of the single maritime boundary may be considered as falling within the parameters of an equitable solution. On the other hand, the delimitation effected in the Hawar Islands maritime area meets none of the requirements of an equitable solution, those islands being *foreign* coastal islands. In such situations, where physical and political geography are paramount, an equitable solution calls for the application of the enclave method in favour of the coastal sovereign

and not, as the Judgment does, the semi-enclave method in favour of the distant sovereign.

In my opinion, the conclusions of the majority of the Court on the above issues (1) fail to acknowledge the scope of the original title of Qatar to the entire peninsula and its adjoining islands established through historical consolidation and general recognition; (2) make of the 1939 British "decision" on the Hawar Islands the source of a Bahraini derivative title prevailing over the original title of Qatar, notwithstanding the formal and essential invalidity of that "decision" in international law and the fact that such islands are located in the maritime belt of the peninsula of Qatar; (3) accept that a maritime formation such as Qit'at Jaradah could be appropriated as land territory through alleged Bahraini activities not amounting to acts performed by the State of Bahrain *à titre de souverain*; and (4) disregard in the Parties' southern sector of the maritime delimitation area highly relevant Qatari special circumstances which should have been taken into account for the delimitation to achieve in the Hawar Islands maritime area an equitable solution as prescribed by the law of the sea.

Bearing in mind that the Court's decision on each of the individual disputed subjects above should be made in accordance with international law, my conviction is, to my regret, that from this standpoint the Judgment exhibits serious legal shortcomings with respect to the four issues referred to above. For the rest, I support the findings of the Judgment in a case which is complex and has also an historical dimension not always easy to assess.

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General Introductory Observations

1. The Two Aspects of the Case

1. As indicated by its title, the present case between Qatar and Bahrain is "territorial" as well as "maritime". It is not the first dispute before the Court in which both territorial and maritime aspects have been combined in a single case. The subject of the dispute as a whole is constituted by the distinct claims presented by each of the Parties within the framework of the "Bahraini formula" accepted by Qatar in the 1990 Doha Minutes. According to this formula the Court should decide:

(a) any matter of territorial right or other title or interest which may be a matter of difference between [the Parties]; and
(b) draw a single maritime boundary between their respective maritime areas of sea-bed, subsoil and superjacent waters.

2. The subject of all the territorial questions at issue being sovereignty, the judicial determinations to be made concern the category of territorial disputes described by doctrine as "*disputes on attribution of sovereignty*". Part I (Territorial Questions) of this opinion is therefore devoted to the question of ascertaining which of the Parties is the holder of territorial title to Zubarah, the Hawar Islands and Janan Island. Both Parties have claimed to be the holders of the original title to these disputed areas and islands, but Bahrain also invokes derivative titles such as *uti possidetis juris*, the 1939 British "decision" on the Hawar Islands and *effectivités* in those islands in addition to, or independently of, the alleged original title.

3. Thus, Part I is divided into two Sections. The first fundamental question regarding the determination of the holder of the original title is dealt with in Section A, which duly takes into account the historical, political and legal events having a bearing on the process of formation, consolidation and recognition of that title. Having concluded at the end of Section A that Qatar is the holder of the original title to Zubarah, the Hawar Islands and Janan Island and noted that the Court's Judgment declares the sovereignty of Qatar over Zubarah and Janan Island but not over the Hawar Islands, in Section B of Part I of the opinion I explain why I consider that the majority of the Court erred in the Hawar Islands dispute when finding that Bahrain has sovereignty over Hawar Island by virtue of the 1939 British "decision". Bahrain is not the holder of such a title or of any other derivative title based upon the *uti possidetis juris* principle and/or upon the alleged *effectivités*.

4. Lastly, Part II (The Maritime Delimitation) of the opinion deals with the principles, rules and methods of maritime delimitation as applied by the Court in the present case, as well as with some of the factors

having, or which would have had, a bearing on the drawing by the Court of the single maritime boundary requested by the Parties. In the same order as in the Judgment, the Parties' claims concerning the shoals of Fasht ad Dibal and Qit'at Jaradah are considered in this Part of the opinion.

2. The Law Applicable to the Case

5. The Court has to render its decision in the present case in accordance with international law. It has to adopt a *de jure* decision because the Parties did not empower the Court, even subsidiarily, to decide the dispute or some aspects of it *ex aequo et bono*. It follows that the present opinion will not dwell on economic or other factors occasionally alleged by Bahrain such as, for example, the respective size of the territory of the Parties, the expansion of their population, their plans for socio-economic development, the amount of their oil or gas reserves, etc. This does not however exclude the application of equity or equitable principles when incorporated by the law to a given legal norm as is the case, for example, of the norms governing maritime delimitations in contemporary international law.

6. In the absence of general or particular international conventions establishing rules expressly recognized by the litigant States concerning the subject-matter of the dispute, the case as a whole is *essentially a general international law case*. It is true that Bahrain invokes the 1939 British "decision" on the Hawar Islands as an arbitral award with the force of *res judicata*. But Qatar is opposing that legal thesis of Bahrain. There is therefore within the case a dispute as between the Parties concerning the legal characterization and possible effects of the said 1939 British "decision" for the determination of which the Court cannot but apply general international law. There are also certain bilateral accords between the Parties concerning Zubarah, such as the 1944 Agreement, but these agreements do not play the role of applicable law in the case. Rather they were invoked in support of particular arguments or contentions of the Parties.

7. The proposition that the dispute taken as a whole is essentially to be decided in accordance with general international law is, furthermore, confirmed by the manner in which the Parties themselves have pleaded their respective cases.

8. It follows that the territorial aspect of the case cannot be handled as in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* where, as concluded by the Court, the dispute was conclusively determined by treaty binding the parties to that case (*I.C.J. Reports 1994*, p. 38, para. 75). It is true that in its search for a derivative title, Bahrain in the hearings gave priority to its *uti possidetis juris* argument, but that principle or norm is not in the present case part and parcel of any applicable treaty provision. Thus, if pertinent, *uti possidetis juris* can only be applied

by the Court to the case as a principle or norm of general international law.

9. In the present case, questions such as the holder of the original title to the disputed territories, the peaceful and continuous exercise of State authority in a territory at the relevant time, the recognition of territorial title by third States, etc., are not matters conclusively determined by any treaty binding the Parties. To determine all those matters, the Court has to apply general international law to the facts and circumstances of the case, bearing in mind its historical dimension.

10. General international law is also the law to be applied to the maritime aspect of the dispute. Certainly, Bahrain is a party to the 1982 Convention on the Law of the Sea, but Qatar has not ratified that Convention. Moreover, neither Bahrain nor Qatar are parties to any of the four 1958 Geneva Conventions on the law of the sea. Lastly, the Parties have not concluded between them any agreement concerning delimitation of the territorial sea, the contiguous zone, the sea-bed and the exclusive economic zone or regarding exclusive or preferential fishery zones. The Court therefore has to apply to the drawing of the single maritime boundary the fundamental customary norm or norms on maritime delimitations to the crystallization of which the Court itself has made a notable contribution as generally acknowledged. The 1947 British "decision" on the sea-bed dividing line is not regarded either by Bahrain or Qatar as an arbitral award, although Qatar considers some aspects of it — because of the equitable principles embodied therein — as a circumstance deserving to be borne in mind by the Court when drawing the single maritime boundary line.

11. It goes without saying that the conclusion that general international law is the law applicable to the territorial and maritime aspects of the dispute in no way means that treaties or agreements are irrelevant in the present case. On the contrary, there are several important treaties and agreements concluded by Qatar or by Bahrain with Great Britain and also, more recently, with Saudi Arabia and Iran, as well as highly relevant treaties between third States such as, for example, the Anglo-Ottoman Conventions of 1913 and 1914 and some agreements concluded between Great Britain and Saudi Arabia. Some of those conventions and agreements, in my opinion, provide conclusive elements of evidence on issues relating to title to territory and others circumscribe the southern and northern limits of the maritime delimitation area. In addition, there are negotiations and concession agreements concluded either by Bahrain or by Qatar with oil companies which likewise provide documentary and cartographic evidence on matters at issue between the Parties.

12. As it should, the present Judgment applies general international law to the case. Consequently, I have no quibble with it concerning the question of the definition of the applicable law as such. My problems

with the Judgment concern rather the concrete application and interpretation it makes — in some instances — of the principles and rules of general international law applied, or applicable, and their interplay in the circumstances of the case.

3. Bahrain's Reference to "quieta non movere" *and Its Contradictions*

13. In the light of the Bahraini references to *quieta non movere*, a few remarks on this maxim are in order here. I will begin by recalling that this is not the first time that the Court has been seised of a case with a certain historical dimension. In the *El Salvador/Honduras* case, for example, the Chamber of the Court had to determine title to territory, islands and waters back to 1821 by taking account of several centuries of Spanish presence in America and the conduct of the parties as independent States thereafter. The *Minquiers and Ecrehos* case involved medieval titles and in the *Eastern Greenland* case the Permanent Court was even required to go back as far as the discoveries at the time of Erik the Red!

14. However, in these and other international disputes the mere time which lapsed between the establishment of the dispute and its submission to judicial settlement was not considered as constituting in itself a settled state of affairs to which the judicial or arbitral organ concerned should bow. I do not see why in the circumstances of the present case matters should be looked at differently. For example, Qatar has made every effort since the 1940s to induce Bahrain to agree to the peaceful settlement of the dispute on the Hawar Islands and in the 1960s the British authorities and the Parties gave some consideration to the possibility of referring that dispute and other questions dividing them, such as the continental shelf delimitation, to a neutral international arbitration. Subsequently, a mediation by the King of Saudi Arabia was set in motion in the context of which the items in dispute in the present case were identified and one of those items concerns the dispute on the Hawar Islands. Thus, in the past, the Parties not only made reservations regarding their respective alleged rights, they were also engaged in trying to find a peaceful means of settlement. Since the 1940s the Hawar Islands have indeed been the subject of an international dispute.

15. The Court would become a useless instrument for dispensing justice between States in territorial disputes if its decisions were to be predetermined by the *quieta non movere* maxim in circumstances such as those in the present case. The Court's decisions are not supposed to be merely declaratory of the status quo, which may well be a reflection of situations of fact without support in international law and which may have lasted simply because of the consensual principle governing the jurisdiction of the Court as well as that of other international courts and tribunals. The functions of the Court, the principal judicial organ of the United Nations, are not notarial in character but judicial, and its judicial decisions ought to be made in accordance with international law, bearing

in mind the submissions of the Parties and the elements of evidence at the disposal of the Court. The evidence submitted by the Parties suffices, in my opinion, to make the judicial determinations required by the present case and consequently there is no justification in this respect either to invoke or apply *quita non movere*. The passage of time did not prevent the furnishing of evidence to the Court on relevant matters some of which dated back to the nineteenth century.

16. The Court is not the 1908 *Grisbadarna* Arbitration Tribunal. Moreover, the Grisbadarna Award was governed by an Arbitral Convention *(compromis)* which — without derogating from the primary role of "title" in the resolution of the dispute — in its Article 3 gave certain subsidiary powers to the arbitrators to decide, *inter alia*, "taking account of the factual circumstances" *[translation by the Registry]* (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XI, pp. 153-154). Furthermore, the subject of the *Grisbadarna* Arbitration concerned a maritime frontier, while the subject of the territorial questions at issue in the present case relates to sovereignty over land territory. In fact, the relevance of the Grisbadarna Award to the present case lies not in its reference to *quieta non movere* but in the statement that title to land territory automatically includes the accessory maritime belt (*ibid.*, p. 159).

17. The principle of the stability and finality of international boundaries when such boundaries are the object of a prior agreement or undertaking in force between the parties is not an issue in the present case. The issue is to determine whether the Party holds a consolidated and recognized original title over the area and/or islands forming part of the disputed territorial questions. Then, if the issue in the case is ultimately to determine whether the existence of a perfect opposable title and its holder *quieta non movere* is inapplicable because the object and purpose of the maxim is precisely the protection of titles and frontiers already consolidated and not otherwise.

18. In the Hawar Islands the Court was not facing a settled state of affairs at all, but an international dispute in existence between the Parties as from the 1937 clandestine occupation of Jazirat Hawar by Bahrain followed by the 1939 British "decision". The state of things existing in the Hawar Islands since these events was not uncontested and the ensuing dispute between the Parties was not settled by 1991 when Qatar filed in the Registry of the Court its Application instituting the present case. Thus, the Hawar Islands dispute, as any other international dispute referred to the Court, has to be determined on its own merits quite independently of whether or not the judicial conclusion would imply *movere* or *non movere*. The Court should not hesitate to opt in favour of *movere* when international law so dictates as it did, for example, in cases such as *Libyan Arab Jamahiryal Chad, King of Spain, El Salvador/Honduras*, etc.

19. The present Judgment does not make any explicit reference to *quieta non movere*, a maxim which has never been endorsed by the jurisprudence of the present Court or of the Permanent Court. But, in the light of the applicable law and the evidence before the Court, it is difficult to escape the conclusion that the finding of the Judgment on the Hawar Islands is the result of a *quieta non movere* state of mind. If so, and to the extent that it might be so, I cannot but dissociate myself from such a possible approach to the Hawar Islands dispute. It was the situation existing in the Hawar Islands for a long time before 1936-1939 that should have attracted *quieta non movere*, but Bahrain and the British then chose to ignore the maxim which Bahrain seeks in the current proceedings to call to its aid, in order to protect its 1937 clandestine and unlawful occupation of the northern part of Jazirat Hawar, as well as the validity of the related 1939 British "decision" as a source of territorial title.

20. It is also a cause of some surprise that Bahrain referred to the maxim considered, because the only issue in dispute in the present case which could be said by the advocates of the maxim to be a candidate for a *non movere* is precisely sovereignty over Zubarah, namely a question forming part of the dispute before the Court at the request of Bahrain. Furthermore, counsel for Bahrain invited the Court to *faire du nouveau* in the settlement of maritime aspects of the dispute. Thus, in fact, Bahrain's message to the Court was *non movere* in the Hawar Islands, but *movere* in all other respects! This is indeed a very peculiar way of invoking *quieta non movere*.

21. In any case, the maxim does not protect territorial situations created by coercion, fraud or other unlawful means at a time when the Covenant of the League of Nations and the Briand-Kellogg Pact were already in force. *Quieta* implies the existence of a peaceful and generally accepted situation created without real or possible infringements of the international legal order contemporaneous with its establishment. Such a situation does not exist in the Hawar Islands, the Ruler of Qatar having protested against the 1937 clandestine occupation of the northern part of Jazirat Hawar on the grounds that it was a *non de jure* occupation, as well as against the 1939 British "decision" for ignoring its historical, consolidated and recognized title to the Hawar Islands —which are located in the maritime belt of the peninsula of Qatar — and reserved, thereafter, the sovereign rights of Qatar over the Hawar Islands as a whole.

4. Questions Relating to the Determination of the Elements of Fact of the Case

22. The determination in the Judgment of the elements of fact in the present case — which should be distinguished from the elements of law — likewise poses certain problems deserving mention in this Introduction. For example, the Judgment is in my opinion particularly restrictive

in taking into account historical facts, which are of some relevance and importance in ascertaining the process of consolidation and recognition of the *original title* in the disputed land territories while, at the same time, it is apparently somewhat liberal with respect to the possible admissibility and effects of minor individual events alleged as evidence of *effectivités*.

23. I cannot share such a general approach. In international law governing the attribution of sovereignty over land territory, the concept and definition of *effectivités* is by no means reduced to mere material *activities* varying in intensity. The material activities concerned should be accompanied by the subjective element of acting *à titre de souverain* and manifest themselves in a public, peaceful and continuous manner. Moreover, the possible taking into consideration by the law of public, peaceful and continuous acts effected *à titre de souverain* in a given territory does not necessarily lead to the birth of territorial title to that territory when, in the territory concerned, another State already has prior territorial title, duly consolidated and recognized, opposable to the newcomer State or enforceable as against all States.

24. This opinion is governed by the contrary proposition, namely by the proposition that the primacy of a consolidated and recognized title over alleged or actual *effectivités* is indisputable in international law as a criterion for the resolution of conflicting territorial claims. Effective possession displays its full effects as a potential source of title in territories having the condition of *res nullius*, but not in territories *avec maître* unless the latter gives his acquiescence or relinquishes his former title. In this connection, it must be recalled that, in the present case, none of the Parties has contended that any of the disputed land territories were *terra nullius* at the relevant time.

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25. In the circumstances of the present case, for ascertaining the respective sovereign territorial rights of the Parties, it is necessary to begin by studying fully and in detail the historical facts invoked by them as a source of their alleged original title to the territories concerned. Such historical facts — which vary in kind and nature — are much more relevant and far-reaching for the resolution of the territorial questions in dispute than the facts invoked with respect to the alleged *effectivités*. I therefore find no justification for the reticence shown by the Judgment in the analysis of the proven historical facts as a potential or actual source of original title, particularly when Qatar and Bahrain, as States, are the result of an historical evolution and both claim to be the holder of an original title whose formation and consolidation would have started, in the case of Bahrain, as from about the second part of the eighteenth century and in the case of Qatar, as from about the middle of the nineteenth century and, in any case, as from 1868-1871.

26. Furthermore, the mode of acquiring the original title concerned claimed by both Qatar and Bahrain is not constituted by a single legal act, for example by a treaty, but rather by an historical process encompassing a series of factual and legal acts and situations unfolding during a number of decades during which other Powers also, and very often, played a decisive role. The general historical considerations of the Judgment are clearly insufficient to cover the historical process leading to the constitution of Qatar and Bahrain as States and, therefore, as independent political territorial entities.

27. In fact, the Judgment makes some incursions into the said historical process only in connection with the dispute on Zubarah. But the Hawar Islands and Janan Island — which are also part and parcel of the territorial questions in dispute — were part of the same historical process. Why, then, does the Judgment keep silent on this historical process in so far as the Hawar Islands and Janan Island are concerned? I have no explanation for this lacuna of the Judgment and certainly find no justification for it.

28. The historical process whereby the State of Qatar was constituted cannot, without appropriate legal explanation, be reduced to the peninsula of Qatar *tout court*, ignoring its adjacent islands and waters. There is not a single element of proof in the case file allowing one to conclude that the "peninsula of Qatar" was understood as meaning a peninsula with dry coasts, namely that the original title of Qatar over the entire peninsula did not encompass the adjacent insular and maritime dependencies which States are generally recognized to have by international law.

29. The general structure of the Judgment implies in fact that Qatar should provide positive proof of its original title to insular and maritime dependencies which belong to it by operation of the law. At the same time, the Judgment avoids embarking upon the definition of the historical and territorial scope of the State of Bahrain with effect from the settlement in 1783 of the Al-Khalifah Rulers in the Bahrain islands. However, the Hawar Islands are not geographically part of the Bahrain islands but of the Qatar peninsula and, therefore, those islands cannot be presumed to belong politically to Bahrain by the mere operation of international law as in the case of the State of Qatar. The burden of positively proving the contrary proposition doubtless belongs with Bahrain in the dispute on the Hawar Islands.

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30. As to the facts alleged as possibly generating a title of *effectivités* which may prevail over the original title, mainly invoked by Bahrain with respect to the Hawar Islands, it is necessary in my opinion to define what period of time should be taken into consideration for the judicial pur-

poses of determining the admissibility of those *effectivités*. The Judgment however fails to define a "critical date" for such a determinative purpose, although it has been proved by Qatar that the alleged Bahraini *effectivités* in the Hawar Islands are subsequent to the clandestine and unlawful occupation of the northern part of Jazirat Hawar in 1937 and the 1939 British "decision", namely subsequent to the time in which the Parties' dispute regarding the sovereignty over the Hawar Islands could be considered as having been established.

31. Moreover, the fact that the Judgment bases its decision on the Hawar Islands upon the 1939 British "decision" and not on Bahrain's *effectivités* argument is not an excuse for avoiding dealing with some aspects of this *effectivités* issue because the 1939 British "decision" is itself based upon the principle of effective possession in the case of Jazirat Hawar and of presumed effective possession in the case of the other islands in the group.

32. In fact, most of the alleged *effectivités* of Bahrain in the Hawar Islands are very recent, to the point of conflicting with the status quo agreed upon by the Parties in the context of the Saudi Arabian mediation. In any case, the development of Bahraini activities in Jazirat Hawar is not opposable to Qatar, which has regularly sent corresponding diplomatic notes of protest and informed the Court accordingly. Moreover, in the hearings the Agent of Qatar said his country accepted that, if the Court were to uphold Qatar's submission that it had sovereignty over the Hawar Islands, direct bilateral negotiations between the Parties would be needed to find solutions to the problems that might arise within the framework of Bahraini withdrawal from the islands with regard to bona fide private investments, as had been done in other similar cases. Once more, the Judgment is silent on the question of the possible violation of the agreed status quo through the development by Bahrain of *effectivités* in Jazirat Hawar, including after proceedings were instituted in the present case.

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33. The British "decisions" of 1939 on the Hawar Islands and of 1947 on the delimitation of the continental shelf as between the Parties also raise questions which are highly relevant to the resolution of the dispute and, in the first place, raise a problem of the characterization of those "decisions". Are those British "decisions" applicable law as between the Parties or rather elements or circumstances of fact like several other historical events in the case? For reasons which will be explained in detail later in this opinion, I consider that the two British "decisions" are elements or circumstances of fact, the applicable law, as already explained, being general international law.

34. The Judgment differs on this. It considers the 1939 British "decision" on the Hawar Islands as having binding legal effects for the Parties, indeed making it the ground for attributing the Hawar Islands to Bah-

rain. On the other hand, in so far as the 1947 British "decision" on the delimitation of the continental shelf is concerned, the Judgment avoids taking it into account even as a circumstance, or as an historical reference point, for the purpose of defining the course of the single maritime boundary line. For those who, like me, consider that the 1939 British "decision" is not a legally binding decision (because as a decision it is lacking in formal and essential validity) the different treatment accorded to the 1947 British "decisions" is quite unjustified. Moreover, the general statement made in the Judgment concerning the 1947 British "decision" appears in practice to apply to the general course of the continental shelf delimitation line rather than to the exceptions set out in the "decision" regarding the Hawar Islands and the shoals of Fasht ad Dibal and Qit'at Jaradah.

5. Some Remarks on the Evidence Submitted by the Parties

35. The Parties submitted to the Court a fair amount of documentary materials of various kinds and sources, including documents which originated in Bahrain or in Qatar, although most of them are letters, memoranda and notes by British officials dealing with the affairs of the Gulf. There are also Ottoman documentary materials and letters from representatives of oil companies. In addition, Bahrain submitted affidavits and a few maps, Qatar submitted a massive collection of official and private maps from various countries, and both Parties submitted texts of treaties or agreements and of oil concessions, reports by experts on specific technical or legal questions, photographs and other forms of visual evidence, etc. The author of the present opinion has taken into account all these elements submitted by the Parties. He has also tried to evaluate them guided by the jurisprudence of the Court on the various means of evidence and its admissibility.

36. For example, regarding the affidavits, the Court considered them as a form of witness evidence, but one not tested by cross-examination. Its value as testimony is therefore minimal. In any case, the Court has not treated as evidence any part of a testimony which was not a statement of fact, but a mere expression of opinion as to the probability of the existence of such facts, not directly known to the witness, as stated in the 1986 Judgment of the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1986*, p. 42, para. 68):

> "Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with

other material, assist the Court in determining a question of fact, but it is not a proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight; as the Court observed in relation to a particular witness in the *Corfu Channel* case. 'The statement attributed by the witness . . . to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence.' (*I.C.J. Reports 1949*, pp. 16-17.)"

37. The weight of maps as evidence depends on a range of considerations such as their technical reliability and accuracy determined by how and when they were drawn up, their official or private character, the neutrality of their sources towards the dispute in question and the parties to that dispute, etc. In general, the value as evidence attached to them by international courts and tribunals is corroborative or confirmatory of conclusions arrived at by other means unconnected with the maps, because the maps as such are not a legal title. However, if map evidence produced by third parties is reliable, uniform and voluminous it may even constitute a highly important evidential element, of recognition or general opinion or repute, as to the fact of a territorial situation in a given period (see, for example, Chapter VIII of the 1998 Arbitral Award in the *Eritrea/Yemen* Arbitration).

38. Moreover, maps may on occasion be a physical expression of the will of a State or States, for example, when annexed to a legal title such as a treaty, or when prepared and used by a State for the purpose of diplomatic negotiations with other States, or when they are the object of written annotations by States' representatives or officials. In any case, maps expressing the will of States have of course superior evidenciary weight to ordinary maps. Moreover, when annexed to a treaty, maps constitute a context for the interpretation of the treaty concerned. There are some maps belonging to these categories in the present case. In its Judgment in the *Frontier Dispute* case, the Chamber of the Court distinguishes between these two categories of maps as follows:

"Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where there is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part.

> Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." (*I.C.J. Reports 1986*, p. 582, para. 54.)

39. The Judgment remains somewhat aloof from the map evidence submitted by the Parties and this has been quite detrimental to Qatar because the Bahraini map evidence was practically nil. Even as regards the maritime aspect of the case, it was Qatar not Bahrain which provided the Court with large-scale charts officially recognized by maritime Powers such as the United Kingdom and the United States, Bahrain limiting itself to submitting sketches (which Bahrain refers to as "maps") drawn by itself and without any indication of an official source.

40. The lack of response to the massive collection of official maps and private maps from well-known and reputed cartographic institutions submitted by Qatar is, in my opinion, quite unjustified, particularly in the case of official maps expressing the will of the State or States concerned regarding the territorial scope of the original title invoked by Qatar and Bahrain. Some of those maps are quite conclusive, for example as to the views of Great Britain and the former Ottoman Empire concerning Qatar's title to the Hawar Islands group. Particular examples of this are the Map attached as Annex V to the Anglo-Ottoman Convention of 1913; the map originally prepared by the British Admiralty in 1917 for the negotiation of the Peace Treaty with Turkey; and the 1933 British Foreign Office annotated version of a 1924 British War Office map. The lack of response to cartographic evidence of this kind is an omission by the Judgment which I cannot accept.

41. As indicated above, the Parties also submitted a number of reports by experts particularly, although not exclusively, in connection with some specific questions relating to the maritime aspect of the present case, such as whether or not Fasht al Azm is naturally joined to Sitrah Island and whether or not Qit'at Jaradah is actually an island or a low-tide elevation. The conclusions of these reports do not coincide in all respects. As matters they deal with are essentially technical questions of physical geography and the arguments of the Parties on such matters are quite antithetical, I regret that the Court did not make use of its power to request its own expert opinion or enquiry on these two questions (Article 50 of the Statute).

42. In addition to the evidence submitted by the Parties, this opinion takes account of the general conduct of the Parties as ascertained by that

evidence, including the possible legal effects of prolonged silence, of the Parties' mutual agreements, of the Parties' admissions against their own interest and of the *juris tantum* presumption of international law concerning the sovereignty of the coastal State over islands within its territorial sea belt, unless there is a fully established case to the contrary.

6. *The Definition by Qatar of the "State of Qatar" and by Bahrain of the "State of Bahrain" in the Current Proceedings*

43. The existence of a peninsula named "the peninsula of Qatar" and of a compact archipelago named "the Bahrain islands" are objective data of physical geography. The same applies to their respective locations on the southern side of the Persian Gulf. The Parties are, however, at issue as to their respective broad territorial extent as States. Generally, for Qatar, physical and political geography coincide, while Bahrain holds a different view. The practical result is that while Qatar is asking nothing of the Court belonging to the Bahrain archipelago geographically understood, Bahrain's claims relate to places, islands, other maritime features and the adjacent sea belonging geographically to the peninsula of Qatar.

44. The Qatar peninsula juts northwards into the Persian Gulf from the Dawhat Salwah Bay and, on the east, from south of Khor al-Udaid. The peninsula is about 180 km long north to south and a maximum of 85 km wide and, excluding islands, covers an area of approximately 14,000 sq km. Its main ports are Doha, the capital, and Umm Said on the eastern side of the peninsula. Qatar territorially defines the State of Qatar as constituted: by the Qatar peninsula, including of course Zubarah; the islands adjoining the peninsula wholly or partly within Qatar's territorial sea, such as the Hawar Islands and Janan Island; and other maritime features in that territorial sea, including the shoals of Fasht ad Dibal and Qit'at Jaradah. Bahrain contests this definition of the territorial extent of the State of Qatar.

45. Bahrain, in turn, claims to be an "archipelagic State" which it defines as including the "Bahrain islands" proper, all islands, other maritime features and waters between that archipelago and the west coast of the Qatar peninsula, including the Hawar Islands and the island of Janan, the shoals of Fasht ad Dibal and Qit'at Jaradah, and the so-called "Zubarah region" in the mainland peninsula of Qatar. It also claims some ill-defined rights — affecting the drawing of the single maritime delimitation line in the northern sector of the area — on certain former pearl fishing banks of the Gulf, characterized by Bahrain as "Bahraini pearl fishing banks". A number of those banks are located to the east of the perpendicular notional line joining the northernmost point of the Qatar peninsula and the median line of the Persian Gulf. Qatar contests

this Bahraini political definition of the territorial/maritime extent of the State of Bahrain.

46. The above considerations are essential to an understanding of the respective submissions of the Parties. I therefore think it necessary in this Introduction to set out some views on the question of the definition by the Parties of their general territorial/maritime extent, without prejudice to further factual and legal refinements to be made in the following Parts into which the opinion is divided. I will begin by stating the obvious, namely that physical and political geography are not the same thing. They may undoubtedly coincide in the case of some States, but not in others. But the question for the Court is whether they coincide or not in so far as the States Parties to the present case are concerned.

47. I do not therefore understand the presentation as evidence of maps of various areas in the world in which a given island in the territorial sea of State A belongs to a State B. This may well be warranted if State B is the holder of territorial title to the island concerned. But, if State B is unable to prove such a title, international law presumes that the island belongs to State A by the very fact of being in its territorial sea. It follows that the State which claims an island in the territorial sea of another State must prove its title over that island, and must also prove that the alleged title is likely to supplant the title of the coastal State derived from the said presumption of international law and/or other possible legal principles and rules.

48. The burden of proof against a *juris tantum* presumption lies with the Party that alleged a contrary proposition. One of the greatest legal inadequacies of the 1938-1939 British "procedure" on the Hawar Islands was precisely to have been conceived and organized the other way round. It does not makes sense unless one takes account of the prior British "provisional decision" of 1936. It was through that initial and then undisclosed "provisional decision" that the *juris tantum* presumption of international law referred to was actually ignored. Thus, in this opinion, we will refer to the British "procedure" of the 1930s as a whole, namely to the whole "1936-1939 period".

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49. In the present case, the best approach for ascertaining whether and to what extent physical and political geography coincide — as regards the broad definition of the territorial/maritime extent of the Parties as States — is to focus on Bahrain's definitions, because Bahrain is the Party which denies such a coincidence not only for Qatar but for Bahrain as well.

50. Physical geography tells us that "the Bahrain islands" are a compact archipelago situated at a point midway along the Persian Gulf

between the western side of the peninsula of Qatar and the part of the coastline often referred to as the Hasa coast or the Qatif coast, running from Ras Tannurah in the north to the end of Dawhat Salwah at the Saudi Arabian town of Salwah. This archipelago is composed of: (1) Bahrain Island itself (previously known as "Awal") which is the main island in the group, some 43 km in length from north to south and some 12.8 km in breadth for the most part; Al Manamah, the capital, is on this island; (2) two other main inhabited islands, the largest being Al Muharraq and the other Sitrah, which lie to the north-east and east of Bahrain Island; (3) the two small islands of Umm Na'asan and Nabi Salih; and (4) a number of minor adjoining islets and other maritime features. The area covered, as defined by physical geography, is approximately 652.8 sq km.

51. This is the physical geography aspect of the archipelago of Bahrain. But, the term "Bahrain" alone has been used in the past with other geographical meanings as well. For example, it has been used to refer only to Bahrain Island or "Awal" or to the group of the three principal islands of the archipelago, namely Bahrain Island, Al Muharraq and Sitrah, to the exclusion of the other minor islands and islets. In other words, the term "Bahrain" could occasionally in certain old documents or contexts mean only a part of "the Bahrain archipelago" proper. For example, the references relating to the conquest of Bahrain by the Persians in 1783 mention "Bahrain Island" or "Awal" as sole object of the conquest. Nothing is said about the other islands of the archipelago. The method or methods whereby the State of Bahrain acquired title to the other islands is unknown to the Court. I venture to say that, probably, proximity or contiguity was not alien to the interpretation that Bahrain's title extended to the whole of the Bahrain archipelago, once the main Bahrain island was conquered. The map in J. Theodore Bent's article entitled "The Bahrein Islands in the Persian Gulf" published in 1890 in *Proceedings of the Royal Geographical Society*, a reduced map of the Admiralty Charts, defines the archipelago of "the Bahrein islands" as described in the previous paragraph. (See Map No. 1 of this opinion, p. 448 below.)

52. Conversely, it is also historically true that the name "Bahrain" or "Bahrein" was likewise geographically used in the past, as recognized by Lorimer and others, as meaning both "the Bahrain islands" and certain areas on the mainland, such as Hasa, Qatif and the promontory of Qatar, and even as denoting the whole south-western side of the Persian Gulf from Ruus al-Jibal to the mouth of the Shatt-al-Arab. A few of the oldest maps before the Court confirm this geographical usage of the term "Bahrain" or "Bahrein". In the map accompanying Captain E. L. Durand's Report of 1879, the name appears with three different meanings according to the context: (1) as referring to the Bahrain archipelago (the report is entitled "Report on the Islands of Bahrein"); (2) as referring to Bahrain Island or Awal (the main island in the archipelago is simply called

"Bahrein"); and (3) as referring to the peninsula of Qatar under the denomination "El Bahrein".

53. In his *Gazetteer of the Persian Gulf, Oman and Central Arabia*, Lorimer dealt first with "Bahrain Island" and other individual islands in the Bahrain group, and then, in the article devoted to "Bahrain Principality", listed the islands in the Bahrain archipelago forming that Principality. Thus, for Lorimer, political Bahrain, namely the "Bahrain Principality", coincided in the first decade of the twentieth century with the archipelago defined in physical geography as "the Bahrain islands" proper. In the article entitled the "Bahrain Principality", a leading article at the time, under the heading "extent and importance", Lorimer in effect defines undisputed political Bahrain as follows:

> "The present Shaikhdom of Bahrain consists of the archipelago formed by the *Bahrain*, *Muharraq*, Umm *Na'asan, Sitrah*, and Nabi *Salih* islands and by a number of lesser islets and rocks which are enumerated in the articles upon the islands: taken all together these form a compact group almost in the middle of the gulf which, as it has no recognized name, may appropriately be styled the Gulf of Bahrain" (Memorial of Qatar, Vol. 3, Ann. II.3, p. 88).

54. The "archipelagic State of Bahrain" defined by Bahrain in the course of the current proceedings and for its own purposes, has certainly little to do with the archipelago forming Lorimer's "Bahrain Principality". The former is much more extensive in terms of land and water. Neither is this enlarged "new Bahrain" the Bahrain existing at the time of the Saudi Arabian mediation, or on 8 July 1991 when Qatar instituted the present proceedings, or even the Bahrain which appeared before the Court in the 1994 and 1995 during the jurisdictional and admissibility phase of the case. It is another Bahrain so far as its claimed territorial/maritime extent is concerned.

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55. Bahrain has been unable to submit to the Court any international or domestic instrument defining the State of Bahrain as "an archipelagic State" with the dimensions alleged in the current proceedings. Not a single one. In fact, it is asking the Court to make a declaration to that effect in the place of the State of Bahrain. For that purpose it invoked Part IV of the 1982 Convention on the Law of the Sea. Qatar is not a party to that Convention and does not recognize that Part of the said Convention as declaratory of customary international law. But Bahrain is a party to the 1982 Convention and has nevertheless not fulfilled the clear obligation set forth in Article 47, paragraph 9, of the Convention

concerning the drawing of archipelagic baselines *before the institution of the present proceedings*, namely that:

> "The archipelagic State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations",

and/or other obligations of the archipelagic States provided for in other articles of Part IV of the 1982 Convention, obligations which were essential elements for the conventional agreement recorded in that Part.

56. Thus, even if Part IV of the 1982 Convention were already customary international law, the Bahraini archipelagic baselines allegedly based upon that Part IV would not be opposable to Qatar for any purpose, territorial or maritime. There is no such thing in conventional or general international law as a *"secret archipelagic State"* appearing in or disappearing from international judicial proceedings or international relations in general. There is a question of good faith involved here. In any case, it is worthwhile noting at this juncture that Part IV of the 1982 Convention does not contain any special rule concerning maritime delimitations of archipelagic States with other States. In matters of maritime *delimitation*, archipelagic States, like any other State, are subject to the same norms as set forth in other parts of the 1982 Convention and general international law.

57. Furthermore, the self-styled archipelagic State of Bahrain of the current proceedings would possess the singular characteristic of alleging title to territory over an area of the mainland, the so-called "Zubarah region", and of having always exercised authority and control in that area of the mainland (Bahrain's general thesis concerning Zubarah). In such circumstances, how is it possible for Bahrain to define itself as an "archipelagic State" of the kind referred to in Part IV of the 1982 Convention on the Law of the Sea? Bahrain's thesis and claim concerning Zubarah are in full contradiction with the definition of the terms "archipelagic State" and "archipelago" in Article 46 of the 1982 Convention, because Bahrain is not alternatively pleading its self-proclaimed condition of "archipelagic State" as referred to in Part IV of the Convention. In the current proceedings, Bahrain pleads that it is such an "archipelagic State", with or without the so-called "Zubarah region". A contradiction of such magnitude remains for me a conundrum with no satisfactory logical and/or legal explanation.

58. In the light of the above, I cannot but reject, as does the Judgment, Bahrain's claim to be an "archipelagic State" within the meaning of Part IV of the 1982 Convention on the Law of the Sea and, consequently, any alleged entitlement of the State of Bahrain to draw straight archipelagic baselines as provided for in Article 47 of that Convention.

PART I. TERRITORIAL QUESTIONS

SECTION A. QATAR'S ORIGINAL TITLE TO THE ENTIRE PENINSULA, INCLUDING ZUBARAH AND THE ADJOINING HAWAR ISLANDS AND JANAN ISLAND

A. The Fundamental Distinction between "Original" and "Derivative" Title and Other General Questions of International Law

59. The question of the establishment of title to territory lies at the heart of the pleadings and oral arguments of the Parties on the "territorial questions" in dispute. Both Parties devoted considerable time and arguments to this question in connection with their respective claims to sovereignty over Zubarah, the Hawar Islands and Janan Island. The Court has therefore at its disposal a considerable number of relevant historical, diplomatic, geographical and other factual and legal data. The present part of this opinion aims to identify the most significant legal conclusions resulting from the application of general international law to those data, bearing in mind some simple but quite fundamental notions and categories concerning the establishment of title over land territory.

60. The first and most fundamental distinction to be made in the circumstances of the case is the distinction between *original title* and *derivative title*. Within the former of these two categories, the question of the definition of title to territory encompasses a constitutive element linked to the very birth of the political entity or State concerned *qua* territorially independent or separate unit. This constitutive element is lacking in the second category, namely in the hypothesis of the acquisition of title by an already existing State or political entity. Since the classical writers, international legal doctrine has distinguished between these two categories when speaking, for example, in terms of *"ab origine"* title or acquisition of title *"by gains"* of territory.

61. It follows that the definition of *original title* to the territory of incoming and new States is a legal operation basically different from that of establishing subsequent increases or decreases in territory. This, in turn, cannot but be reflected in the relative weight given to the different modes or combination of modes of acquisition of title recognized in international law. Political considerations, historical consolidation, recognition, legal presumptions, self-determination, repute, silent consent, including acquiescence and tolerance, etc., play a much more determinative legal role in the case of the formation of an *original title* than in the hypothesis of acquisition or losses of territory by an already existing State or political entity resulting from the operation of modes such as occupation of *territorium nullius*, gradual accretion and other additions of land by natural causes, cession by treaty, etc.

62. For example, the establishment or re-establishment of a State with a given territory is not a question which could be determined by simply invoking or applying the criteria defined in the *Island of Palmas* or other cases of the same kind. It follows that questions such as the relationship between legal title and the so-called *effectivités*, when they actually exist, should be approached with considerable caution if the legal operation at issue aims to define the scope of the original territory of a given State or political and territorial entity. In the latter hypothesis, the principle of effectiveness, understood as effective or actual apprehension or possession, initially has a more modest role to play than in the case of increases in the territory of a State by gains.

63. The criteria applicable to defining the territory of a State at the moment of its establishment or re-establishment, are not necessarily the same or exclusively those followed by Huber for deciding title to territory over an island located in the Pacific in a case between the United States and the Netherlands. For example, in its Advisory Opinion on the question of *Jaworzina* (1923), the Permanent Court of International Justice treated recognition as one of the constituent elements of title to territory of the re-established Poland and Czechoslovakia (*P.C.I.J., Series B, No. 8*, p. 20). Recognition did not play such a role in the *Island of Palmas* Arbitration (1928).

64. The manner in which territorial claims are normally put forward before international courts and tribunals has tended to mask the distinction referred to because, in the majority of cases, the parties argued in terms of *derivative title* rather than of *original title*. This is certainly not the case in the current dispute because Qatar, as well as Bahrain, pleaded as if it were the holder of the *original title* to the territory of Zubarah, the Hawar Islands and Janan Island. The original respective claims of the parties were based upon the affirmation that the disputed territories had belonged to the claimer as from their very origin as individual political entities or States.

65. Thus, in this section of the opinion, I will consider a number of historical events as well as other relevant elements of fact and law in order to be in a position to reach some conclusions on the original territorial title of Qatar and of Bahrain at the time of their constitution as two distinct political entities in the international context of the Gulf. In my opinion, this method will help to clarify a number of questions, the result being that, contrary arguments, propositions, claims or submissions of this or that Party will cease to be relevant for that very reason. It is also my conviction that in the present case, in-depth consideration of the question of the territorial scope of the *original title* will ultimately help to decide the territorial questions in dispute because, in general, the aggregate of the related elements of evidence speaks with a clearer and

louder voice than any argument on the *praiseworthiness* of the submissions of the Parties in the light of international law.

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66. It should also be noted that this opinion does not use the terms "title" and "mode" indiscriminately. By "title" we mean exclusively the right to sovereignty as and when acquired, or its very source or foundation. This clarification is necessary because sometimes the term is used as meaning both the process of acquiring the right or its source, and even occasionally documentary proof of the right. Thus, I do not use the term "title" as encompassing the actual process whereby title or territorial sovereignty is acquired. For the latter, I will use the term "mode" or "mode of acquisition". International law knows several modes, or combinations of modes, whereby title to territory may established or acquired. I do not *a priori* exclude any of those modes. Thus, for this opinion a "mode", each "mode", is no more than a material description of a factual or legal means which international law, as an objective system of reference, acknowledges to be capable of creating, by itself or together with other means, a title over the territory concerned. In other words the "mode" is the *antecedent* and the "title" the *consequence.*

67. As to the "modes", namely the antecedents, I have no difficulty with the traditional distinction between modes derived from a factual situation *(situation de fait)* and modes derived from a legal situation *(situation de droit)*. The nature — factual or legal — of the acquisitive process is immaterial, providing of course that the acquisitive process concerned is one of those capable of generating title to territory in international law in the particular circumstances of the given case. On the other hand, the consequence, namely the "title", always refers to a legal situation *(situation de droit)*. In dealing with the "original title" to the territory of Qatar and of Bahrain, I would also point out that both States are the result, as already indicated, of a process of development and that, consequently, *historical consolidation* is called upon to play a paramount role in reaching conclusions.

68. C. De Visscher and other authors drew attention to the mode of establishing title to territory by historical consolidation, understood as a process whereby initial relative titles are consolidated in the course of time in relation to another State or States and, ultimately, *erga omnes* by the operation of certain rules of international law which add strength to the initial constituent element of the title. These rules were defined by Schwarzenberger as follows:

> "It then emerges that titles to territory are governed primarily by the rules underlying the principles of sovereignty, recognition, con-

> sent and good faith. By the interplay of these rules, relative titles may be transformed into absolute titles . . . In the typical case it is the result of a gradual process in time that the World Court has aptly described as historical consolidation of title." (*International Law as Applied by International Courts and Tribunals*, Vol. I, 3rd ed., 1957, p. 309.)

69. The individual rules governing the establishment of title to territory are in effect rules derived in State practice from one or other of the principles of international law referred to in the above quotation. It is by analysing from the historical perspective the interplay of those rules in the particular circumstances of the case considered that it would be possible to conclude that an alleged original title has been consolidated and that it is opposable to another and therefore legal State or States. It would be also necessary to bear in mind factors of intertemporal law because the contents of those principles and derived rules may have evolved with the passage of time. However, in the temporal circumstances of the present case it may be taken that rights of sovereignty in the abstract were already supplanted in international law by a concept of sovereignty based upon effective possession, as defined by doctrine and international courts and tribunals from the nineteenth century onwards.

70. However, I naturally accept the rule concerned in its entirety, namely with all its conditions, presumptions and qualifying criteria. For example, if the alleged holder of the title to a territory abandons it, the unilateral assumption of jurisdiction over the territory by another subject is an effective means of acquiring territorial title. In that event, as in the case of a *territorium nullius*, unilateral assumptions of territorial jurisdiction, for example by occupation, may be a source or basis of territorial title. As to the presumptions, the rule referred to provides that title to territory includes the *appurtenances* of the territory concerned, such as its maritime spaces and the adjoining islands wholly or partly within its territorial sea belt. Thus, title to these appurtenances does not require the continuous and peaceful exercise of jurisdiction and State functions thereon, *but on the main territory to which such appurtenances belong*. The effective control of the appurtenances is presumed by the rule. Moreover, the degree and continuity of the display of authority or physical control required in general by the rule is tempered in certain cases by reasons such as the nature of the territory, the existence or size of its population, actual needs, etc.

71. In addition to rules such as the above ones derived from the principle of sovereignty, the present opinion will also take into account the rules derived from the principles of recognition, consent and good faith because of the equally fundamental role they play in the historical consolidation of title to territory. In certain cases, recognition and consent

may even be an independent source or basis of territorial title. Recognition and consent are particularly important means because, independently of the initial weakness of a title, they prevent recognizing or consenting States from contesting the validity of the title at any future time. Indeed, together with the principle of good faith, they tend to create situations of estoppel. Recognition offers a means of making a relative title into an absolute one. Consent, in its most comprehensive sense, which includes not only consent expressed in treaties, agreements and other formal undertakings, but also acquiescence, toleration and other forms of silent consent, is also paramount in the determination of the establishment, maintenance and opposability of territorial title.

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72. As to the relationship between "title" and *effectivités* the normative mandate of international law is clear, namely *in the presence of a title* the role of the *effectivités* is always subordinate. The legal primacy of title is unquestionable in international law. When the *effectivités* are contrary to the title, they lose the legal value that they may possibly have in other situations. It is only in the absence of title, or of its proof, that the *effectivités* may play a determinative role, other circumstances permitting, in the process of ascertaining the holder of the title. Otherwise, the *effectivités* may serve either to confirm the title or possibly, if the title is not perfectly clear, as a means of interpreting it, and always bearing in mind in concrete cases the nature of the "title" invoked and the features of the norm of international law applicable to the case.

73. In principle, it seems that the Parties are in agreement that "title" prevails over the *effectivités* as a factor generating sovereignty. But I am less sure about the meaning they have given to the term *effectivités*. In fact, the term *effectivités* has been used by counsel in the current proceedings, particularly by counsel for Bahrain, as meaning everything short of "title" and, even in some contexts and not without contradictions, as "title" itself. I cannot accept such an abuse of legal language. Generally, in international law, the term describes the *fact* of the intentional exercise of jurisdiction or State functions in a given territory independently of the *right* to do so, namely of the question of the holder of the title. Thus, the *effectivités* are not *per se* "title" but an element of fact that may be confirmatory of "title", or which even in certain circumstances and in accordance with certain conditions provided for by international law, may be conducive to the acquisition of "title". Thus, the *effectivités* may be a "mode" of acquisition of "title" in the said circumstances and conditions, but they are not "title" in themselves even in those cases. For cases of *effectivités* becoming

"title" one must look to international law and take due account of the particular circumstances of the case (nature of the acts, absence of a previous title, etc.).

74. For example, in the absence of title, occupation as a manifestation of effectiveness may be considered "title" or "as good as title", to use Huber's expression in the *Island of Palmas* Arbitration. But not every form of occupation is an *effectivité* capable of generating title or being as good as title in international law. As explained by Huber himself, it must be an effective, peaceful and continuous occupation. Moreover, the occupied territory must have been a *terra nullius* or, as explained by Rousseau, be "un territoire soustrait par un acte juridique régulier à une compétence étatique antérieure" (territory excluded by a legitimate legal act, from a former State jurisdiction) ("Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 93 (1958), p. 415). In other words, occupation must concern a *terra nullius*, or a territory which has lost its owner, to be able to generate, other circumstances permitting, title to territory in international law. As to the nature of the acts, the jurisprudence of the Court has underlined that the acts concerned must be performed *à titre de souverain*. This excludes from the international law notion of *effectivités* acts performed by private individuals or groups acting in that capacity or for their own purposes.

75. In addition to the case of the effective, peaceful and continuous occupation of a *terra nullius*, the *effectivités* may also have a role to play as proof of alleged title to a territory acquired by a mode other than occupation or as an exercise of title. But again not every act invoked as an *effectivité* is necessarily in international law an *effectivité* capable of being admitted as proof of title or of the exercise of title. The acts must be *actes publics et paisibles de nature étatique*, namely a manifestation of State authority imputable to the State in question. If the act has not been performed *à titre de souverain* or is not imputable as such to the State concerned it would not be as proof of title to territory or of its exercise.

76. Furthermore, *effectivités* are by no means the only manifestation or form of evidence of title to be taken into account. The general conduct of the Parties, including, as the case may be, admissions, and instances of recognition by interested third parties are often more revealing as to the holder of the title, particularly in the case of original title, than alleged *effectivités* which are more frequently than not quite flawed. Lastly, there is the intertemporal factor. "Critical dates" and "critical periods" are applied by international courts and tribunals for distinguishing *effectivités* admissible *in casu* from other possible alleged *effectivités*. Moreover, the status quo agreed by the parties to the dispute also has a role to play in this respect.

B. Origins of the Ruling Families of Qatar and of Bahrain and Settlement of the Al-Khalifah in the Bahrain Islands in 1783

77. The socio-political organization prevailing in the past in the Arabian Peninsula was the "tribal system" and many Bedouin tribes were nomadic *(bedu)*, although there were also settled tribes and people *(hadar)* mainly in coastal areas and towns. The process of the settlement of the tribes took time. It was not done at once or in a uniform manner. Thus, for a long time nomadic tribes and settled tribes coexisted with each other, at least in the Qatar promontory. There were also semi-nomadic tribes. But, the *hadar* ultimately came to dominate political life because of the fundamental economic importance of the sea (trade, pearl fishing, etc.). The ancestors of most of the tribes who reached the Qatar promontory by land are to be found in Central Arabia, the present ruling families of Qatar and Bahrain included.

78. According to Qatar, the Al-Maadid tribe, including the forebears of the Al-Thani family, and the closely related Al Bu Kawara, migrated by the end of the seventeenth century from Ashayquir in Washm to Jabrin, an oasis in Central Arabia, and from there to the Qatar peninsula settling, broadly, first in its south-western tip, near Salwa, then moving to the north-west, to the Zubarah area and nearby Ruways, where the Al-Maadid group settled, while the Al Bu Kawara moved to the north-east of the peninsula and began to develop the Fuwayrat settlement in the vicinity of the Musallam area at Al-Huwayla. When the Al-Khalifah moved to Bahrain and the Zubarah area was ruined, settlement in the north-eastern corner of Qatar intensified. It was to Fuwayrat that the eponymous Thani moved. Subsequently, Mohamed bin Thani left Fuwayrat and settled in Doha, becoming the governor of Bida and rising to the position of paramount Sheikh of Qatar in the 1850s.

79. In so far as Bahrain is concerned, and also in general, the Al-Khalifah family is a branch or section of the Al-Utub tribe. Apparently, the Al-Utub tribe first reached the Qatar peninsula also coming from Central Arabia and establishing themselves in 1715 in the area of Zubarah for about two years, after which they went to Kuwait. While in Kuwait, three branches of the tribe emerged: the Bin Khalifah, from whom the present ruling family in Bahrain is descended, the Bin Sabah and the Al-Jalahma. In 1766 the Bin Khalifah and the Al-Jalahma sections left Kuwait for Bahrain, which had been occupied by the Persians since 1753, thence moving on to the Qatar peninsula, where in 1768 they built a fort, known as Al-Murair, at some distance outside the outer wall of Zubarah town (about 1.5 km). They settled for about 17 years in the Zubarah area, helping in the development of the pearl industry of the town and there reaching a position of some pre-eminence.

80. But in 1783, the Utub (the Bin Khalifah and Al-Jalahma branches),

together with other Arab tribes, including Qatari tribes, seized Bahrain from the Persians in retaliation for previous attacks upon the town of Zubarah by the Persian Governor of Bahrain. Following a struggle for power on the island, the Bin Khalifah became the ruling family in Bahrain and settled on the island, while the Al-Jalahma section returned to Qatar. In other words, the Al-Khalifah abandoned their previous settlement in the Zubarah area. The first Al-Khalifah Ruler of Bahrain was Ahmad bin Khalifah, known later as Ahmad the Conqueror.

81. Within the "tribal system", the links between a tribe and a territory were established by the very fact of the *"settlement"*. If a settled tribe abandoned the settlement, those territorial links disappeared, although personal links with other sheikhs, tribes or branches of tribes might continue, but from a distance. By moving freely to Bahrain Island in 1783, the Al-Khalifah left their previous settlement in the Zubarah area and therefore the only territorial basis they had had in the Qatar peninsula since their arrival in 1766. The Al-Thani, however, did not move from the Doha area, always retaining that territorial base in the peninsula of Qatar. Thus, those in command at Doha and Bida began to be seen by the local tribes as the heads of Qatar, although it took time for their authority to be effectively exercised over all the tribes and territory of the peninsula. Writing at a time when the Sheikhs of Bahrain still claimed some kind of nominal authority over Qatar, Palgrave, in his *Narrative of a Year's Journey through Central and Eastern Arabia (1862-1863)*, 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, whose occupation is to look after and to bring in the annual tribute on the pearl fishery" (Counter-Memorial of Qatar, Vol. 2, Ann. II.75, p. 415).

82. The settlement of the Al-Khalifah family in the Bahrain islands, while the Al-Thani remained settled in the mainland, is an important historic event for understanding the subsequent territorial development of the two countries. Speaking with hindsight it may even be added that, from that very moment, the future broad territorial profile of Bahrain and Qatar as separate political entities began to take shape. Bahrain began to be viewed as the archipelago formed by the Bahrain islands and Qatar as a continental or mainland country in the peninsula of Qatar, and this not only by local inhabitants but also, and mainly, by the foreign

forces called upon by history to participate in the creation and shaping of the modern States of Qatar and Bahrain.

C. Legal Effects on Title to Territory Consequential on the Settlement of the Al-Khalifah in the Bahrain Islands

83. In international law, for possession to generate title to territory requires *animus possidendi* and *corpus possessionis*. I am ready to admit that, after leaving their settlement in the Zubarah area in 1783, the Al-Khalifah at times, and with different degrees of intensity according to the moment, expressed a certain *animus* regarding the Qatar peninsula in the guise of attempts aimed at giving recognition to some kind of pre-eminence among the Qatari tribes, or certain Qatari tribes, as well as at avoiding the possibility that the peninsula might become a source of danger to the security of the Bahrain islands. But this *animus* of the Al-Khalifah Rulers of Bahrain never resulted in the establishment of an administrative/territorial unit of their own in the Qatar peninsula, or in the establishment of a common political or territorial entity between the Bahrain islands and the Qatar peninsula or a part thereof, or in the recognition by the Powers of the existence of such a common administrative or political entity of whatever form.

84. Regarding the objective element of title generating possession, it is quite obvious in the light of the historical and diplomatic documentation submitted by the Parties that there is no *corpus possessionis* by Bahrain in the Qatar peninsula between 1783 and 1868. During this long period of about 85 years, the Al-Khalifah Rulers of Bahrain were not in possession of any part of the peninsula of Qatar or of any of the islands adjoining the peninsula, nor did they even claim to be. In fact, not until 1873 did the Ruler of Bahrain submit to the British its first claim to Zubarah, then a part of the Ottoman *kaza* of Qatar! And not until 1936 was Bahrain's claim to the Hawar Islands submitted, also to the British! Thus, during the period 1783-1868, as *corpus* of possession the Rulers of Bahrain did not have any territory in the Qatar peninsula and/or in its adjoining islands to make them the holders of title to territory under international law either as a *effective possession* or in the form of *in precario possessionis*.

85. Bahrain's thesis of the effective exercise of authority during the period 1783-1868 in the Qatar peninsula is not therefore based upon any kind of effective or actual possession of territory, but rather on an alleged *animus* to pre-eminence in the peninsula, as well as in the alleged ties of allegiance of certain tribes with the Al-Khalifah Rulers of Bahrain, the Naim (the nomadic tribe) in the case of the so-called "Zubarah region" and the Dawasir in the case of the Hawar Islands. We will consider these alleged "ties of allegiance" below.

86. For the moment, let us merely emphasize that neither the *animus* argument nor the allegiance argument implied effective possession of territory by the Al-Khalifah Rulers of Bahrain in the Qatar peninsula from 1783 to 1868. The possession by Bahrain of part of Jazirat Hawar did not take place until 1937 and was the result of a clandestine occupation, following the 1936 British "provisional decision" on the Hawar Islands. The only point concerning this occupation which should be mentioned here is that because of its very date, and independently of its characterization in international law, such an occupation cannot have retroactive effect so as in any way to interrupt the process of the formation and consolidation of the Al-Thani Rulers' original title to the territory of the whole peninsula of Qatar and its adjoining islands.

87. Furthermore, the case file contains no evidence of the exercise of territorial authority by the Al-Khalifah — even during the period when they remained settled in the Zubarah area (1766-1783) — over other parts of the peninsula of Qatar. Bahrain asserts, however, that a *qadi* of Zubarah, subject to the authority of the Al-Khalifah, granted the Hawar Islands to the Dowasir. This alleged judicial act is not part of the documentation before the Court. In fact, counsel for Bahrain tried to construct it by means of second-hand evidence such as, for example, the so-called "affidavits" and hearsay *(ouï-dire)* testimony of private and perhaps self-interested individuals.

88. My general conclusion on this matter is that, having left for the Bahrain islands in 1783 by an act of free will, the Al-Khalifah abandoned their former territorial title in the area of Zubarah and never before 1868 acquired any new title of a *territorial character* regarding that area or any other area of the Qatar peninsula and/or its adjoining islands and waters. The absence of effective possession under international law, because of the lack of *corpus possessionis*, is manifest from 1783 to 1868, quite independently of any possible nominal pre-eminence of the Al-Khalifah among tribes in the peninsula for reasons of prestige or other considerations. It is also crystal clear that, while settled at Zubarah (1766-1783), the Al-Khalifah were not rulers of Qatar. They were not — before or after 1783 — a kind of dynasty reigning over all the tribes and territory of the Qatar peninsula as counsel for Bahrain has sought to insinuate during the proceedings. Qatar does not therefore have to prove the loss by the Al-Khalifah of any title over Qatar to prove its own *original title*. It is to Bahrain — to the extent that it asserts a contrary proposition — to prove that territorial title actually existed to the extent indicated and did not lapse following the settlement of the Al-Khalifah in the Bahrain islands in 1783. What "the British" considered or did not consider in the first part of the nineteenth century is not the issue; the issue is what international law considers a territorial title to be in that century.

D. Presence of Great Britain in the Gulf and Maintenance of Peace at Sea

89. Europeans arrived in the Gulf in the seventeenth century, as it lay along one of the trading routes with India. The first to arrive were the Portuguese, who established forts at Hormuz and Bahrain. Their monopoly of trade in the Gulf was first challenged by the Dutch who had trading posts on the Persian coast. Somewhat later came the British who, in association with Persia, succeeded in expelling the Portuguese from the Gulf, the last Dutch trading post also being abandoned in 1766. Thereafter, the British almost acquired a monopoly of foreign trade in the Gulf ports, and were left as the only foreign Power in the area until the arrival of the Ottomans some decades later.

90. By the end of the eighteenth century, in addition to commercial and trade interests, there were also other reasons for Britain's increased involvement in the Gulf. The growing British presence in India made the Gulf an area of great strategic importance for successive British Governments. At the same time, maritime trade had considerable increased, as had piracy, with the result that part of the southern coast of the Gulf came to be known by the British as the "Pirate Coast". Since 1797, and on several occasions, British vessels were attacked by Arab tribes led by the Qawasim whose headquarters were in Ras Al-Khaimah. It took the British from 1797 to 1819 to defeat the Arab tribes led by the Qawasim.

91. But in 1819 a substantial force of combined British naval and East India Company vessels finally took control of Ras Al-Khaimah. Other ports on the "Pirate Coast" were also visited by the British and a clean sweep was made of their military defences and their larger war vessels. These kinds of measures were also taken against the Bahrain Sheikhs in the Bahrain islands. It is noteworthy that *when the British took control of the Gulf, the Bahrain Rulers were already settled in the Bahrain islands.* The British did not meet the Al-Khalifah in their former Zubarah settlement or in the Hawar Islands but in the Bahrain islands.

92. Following the events described, individual agreements were signed by the British with the Sheikhs including an undertaking to enter into a general peace treaty in the future. The General Treaty of Peace was concluded in January 1820 and, on various dates, the Sheikhs of the Pirate Coast and the two Bahraini Sheikhs in power in the Bahrain islands severally became parties thereto. By this Treaty the Arab signatories undertook in future to abstain from plunder and piracy, as distinguished from "acknowledged war", and various arrangements were prescribed for ensuring the strict observance by them of their new treaty obligations,

among them being the adoption by the tribes of a common distinctive flag, and the institution of a system of ship's papers for the purpose of identification.

93. To enforce the Treaty of 1820, the British stationed more permanent naval forces in the Gulf, and subsequent acts of piracy, including several believed to have been perpetrated by tribes of Qatar and of Bahrain, were dealt with directly by these forces. However, piracy as well as acts of aggression by one Arab tribe against another continued, resulting in disruption to both British and Arab trade. Therefore, in 1835, at the suggestion of the British, a maritime truce was established which was renewed for certain periods on a yearly basis. In 1836, The British also imposed a *de facto* restrictive line between the Persian coast and the Arab coast, beyond which the Arab tribes were not allowed to conduct any hostile operation. Finally, a Treaty of Maritime Peace in Perpetuity was signed in August 1853 by Great Britain and the Chiefs of the "Trucial Sheikhdoms".

94. British control led to the maintenance of peace at sea in the Gulf. For example, they imposed fines and assisted in the recovery of plundered property. They were also, inevitably, drawn into intervening in local disputes, sometimes supporting one sheikh rather than another. However, British ascendancy in the Gulf from 1820 onwards over the affairs of the Arab chiefs was mainly a *de facto* position and not a position as of right. The moves to establish and maintain peace at sea, as well as other moves in 1838 and 1847 in connection with the slave trade, allowed the British to intervene to secure the performance of *treaty obligations*. But Great Britain did not establish any supremacy over the Arab chiefs with regard to their other internal or external affairs. Nor did Great Britain claim or proclaim suzerainty or sovereignty over them on treaty or other grounds. In 1892, a new form of protection was devised, the "exclusive agreements", but the territories of the various Arabs Chiefs in the Gulf never became territories of the British Crown.

E. Termination of the Historical Connection between the Al-Khalifah Rulers of Bahrain and Qatar (1868-1871)

95. The Al-Khalifah's title to the Bahrain islands was acquired by conquest, a mode of acquiring territory not excluded by eighteenth century international law. But the consolidation of their title to the Bahrain islands took some time because the Al-Khalifah were by no means the only political actors in the area and also because of internal power struggles among the Al-Khalifah Sheikhs.

96. From 1783 until about 1820, the Persians, Muscat and, in particular, the Wahhabis struggled for control over Bahrain Island and from time to time the Al-Khalifah Rulers had to acknowledge their submission

to one or other of those powers. There were therefore permanent threats, in the first place from the Wahhabis who, once they had occupied the Hasa coast in 1795 with the assistance of the Naim (the tribe allegedly loyal to the Al-Khalifah) and other tribesmen, besieged Zubarah and other localities in the north of the Qatar peninsula. By 1802-1803, the Wahhabis had nominally subjected all the inhabitants of the Arab Gulf coast from Basra to Muscat and also turned their attention to the island of Bahrain itself, demanding in particular the payment of the *zakat* by the Rulers of Bahrain.

97. By 1809, the Wahhabis had brought Qatar under their rule and the Bahrain islands themselves succumbed to the powerful Wahhabi influence, which was then controlled from Zubarah in Qatar. From 1809, the influence of the Wahhabis extended over Bahrain culminating in a period of Wahhabi control of the islands in 1810-1811. In 1810 a Wahhabi Governorship of Qatif, Qatar and Bahrain was instituted with its headquarters on Bahrain Island. The Wahhabi influence in the area continued intermittently until about 1860.

98. In the years after 1811, there were also other threats from the Qatar peninsula. For example, Rahmah bin Jarb 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" (Memorial of Bahrain, Vol. 3, Ann. 83, p. 445).

99. There were further threats to Bahrain by Muscat in the 1820s and, in 1830, the Wahhabis again obtained the submission of the Sheikhs of Bahrain. The 1830s also saw renewed threats from the Hasa coast, this time by the Egyptian forces who were engaged in an expedition in support of the Ottomans and, despite British assurances that it would protect Bahrain, the Al-Khalifah Rulers nevertheless acknowledged Egyptian supremacy in 1839 and paid tribute that year to the Egyptians, themselves vassals of the Porte. The Wahhabis continued to play a role in Bahrain's affairs by intervening in the power struggles between rival Bahraini Sheikhs from 1840 to 1860. Furthermore, in 1835 and 1851, people in Qatar took advantage of the Wahhabis' presence to oppose attempts by the Bahrain Sheikhs to exercise authority in the peninsula (Memorial of Qatar, Vol. 3, Ann. II.5, pp. 201 and 207). At one time, between 1852 and 1866, the Wahhabi Amir had a representative at Doha (*ibid.*, p. 207).

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100. Thus, during the first decades of the nineteenth century, there were sufficient threats to Bahrain from outsiders to warrant the assumption that the Rulers of Bahrain were perhaps engaged in a continuous policy of maintaining or extending effective territorial authority over the

Qatar peninsula. The contrary contention defended by Bahrain in the present case is even less likely if account is taken of the internal political situation existing at that time on the island of Bahrain. Political life in Bahrain had been marked by internal struggles since the conquest of the island. There was no hard and fast rule about succession and sons and nephews of the Ruler were often at odds with one another.

101. From the early days of their settlement on Bahrain Island until about 1860 or even until the beginning of Sheikh Isa bin Ali's reign in 1869, the history of the Al-Khalifah rule in Bahrain was punctuated by different attempts, successful and unsuccessful, to seize power at home. There were also occasionally co-rulers. It was certainly not the best situation, even if the *animus* may perhaps have been there, for the display of effective territorial authority on the mainland.

102. These internal struggles often affected nearby Qatar, but this is by no means the exercise of territorial authority over the peninsula by the Bahraini Rulers — the opposite if anything. It was precisely because that authority did not exist or was not effectively manifest in the peninsula that the Al-Khalifah Sheikhs struggling for power on the Island of Bahrain came to Qatar. The conflict between Sheikh Abdullah bin Khalifah and his great-nephew, Sheikh Mohamed bin Khalifah, who were co-rulers at the time, provides a good historical example of this kind of situation. Expelled in 1842 from Bahrain, Sheikh Mohamed took refuge in the Murair fort outside the old walls of Zubarah. His presence there lasted till April 1843. Then, helped by the Qataris, Sheikh Mohamed retook Muharraq and ousted Sheikh Abdullah, who was in turn expelled from Bahrain and proceeded to seek alliances with both the Wahhabis and the Persians in an effort to regain control of the Island of Bahrain (see Lorimer, Memorial of Qatar, Vol. 3, Ann. II.3, pp. 206, 276-277 and 279-286).

103. In fact, the Al-Khalifah Rulers survived in the Bahrain islands because of the protection afforded to them by the British. The protection of the Bahrain islands became a constant feature of British policy. Britain always protected Bahrain, understood as the "Bahrain islands", from foreign threats (for example, in the 1820s from threats posed by Muscat; in 1835 and 1859 because of tensions with the Wahhabi Amir; in 1843 and 1869 from renewed Persian claims to sovereignty over Bahrain Island, etc.), as well as from threats from the Qatar peninsula. But at the same time, Great Britain did not support the interventions of the Al-Khalifah Rulers or their claims on the mainland and its adjoining islands, the Qatar peninsula and its islands included.

104. Thus, for example, when in 1861 in response to Wahhabi threats, Sheikh Mohamed of Bahrain began to blockade the Hasa coast and to harass the pearl fishers of Qatif and Damman, the British intervened with naval forces and the Sheikh of Bahrain was forced to submit. Thereafter, in May 1861, Sheikh Mohamed (together with other Sheikhs of Bahrain) was required by Felix Jones, British Political Resident in the Persian

Gulf, to enter into an agreement with Great Britain, *the Agreement of 31 May 1861*, whereby the Bahraini Sheikhs undertook to abstain from all maritime aggression of any description (Memorial of Bahrain, Vol. 2, Ann. 8, p. 110).

105. After the 1861 Agreement, in which no reference is made to Qatar or to the peninsula of Qatar, the Rulers of Bahrain had their hands tied by treaty obligations with Britain. They could not make forceful interventions to assert or exercise authority over the mainland without British authorization. The "hands off" policy adopted by the British with respect to the mainland, applied by the Agreement to the Rulers of Bahrain, from that moment became an important factual element in the formation and consolidation of the Al-Thani Rulers' title over the territory of the Qatar peninsula and its adjoining islands. The only departures from this consistent British policy were the 1936 and 1939 "decisions" on the Hawar Islands, as well as the 1947 sea-bed dividing line in so far as these islands and the shoals of Dibal and Qit'at Jaradah are concerned.

106. Lastly, it should also be noted that the Arab occupation of Bahrain Island did not put an end to the Persian Government's claim to sovereignty over Bahrain. The Persian claim regularly renewed after 1843, in particular in 1869, and again in the 1920s, was dropped only in 1970, namely one year prior to the end of the British political presence in the Gulf. As already indicated, in accordance with its policy of protecting Bahrain, understood to mean the Bahrain islands, Great Britain always opposed and refused to recognize such a claim, deciding even in 1843 to resist by force any attempt by the Persian Government to establish troops on the Island of Bahrain. But, what is more interesting for the matter under consideration is the fact that, *for Iran, Bahrain was exclusively Bahrain Island or the Bahrain islands*, and not a Bahrain comprising the peninsula of Qatar or any part thereof or its adjoining islands. This is important historical testimony from a powerful and interested neighbouring Gulf State.

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107. In the light of the above, any suggestion that the question of the exercise of effective authority in the Qatar peninsula between 1783 and the 1860s was merely a question of the relationship between the Rulers of Bahrain and the Rulers of Qatar is at odds with the historical truth. Bahrain's consequential assertion that it was only as the territorial authority of the Rulers of Qatar gradually expanded that the territorial authority of the Rulers of Bahrain within the Qatar peninsula contracted (Memorial of Bahrain, para. 64) is without any doubt historically erroneous and cannot but be rejected.

108. In 1783, the Al-Khalifah voluntarily settled in the island of Bahrain and with that settlement the continuous exercise by them of effective territorial authority over the Zubarah area in the Qatar peninsula ceased. They lost and never recovered their former Zubarah area and were henceforth unable to establish any new territorial base in the Qatar peninsula and/or its adjoining islands until the British "decisions" of 1936 and 1939. It appears, however, that they continued to claim, from time to time, some kind of ill-defined pre-eminence vis-à-vis tribes in the Qatar peninsula, but this *animus* never materialized in the physical taking of possession of any piece of land in the peninsula or its adjoining islands. At a certain moment, towards the middle of the nineteenth century, the Al-Khalifah Rulers of Bahrain apparently succeeded in being recognized to have a kind of *nominal* pre-eminence among Qatari tribes, but without the physical occupation of territory and without organizing any kind of government or administration in the peninsula. What the Al-Khalifah Ruler did for a time was to have a representative at Doha, such as the Wahhabi Amir in 1852 and 1866.

109. Furthermore, if one takes the period considered as a whole (1783-1868), the absence of any element of *continuity* in the alleged nominal pre-eminence of the Al-Khalifah Rulers in the Qatar peninsula is obvious. What emerges, generally speaking, from contemporary history is not continuity at all, but a clear *discontinuity* in the relations of the Al-Khalifah with Qatari tribes, even nominally. As noted by the British First Assistant Resident in the Persian Gulf, referring to the period prior to 1868:

> "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." (Counter-Memorial of Qatar, Vol. 3, Ann. III.11, p. 75.)

110. On the other hand, those in command at Doha began to be seen by the Qatari tribes, as underlined by Palgrave (see above) and others, as the natural head or ruler of the tribes in Qatar, although their authority was not yet effectively exercised at that period over all the tribes and territory of the peninsula. Subsequent historical events, as we will see, would confirm the Al-Thani as the Ruler of Qatar with its tribes and territory and his recognition as such by foreign and local Powers.

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111. In 1908, Lorimer described the former pre-eminence of the Al-Khalifah retroactively in terms of "a suzerainty — more apparent than real" (see below). I do not know whether the term "suzerainty" is more appropriate to describe the situation existing in the Qatar peninsula by the middle of the nineteenth century. In any case, the nominal Al-Khalifah pre-eminence was a form of "suzerainty" having little in common with the one established since 1871 by the Ottomans over the whole of the peninsula of Qatar. The Ottomans were present in the peninsula, organized the administration of Qatar as a part of the administration of the Ottoman Empire and maintained a permanent military presence there for decades. The so-called suzerainty of the Al-Khalifah Rulers was deprived of any kind of presence, of any power *in rem*, namely of *dominium* over territory or of a right of ownership over land. The complete absence of *corpus possessionis* is obvious if one reads the historical record.

112. The payment of the *zakat* to the Wahhabi Amir, common to Bahrainis and Qataris, and personal links with some local sheikhs, tribes or sections of tribes was probably used at times by the Al-Khalifah in an attempt to assert the said nominal pre-eminence. This, together with the already existing special relations between Great Britain and the Al-Khalifah Rulers of Bahrain, surely explained that until about the 1860s, *the British*, who at that time were not interested in Qatar, would sometimes describe Qatar as a "dependency" of Bahrain (a fact recognized by Qatar in paragraph 5 of its Application instituting the present proceedings). But even this was far from being a unanimous British view on Qatar in the 1860s. For example, in 1860-1862, Palgrave describes Qatar as dependent on the Sultan of Oman (see above) and, on some contemporary maps, Qatar was so represented. The descriptions which, as Bahrain now contends, originated with the British, were however made without any regard to the principle of effectiveness as understood in nineteenth-century international law. They were a politically convenient means for the British to describe a still evolving political situation in the peninsula. It was convenient for them to continue with this fiction because, after all, they controlled Bahrain, which is to say the Bahrain islands, and also had some established links with the Sheikhs of Oman.

113. Furthermore, as already indicated above, the term "Bahrain" was used to convey several different geographical meanings during part of the nineteenth century. For example, when, in his *Memoir Descriptive of the Navigation of the Gulf of Persia (1821-1829)*, Captain Brucks of the Indian Navy described the Warden's Islands as belonging to Bahrain (Memorial of Bahrain, Vol. 2, Ann. 7, p. 101), we cannot be sure which "Bahrain" he had in mind. Moreover, Qatar does not claim to be the holder of title to the territory of the Hawar Islands in the 1820s, but from 1868 onwards. The insistence of Bahrain on Captain Brucks's 1829 state-

ment on the Hawar Islands is somewhat surprising, because in other contexts counsel for Bahrain appears to dismiss the legal relevance of hydrographers' testimony for the determination of territorial matters. For example, in the 1982 version of the *Persian Gulf Pilot*, published by the Hydrographer of the British Navy, we find that Bahrain:

> "is an island about 27 miles in length from N to S, with a breadth of about 8 miles for most of its length, which lies in the entrance to Dawhat Salwa; together with a number of small islands and islets lying close to its shores, they form the independent Sovereign State of Bahrain" (Memorial of Qatar, Vol. 3, Ann. II.1, p. 37).

114. With the Agreements of 1868 concluded by the British with the Al-Khalifah Rulers of Bahrain and the Al-Thani Chief of Qatar and the arrival of the Ottomans at Doha in 1871 (see below), the principle of effectiveness began to operate in favour of the Al-Thani Chief of Qatar. In effect, from then onwards, the peninsula of Qatar as a whole became a territory under the authority and control of the Ottomans and the Al-Thani Chief of Qatar, with the *de facto* diplomatic understanding and support of Great Britain, while the Al-Khalifah Rulers remained settled in the Bahrain islands under British protection, but deprived by treaty from even the power to intervene on the mainland, including the peninsula of Qatar and its adjoining islands, because this could only be done via the sea, in other words, not to breach the peace at sea was the main aim of British policy in the Gulf at that time. There were no planes then!

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115. The above is merely an overall description of the historical record of the period concerned, the details of which are to be found in the case file. But it is enough for determining the moment from which the original title to territory of the State of Qatar must be ascertained for the purpose of the present case. The following passage from *Lorimer* in my opinion provides some decisive evidence for identifying that moment, which is of fundamental importance for the legal determinations to be made in the present case. According to Lorimer:

> "Prior to 1766 A.D., the peninsula of Qatar, it is believed, was included in the dominions of the Bani Khalid Shaikhs, whose headquarters were at the time in Hasa and whose jurisdiction then extended as far north as Kuwait; and it is probable that the Utub, when they arrived at Zubarah in 1766, found the Al Musallam occupying a pre-eminent, though not a paramount position in the country. In the course of about 20 years the pre-eminence of the Al

Musallam appears to have been transferred to the Utub; but the attention of the latter was for some time held in another quarter by their conquest of Bahrain. By the middle of the 19th century, however, the Shaikh of Bahrain had established a suzerainty — more apparent than real— over Qatar, and was represented at Bida (Dohah) by a political agent who was a member of his own family. In 1868 direct negotiations took place between the British Government and the tribal Shaikhs of Qatar; and, in the result, the interest of the Shaikh of Bahrain in Qatar was limited to the receipt of tributes probably on behalf of the Wahhabi Government of Najd. *In 1872, the Turks established a garrison in Dohah; and with the cessation of the Wahhabi Zakat the political connection, such as it was, between Bahrain and Qatar came to an end.*" (Memorial of Qatar, Vol. 3, Ann. II.4, pp. 140-141.)

F. The 1861 Agreement between Great Britain and Bahrain

116. As indicated above, the British opposed by force the blockade of the Wahhabi Hasa ports by the Ruler of Bahrain, Sheikh Mohamed bin Khalifah. The British military intervention was preceded by a letter of 18 May 1861 addressed by the British Resident in the Persian Gulf, Felix Jones, to the Chief of Bahrain, Sheikh Mohamed bin Khalifah, paragraph 3 of which transcribed the following:

"On the other hand my determination sternly to control any hostile attempts on the neighbouring tribes, which may be made by Bahrein, or in the name of Bahrein, under any Agency whatever, is taken, and true to our old policy of maintaining the integrity of the Island, I will not hesitate to defend it against the encouragements or aggressions of its enemies. This resolution you will communicate distinctly to all parties in authority, whether native or foreign, at Bahrein, as the peace of this Gulf compels me to be explicit, while the question is pending a decision in higher quarters." (*Ibid.*, Vol. 5, Ann. II.19, p. 43.)

117. After this British military intervention, Great Britain and Bahrain concluded an agreement on 31 May 1861 entitled "Friendly Convention entered into between Sheikh Mahomed bin Khuleefa, independent Ruler of Bahrain, on the part of himself and successors, and Captain Felix Jones, Her Majesty's Indian Navy, Political Resident of Her Britannic Majesty in the Gulf of Persia, on the part of the British Government" (*ibid.*, Vol. 5, Ann. II.20, p. 47). The preamble describes the Agreement as a "perpetual Treaty of peace and friendship" between the independent Ruler of Bahrain and the British Government, having for its object the advancement of trade and the secu-

rity of all classes of people navigating or residing upon the coast of this sea.

118. After recognizing as valid and in force all former treaties and conventions between the Chiefs of Bahrain and the British Government, the independent Ruler of Bahrain agrees, in Article 2 of the 1861 Agreement, "to abstain from all maritime aggressions of every description, from the prosecution of war, piracy, and slavery by sea, so long as I receive the support of the British Government in the maintenance of the security of my own possessions against similar aggressions directed against them by the Chiefs and tribes of the Gulf". Moreover, Article 3 provides that the Ruler of Bahrain, in order that the above engagements may be fulfilled, agrees:

> "to make known all aggressions and depredations which may be designed, or have place at sea, against myself, territories, or subjects, as early as possible, to the British Resident in the Persian Gulf, as the arbitrator in such cases, promising that no act of aggression or retaliation shall be committed at sea by Bahrein or in the name of Bahrein, by myself or others under me, on other tribe, without his consent or that of the British Government, if it be necessary to procure it. And the British Resident engages that he will forthwith take the necessary steps for obtaining reparation for every injury proved to have been inflicted, or in the course of infliction by sea upon Bahrain or upon its dependencies in this Gulf. In like form, I, Sheikh Mahomed ben Khuleefa, will afford full redress for all maritime offences, which in justice can be charged against my subjects or myself, as the ruler of Bahrein."

119. The Agreement refers to "possessions", "territories" and "subjects" of the Ruler of Bahrain and distinguishes between "Bahrain", or the main island of Bahrain where the Agreement was done, and "its dependencies in this Gulf". But the Agreement does not define the territories, possessions or dependencies concerned. Qatar is not mentioned at all in the Agreement. The third parties are described as "the Chiefs and tribes of this Gulf", as well as by the term "other tribes". As we will see, in 1868, following the attack of the Ruler of Bahrain on the Doha area, the British considered the Chief and tribes of Qatar as protected by the 1861 Agreement against attacks from the Ruler of Bahrain and, therefore, as not falling within the terms "subjects", "possessions", "territories" or "dependencies" of the Ruler of Bahrain referred to in the 1861 Agreement.

120. The 1861 Agreement is particularly significant since its violation by the Ruler of Bahrain was to lead to the conclusion of the 1868 Agreements whereby Great Britain first formally recognized the separate identity of Qatar under the rule of Mohamed bin Thani.

G. Historical Consolidation and Recognition of the Al-Thani Rulers' Title to the Territory of the Entire Qatar Peninsula and Its Adjoining Islands (1868-1915)

1. The Ruler of Bahrain's 1867 acts of war across the sea and British intervention

121. In 1867, increased tension between Mohamed bin Thani and other headmen in Qatar and the Ruler of Bahrain, Sheikh Mohamed bin Khalifah al Khalifah, developed as a result of the seizure and deportation to Bahrain Island of a Qatari Bedouin by the representative of the Chief of Bahrain at Wakrah, his son Sheikh Ahmed. The headmen of Bida and Wakrah demanded the Bedouin's release and, when their request was refused, they took steps to expel the representative of the Sheikh of Bahrain from Wakrah. In a communication to the British Political Resident in the Gulf, dated 23 April 1868, Captain Cotton Way made a report on this initial event recording that:

> "4. One Ali bin Shamir al Naimi of the Bedouins of Gutter having been seized to Bahrain by Sheikh Ahmed bin Mahomed bin Sultan, the representative of the Chief of Bahrain on the Gutter coast for going to his tribes, the naims of Wakra, the naims and the people of Biddah, Doha and Dougha combined and demanded his release. This demand was refused, and they then determined to turn Sheikh Ahmed out of Wakra." (Counter-Memorial of Qatar, Vol. 3, Ann. III.3, p. 13.)

122. In the light of the determination of the Qataris, Sheikh Ahmed fled Qatar and reported what had occurred to the Chief of Bahrain, who then invited Sheikh Jassim, the son of Mohamed bin Thani of Qatar, to Bahrain for a meeting but on his arrival imprisoned him. Thereafter, the Ruler of Bahrain in a co-ordinated action with the Ruler of Abu Dhabi, launched attacks on Qatar across the sea on the towns of Wakrah, Biddah, Doha and Dougha. Doha was totally destroyed and the towns were plundered. The victims appealed for redress to the Wahhabi Amir — who maintained a claim to authority over Qatar — but whose demand for reparation was this time rejected by the Ruler of Bahrain. According to Qatar's pleadings, at about the same time, an encounter also occurred at Al-Hamroor, where the Naim defeated the Bahrain Ruler's son, Sheikh Ahmed. In a letter to the Government of Bombay, dated 7 December 1867, Lieutenant Colonel Pelly, the British Political Resident in the Gulf, reported on the Bahraini attacks on Qatar as follows:

> "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 . . ." (Counter-Memorial of Qatar, Vol. 3, Ann. III.1, p. 1. See also, letter from the First Assistant Political Resident to the Political Resident dated 27 November 1867, in Memorial of Qatar, Vol. 5, Ann. II.25, p. 71.)

123. The following year, 1868, the Qatar tribes organized a retaliatory attack, also across the sea, and nearly succeeded in surprising the Island of Bahrain. The events referred to created a situation of *war* in the Gulf — the term "war" is indeed used in some British papers (see, for example, Memorial of Qatar, Vol. 5, Ann. II.25, p. 73) — alarming all the interested parties. On 4 April 1868, Lieutenant Colonel Pelly, the British Political Resident in the Gulf, informed the Government of Bombay that both the Sultan of Muscat and the Wahhabi had complained to him of "the flagrant breach of the peace at sea" by the Chief of Bahrain (Counter-Memorial of Qatar, Vol. 3, Ann. III.2, p. 9). There is no doubt, in the light of the documentation submitted, that the instigator of the situation and the violator of the peace at sea was the Chief of Bahrain described by Lieutenant Colonel Pelly, in the same communication, as one of "the most troublesome and least reliable subscribers to the Maritime Truce" *(ibid.)* and again, in a further communication to the Government of Bombay of 22 June 1868, that

> "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" (Counter-Memorial of Qatar, Vol. 3, Ann. III.4, p. 25).

124. The situation being a test of Great Britain's determination and readiness to maintain peace at sea, *the British resolved to intervene in the conflict* because it involved a breach of obligations assumed by the Chief of Bahrain in the Agreement concluded in 1861 with Great Britain. As stated in a telegram to the Government of Bombay on behalf of the Viceroy and the Governor-General in Council, C. M. Aitchison, then Officiating Secretary to the Government of India:

> "It is not a matter of surprise that . . . Gutter 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 out 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 from the injury inflicted." (*Ibid.*, Vol. 3, Ann. III.5, p. 35.)

125. The British intervention would have far-reaching historical consequences because it led to a further conventional limitation of the

authority of the Al-Khalifah, circumscribed to the Bahrain islands, and to the recognition, by the British, of Mohamed bin Thani of Doha as the Chief of Qatar. Thus, the Bahrain Ruler's attacks on Qatar, in 1867 and the subsequent Agreements of 1868, opened the way for the recognition and consolidation of the Al-Thani Ruler's title to the territory of the peninsula of Qatar as a whole, including its adjacent islands.

126. The acts of war in 1867 by the Ruler of Bahrain are also relevant to the present case for other legal reasons. First, the British authorities clearly acted on the assumption that Bahrain was exclusively "the Bahrain islands"; previous references to Qatar as a dependency of Bahrain therefore ceased by 1867-1868. Secondly, the conduct of the Chief of Bahrain, consisting of acts of war, was liable to put an end to any ties of allegiance there were with Qatari tribes (see *Dubai/Sharjah* Arbitration). Thirdly, and with regard to the *effectivités*, events prove that, as in 1835 and 1851, attempts by the Rulers of Bahrain to exercise effective authority in Qatar were effectively opposed by the Qatari tribes under the leadership, this time, of the Al-Thani of Doha. And fourthly, the use of force against Qatar by the Ruler of Bahrain was not viewed by Great Britain as a lawful use of force *in Bahraini foro domestico.*

2. *Agreements concluded in 1868 by Great Britain with the new Al-Khalifah Ruler of Bahrain and with the Al-Thani Chief of Gutter, respectively*

127. Concluding that the Bahrain Sheikh Mohamed bin Khalifah's attacks on Qatar tribes and territory were a violation of the British enforced "maritime peace" and of the agreements signed by him with Britain, particularly the Agreement of 1861, the British authorities instructed Lieutenant Colonel Pelly, the British Political Resident in the Gulf, to take strong action. On 2 September 1868, Pelly served notice on the Chief of Bahrain, Mohamed bin Khalifah, in which, while demanding compensation of 300,000 dollars for Qatari losses and compliance with other terms of the notice, it was 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 Gutter. A retaliatory attack being made you fought at

sea and then again despatched your brother to attack the Gutter coast.

. . . . . .

It is my painful duty to add that if you refuse or hesitate to comply with these demands they will be enforced . . ." (Counter-Memorial of Qatar, Vol. 3, Ann. III.6, p. 45.)

128. It was against this background that Pelly then proceeded to Bahrain and Qatar and secured acceptance of the Agreements of September 1868. He went first to Bahrain Island. When Pelly arrived at Bahrain Island with three naval vessels, Sheikh Mohamed bin Khalifah had already fled the island. Thus, on 6 September 1968, the British Political Resident in the Gulf concluded an Agreement settling the affair with Sheikh Ali bin Khalifah, who after the flight of Sheikh Mohamed, was now Chief of Bahrain. In addition to seizing all the war appurtenances belonging to Sheikh Mohamed (he also destroyed both the fort and cannon and burnt three war vessels) and paying the British Political Resident a given sum of dollars in cash as compensation for damages, the Agreement between Britain and the new Ruler of Bahrain, signed on 6 September 1968, provides as follows:

"We, the undersigned, Ali bin Khalifeh and the inhabitants and subjects of Bahrein in general, do thereby declare that Mahomed bin Khalifeh having repeatedly committed acts of piracy and other irregularities at sea, and having now, after his recent piratical act, fled from Bahrein, has forfeited all claim to his title as principal Shaikh and Chief of Bahrain, and at the present moment there being no other Shaikh, I, Ali bin Khalifeh, received the Resident's letter addressed to Mahomed bin Khalifeh, and have understood the demands therein made, and I thereby agree and accept the conditions . . ." (Memorial of Qatar, Vol. 5, Ann. II.26, p. 77.)

129. One of the conditions accepted by the new Ruler of Bahrain in the Agreement was to consider Mahomed bin Khalifah as permanently excluded from all participation in the affairs of Bahrain and as having no claim to that territory, and in the case of his returning to Bahrain, to seize and hand him over to the British Resident (Art. 3 of the Agreement). With a view to preserving peace at sea, and precluding further disturbance, and in order to keep the British Resident informed of events, the new Ruler of Bahrain promised to appoint an agent at Bushire (then the seat of the British Resident in the Gulf) (Art. 4 of the Agreement).

130. After securing this Agreement from the new Ruler of Bahrain, Ali bin Khalifah, Lieutenant Colonel Pelly entered into direct contact with Mohamed bin Thani by sending a letter to him in Wakrah dated 11 September 1868. This important piece of evidence of the recognition by the

British of Bahrain and Qatar as two distinct political entities, each with its own responsibilities, reads as follows:

> "The Shaikh Mahomed bin Khalifeh of Bahrein and yourself and other Shaikhs of Guttar having committed serious piratical breaches of the maritime truce, the British Government, as arbitrator of that truce, instructed me to demand reparation from the said Shaikhs and to show the marked displeasure of Government.
>
> Shaikh Mahomed bin Khalifeh did not comply with the just demands of Government, but, on the contrary, fled his country; hence it became necessary to arrange matters with Shaikh Ali bin Khalifeh, brother of Shaikh Mahomed, and who is now Shaikh of Bahrein. I have to request that you continue towards Shaikh Ali bin Khalifeh the peaceful relations formerly subsisting between Bahrein and Guttar, fulfilling towards him all just obligations, whether in regard to money payments or other matters.
>
> I have to warn you that, if you conspire with Shaikh Mahomed against Bahrein, or again put to sea for the purpose of disturbing the peace, it will be my duty to take measures for putting it beyond your power to do further mischief.
>
> British Indian subjects have suffered loss at your hands by the destruction or plunder of their mercantile craft. I invite you to come on board at once and settle these questions.
>
> You will have safe conduct while on board." (Memorial of Qatar, Vol. 5, Ann. II.27, pp. 81-82.)

131. Following that letter, on 12 September 1868, Lieutenant Colonel Pelly, "Her Britannic Majesty's Political Resident, Persian Gulf", concluded an Agreement with Mohamed bin Thani *of Guttur*. By this Agreement, published in *Treaties and Engagements relating to Arabia and the Persian Gulf* compiled by C. U. Aitchison, Vol. IX, 1987 edition, and entitled "Agreement of the Chief of El-Kutr (Guttur) engaging not to commit any Breach of the Maritime Peace", Mohamed Al-Thani of Guttur promised: (1) to return to Doha and reside peaceably in that port; (2) on no pretext to put to sea with hostile intentions and to refer disputes and misunderstandings to the British Resident; (3) on no account to aid Mohamed bin Khalifah or in any way contact him; (4) if Mohamed bin Khalifah fell into his hands, to hand him over to the British Resident (Arts. 1-4 of the Agreement); and

> "(5) to maintain towards Shaikh Ali bin Khalifeh, *Chief of Bahrein, all the relations which heretofore subsisted between me and the Shaikh of Bahrein, and in the event of a difference of opinion arising as to any question, whether money payment or other matter, the same is to be referred to the British Resident*" (Art. 5 of the Agree-

ment) (Memorial of Qatar, Vol. 5, Ann. II.28, p. 85; emphasis added).

The Agreement "sealed in our presence by Mahomed bin Sanee [Thani] *of Guttur*" was signed by Lewis Pelly, the British Political Resident, and R. A. Brown, Captain of HMS *Vigilant*.

132. Moreover, on 13 September 1868, Lieutenant Colonel Pelly, again in his capacity of British Political Resident in the Persian Gulf, made an *address to the Sheikhs and tribes of Qatar*, warning them that if anyone were found in any way breaching the peace at sea, he would be treated in the same manner as Sheikh Mohamed bin Khalifah of Bahrain had been. He solemnly warned the Qatari tribes that the British Government was determined to preserve peace at sea in the Persian Gulf. At the same time "all the Shaikhs and tribes of Gutter" (not the sheikhs and tribes of Bahrain) were informed by Pelly as follows:

> "Be it known to all the Shaikhs and others on the Guttar Coast that Mahomed bin Sanee, of Guttar, is returning with his tribe to reside at his town of Dawka, and has bound himself to live peaceable there and not to molest any of his neighbouring tribes. It is therefore expected that all the Shaikhs and tribes of Gutter should not molest him or his tribesmen . . ." (Memorial of Qatar, Vol. 5, Ann. II.29, p. 89.)

133. The peaceful relations formerly existing between Bahrain and Gutter were to continue, but as two separate political entities and without any subordination of the latter to the former or *vice versa*. The Agreement recognized the Chief of Qatar as being on an equal footing with the Chief of Bahrain, and not as a subordinate in any hierarchical relationship to himself or any part of the territory of Qatar. The contrary proposition of Bahrain in the current proceedings is not upheld by the text of either of the two main 1868 Agreements or by the documentation and circumstances relating to their conclusion, or by the conduct of Great Britain concerning the interpretation or application of the Agreements in practice. The engagement not to commit a breach of the maritime peace, already assumed by Bahrain in its 1861 Convention with Great Britain, was extended by the main 1868 Agreements to both the Chief of Bahrain and the Chief of Qatar, the integrity of their respective territories, including their coasts and adjoining islands, being fully respected. The sea was to act as a buffer between the Bahrain islands and the Qatar peninsula, Great Britain continuing to assume the duty of maintaining peace at sea.

134. In January 1869, and despite the terms of Article 3 of the 1868 Agreement with Sheikh Ali, the British allowed Sheikh Mohamed to return to Bahrain. This was at the request of Sheikh Ali himself. However, he soon began to intrigue, and Sheikh Ali deported him to Kuwait. By September 1869, Sheikh Mohamed had moved to Qatif, and from

there attacked Bahrain. Sheikh Ali was killed and his forces defeated (see Saldanha, Memorial of Qatar, Vol. 4, Ann. II.7, pp. 39-40). As soon as the British Political Resident, Lieutenant Colonel Pelly, learned of these new treaty violations of the maritime peace, he proposed to the Government of India a *blockade of Bahrain* until Sheikh Mohamed surrendered. This was implemented in November 1869 and Sheikh Mohamed was taken prisoner. Subsequently, the British invited Sheikh Issa to assume control of government on Bahrain Island. The protests by Persia and the Porte were rejected by Great Britain. This British intervention in Bahrain Island had no effect whatsoever on Chief Al-Thani's rule over Qatar, a further confirmation of the recognition by Britain of Qatar and Bahrain as two distinct political and territorial entities.

135. The Treaty signed in 1916 between the British Government and the Ruler of Qatar confirmed the territorial conclusions consequential on the two main Agreements of 1868 as well as the previous 1861 Convention concluded between Great Britain and Bahrain.

3. *The 1868 undertaking of the Qatari tribal chiefs on payment of "tribute"* (zakat) *to the Wahhabi Amir*

136. Following the conclusion of the 1868 Agreements referred to above, and through the mediation of the British Political Resident Lieutenant Colonel Pelly, the tribal chiefs residing in Qatari agreed to pay Sheikh Ali bin Khalifah, the new Chief of Bahrain, the annual sum previously paid by them to the Chief of Bahrain (Memorial of Bahrain, Vol. II, Ann. 13, p. 159). The chiefs of the Qatari tribes were to pay the total sum to Mohamed bin Thani of Doha and the latter to the British Political Resident, who would deliver it to the Agent of the Chief of Bahrain at Bushire. In the current proceedings, Bahrain has invoked this ancillary undertaking as confirmation of its authority over the peninsula of Qatar. In this connection, it should be recalled that the Bahraini and Qatari tribes were supposed to pay the Wahhabi Amir a tribute since becoming a powerful presence in the area from the beginning of the nineteenth century. It is obvious that Pelly did not intend to prevent the payment of the tribute to the Wahhabi Amir, notwithstanding the recognition of Qatar by the British as a political entity separate from Bahrain by the Agreement of 12 September. This is why Lieutenant Colonel Pelly mediated the following day to secure the said undertaking of the chiefs of the Qatari tribes on the payment of the *zakat* and the arrangements for it.

137. However, for the British this undertaking did not involve any question of the recognition of Bahraini sovereignty over Qatar or, for that matter, of the Wahhabi Amir's sovereignty over either Bahrain or Qatar. This issue arose upon the arrival of the Ottomans in Qatar in 1871, three years after the 1868 Agreements. Ibn Saud, the Wahhabi

Amir, demanded payment from the Ottomans, who in turn addressed an inquiry about it to the British.

138. Lieutenant Colonel Pelly, referring to the events of 1867 and 1868, informed the Government of Bombay, in a letter dated 12 September 1871, that at the time:

> "The 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";

and he added

> "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"

and that

> "[h]ad 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 . . ." (Counter-Memorial of Qatar, Vol. 3, Ann. III.8, p. 59; emphasis added.)

139. In a further report of 28 October 1871 from the Political Department to Aitchison, Secretary of the Government of India, Foreign Affairs, it was stated:

> "it is shown that the arrangement as to the tribute payable by Guttur to Bahrain is to be considered not to affect the independence of Guttur in relation to Bahrain but is to be considered a fixed contribution by Guttur and Bahrain combined in view to securing their frontiers from the Naim and the Wahabee Tribes more particularly during the Pearl diving season" (Counter-Memorial of Qatar, Vol. 3, Ann. III.9, p. 65).

140. It is interesting to note that the issue of the tribute was revived by the Ruler of Bahrain during the British negotiations with the Ottomans of the 1913 Anglo-Ottoman Convention, but not the issue of sovereignty over the Hawar Islands! On 13 July 1913, the Government of India gave the following instructions to the British Political Resident in the Gulf:

> "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 cheick de Bahreïn 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." (Counter-Memorial of Qatar, Vol. 3, Ann. III.20, p. 111.)

4. Arrival in Qatar of the Ottomans in 1871 and related conduct of Great Britain and Bahrain

141. In 1871, three years after Pelly's 1868 Agreements, the Sublime Porte sent a military expedition to Hasa and the Nejd to restore peace and order in the region, in view of the conflict which had broken out between Abdullah and Saud after the death of their father, the Wahhabi Amir Faisal bin Turki. This internal conflict in a way affected the question of the recognition of the suzerainty of the Ottoman Sultan in Central Arabia. This second expedition by the Porte to Hasa and the Nejd — the first was undertaken some decades before by the Egyptians against Wahhabi power (see above) — was the origin of the arrival of the Ottomans in Qatar.

142. In effect, in July 1871, the Sheikh who had been appointed Ottoman *kaimakam* of Kuwait sailed to Qatar to meet Mohamed bin Thani and his son Jassim. He offered them the protection of the Ottoman Empire, handing over some Ottoman flags. Thereafter, in January 1872, a detachment of Ottoman regular troops arrived to install a garrison in Bida at the invitation of Mohamed bin Thani of Qatar. The troops were replaced in 1873 by *gendarmes*. On the immediate effect of those events, 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 Doha; tribal relations generally continued on the same footing as formerly, and the Al-Thani Shaikhs of Doha were still the principal factor in politics." (Memorial of Qatar, Vol. 3, Ann. II.5, p. 210.)

*

143. It is interesting to note the diplomatic conduct of Great Britain in relation to these events. Once the British had learnt of the Ottoman expedition to Hasa and the Nejd, their concern seems to have been to establish that the Ottomans would assert no claims over the Bahrain islands and the Trucial Sheikhdoms. In response to a request for clarification made to the Ottoman Government through the British Ambassador in Constantinople shortly before the *kaimakam* of Kuwait visited Qatar, it was reported on May 1871, as commented by Saldanha, that: "The Otto-

man Porte explicitly denies all intentions of extending supremacy over Bahrain, Muskat, to the independent tribes of Southern Arabia, and contemplates no attack against them." (Memorial of Qatar, Vol. 4, Ann. II.7, p. 48.)

144. A further Ottoman assurance was given that the officer commanding the expedition had instructions "on no account to turn his eyes on Bahrain" (*ibid.*, p. 70). Subsequently, having been asked by the British whether the Ottoman arrival at Doha had been authorized by the Ottoman Government, the Vali of Baghdad "claimed that Qatar was not covered by a previous Turkish assurance that there should be no interference with Bahrain" (see Lorimer, Memorial of Qatar, Vol. 3, Ann. II.5, p. 210).

145. Thus, as reflected in these exchanges, in 1871 both the Ottoman Empire and Great Britain had a *de facto* understanding. The British did nothing to hinder control of Qatar by the Ottomans once they obtained the assurances referred to above, and while peace at sea was not disturbed. Although the Ottoman Empire formally also claimed the Bahrain islands as part of its dominions, this Ottoman claim was to remain nominal during the whole period of the Ottoman presence in Qatar. It must also be noted that the Ottoman assurances to the British were not accompanied by similar assurances concerning Zubarah, the Hawar Islands, Janan Island or any other mainland territory and/or its adjoining islands and waters.

146. This confirms that, in 1871, for Great Britain: (1) "Bahrain" was the Bahrain islands and "Qatar" the peninsula of Qatar, as previously recognized by the 1868 Agreements; and (2) that "Bahrain" and "Qatar" were two distinct political/territorial entities in the area. Qatar's general thesis in the current proceedings is therefore fully confirmed by British diplomatic conduct vis-à-vis the arrival of the Ottomans in Qatar in 1871. The clear understanding between Great Britain and the Ottoman Empire on what "Bahrain" and "Qatar" were in that year was indeed to become a factor of the greatest importance in the consolidation of Qatar's original title to territory.

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147. It is also worthwhile noting that, contrary to Bahrain's general thesis concerning the alleged effective and continuous authority of its Rulers over the peninsula of Qatar up to the 1930s, Bahrain itself remained an alien third party in so far as the arrival of the Ottomans in Qatar in 1871 and the British/Ottoman understanding relating thereto was concerned. The case file does not contain any protest by the Ruler of

Bahrain concerning such an event, nor any representation by Great Britain to the Ottomans on behalf of Bahrain because of the alleged Al-Khalifah Rulers' authority in Qatar. This can only mean that at that time no part of the Qatar peninsula and/or its adjoining islands was considered by any of the interested parties as forming part of the territories or dependencies of the Al-Khalifah Rulers of Bahrain. In this respect, it should be recalled that in 1871 there was no *exclusive agreement* between Bahrain and Great Britain. It was only in 1880 (Memorial of Qatar, Vol. 5, Ann. II.36, p. 119) and 1892 (*ibid.*, Vol. 5, Ann. II.37, p. 123) that exclusive Anglo-Bahraini agreements were concluded.

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148. The acquiescence of Bahrain in 1871 to the territorial situation resulting from the 1867 Bahrain/Qatar war and the subsequent 1868 Agreements is, therefore, confirmed. The protection granted by Great Britain to Bahrain against a possible Ottoman threat was, as in the past, to a "Bahrain" territorially defined as the compact group of islands forming the archipelago geographically known as "the Bahrain islands". This was the Bahrain recognized by Great Britain and the Ottoman Empire in 1871, as well as by the Bahrain Ruler himself.

5. *Qatar as a* kaza *of the Ottoman Empire and the appointment of the Al-Thani Chief of Qatar as* kaimakam

149. The Ottoman presence in Qatar would last until 1915, i.e., about 44 years. Under the Ottoman administrative system, the *vilayets* or provinces were governed by a *vali*. Basrah was one of the *vilayets* of the Ottoman Empire. It comprised four *sanjaks* or sub-provinces: Basrah, Muntefik, Ammara and Hasa (or Nejd). Each *sanjak* was governed by a *mutassarif*. The *sanjaks* were divided into districts or *kazas* under the administration of a local governor or *kaimakam*. Normally, the residence of the *kaimakam* was in the main town of the *kaza*, named *kasaba*. The *kaza* were in turn divided into sub-districts or *nahiyes* each of which might comprise several towns or villages *(koys)*.

150. Qatar was a *kaza* of the *sanjak* of Hasa (or Nejd) of the *vilayet* of Basrah. The town of Doha or Al-Bida was the *kasaba* or residence of the *kaimakam* of Qatar. The *kaza* of Qatar included the *nahiyesi* or sub-districts of Zubarah and Odeid. In other words, the whole of the peninsula of Qatar formed an administrative unit within the Ottoman Empire. This is confirmed by some expert reports (see Reply of Qatar, Vol. 2, Ann. II.75, p. 531) and maps before the Court, such as the Ottoman map

of the "Vilayet of Basrah" of the end of the nineteenth century, reproduced as Map No. 35 in the Map Atlas submitted with its Reply by Qatar. This map also confirms that the Ottomans defined Bahrain (nominally also claimed by them, but under the protection of Great Britain) as the compact group of islands forming the archipelago of Bahrain proper. The extent of the *kaza* of Qatar and the location of its *kasaba*, namely the town of Doha, are shown very clearly on the Ottoman map reproduced as Map No. 15 in the Map Atlas of the Reply of Qatar (see Map No. 2 of this opinion, p. 448, below).

151. Contrary to Bahrain's thesis during the proceedings, for the Ottomans the *kaza* of Qatar was not the Doha or Al-Bida area and its vicinity but the whole of the peninsula including Zubarah, named in Map No. 15, and its adjoining islands as the Hawars. Bahrain's thesis confuses the extent of the *kaza* of Qatar with the extent of the area of the capital or *kasaba* of the *kaza* of Qatar. The said extent of the *kaza* of Qatar is, furthermore, confirmed by Ottoman documents before the Court. A report on Arabia of about 1895 to the Great Vizir by Kamil Pasha states that: "The place called Qatar, on the coast at a distance of one hundred miles from the Ojeir land station, is a tongue projecting into the sea between Oman and Bahrain Island." (Reply of Qatar, Vol. 2, Ann. II.45, p. 255.) Moreover, the report expressly states that: "The administrative centre of this *kaza* is the *kasaba* Al-Bida" *(ibid.)*; and that the *kasaba* Al-Bida "has eleven villages which are on the coast" *(ibid.)*.

152. The villages of the *kasaba* of Al-Bida were not therefore the only villages of the *kaza* of Qatar which of course included the other villages in the peninsula, such as Zubarah. Ottoman documents submitted by Bahrain also confirm the above conclusions (see Counter-Memorial of Bahrain, Vol. 2, Anns. 25 *(b)* and 35 *(b)*, pp. 73 and 113). The latter document states: "The districts of Zubare and Udeyd are extensions of the Katar subdivision of the province of Nejid and occupy important positions."

153. In 1876, the Ottomans appointed the Al-Thani Chief of Qatar as *kaimakam* or governor of the *kaza* of Qatar. Thus, during the Ottoman period (1871-1915), the Al-Thani were at the head of the Ottoman administration in Qatar, while continuing to be the Chiefs of Qatar as before the arrival of the Ottomans. It was a period of the greatest significance for the consolidation of the title of the Al-Thani Chiefs to the territory of Qatar. There are two main reasons for this. First, because although the Ottomans were formally in control of the whole peninsula, it was the Ruler of Qatar, Sheikh Jassim, who wielded power in the field, namely in the territory of the *kaza* of Qatar, and this facilitated the development of his own authority over the tribes living in the peninsula and the effective exercise of that authority over them. Secondly, because Ottoman authority over the whole of the Qatar peninsula combined with the exercise of power by Sheikh Jassim in the field, and aided by general

British policy, precluded any presence of, or exercise of authority by, the Al-Khalifah Rulers of Bahrain in any part of the *kaza* of Qatar from 1871 to 1915.

154. During the written phase and the first round of the oral phase, Bahrain in a variety of contexts invoked the alleged Al-Khalifah Rulers' authority and control as the basis of its title to Zubarah and the claimed islands, *implying effective possession of territory*. However, Bahrain failed to explain to the Court *how it was possible* that alleged authority and control could have been exercised by the Al-Khalifah Rulers on the peninsula and adjoining islands during the 44 years of Ottoman presence in Qatar, namely during the period of the historical development and consolidation of the Al-Thani Rulers' title over the whole of Qatar. The historical fact is that during the Ottoman period the Al-Khalifah Rulers of Bahrain had no effective and peaceful possession of any territory in the Qatar peninsula and its adjoining islands at any time, even if they occasionally tried to obtain from the British (not from the Ottomans or from the Chief of Qatar) formal recognition of certain alleged ill-defined rights in Zubarah by invoking their former settlement there and their relations with a branch of the Naim tribe.

155. As to the Hawar Islands, the Al-Khalifah Rulers remained completely silent about them during the Ottoman period, including in their relations with the British. For example, not a single *démarche,* attempt or protest by the Al-Khalifah relating to the Hawar Islands is recorded in any documents of the Ottoman period. Although the Dowasir were settled on the main Bahrain Island with effect from 1845, the arguments based on the granting of permission to the Dowasir to reside in the Hawars and the argument that the Hawar Islanders were Bahrainis were nevertheless inexistent during the whole of the Ottoman period of Qatar. The same applies to the argument based on Bahrain's alleged sovereign rights in the waters and on maritime features between the Qatar peninsula and the Bahrain islands.

156. The fact of this, as well as previous silences, probably explains that during the oral reply the order of priority of Bahrain's arguments shifted from the thesis of an *original title*, supplemented by the alleged exercise by the Al-Khalifah of authority and control, to the opposite, namely to an alleged *uti possidetis juris* title! This shift amounts to an admission by Bahrain of the weakness of its original general thesis on the claimed Qatari territories in general and of its *res judicata* argument with respect to the Hawar Islands.

157. In any case, the Ottoman period of Qatar proves beyond any reasonable doubt the absence of a *continuous* exercise of State authority

by Bahrain in the Qatar peninsula and the adjoining islands, namely of one of the essential elements required by international law for an alleged authority to become a possible source of title to territory. There is no evidence of *corpus possessionis* of the Al-Khalifah Rulers in any part of the Qatar peninsula and/or any of its adjoining islands. Moreover, the only manifestation of *animus* is their ill-defined rights in Zubarah claimed in 1873 and rejected by the British.

6. *Conduct of Great Britain vis-à-vis the Al-Thani Chief of Qatar during the Ottoman period*

158. During the Ottoman period, British relations with Qatar were marked by a desire to continue to enforce the maritime peace against acts of piracy stemming from Qatari ports and to protect the local Indian traders from harassment. At the same time, the British recognized that the Ottomans had *de facto* control of the peninsula and were prepared to acknowledge this control. The 1882 instructions issued by the British Government in reply to a clarification sought by the Government of India are a good illustration of this policy. According to these instructions, although the Sheikh of Qatar had accepted the position of Ottoman dependent on land, he should be encouraged to maintain close and direct relations with the officers of the Government of India and to defer to them in all matters affecting the peace at sea (see Lorimer, Memorial of Qatar, Vol. 3, Ann. II.5, p. 217).

159. When in 1889 the Ottomans reinforced their troops in Qatar, the British Ambassador at Constantinople was instructed to remind the Ottoman Government that the British Government could not view with indifference any attempt on the part of the Turkish authorities at interference or aggression in Oman (today the United Arab Emirates! see Saldanha, Memorial of Qatar, Vol. 4, Ann. II.8, pp. 221-222). But nothing was said about Qatar itself or its Al-Thani Ruler. The events of March 1895 relating to the Al-bin-Ali tribe are also very revealing of British conduct. The tribe fell into dispute with the Ruler of Bahrain and returned to Qatar to settle close to Zubarah with the support of the Ruler of Qatar Jassim bin Thani (further proof that Zubarah was not under the authority and control of the Al-Khalifah Rulers of Bahrain).

160. The Ruler of Bahrain complained to the British Political Resident about the threat to Bahrain that he alleged was caused by this settlement. The Political Resident warned Sheikh Jassim that Great Britain could not accept this. The Ottomans then sent soldiers into the region. But the British — concerned to ensure the security of Bahrain — sent a warship

and destroyed some forty-four boats apparently assembled by the Ottomans and Sheikh Jassim to attack Bahrain. Thereafter, Sheikh Jassim accepted the British conditions, including the removal of the Al-bin-Ali. The Ottomans protested, but the British replied that the measures were necessary for the defence of Bahrain, which was under their protection.

161. Thus, British conduct during the Ottoman period remained the same as in 1868 and 1871. Qatar was the domain of the Al-Thani Ruler of Qatar, but the latter should not alter the peace at sea or help the Ottomans in a way that could be represented as a threat in the west to the Bahrain islands or in the east to Oman, Bahrain and Oman both being under the political protection of Great Britain. On the other hand, Great Britain did not interfere at all in the consolidation of the title of the Al-Thani Rulers to territory through further development of their effective control over the tribes and territories of Qatar.

162. Lastly, in view of the Bahraini argument based on *uti possidetis juris*, it should be noted that during the Ottoman period (1871-1915), Qatar did not sign any exclusive agreement or any other kind of treaty with Great Britain, as did Bahrain in 1880 and 1892 and other Sheikhdoms in the Gulf in 1892. Indeed, in 1891, Sheikh Jassim of Qatar sought from the British a treaty *on the same terms as the Trucial Chiefs* (not on the same terms as the Bahrain Rulers), but the British rejected the proposal on the ground that the Sultan would not agree and nothing would be gained by concluding one (Memorial of Qatar, Vol. 5, Ann. II.8, p. 121).

7. *Development of the effective authority of the Al-Thani Chief of Qatar over Qatari tribes and territory during the Ottoman period*

163. The presence of the Ottomans in Qatar from 1871 onwards contributed to the consolidation of the Al-Thani Sheikhs as Rulers of the country to the exclusion of any possible claim on the peninsula by the Al-Khalifah Rulers of Bahrain. In effect, during the Ottoman period, the authority of the Al-Thani Ruler of Qatar was progressively extended to other tribes living in the *kaza* of Qatar. Thus, far from diminishing Al-Thani authority, the Ottoman presence helped to develop their effective authority in the peninsula. In this respect, the appointment in 1876 of Sheikh Jassim as *kaimakam* of the *kaza* of Qatar as a whole, including its sub-districts of Zubarah and Odeid, and as Ottoman governor of Doha in 1879, was paramount.

164. This also helped the Ottomans to assert their supremacy over the whole peninsula, their physical presence in Qatar being rather limited during this period. The Ottomans were thus able, via the authority exercised in the field by Sheikh Jassim of Qatar, their *kaimakam*, to claim jurisdiction over all the areas of Qatar. The Ottoman conduct confirmed

the usefulness for them of the development of Sheikh Jassim's authority in the field. Thus when he resigned as *kaimakam* in 1892, his resignation was not accepted by the Ottomans. In 1893, the Vali of Basrah led an army against Sheikh Jassim for alleged acts of insubordination and a battle took place to the west of Doha. Thereafter, Sheikh Jassim resigned his position as *kaimakam*. But the Ottomans left the administration of the *kaza* of Qatar in the hands of Ahmed, brother of Sheikh Jassim. In other words, the relation between the Ottomans and the Al-Thani family was advantageous for both parties.

165. At times, the British purported to deny Ottoman jurisdiction over the whole of Qatar (as distinct from the jurisdiction of the Ruler of Qatar), but they never asserted their own jurisdiction over any part of Qatar or endorsed Bahrain's claims to Zubarah. In fact, Great Britain tacitly acknowledged the Ottoman presence in Qatar and during the Ottoman period never questioned the authority of the Al-Thani Rulers of Qatar over the whole of Qatar.

166. This British attitude is well documented in paragraphs 2.31 *et seq.* of the Counter-Memorial of Qatar and corresponding annexes. There is no point in going into all the details here. The following should suffice: (1) the letter of 28 August 1873 from Colonel Ross, the British Political Resident (Counter-Memorial of Qatar, Vol. 2, Ann. II.3, p. 11, and a subsequent letter from Colonel Ross in Memorial of Bahrain, Vol. 2, Ann. 20, p. 174); (2) the memorandum of 22 May 1879 of the Government of India on Ottoman jurisdiction along the Arabian coast of the Gulf, in which reference was made to a note of 28 July 1871 from the Foreign Secretary, Mr. Aitchison (Counter-Memorial of Qatar, Vol. 2, Ann. II.1, p. 1); and (3) the letter from the India Office of 17 September 1879, which made a reference to a previous conclusion by Colonel Ross (*ibid.*, Vol. 2, Ann. II.8, p. 35, and Vol. 2, Ann. II.7, p. 27).

167. Besides the Ottoman presence, the British also recognized the authority of Sheikh Jassim, holding him responsible for maintaining order in Qatar and preventing piracy from Qatari ports. It is true that, on one occasion, when requested by the British to keep order along the whole coastline of Qatar, Sheikh Jassim disclaimed this responsibility. The Parties argued about this event (Memorial of Bahrain, Vol. 1, p. 59, para. 133), also referred to at the hearings by counsel for Bahrain. Qatar, quoting Zahlan, suggested in its Counter-Memorial that the disclaimer was merely a part of Sheikh Jassim's policy of playing the Powers off against each other (Counter-Memorial of Qatar, Vol. 1, pp. 26-27, para. 2.34; for Zahlan, see *ibid.*, Vol. 2, Ann. II.82, pp. 462-463).

168. In any case, the standards of international law do not require that a country or the ruler of a country, particularly in the circumstances then prevailing in Qatar, should assume responsibility for all that happens or

originates in the territory concerned. The rules of customary international responsibility relating to wrongful acts are not framed in terms of objective responsibility. What is significant, however, in the present context is the fact that it was not the Al-Khalifah Ruler of Bahrain whom the British requested to keep order along the coasts of Qatar, but the Al-Thani Ruler of Qatar. Bahrain completely missed the only legal relevant point in this episode.

169. In this section, we refer to the development of Sheikh Jassim's authority over the whole peninsula of Qatar in general, without prejudice of course to specific questions, places or tribes. In this respect, enhancement of the status and position of Sheikh Jassim and the general development of his effective authority is a historical fact pregnant with political and legal consequences. In politics, as in physical sciences, a vacuum is short-lived and the Al-Khalifah had been settled in the Bahrain islands since 1783 and prevented from interfering in Qatar by the Agreements of 1861 and 1868!

170. During the Ottoman period, neither the Ottomans nor the British, nor the Chief of Qatar, acknowledge the existence of any kind of title, historic or otherwise, of the Al-Khalifah Rulers in the mainland territory of Qatar and/or its adjoining islands and waters. The British since the war of 1867 and the Agreements of 1868 and the Ottomans since their arrival in Qatar in 1871 understood the situation perfectly well. In fact, in various different ways, they invited the Al-Thani Ruler to fill the vacuum by becoming Chief of the whole of Qatar and by facilitating the development of his effective authority over Qatari tribes and territory.

171. Some British reports from the period 1902-1904 are particularly clear as to the development of general Al-Thani authority in the Qatar peninsula in the last decades of the nineteenth century. According to these reports: (1) Sheikh Jassim lived in the interior of Katr; (2) it would have been possible to arrange for Sheikh Ahmed to be interviewed somewhere in Katr, say, at Zobara; (3) if the British Political Resident could be authorized to enter into an agreement with the Chief of Katar whereby his independence was recognized, most satisfactory results might be expected to follow; and (4) Sheikh Jassim was the actual Chief so far as the Qatari tribes were concerned (see Saldanha, Memorial of Qatar, Vol. 4, Ann. II.8, pp. 235-236).

172. However, in the present case, Bahrain began by affirming that the Al-Khalifah would have had a kind of general authority and control exercised peacefully and continuously over most of the Qatar peninsula, quite an accomplishment for a section of a tribe which remained settled in the Zubarah area for only some 17 years, leaving their settlement there in 1783. But the logical conclusion of such an argument would be today to claim title to the entire Qatar peninsula or at least to a considerable part of it. But here Bahrain's thesis suddenly becomes more modest.

173. Bahrain admits in effect that the alleged general authority and control over the Qatar peninsula diminished from the advent of the Ottomans in 1871, while the scope of Al-Thani authority and control in the peninsula increased. But for Bahrain, the acknowledged increase in general Al-Thani authority and control in the Qatar peninsula would have been stopped at the "boundaries of the Zubarah region" as drawn by Bahrain in the present proceedings. However, this *"stopping phenomenon"* remained unexplained in the Bahraini presentations and is in full contradiction with the contemporary documentary evidence before the Court.

174. Bahrain's above thesis makes a further appearance in relation to the Hawar Islands and Janan Island because Bahrain also asserts that its alleged original title to those islands has the same common basis or source as its original title to Zubarah. In other words, the Al-Khalifahs' alleged general authority and control over Zubarah would also have covered the Hawar Islands and Janan Island. This also remained unexplained in territorial terms because: (1) the Hawar Islands and Janan Island are not islands adjacent to the coastline of the so-called "Zubarah region" as defined by Bahrain or within the 3-mile territorial waters then generated by the said coastline; and (2) there is no territorial continuity by land between the southern "border" of the so-called "Zubarah region" and the mainland coast facing the Hawar Islands and Janan Island, but a considerable piece of mainland territory that Bahrain is not claiming and, therefore, admits to be mainland territory of Qatar.

175. Thus, the unexplained *"stopping phenomenon"* of the otherwise acknowledged increase in the Al-Thani Rulers' authority and control since 1871 also applies to the above-mentioned islands. But why did the Al-Thanis' authority and control reach the mainland coastline in front of the adjacent islands and stop there, as in the "border" of the so-called "Zubarah region"? I consider this matter to be of sufficient importance to have deserved some explanation from Bahrain, as well as in the Judgment. To invoke personal ties of allegiance or other ties between tribes or sections or families of tribes in the eighteenth and nineteenth centuries is not an answer. In the current proceedings, these personal ties cannot be more than a possible element of proof, among many others, of the respective title to territory of the Parties in matters at issue before the Court, but not — as such and in isolation — the source or the basis of a given State's title to territory. The question at issue is territorial sovereignty, not flawed and ambiguous relations between tribes, of a personal character.

176. On this latter question, my general conclusion is that, in translating the concept of "authority" from a tribal society such as the one existing in the Gulf in the eighteenth and nineteenth centuries into the contemporary international law concept of "territorial authority", one must take note, before anything else, of the concept of "settlement". Can the settlement of the tribes, which begins to establish links with territory, be

regarded, other circumstances being equal, as the origin in that environment of a title to territory in international law so much discussed by the Parties? If we start from this point, what is the situation in the present case? The situation is that the Al-Thani family which settled in the Doha area never left that settlement in the peninsula of Qatar, while the Al-Khalifah family abandoned its settlement in the Zubarah area and voluntarily moved to the Bahrain islands in 1783. By this action, the potential of the Al-Khalifahs' former Zubarah settlement to generate title to territory in the peninsula of Qatar and its adjoining islands was first interrupted and then vanished. In turn, for Bahrain, the Al-Khalifahs' settlement in the Bahrain islands generated title to the territory of the islands of that archipelago.

8. Bahrain's unfounded claim of 1873 to Zubarah and its rejection by the British; Zubarah as a part of the Ottoman kaza *of Qatar; the effective exercise of authority in Zubarah by the Ottomans and by the Chief of Qatar; recognition of such exercise by the British and by the Ruler of Bahrain; British concern to ensure the security of the Bahrain islands; critical date for ascertaining the original title of Qatar over Zubarah; the 1937 events and the alleged "ties of allegiance" of the Naim with Bahrain's Al-Khalifah Rulers; judicial irrelevance of the related Bahraini argument; British conduct and Parties' conduct subsequent to the events of 1937*

177. Bahrain's first claim to Zubarah was presented to the British *in August 1873*. The very timing of the claim appears to confirm that it was an attempt to alter the political and territorial situation achieved by the 1868 Agreements referred to above. The Zubarah area — part and parcel of the *kaza* of Qatar — was then under the authority of the Ottomans and of the Al-Thani Chief of Qatar. Zubarah was not therefore in the effective possession of the Al-Khalifah Ruler of Bahrain and/or of Great Britain when the claim was made and the Ruler of Bahrain did not invoke such possession or the former settlement of the Utub, including the Al-Khalifah section, at Zubarah during the period 1766-1783 (see above). Rather, the Ruler relied on his alleged authority over a section of the Naim tribe who would have come to Bahrain for help to avoid declaring themselves Turkish subjects. Thus, by its very formulation this first claim already implied an admission by Bahrain that in 1873 Zubarah was part of the Ottoman *kaza* of Qatar and, in any case, that the area was not effectively occupied or controlled by the Al-Khalifah Rulers of Bahrain.

178. The claim was first raised orally in a conversation between Sheikh Issa, Ruler of Bahrain, and Major Grant, British First Assistant Resident. On the advice of Major Grant, the Ruler addressed a communication to Colonel Ross, British Political Resident in the Gulf on 2 Septem-

ber 1873. As indicated, the Ruler invoked his authority over the Naim and also made the following additional points: (1) that Zubarah was a "property" under the Rule of Bahrain; (2) that by reference to the Treaty *(sic!)* Zubarah was a "dependency" of this "Island"; and (3) that his claim to Zubarah had been acknowledged by Colonel Pelly in 1868. However, Sheikh Issa accepted that the 1868 records of Colonel Pelly should be examined (Counter-Memorial of Qatar, Vol. 1, p. 152, para. 5.10). All the ambiguities of Bahrain's successive claims to Zubarah were already present in this first attempt, as indicated by the confusion between "property rights" and "sovereignty rights" and the admission, on the one hand, that Bahrain was an "Island" and, on the other hand, the alleged recognition by the British of Zubarah as a part of Bahrain.

179. The British immediately expressed doubts as to the reality of the rights which the Ruler of Bahrain claimed to have over either Zubarah, the Naim or the rest of the peninsula of Qatar. After an initial investigation, Major Grant wrote in August 1873 to Colonel Ross that

> "he had no means of forming an opinion on the claim advanced by the Bahrein Chief to sovereignty over the Naim tribe, but from verbal information he inferred that any power exercised by Bahrein in later years over that tribe had been *merely nominal, if it existed at all*" (Memorial of Qatar, Vol. 4, Ann. II.8, p. 188; emphasis added).

Thus, all that Major Grant would concede was that if Bahrain had any authority over that tribe, it was purely nominal.

180. In his reply of 28 August 1873, Colonel Ross, British Political Resident, instructed Major Grant to advise the Bahrain Chief to remain aloof from all complications on the mainland with the Turks, Wahhabis, etc. (further confirmation of the general British conduct referred to above in this opinion), and underlined the principle of effectiveness and the uncertain character of Bahrain's rights as follows: "the Bahrein Chief *had not the power*, if he wished, to protect tribes residing in Katar and . . . he could not expect [the] Government to interfere where the rights were involved in *uncertainty*" (*ibid.*; emphasis added). In contradiction with Bahrain's general thesis in the current proceedings, the best politically informed person in the Gulf, the British Political Resident, stated in August 1873 that the Chief of Bahrain had no power "to protect tribes residing in Katar".

181. It is also important to note that Major Grant investigated further and obtained a report showing that, apart from the *Naim*, there were a number of other tribes living in Zubarah: the *Chibisa*, the *Manamaneh*, the *Sadeh* and the *Hamadal* (for the full text of the report see Counter-

Memorial of Qatar, Vol. 3, Ann. III.10, p. 69) and the sketch of the tribes "at present inhabiting" Zubarah was apparently shown by Major Grant to the Ruler of Bahrain who pronounced it to be correct (*ibid.*, Vol. 1, p. 153, para. 5.11). Moreover, on 11 September 1873, Major Grant again informed Colonel Ross that, after consulting various treaties, he had arrived at the conclusion "*that there is no special mention made in the treaties either of the Naim or of Zobareh*" (*ibid.*, Vol. 3, Ann. III.11, p. 73; emphasis added).

182. Inquiries having been made, Colonel Pelly advised (see 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 regarded as empowered to put to sea for the purpose of coercing any port in Qatar — a confirmation of the 1868 Agreements and of the recognition by the British of Bahrain and Qatar as two distinct political entities. *Therefore Colonel Pelly did not acknowledge either suzerainty or sovereign rights of the Chief of Bahrain "on the Qatar coast"*.

183. The Government of India, then in charge of British policy in the Gulf, concurred with the views expressed by Ross and Pelly. From that time this official British position never changed — except to the extent that in later years the British stated that the Ruler of Bahrain *had no rights at all in Zubarah* — and informed him accordingly in full awareness of the issue, as proved by their careful study of the matter since the filing of the first Bahraini claim in August 1873.

184. In his article on the "Bahrain Principality", Lorimer referred to a 1905 Bahrain claim on Zubarah, then "under discussion" as he said, in the following terms: "Connected with the sovereignty of Bahrain, or possibly appertaining to the Sheikh as hereditary personal property, are certain ill-defined rights upon the mainland of Qatar . . ." (Memorial of Qatar, Vol. 3, Ann. II.3, p. 88). The claim referred to by Lorimer as under discussion in 1905 was rejected by the British like all those before and after, because no modification of the relevant British policy is recorded. In any case, in his principal article on Qatar (1907-1908), Lorimer listed "Zubarah" as a place on the "*west side of Qatar*" (*ibid.*, Vol. 3, Ann. II.4, p. 123).

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185. That Ottoman suzerainty extended to the whole of Qatar is an unquestionable historical fact. For the Ottomans, Zubarah was subject, as the rest of Qatar, to the Ottoman Empire under the administration of the Al-Thani Ruler, their *kaimakam* in Qatar. Zubarah and Odeid were mere sub-districts of the *kaza* of Qatar. The Ottomans even planned to appoint an official or *mudir* in Zubarah, but the British opposed it out of concern for Bahrain's security, this kind of matter frequently being the

object of subtle diplomatic understandings between Great Britain and the Porte. Without prejudice to those understandings, the case file contains at least three clear examples of the direct exercise of State authority by the Ottomans over the Zubarah area. First in 1873 to subjugate the Naim, giving rise to the first claim to Zubarah presented by the Ruler of Bahrain to the British (see above), and again at the time of the events of 1878 and 1895. Each time the Ottomans sent warships.

186. However, to sustain its present claim before the Court Bahrain tries to show that the Ottomans and the Al-Thani Rulers failed in some of their attempts to exercise authority over the so-called "Zubarah region" because of British and Bahraini opposition (Memorial of Bahrain, Vol. 1, paras. 167 *et seq.*). The documentation relating to these Bahraini allegations should therefore be considered as well. The first event alleged by Bahrain took place *in 1874*. In that year, Nasir bin Mubarak — the chief of a rival branch of the family of the Rulers of Bahrain who fled to the mainland to place himself under the protection of the Turks — and the Beni Hajir — a Bedouin tribe — threatened to attack Bahrain from the coast of Qatar, but were dissuaded by the presence of British warships and also by orders of the Chief of Qatar, Sheikh Mohamed bin Thani (Memorial of Qatar, Vol. 4, Ann. II.7, pp. 59-60). But at the end of the year, the Ruler of Bahrain, afraid that Nasir bin Mubarak would attack the Naim of Zubarah, requested authorization from the British to be allowed to help them.

187. Initially, the British Political Resident allowed the Sheikh of Bahrain to dispatch reinforcements "as a purely defensive measure" (Memorial of Bahrain, Vol. 2, Ann. 70, p. 293). But, the Government of India disapproved of the Resident's action in the clearest possible terms. The Chief of Bahrain should not have been encouraged to despatch troops to the mainland for the reinforcement of the Naim, at the same time confirming that: "The Chief of Bahrain had no possessions on the mainland of Katar, and . . . his rights there were of a very uncertain character . . ." (Memorial of Qatar, Vol. 4, Ann. II.8, p. 192). As recorded in other contemporary documents, "not to interfere with the mainland" was the *leitmotiv* that the British constantly repeated to the Ruler of Bahrain.

188. The second example concerns a serious act of piracy accompanied by the murder of some persons in September *1878* by inhabitants of Zubarah. Colonel Ross was directed by the Government of India to demand of the Turkish authorities that they punish those at fault and offered British naval assistance for that purpose. Meanwhile, the Qataris who had also suffered from raids and acts of piracy by Naims from Zubarah, laid siege to the Murair fort (near the ruins of Zubarah) under the leadership of the Chief of Qatar, Jassim bin Thani, and Nasir bin Mubarak, the Al-Khalifah dissident living in Qatar. When Colonel Ross

learned of the siege he offered not the slightest opposition, despite the Ruler of Bahrain's renewed request for intervention. The Turks sent a gunboat to prevent the Qataris from Zubarah from attacking Bahrain and then negotiated the surrender of the Naim besieged in the Murair fort. Most of the surrendered Naim were transferred to Doha.

189. The events of 1878 confirm the integration of Zubarah with the rest of the peninsula. The standard conditions for title to territory were fulfilled. First, the intention to act in the capacity of sovereign authority and the effective exercise of such authority (*Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53*, pp. 45-46) are present in the siege of Zubarah by Sheikh Jassim, Chief of Qatar, and the surrender of its occupants, i.e., the Naim. Second, the interested parties, i.e., both the British and the Ruler of Bahrain, accepted without any reservation regarding sovereignty or other rights, that Zubarah was an area forming part of the territory of the Ottoman *kaza* of Qatar and of the Chief of Qatar. Almost 80 years later, in 1957, the British Political Resident in Bahrain wrote concerning this event: "at this point the sovereignty over Zubarah appears to have passed unquestionably into the hands of the Ruler of Qatar" (Memorial of Qatar, Vol. 8, Ann. III.283, p. 403).

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190. Both the British and the Ruler of Bahrain considered at that time that the best solution *for ensuring the security of Bahrain* was for the Turks to occupy Zubarah permanently (Memorial of Qatar, Vol. 3, Ann. II.5, pp. 224-225; Vol. 4, Ann. II.8, p. 199; Counter-Memorial of Qatar, Vol. 1, para. 5.17 (2); Reply of Qatar, Vol. 1, para. 6.8 *(c)*). After 1878, the Turks did not maintain a military presence at Zubarah and the British opposed the appointment of Ottoman officials there. But this in no way altered the fact that Sheikh Jassim Al-Thani of Qatar effectively exercised his authority at Zubarah in 1878, that Bahrain itself accepted the Turkish presence there without reservations of rights and that Article 11 of the Anglo-Ottoman Convention of 1913, confirmed by that of 1914, stipulates that "the peninsula will be governed *as in the past* by shaykh Jasim-bin-Sami and his successors" (see below; emphasis added). In speaking of the "peninsula" as a whole, the British confirmed that their opposition to the Turkish presence in Zubarah did not entail recognition of the rights claimed by Bahrain or derogation from the title to the Zubarah area of the Ruler of Qatar and his successors.

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191. The altered British policy, from 1888-1889 onwards, of opposing any further presence of the Turks in Zubarah, or any settlement at Zubarah, was exclusively dictated by considerations relating to the safety of

Bahrain and security at sea. For example, Colonel Ross considered that to instigate the dissident Nasir-bin-Mubarak, together with his followers from the Beni Hajir tribe, to settle at Zubarah, was dangerous for Bahrain. As he put it:

> "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." (Memorial of Bahrain, Vol. 2, Ann. 41, p. 228.)

If the installation of an unfriendly settlement at Zubarah was a menace and standing danger to Bahrain, it is obvious that "Zubarah" was not "Bahrain", as it is likewise obvious that the Ruler of Bahrain was not at Zubarah exercising the authority and control claimed by Bahrain in the current proceedings.

192. In *1890-1891*, new rumours of Ottoman plans to rebuild Zubarah prompted a British diplomatic intervention with the Porte (Memorial of Bahrain, Vol. 2, Ann. 70, p. 325) and the Ottomans again abandoned implementation of the plans. The British once more declined to accept a Turkish military presence at Zubarah, but they did not deny the authority of the Al-Thani Ruler of Qatar in the area called the "Zubarah region". Lorimer's observations, for example, do not suggest that this episode involved any recognition by the British of Bahrain's sovereignty over Zubarah (*ibid.*, Vol. 3, Ann. 83, p. 471).

193. British concern for the security of the Bahrain islands and not the alleged sovereignty of Bahrain over Zubarah also explained the *1895* destruction of the Turkish and Qatari vessels in the port of Zubarah by the British. Once more the British intervened to prevent an attack *from* Zubarah. The naval military action was clearly intended to prevent an invasion of Bahrain from Zubarah (see Colonel Wilson's report of 13 September 1895 to the Government of India, *ibid.*, Vol. 2, Ann. 62, p. 268; also his previous reports of May and August 1895).

194. The *1903* British opposition to the appointment of an Ottoman Mudir in Zubarah had the same motives. On this occasion, the British Political Resident, Colonel Kemball, considered it essential for the security of the Bahrain islands that Zubarah should not be militarily occupied by the Turks and expressed concern at the increased prestige which the Turks would gain from eventual Turkish occupation of Zubarah (*ibid.*, Vol. 2, Ann. 67, p. 281). In this connection, it should be noted that, at the same time, the British were contemplating a closer relationship with the Sheikhs of Qatar (*ibid.*, Vol. 3, Ann. 83, p. 483).

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195. In the light of the concurring information and evidence in the case file (see for example, the views of Major Grant, Colonel Kemball and Prideaux in Memorial of Bahrain, Vol. 2, Ann. 41, p. 228, Vol. 2, Ann. 67, p. 281, and Vol. 3, Ann. 71, p. 358, respectively, as well as other documents), it is beyond any reasonable doubt for me that the root of British concern for Zubarah from 1868-1871 onwards was the security of the Bahrain islands and the maintenance of peace at sea, although in the early 1900s a certain concern to diminish the effects of the Ottoman presence in the peninsula of Qatar for general political reasons also appears, but it has no connection with the particular local question of relations between Bahrain and Qatar. The following statement, in a letter to the Secretary of State for India of 22 May *1879*, is particularly clear on the matter:

> "It may, also, be necessary to protect the islands of Bahrain by special arrangements which should provide:
>
> (i) For the maintenance of the territories of the Chief of Bahrain 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 . . ." (Memorial of Bahrain, Vol. 2, Ann. 36, p. 211.)

196. That security was also the main concern of the Al-Khalifah Rulers of Bahrain, as alleged by Qatar in the present proceedings, also seems correct to me as a general proposition in the light of the geographical location of Zubarah and the Bahrain islands. After all, the Al-Khalifah knew from their own history that they and other Arab tribes occupied the Bahrain islands by force from Zubarah. Moreover, this is plainly stated in several documents before the Court, originating with the Chiefs of Bahrain such as, for example, in a memorandum dated 22 June 1875 addressed on behalf of the Chief of Bahrain to the British Political Resident in the Gulf:

> "in respect to our agreeing to abstain from interference in 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 of the quarter, it behoves us to devise other plans for the protection of Bahrein* . . . (Memorial of Bahrain, Vol. 2, Ann. 33A, p. 202 *(a)*; emphasis added.)

The same fear is expressed, in still more precise terms, in the following passage of a letter of the Chief of Bahrain, dated 12 October 1877, to the acting British Political Resident, Major Grant:

"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" (Memorial of Bahrain, Vol. 2, Ann. 35, p. 205).

197. Thus, the "propinquity of Zobarah to Bahrein", to adopt the language used in 1877 by Major Grant (*ibid.*, p. 204), was a permanent source of danger for Bahrain and better than anything else explained the relationship between the Rulers of Bahrain and some of the Naim living in the Zubarah area during the relevant period. The Al-Khalifah Rulers cultivated the friendly Naim with gifts and provisions to keep them in good humour. From 1868-1871 onwards, the leading political motivation behind the Al-Khalifah Rulers' concerns about Zubarah and their relations with the Naim when living there was "security" and not "sovereignty".

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198. In the current proceedings, Bahrain's claim to sovereignty over the so-called "Zubarah region" is mainly based upon the alleged "ties of allegiance" of the Naim with the Al-Khalifah Rulers of Bahrain. In that way, Bahrain tries to fill the gap of the *absence of effective possession* of Zubarah by the Al-Khalifah Rulers of Bahrain, following their departure and settlement in 1783 on Bahrain Island. The Bahraini thesis would thus seem to be that the Al-Khalifah left for Bahrain Island some 217 years ago, but the loyal Naim remained behind exercising on their behalf authority over the area in an effective, continuous and peaceful manner, until the Ruler of Qatar's action in 1937 against the section of the Naim then living at Zubarah, an action characterized by Bahrain as an act of aggression or of conquest contravening the law of the League of Nations and the Briand-Kellogg Pact (Memorial of Bahrain, Vol. 1, p. 12, para. 31)! By this kind of assertion, typical of the Bahraini pleadings and oral arguments, *Bahrein has tried to question and alter the time when Qatar's original title over Zubarah was definitively consolidated and recognized.*

199. For Bahrain, the critical date for ascertaining the non-exercise of effective authority by Bahrain at Zubarah would not therefore be 1783 (departure of the Al-Khalifah from Zubarah), or 1868 (Pelly's Agreements), or 1871 (arrival of the Ottomans in Qatar), or 1873 (rejection by the British of the first Bahraini claim to Zubarah), or 1913 (date of the Anglo-Ottoman Convention), or 1916 (date of the Anglo-Qatari Treaty), or 1934 (when the British Political Resident in the Gulf reminded the Al-Thani Ruler that he was Chief of Qatar, of "the whole of Qatar"), but, precisely, 1937, namely the year of the clandestine Bahraini occupation of

Jazirat Hawar! Such an implied critical date simply disregards the historical record, including the exercise of acts of authority at Zubarah by the Ottomans and the Chief of Qatar and the effective possession of the area by them. It also disregards the former conduct of Great Britain and the Rulers of Bahrain themselves, as indicated above. Moreover, in 1911 the Ruler of Bahrain requested of the Ruler of Qatar, through the British Political Agent, permission to rent the site of Zubarah for an annual payment of 10,000 rupees, an offer flatly refused by the Ruler of Qatar, Sheikh Jassim. Qatar's refusal to rent Zubarah to the Ruler of Bahrain, and the acceptance of this refusal by both Bahrain and the British, amounts to a further recognition of Zubarah as belonging to Qatar going back to 1911 (Memorial of Qatar, Vol. 6, Ann. III.56, p. 266).

200. Certainly, the historical record and evidence before the Court fully contradicts Bahrain's assertions of having been the holder of sovereign title over Zubarah. But how otherwise could a new claim to sovereignty over Zubarah be formulated in 1987 be justified? The file on Zubarah's sovereignty was closed long before 1937 and Bahrain knows this and has admitted it in the past (only to revert to it in the 1980s). Matters concerning territorial questions or rights cannot be artificially maintained by reiterated ill-considered formal claims, because title to territory once established and recognized generates rights *in rem* opposable *erga omnes*, including of course against a daring claimant State. The 1937 action of the Ruler of Qatar was the exercise by Qatar of its policing powers within its territory in order to assert authority over Qatari subjects or residents in Qatar seeking to avoid taxation. It was not an internationally unlawful use of force, but a use of police powers *in foro domestico*, namely a true example of *effectivités* accepted in international law as a manifestation or proof of territorial title. What in 1937 contravened the law of the League of Nations and the Briand-Kellogg Pact was the clandestine occupation of a territory *avec maître*, e.g., Jazirat Hawar. Where appropriate, actions should be characterized according to international law.

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201. Thus, Bahrain took the Court back to the former "tribal system" of the Arabian Peninsula without a temporal reference framework and without regard to the historical process leading to the establishment in the area of political entities with a permanent territorial base, as recog-

nized by third States. The effects of the "tribal system" and "ties of allegiance" between tribes in the second part of the eighteenth century, the first part of the nineteenth century, the second part of the nineteenth century or the twentieth century are not the same. The generality of the argument, as presented, is already legally self-defeating. It is self-defeating because, presented in such terms, the argument does not lend itself to proof. Also, in a court of justice, a mere assertion is not enough without the corresponding evidence.

202. Furthermore, for me, the alleged but unproven "ties of allegiance" with the Naim — as a manifestation of the *effectivités* of the Al-Khalifah Rulers of Bahrain at Zubarah — is in the circumstances of the case both historically incorrect and legally irrelevant for the determination by the Court of sovereignty over Zubarah, including over the so-called "Zubarah region". The alleged "ties of allegiance" did not prevent the consolidation and recognition of the original title of the Ruler of Qatar over the whole of the peninsula of Qatar, including the Zubarah area, long before the 1937 events and such alleged ties are unable by themselves, even if they were verifiable, to create a derivative title for Bahrain superior to Qatar's original title to Zubarah.

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203. A few considerations of fact and law would suffice to dispose of Bahrain's Naim ties of allegiance argument. The history of the Naim as a Bedouin tribe *(bedou)* is far from clear in the case file, probably because the "fluctuating" Naim, as Lorimer described them, fluctuated not only in the territorial sense, but also in their loyalties to the rulers or sheikhs of other tribes. In the case file, we see Naims to the east (today the United Arab Emirates) and to the west (Hasa) of the base of the Qatar peninsula, as well as on the eastern side (Doha area) and western side (Zubarah area) of the peninsula and in the Bahrain islands. There were also Naims living alternately in the Bahrain islands and the Qatar peninsula according to the season and Naims living among settled tribes or populations *(hadar)*. From the reports of Major Grant, moreover, the Court knows that by 1873 there were other tribes, not only the Naim, living in the Zubarah area and that the Ruler of Bahrain had no power over them.

204. In the historical documentation of the case, we also see Naims helping the Wahhabis to occupy the Zubarah area and from there threatening Bahrain Island itself; Naims allied with other Bedouin tribes of Hasa against other Qatari tribes; Naims feared by all and sundry during the annual pearl fishing season; Naims involved in internal power

struggles between rival Al-Khalifah Sheikhs; Naims on occasion helping dissidents of the Al-Khalifah family such as bin Mubarak or vice versa; Naims and other Qatari tribes fighting together, under the leadership of the Doha headmen, against the Al-Khalifah Ruler of Bahrain during the war of 1867, which led to the 1868 Pelly Agreements and the recognition of Qatar and Bahrain as two distinct political entities; Naims engaged in piracy from the Zubarah area, subjugated by the Ottomans and the Chief of Qatar; Naims at various times opposing the payment of taxes, etc.

205. The Court also knows, *dixit* Lorimer, that the Naim were mercenaries and that "their loyalty was very uncertain" (Counter-Memorial of Qatar, Vol. 1, pp. 160-161, para. 5.19 (1), and pp. 180-181, para. 5.47; also Reply of Qatar, Vol. 1, pp. 260-261, para. 6.46). In any case, most of the tribes had a common interest in remaining on good terms with them, in particular during the pearl fishing season, and in the case of the Al-Khalifah Rulers, for reasons linked to the security of Bahrain Island itself. The Naim were well known as a tribe which had fluctuating ties with other sheikhs and tribes, not to mention with more than one sheikh or tribe at a time. Even in 1948, 40 years after Lorimer, the British noted that more than any other Bedouin tribe, the Naim were known from Bahrain to Oman for changing allegiance whenever it suited them (Supplemental Documents of Qatar, doc. 16).

206. Moreover, like most of the other tribes, the Naim were divided into different sections or branches, a fact acknowledged by both Parties to the present case, and each section or branch could have its own loyalties at different times. There were therefore Naims and Naims. Moreover, in so far as the Naim living in the Qatar peninsula are concerned, their *continuous* presence at Zubarah is a fact denied by the evidence before the Court. Bahrain recognized the impossibility of such a task. Qatar, however, provides some information on this which was summarized in the hearings, as follows: (1) that in 1811 Zubarah was destroyed and became deserted; (2) that Naims were expelled from Zubarah in 1878 by the Ottomans and the Al-Thani Chief of Qatar, a fact not contested by Bahrain; (3) that British reports of 1879-1880 and 1888 described Zubarah as being uninhabited; (4) that in 1903 a Turkish document noted that Zubarah was uninhabited; (5) that in 1908 Lorimer made the general point that the Naim went to Zubarah in winter, but in summer lived in Bahrain or, in the case of some of them, in Doha; he also says that at that time there was no branch of the Naim settled in Qatar; Bahrain does not challenge these observations either; and (6) that in 1934 a British report stated that Zubarah is now a ruin without a single inhabitant.

207. Bahrain accepts the distinction between the Naim living northwest of Qatar and those who emigrated to Wakrah in the nineteenth century. Furthermore, it appears that among those sometimes living north-

west of Qatar only the Al-Jabr, according to Bahrain, paid allegiance to the Ruler of Bahrain, while the Al-Ramzan branch also living in that area paid allegiance to the Ruler of Qatar. This admission is important because it informs the Court that, to the extent that Bahrain bases its alleged *effectivités* in the so-called "Zubarah region" upon the invoked "ties of allegiance" of the Naim with the Al-Khalifah Rulers, this means *"the Al-Jabr section of the Naim"* only, to the exclusion of other sections or families of the same tribe independently of where they lived. In effect, the Naim of the events of 1937 belong to the Al-Jabr section. Thus, the Naim tribe argument is already reduced to an "Al-Jarb section argument". All the above facts point to the irrelevance of Bahrain's Naim argument as evidence of its alleged *effectivités* at Zubarah from 1783 to 1937. There is nothing better than the facts to show the absurdity of an argument.

208. As to international law, the jurisprudence of the International Court of Justice and other international tribunals has laid down certain legal principles concerning the conditions to be fulfilled by "ties of allegiance" of tribes if they are to be taken into consideration in matters relating to the establishment, consolidation or recognition of an international legal title to territory. The first condition is that for the ties of allegiance *to afford indications of the ruler's sovereignty they must clearly be real and have been manifested in acts evidencing the acceptance of the ruler's political authority* (*Western Sahara, I.C.J. Reports 1975*, p. 44, para. 95).

209. Bahrain has not proved that the Naim tribe has met this first condition. To meet that condition it is an indispensable first step. But in the present case: *(a)* the reality of the ties between the Naim and the Rulers of Bahrain were considered by the British in 1873 to be doubtful and, if they existed at all, to be purely nominal; and *(b)* there were various sections of the Naim tribe living in different areas or places at different times. Moreover, as already indicated, the Naim tribe formed part of the coalition of Qatari tribes that went to war against the Ruler of Bahrain following the 1867 attack on Doha and Wakrah. Then, even in the *DubaiSarjah* Arbitration, a case in which it was considered that a change of *alliance* from one sheikh to another did not necessarily entail a change of *allegiance*, the arbitrators recognized that it was so only *"provided war was not waged against the Ruler to whom allegiance was owed"* (91 *ILR*, p. 637; emphasis added). Thus, in the present case, Bahrain has to show to the Court the existence of clearly real and manifest acts of the Naim tribe *subsequent to 1868* accepting the political authority of the Al-Khalifah Ruler of Bahrain.

210. Lastly, Bahrain has also not provided the Court with any example of the Naim performing acts *à titre de souverain* at Zubarah on

behalf of the Ruler of Bahrain (case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* and *Eritrea/Yemen* Arbitration). Moreover, the ties of allegiance — as a possible basis of title to territory — must be recognized as such in the practice of the region concerned and, in the Persian Gulf, tribes not under a given Ruler's authority could frequent his territory, but without thus impairing the title to the territory of the Ruler concerned.

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211. During and following the 1937 events, Qatar has continued to exercise effective authority and control of the so-called "Zubarah region" in accordance with its original title to the entire Qatar peninsula, just as before 1937. At no time has it renounced territorial sovereign rights over the Zubarah area derived from that title. The Agreement of 24 June 1944 between Qatar and Bahrain, brought about by Britain, stipulated the restoration of friendly relations between the two Rulers and a mutual undertaking to do nothing that might change the existing situation or harm each other's interests (Memorial of Qatar, Vol. 8, Ann. III.240, p. 183). As a goodwill gesture, Qatar consented to withdraw the guards from the fort at Zubarah, stationing them just outside. Bahrain protested at this presence and also that of other Qatari actions *(effectivités)* carried out at Zubarah, but the British did not ask Qatar to put an end to those actions. The 1944 Agreement did not in any respect derogate from Qatar's sovereignty over Zubarah, or its territorial sovereign rights in the area. This is also confirmed by the fact that the Agreement did not affect the oil concession granted by the Ruler of Qatar in 1935.

212. There are also other examples in the 1950s of the exercise of acts of authority by Qatar at Zubarah such as, for example, in relation with the granting of authorization to a limited number of Bahrainis to go to Zubarah. In 1952, Qatar prohibited access to Zubarah, without any objection on the part of Great Britain. In a new request of 13 June 1957 Bahrain again asked the British to decide upon its rights in Zubarah, *committing itself in advance to abide by their decision.* In their formal reply of 10 August 1957, the British stated that *they had never supported any Bahraini claim to sovereignty over Zubarah and that Qatar was at liberty to control access to it as it pleased* (Memorial of Qatar, Vol. 8, Ann. III.284, pp. 411-412). Bahrain tried to resurrect its claim in 1961, but the British maintained the position taken in 1957. It was in full awareness of the issue that, from 1873 to 1961, the British rejected Bahrain's position on Zubarah because there was an established and recognized international title of Qatar to the Zubarah area, an integral part of the Qatar peninsula.

213. Lastly, one further and most striking admission by Bahrain of Qatar's title to Zubarah, dating from after the Second World War, is the Bahraini reaction to the British 1947 sea-bed dividing line. That British

line took no account of Bahrain's claims to Zubarah. No maritime area off Zubarah was attributed to Bahrain. The coastline of the so-called "Zubarah region" was not therefore considered to be Bahrain's coastline by the British. However, this was accepted at the time by Bahrain. The Ruler of Bahrain did not protest at this particular aspect of the British 1947 sea-bed dividing line.

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214. The historical consolidation and general recognition of Qatar's original sovereign title to Zubarah and its area is bound up with: *(a)* the settlement of the Al-Khalifah on Bahrain Island in 1783; *(b)* the acknowledgement of Al-Thani authority over Qatar, confirmed by the separate Agreements signed by the British with Bahrain and Qatar in 1868 following the acts of war of 1867; *(c)* the presence in Qatar of the Ottomans from 1871 to 1915; *(d)* the fact that Zubarah was part of the Ottoman *kaza* of Qatar, an administrative unit of the Ottoman Empire; *(e)* the exercise of authority by the Ottomans and the Al-Thani Chief of Qatar at Zubarah; *(f)* general conduct of the British with respect to Zubarah during that period and their rejection of Bahrain's claims in 1873 and thereafter; *(g)* the various admissions by the Al-Khalifah Rulers of Bahrain, at different times, of the non-exercise of effective authority at Zubarah; *(h)* the Al-Khalifah Rulers' own characterizations at times of their previous ill-defined claims to Zubarah as a matter of "private or property rights" rather than of "sovereignty"; and *(i)* the recognition by Great Britain and the Ottoman Empire in the 1913 Anglo-Ottoman Convention that the "peninsula of Qatar" will be governed *as in the past* by the Al-Thani Ruler of Qatar, without any kind of protest or reservation of rights by the Al-Khalifah Rulers of Bahrain.

215. Thus, long before the event of 1937, *sovereignty over Zubarah appertained to Qatar* through the Rulers of Qatar, who were the holders of an original title to the town and its territory, a title fully consolidated under international law and generally recognized.

9. *Bahrain's late claim on the Hawar Islands and Janan Island; legal effects of Bahrain's silence during the period of historical consolidation and recognition of Qatar's original title to territory; the 1889 definition by Bent and other definitions of "Bahrain"; Lorimer's authoritative testimony of 1908 and Prideaux's approval of that testimony; the 1909 Prideaux letters; presumption of international law concerning islands in the territorial sea of a given State; role of proximity or contiguity in the establishment of title to islands; the 1913 and 1914 Anglo-Ottoman Conventions; the 1915 Anglo-Saudi Treaty; a 1916 British acknowledgment of the Hawar Islands as part of Qatar; the 1916 Treaty between Great Britain and Qatar; recogni-*

tion, general opinion, and repute and maps evidence; exercise of authority over the islands by the Ruler of Qatar in the 1920s and 1930s

216. In contradistinction to Zubarah, Bahrain did not claim the Hawar Islands until 1936. In other words, during the whole period of historical consolidation and recognition of the original title to the territory of Qatar (1868-1915), as well as between 1916 and 1936, Bahrain remained aloof from and silent about the Hawar Islands and Janan Island. No attempts to take possession by Bahrain and not a single word about its sovereignty over those islands or about the effective exercise of authority on or over those islands between 1868 and 1936. Nor were there even any allegations by Bahrain during all those years of ties with tribes or fishermen in the islands. Some 68 years of silence are indeed too long a silence for a Party that, in the current hearings, presented its submissions on the Hawar Islands as very much linked to the history of Bahrain as a nation. The fact is that Bahrain was not in the Hawar Islands before the clandestine occupation of 1937 and never claimed in writing before 1936 that the Hawar Islands and Janan Island were islands under its sovereignty.

217. One of the reasons why the author of this opinion has devoted so much time to an examination of the historical record of the case *before 1868* was precisely to verify whether there was any hint, sign or manifestation by the Rulers of Bahrain at that time of their alleged original title over the Hawar Islands and Janan Island. I have found nothing to this effect in the case file. The only relevant publication submitted and dating from before 1868 which I have found mentioning Bahrain and the Hawar Islands is Captain G. Brucks's "Memoir Descriptive of the Navigation of the Gulf of Persia, 1821-29" (Memorial of Bahrain, Vol. 2, Ann. 7, p. 101). Bahrain has invoked this publication. But the Brucks Memoir is of course not a manifestation of Bahraini conduct regarding the Hawar Islands, as apparently suggested by certain Bahraini arguments.

218. In addition to Brucks's Memoir, I am of course aware of other allegations made by Bahrain concerning the Hawar Islands during the current proceedings and during the 1936-1939 British procedure such as: the alleged grant of the Hawar Islands to the Dowasir by a qadi of Zubarah, who was allegedly an official of the Al-Khalifah; the alleged Bahraini activities or exercise of jurisdiction over the islands, etc. But all this has been invoked by Bahrain *with effect from 1936-1939 backwards, in other words retroactively*. Those allegations were not made by the Rulers of Bahrain when they concluded the Agreements of 1861 or 1868, nor during the decades of the Ottoman period of Qatar, nor in connection

with the 1913 and 1914 Anglo-Turkish Conventions or the 1915 Anglo-Saudi Treaty, nor even at the time of the conclusion of the 1916 Treaty between Britain and Qatar or at the time of the Qatari oil concession of 1935. In other words, Bahrain's allegations concerning the Hawar Islands and Janan Island were not made by the Rulers of Bahrain *at the time* of the establishment of Qatar as a distinct political entity and/or during the process of historical consolidation and recognition of its original title over the territory. It follows that none of those allegations could ever have the legal effect of interrupting or modifying the process of historical consolidation and recognition of the original title over the territory of Qatar or its scope.

219. The conduct of the Rulers of Bahrain, namely their silence, on the Hawar Islands and Janan Island for a 68-year period is not the kind of conduct that an international court or tribunal is entitled to disregard, in particular when the silence related to islands located *in toto* or in part in the territorial sea of another State, Qatar in the present case, and the silence cannot therefore be explained by presumed possession of the islands concerned by virtue of the operation of any relevant principle or norm of international law. Territorial sovereignty also means obligations and, in the first place, the obligation to maintain and protect it by vigilant conduct towards possible legal or factual inroads by other political entities or States (see, for example, the *Island of Palmas* case). Why did Bahrain not comply with these general obligations of vigilance before 1936? Simply because its Rulers did not at the time claim that the islands belong to them.

220. Between 1868 and 1936 Bahrain did not adopt the conduct expected of a State which claims, with retroactive effect to 1936, to be the holder of the original title to the Hawar Islands and Janan Island. Its conduct at the relevant period was below the standards required in that respect by international law, bearing in mind the circumstances in the Gulf and the location of the islands concerned. In any case, the Parties to the present case are supposed to know that to establish, obtain or have title and to maintain it are not necessarily the same thing under international law. Thus, either Bahrain was not in possession of an original title to the islands concerned before 1868 or, having been in possession of such a title, by its silence did not prevent the historical consolidation and recognition of an original title over the islands in favour of Qatar *(qui tacet consentire videtur)* (see, for example, the case concerning the *Temple of Preah Vihear, I.C.J. Reports 1962*, p. 6).

221. The Rulers of Bahrain were not in possession — in any effective or presumed form accepted by international jurisprudence — of the Hawar Islands or Janan Island during the period of historical consolidation and recognition of Qatar's title to the entire peninsula and its adjoining islands. Moreover, they did not manifest any interest in claiming to be the holders of title to the islands or in laying claim to the islands on

other grounds. When in 1909 Major Prideaux, the British Political Agent, anxious to contain Ottoman expansion, explained to the Ruler of Bahrain his visit to Zakhnuniya and the Jazirat Hawar (see below), the Ruler of Bahrain did lay claim to Zakhnuniya by letter of 30 March 1909, but refrained from doing so with respect to Hawar (see Memorial of Qatar, Vol. 1, p. 177, para. 5.40, and Vol. 6, Ann. III.52, p. 241).

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222. The definitions or descriptions of "Bahrain" during the Ottoman period of Qatar consistently confirm that the Hawar Islands and Janan Island were not part and parcel of the territory of the Al-Khalifah Rulers of Bahrain. Bahrain's contrary contention in the current proceedings is not supported by the historical record and maps submitted by the Parties. For example, the article entitled "The Bahrein Islands in the Persian Gulf" and attached map published by J. T. Bent in 1890 in the *Proceedings of the Royal Geographical Society* mentioned — as forming the Bahrain islands — the main Bahrain Island, Moharek, Sitrah, Nebbi-Saleh, Sayeh, Khaseifah and Arand and stated that "the sea all around the Bahrein is remarkably shallow" (Reply of Qatar, Vol. 4, Ann. IV.35, p. 211; see Maps Nos. 1 and 2 of this opinion, p. 448 below).

223. The Military Report on Arabia of 1904 by the General Staff, War Office, distinguished between "the island of Bahrein, which is ruled by Sheikh Isa, an independent prince of the Uttubi Arabs, under the protection of the Indian Government" separated from the mainland by the sea and "the Katr peninsula to the east of the island of Bahrein . . . ruled by Sheikh Jassim-ib-Thani, a rich and powerful chief" subject nominally to the Turks (*ibid.*, Vol. 2, Ann. 37, p. 214). And the publication of the Admiralty War Staff, Intelligence Division, of May 1916 — entitled *A Handbook of Arabia* — defined "the present Sheikhdom of Bahrein as the compact group of islands (Bahrain, Muharraq, Umm Na'asan, Sitrah and Nebi Salih, with a number of lesser islets and rocks) in the middle of the gulf which separates the promontory of El-Qatar and the coast of Qatif". It added that "the Sheikhs of Bahrein have had relations of a political nature with El-Qatar (see p. 328)" (Reply of Qatar, Vol. 4, Ann. IV.1, p. 4). On page 328, under the heading "Recent History and Present Politics", the *Handbook* explained that:

> "Prior to 1868, the Sheikh of Bahrein claimed suzerainty over El-Qatar, and was represented at Doha by a member of his family. But in that year, as a result of negotiations conducted by the British Government, the interest of this Sheikh was limited to the receipt of tribute, and this ceased on the occupation of Doha by the Turks in 1872." (*Ibid.*, Vol. 2, Ann. II.55, p. 319.)

224. The above definition of "Bahrain" did not by any means cease to

be used with the end of the Ottoman period in Qatar. For example, in 1928, Belgrave, the adviser of the Bahrain Government who on 28 April 1936, on behalf of the Al-Khalifah Ruler, signed the first written Bahraini claim to the Hawar Islands, in an article entitled "Bahrain", published in the *Journal of the Central Asian Society*, defined it as the archipelago formed by "a group of small islands about seventeen miles off the Arab coast half-way down the Persian Gulf" (*ibid.*, Vol. 2, Ann. II.81, p. 570).

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225. The authoritative testimony of Lorimer is, furthermore, self-explanatory as to the holder of title to the Hawar Islands and Janan Island during the first decade of the twentieth century. In his leading article on the "Bahrain Principality", Lorimer referred to: (1) ill-defined rights claimed by the Ruler of Bahrain "*upon the mainland of Qatar*" (Zubarah), under discussion in 1905; and (2) "the undisputed insular possessions" of the Ruler of Bahrain, described by him as the archipelago formed by the Bahrain islands proper. The use by Lorimer of the term "mainland" excluded from the matters under discussion in 1905 any island or other maritime features adjoining the peninsula of Qatar.

226. This led to the important initial conclusion that in 1905 Bahrain was an archipelago, but that this archipelago was limited to the compact group of islands (in his article on the Bahrain Principality Lorimer also uses the term "group of islands") known as "the Bahrain islands" and not the "archipelagic State" defined by Bahrain in the present case which includes, *inter alia*, the Hawar Islands and Janan Island. It should also be recalled that, in all the evidence before the Court, "the Bahrain islands" and "the Hawar Islands" are consistently referred to as two different "physical units", the first never including the second and vice-versa. However, Bahrain is pleading its case on title to territory generally, as well as with respect to the Hawar Islands and Janan Island in particular, in terms of being in continual possession of a "original title". Such an assertion is in full contradiction with Lorimer's definition of the extent of "Bahrain Principality" in 1908. Thus, if Bahrain by then had title to the Hawar Islands and Janan Island as claimed, it cannot be but a "derivative title" because by 1908 Bahrain and Qatar were already recognized as two distinct political and territorial entities. As Lorimer's works were fully respected and well known among British officials in the Gulf, New Delhi and London, it is difficult to understand *in terms of law* how some of those British officials could conclude in 1936 and 1939 that the Hawar Islands belonged to the Ruler of Bahrain, as they did, forgetting the historical record, and the Anglo-Turkish Conventions of 1913 and 1914, as well as other treaties and agreements concluded by Great Britain, and also British prior conduct, diplomatic correspondence and maps.

227. Moreover, Lorimer did not limit himself to territorially defining the "Bahrain Principality". In his leading article on Qatar, he also defined *the boundaries of Qatar* as follows: "On the east, north and west Qatar is surrounded by the sea. The southern boundary is somewhat indeterminate." (Memorial of Qatar, Vol. 3, Ann. II.4, p. 113.) But, Lorimer did not stop there. He also described the *places and features of the coast of Qatar* distinguishing between the "east side of Qatar" and the "west side of Qatar" and alphabetically enumerating the chief places, bays, headlands, hills, *"and islands which form or adjoin the coast"* of Qatar on the east as well as on the west side (*ibid.*, p. 114). On the west coast of Qatar, in addition to Zubarah, Lorimer listed the following islands and islets:

— Ajirah (Jabalat)
— Anaibar (Jazirat)
— Falitah (Jazirat Abu)
— *Hawar (Jazirat)*
— *Janan (Jazirat)* (described as an "islet")
— Rakan (Jazirat Ras)
— Rubadh (Jazirat) (described as an "islet")
— Suwad (Jazirat) (*ibid.*, pp. 118-123).

228. The name of each of the islands or islets listed is, furthermore, accompanied in the article by an indication of its "position" together with some "remarks". Regarding the position of *Hawar (Jazirat)*, Lorimer says: "due west of the point of Ras Aburuk and about 5 miles from it". We know today that the distance of 5 miles is a mistake. The island is much closer to the mainland coast of Qatar, but Lorimer nevertheless had no doubt that the island belonged to the western coast of Qatar. Under the "remarks" on Hawar (Jazirat), Lorimer gave the following details: (1) that Hawar (Jazirat) was about 10 miles long, north to south, and roughly parallel to the Qatar coast; and (2) that Hawar (Jazirat) is adjoined on the north by *Jazirat Rubadh* and on the south by *Jazirat Janan*, while *Jabalat Ajirah* and *Jazirat Suwad* lie in the channel between it and the mainland (*ibid.*, pp. 120-121). As to the conditions and life in Hawar (Jazirat), Lorimer remarked that: "There are no wells, but there is a cistern to hold rain water built by the Dawasir of Zallaq in Bahrain, who have houses at two places on the island and use them in winter as shooting boxes. Fishermen also frequent Hawar." (*Ibid.*, p. 120.)

229. As to the position and conditions of *Janan (Jazirat)*, Lorimer indicated that the islet was "in the channel between Jazirat Hawar and the mainland" and was "waterless" (*ibid.*, p. 121). Furthermore, in the case of *Ajirah (Jabalat)*, Lorimer said that the island was "between Ras Aburuk and Jazirat Hawar" (*ibid.*, p. 118). In the case of *Rubadh (Jazirat)*, that the islet was "close to the northern extremity of Jazirat Hawar"

and "destitute of fresh water" (Memorial of Qatar, Vol. 3, Ann. II.4, p. 122) and in the case of *Suwad (Jazirat)*, that the island was "between Jazirat Hawar and Ras Aburuk" and had "no fresh water" either *(ibid.)*.

230. Lastly, it must be underlined that Lorimer's leading articles on "Bahrain Principality" and on "Qatar" were carefully prepared with the participation and approval of British political officers in the Persian Gulf and surveys made in the field, as per the detailed footnotes printed with the articles in question in the *Gazetteer of the Persian Gulf, Oman and Central Arabia*. It is particularly interesting to note, in the light of some arguments of Bahrain, that *Captain F. B. Prideaux*, British Political Agent in Bahrain, was personally involved in the preparation and completion of the two articles. In view of the evidentiary value of that fact, I quote below the essentials of the said footnotes: Lorimer's article on "Bahrain Principality":

> "This leading article on the Bahrain principality and the minor articles in the same are founded chiefly upon systematic and careful investigations made on the spot during the years 1904-1905. The information existing before 1904 was arranged by the writer and was issued in November of that year in the form . . . The inquiry proper was begun by the writer on tour in Bahrain early in 1905; but it was carried out chiefly by Lieutenant C. H. Gabriel, I. A., who personally travelled over the greater part of the islands, and by Captain F. B. Prideaux, Political Agent in Bahrain, *who supplied very full information regarding all places in his jurisdiction*. A set of draft articles founded on the notes and reports of 1905 was then prepared by the writer; it was finished in January 1906 . . . These drafts were sent to Captain Prideaux, *by whom they were carefully revised* with the assistance of . . ., the Agency Interpreter. Early in 1907 the drafts were reissued, with modifications and additions, *and some points which remained doubtful or obscure were disposed* by Captain Prideaux and his assistant during the year . . ." (Memorial of Qatar, Vol. 3, Ann. II.3, p. 87; emphasis added.)

Lorimer's article on "Qatar":

> "The bulk of the information contained in this principal article on Qatar, and in the minor articles subordinated thereto, was obtained expressly for this Gazetteer during the years 1904-07; previously little was known regarding the promontory. The data at the time existing were condensed by the writer in November 1904 . . .,

> which formed the basis of the subsequent investigations. The further inquiry was begun by the writer in Bahrain early in 1905, was continued by Mr. J. C. Gaskin, Political Assistant in the Persian Gulf, *and was completed* by Captain F. B. Prideaux, Political Agent in Bahrain, in the same year; *the greater part of the information obtained was supplied by the last named officer*. A set of draft articles was then compiled by the writer, . . . and was ready at the end of 1905; *it was sent* to Captain Prideaux *for revision, a process which occupied a considerable part of the year 1906*. Early in 1907 the draft, improved and somewhat amplified, was reprinted, *and investigations for the purpose of clearing up certain points continued to be made* by Captain Prideaux throughout the year." (Memorial of Qatar, Vol. 3, Ann. II.4, p. 112; emphasis added.)

231. It is my submission that the 1928 Brucks's Memoir, so often invoked by Bahrain in the current proceedings, is not a publication that in any respect (purpose, timing, preparation, verification of data, etc.) admits any kind of comparison as evidence with Lorimer's leading articles of 1908. Furthermore, Lorimer's contemporary testimony concerning the Hawar Islands and Janan Island, verified by the British authorities in the Gulf, in 1908 accurately reflected the situation *necessarily* resulting from the application of the 1868 Agreements with Britain, as well as from the fact of the Ottoman presence in Qatar since 1871. The Hawar Islands and Janan Island did indeed form part of the Ottoman *kaza* of Qatar and of the territory of the Chief of Qatar. Lorimer and Prideaux limited themselves to describing the territorial situation as it existed in 1904-1907.

232. The absence of any provision excluding the Hawar or any other islands adjoining the peninsula of Qatar from the territories of Qatar referred to in the 1913 Anglo-Ottoman Convention (which expressly preserved the rights of Bahrain's fishermen in Zakhnuniya but not in the Hawar Islands or in Janan Island, see below) amounts, furthermore, to a conventional recognition by the two major Powers in the area at that time of Qatar's consolidated original title, as well as of the fact that its territorial scope coincides, generally speaking, with Lorimer's description, revised by Prideaux, and therefore included the Hawar Islands and Janan Island.

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233. A few comments now on Major F. B. Prideaux's letter of 4 April 1909 to Cox, the British Political Resident in the Persian Gulf, invoked by Bahrain (Memorial of Bahrain, Vol. 5, Ann. 236, p. 1039; Memorial of Qatar, Vol. 6, Ann. III.53, p. 247). As indicated, in 1909 Major Prideaux was anxious to contain Ottoman expansion and, in particular, was concerned about the news that the Turkish Mudir of Ojair in Hasa, who visited Zahknuniya island with Turkish flags, had been corresponding

with *the Dowasir* who periodically visit Zakhnuniya island from Bahrain and suggested to them that the Dowasir headman in Bahrain should agree to come under Turkish rule. The Dowasir declined this advice (fearing the loss of their possessions in Bahrain). The Mudir then laid waste the fort on Zakhnuniya Island and left, while the Dowasir returned to Bahrain. In a previous letter to Cox, dated 20 March 1909, Prideaux explained "that Dowasir of Budaiya and Zellaq on the north-east coast of Bahrain *are in the habit* of every winter partially migrating to Zakhnuniya and the Hawar Islands for fishing" (Memorial of Qatar, Vol. 6, Ann. III.51, p. 235).

234. Following the above events, Major Prideaux landed on Zahknuniya to observe the situation on the spot. He observed that the Bahraini fishermen "were living in two or three *temporary mat huts*" (emphasis added). Prideaux then proceeded across the Bay to Jazirat Hawar where, according to him, the Dowasir had "two similar winter villages", namely two "winter villages" of temporary mat huts like those on Zakhnuniya. In effect, Major Prideaux "found in one locality a collection of 40 large huts under the authority of a cousin of the principal tribal Shaikh" (the principal Dowasir Sheikh). Major Prideaux's letter then goes on to mention that his cousin told him that: "he had at first thought that the Launch was a Turkish gunboat, a visit from which they quite expected to receive" (Memorial of Bahrain, Vol. 5, Ann. 236, p. 1042). From this the Court knows that there were Turkish gunboats in the area and that the Turkish paid visits not only to Zakhnuniya but also to Jazirat Hawar. This is also indirectly corroborated by the alleged unproven episode of the rescue at Hawar by Sheikh Isa of Bahrain of a party of Turkish soldiers shipwrecked there in 1878. Thus the sea between the Bahrain islands and Qatar peninsula was not even at that time the "Bahraibi lake" referred to in the current proceedings.

235. Following that reference to Turkish activities in the area, including in or around Jazirat Hawar, the cousin of the tribal Dowasir Sheikh, as reported by Prideaux, stated that:

> "Zakhnuniya was undoubtedly a possession of the Chief of Bahrain, but the Dowasir regarded Hawar as their own independent territory, the ownership of this island having been awarded to the tribe by the Kazi of Zubara more than 100 years ago, in a written decision which they still preserve.
>
> The contesting tribe named Al bu Tobais now is apparently extinct, but as the kazi of Zubara was in those days an official of the Al Khalifah, the island would seem to be a dependency of the mainland State, which the Chief of Bahrain still claims as morally and theoretically his." *(Ibid.)*

236. Major Prideaux, who a couple of years before had personally been involved in the preparation and revision of Lorimer's articles, adds no comment of his own to the above allegation by the cousin of the principal Sheikh of the Dowasir, but he informed the Ruler of Bahrain. However, the Ruler of Bahrain, Sheikh Esa, took no action regarding the Hawar Islands. He claimed the sea named "Al Labaina" and the island of Zakhnuniya, but not the Hawar Islands or the Island of Janan (Memorial of Qatar, Vol. 6, Ann. III.52, p. 243).

237. However, in 1939, the passage from Prideaux's letter of 4 April 1909 quoted above became the starting point of the Weightman Report of 22 April 1939 on the "Ownership of Hawar Islands" (Memorial of Bahrain, Vol. 5, Ann. 281, p. 1168). Nevertheless, the Weightman Report recognized that the "written decision" referred to in Prideaux's letter *"now seems to have disappeared"*. It was not indeed as well preserved as suggested by the cousin of the Dowasir Sheikh! Thus, at no time did Prideaux in 1909, nor Weightman in 1939, nor the Court today, see the 100-year-old "grant" referred to in the hearsay *(ouï-dire)* allegation of 1909. It should also be recalled that at the beginning of the nineteenth century the dominant power in the Bahrain islands and in the Qatar peninsula was the Wahhabi Amir. However, in the current proceedings, this passage from Prideaux's letter is the main piece of evidence submitted by Bahrain concerning the alleged existence of an original title of its own to the Hawar Islands.

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238. It is also clear that, in 1939, Weightman saw no reason for not extending the unknown *kazi* grant to the Dowasir from the Jazirat Hawar (in the Prideaux letter "Hawar" is in the singular) to the archipelago of the Hawar Islands as a whole through application of the contiguity principle (see last sentence of the Report). He did not show the slightest concern at the natural contradiction thus created in his Report through the rejection of the Ruler of Qatar's proximity argument regarding the Hawar Islands, at the same time upholding the same argument in favour of Bahrain with respect to the Hawar Islands other than Jazirat Hawar. Nor did he take any account of the reference in Prideaux's letter of 1909 to the fact that "the island (Jazirat Hawar) would seem to be a dependency of the mainland State", namely of Qatar. The "moral" and "theoretical" nature of the claim by the alleged Ruler of Bahrain in Prideaux's letter was also disregarded by Weightman. Moreover he attempted, in his Report, to set the principle of "geographical contiguity or proximity" against the principle of "physical possession", despite knowing full well that such possession was *in casu* the result of the clandestine occupation of the northern part of Jazirat Hawar that he knew perfectly well!

239. It follows that the Dowasir argument in the Weightman Report

looks if anything like a convenient retrospective concealment of that occupation. It should also be noted that the hearsay distinguished between "possessions" of the Ruler of Bahrain (Zakhnuniya is the only island mentioned in this respect) and Jazirat Hawar as "independent territory" of the Dowasir. The title of the Weightman Report used the term "ownership", but it concludes by considering the islands a "possession" of the Ruler of Bahrain. There is also no reference in the Weightman Report to the "contesting tribe" of the hearsay. This point does however have a certain relevance in the sense that it does not exclude the presence in the Hawar Island of other tribes before the Dowasir fishermen, as corroborated by existing old ruins.

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240. As to international law, there is a norm, already in existence in the nineteenth century, to the effect that islands lying wholly or partly *within the territorial sea of a given country are to be regarded as part of that country*. This norm is formulated in the form of a strong *juris tantum* presumption and is not therefore an absolute rule in the sense that it is capable of being rebutted by evidence of superior title. However, during the period of historical consolidation and recognition of the original title of Qatar over the whole peninsula of Qatar and its adjoining islands (1868-1915), Bahrain did not rebut that presumption by claiming or submitting evidence of superior title or indeed any evidence at all. As already indicated, Bahrain remained silent. It is thus an objective geographical fact that the majority of the islands and islets constituting the Hawar Islands and Janan Island lie wholly or partly within a 3-mile territorial sea limit from the mainland coast of Qatar (recognized at the relevant time here considered) and *all* of them lie within a 12-mile territorial sea limit from the mainland coast currently applied by Qatar in conformity with international law.

241. Map No. 9 facing page 145 of the Memorial of Qatar indicates the location of the islands and islets constituting the Hawar Islands in relation to a territorial sea limit of 3 nautical miles drawn from the cost of the Qatar mainland, measured at high tide. Further details of the close proximity of the Hawar Islands to the mainland coast may be found on Map No. 5 facing page 50 of the Memorial of Qatar. Of the 17 islands and islets claimed by Bahrain to constitute the Hawar Islands in its "preliminary statement" of 29 May 1938, 11 (including the Jazirat Hawar) are located wholly or substantially within the 3-mile limit. A 12-mile limit drawn from the coast of the Qatar mainland, even measured at high tide rather than low tide, would wholly encompass all the Hawar Islands identified on Map No. 9 of the Memorial of Qatar. (On the proximity of the Hawar Islands to Qatar, see also Memorial of Qatar, Vol. 17, Map

Atlas, Map No. 5, and on photographic evidence, Reply of Qatar, Vol. 6, App. 5.)

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242. Qatar's general thesis that its original title over the whole of the Qatar peninsula and its adjoining islands therefore finds further support, in the case of the Hawar Islands and Janan Island, in the above-mentioned norm of international law. This norm was born at a time when the territorial sea was limited to three miles. It was then considered, for reasons of security and convenience, that islands off a particular coast would, failing a clearly established title to the contrary, be under the sovereignty of the nearest coastal sovereign authority. There is no need to quote here international doctrine on this topic. Qatar's reply mentions Gidel, Waldock, Bowett, Lindley, among others. Some authors, such as the last one mentioned, qualify the norm somewhat by referring to "uninhabited islands", but the Hawar Islands and Janan Island were not, in any case during the period considered, inhabited by a genuinely permanent population, as proved by Prideaux's letter itself. The Court knows that the occasional use of an island by fishermen from a particular State other than the coastal State is insufficient to confer title on the island in favour of the former State (*Aves Island* Arbitration and others).

243. It should also be borne in mind that, when in the *Island of Palmas* Arbitration, Judge Huber rejected title to islands arising from contiguity he was referring to *islands outside the territorial sea*. But here I am considering the norm of international law governing title to islands *in toto* or in part *within the territorial sea* of Qatar. This norm has recently been applied by the Arbitral Tribunal in the case between Eritrea and Yemen, presided over by Judge Sir Robert Jennings, to islands located on the Red Sea, on the western side of the Arabian Peninsula. The Award, dated 9 October 1998, updated the international law norm referred to, formulating it as follows:

> "There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal State, unless there is a fully-established case to the contrary (as, for example, in the case of the Channel Islands). But there is no like presumption outside the coastal belt, where the ownership of the islands is plainly at issue." (Para. 474 of the Award.)

244. Thus, the *Island of Palmas* and *Eritrea/Yemen* Arbitrations complement each other. The circumstances of the *Eritrea/Yemen* Arbitration were to a certain extent similar to some of those in the present case. There was also question of original title and its historical consolidation,

as well as a series of different arguments presented as evidence of the display of effective authority, including activities of fishermen. Even the *uti possidetis juris* argument was presented by Yemen and rejected by the Arbitral Tribunal (see paras. 96-100 of the Award). I have no doubt that Qatar has an original title to the whole of the peninsula of Qatar and its adjoining islands, the Hawar Islands and Janan Island included. But if one considers that the historical record of the case file still speaks with "an uncertain voice" as to the holder of the original title to the Hawar Islands and Janan Island, the norm of international law here considered offers the solution in international law, even if for me that norm does no more than confirm Qatar's original title as established by historical consolidation and general recognition.

245. Between 1936 and 1939, some British officials altogether disregarded Qatar's right to the Hawar Islands derived from the presumption under international law just considered. Moreover, Qatar was put in the position of proving that the Hawar Islands were part of its territory. But Qatar had nothing of the kind to prove because the law spoke for it. It was Bahrain that should have been called to establish a full case to the contrary. Thus, not only was Lorimer's testimony regarding the islands endorsed by Prideaux, together with the historical record, including British and Bahraini conduct and conventional instruments ignored, but also an elementary norm of general international law, very familiar to British jurists, was excluded to the detriment of Qatar by flawed arguments and an aggregation of considerations of little account or minor importance, as recalled by Prior's comments of 1940 on the criteria applied by the Weightman Report (Memorial of Qatar, Vol. 7, Ann. III.195, p. 499, and Memorial of Bahrain, Vol. 5, Ann. 281, p. 1165).

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246. Proximity is not, as stated by counsel for Bahrain at the hearings, a principle without legal consequences in the establishment of title. That was a misleading statement. Certainly, proximity does not constitute title as such, and in isolation of a neighbouring sovereign, but it may be incorporated into a norm of international law (as in the presumption above) or into a provision of a treaty defining title, as well as, together with other elements, constituting the root of title in a given case or means of defining the scope of an established title. The very *ab origin* entitlement of a coastal State to "territorial sea" is based upon the concept of proximity and the same may be said of other national maritime jurisdictions defined in terms of "distance". The "portico doctrine" also takes contiguity into account. Even the Weightman Report itself acknowledges this in the following terms:

"A claim for sovereignty based merely on geographical contiguity is, as I understand it, of little practical value *save possibly* in respect of an unoccupied area of land or an island being contiguous to or in the territorial waters of the State raising the claim." (Para. 4 of the Report; emphasis added.)

247. Thus, the Weightman Report acknowledges not only the *juris tantum* presumption of international law concerning islands lying wholly or partly in the territorial sea of a given coastal State, but also the "contiguity" principle of the so-called *"portico doctrine"*. This doctrine, as formulated by Lord Stowell in *The Anna* case (1805), applies to islands when they are *"natural appendages of the coast on which they border and from which indeed they are formed"*, because the protection of territory is to be reckoned from the islands forming *"a kind of portico to the mainland"* (see C. J. Colombos, *The International Law of the Sea*, 6th ed., 1967, pp. 113-114). The Hawar Islands and Janan Island fall entirely within the scope of the "portico doctrine" as formulated by its own author.

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248. There are many examples in pronouncements of international courts and tribunals on the role of proximity or contiguity in matters relating to the establishment of title particularly, although not exclusively, in relation to islands. In any case, it is self-contradictory that during the present proceedings Bahrain peremptorily rejected proximity, on the one hand, and for itself invoked the condition of being an "archipelagic State", on the other. But what would become of the notion of "archipelagic State" if deprived of the mortar of proximity or contiguity? Bahrain's archipelagic State plea amounts to an admission by Bahrain of the role of proximity or contiguity in territorial disputes. It defies reason to invoke proximity or contiguity as between islands and to reject it as between an island or group of islands and the mainland.

249. Whenever for one reason or another an international court or tribunal has to deal with a given "physical unity" — as it is the "peninsula of Qatar" or the "Hawar Islands" — proximity or contiguity is called upon to play a role, even within the application of the principle of effective possession because this principle admits "presumed possession". This is particularly so when the general international law standards or requirements concerning the effective, continuous and peaceful display of authority have to be adjusted, as in the present case, to difficult, inhospitable or scarcely populated territory or to a territory in the process of evolving from an original tribal system to more modern forms of administration. As stated in 1933 by the Permanent Court in the *Eastern Greenland* case:

> "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim." (*P.C.I.J., Series A/B, No. 53*, p. 46.)

250. Greenland and the Qatar peninsula are certainly very distant from each other. But the *Eastern Greenland* case has quite a number of points in common with the present case, particularly regarding aspects relating to the establishment of the original title to territory. Proximity or contiguity played a considerable role in the *Eastern Greenland* case, as it should in the present case, in connection, for instance, with Bahrain's allegations that the effective authority of the Rulers of Qatar did not at the time reach the west coast of the Qatar peninsula nearest the Hawar Islands (Counter-Memorial of Bahrain, Vol. 1, p. 10, para. 23). Allegations of this kind find a fitting answer in the following passage from the *Eastern Greenland* Judgment:

> "Even if the period from 1921 to July 10th, 1931, is taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty. When considered in conjunction with the facts of the preceding periods, the case in favour of Denmark is confirmed and strengthened." (*P.C.I.J., Series A/B, No. 53*, pp. 63-64.)

251. In other words, the Danish coastal settlements and related display of authority were declared by the Permanent Court to be sufficient evidence of Denmark's title to the whole of Greenland considered as a single "natural or physical unit", including of course to the islands within the territorial sea of Greenland or contiguous to it. I therefore see no reason why Qatar's *effectivités* on the peninsula or promontory of Qatar would or should be excluded in any evaluation of the respective *effectivités* of the Parties concerning the Hawar Islands or Janan Island. Those islands were not *terra nullius* and were located, at least partly, within the territorial sea of the mainland State or contiguous to it. The way in which between 1936 and 1939 some of the British officials involved approached the question of sovereignty over the Hawar Islands was indeed, in addition to other failures, absolutely selective and narrow-minded in the definition of the *effectivités* to be considered in the case.

252. It should likewise be underlined — in the light of the emphasis placed by Bahrain on the 1829 Brucks's Memoir — that the *Handbook of*

Arabia, published in 1916 by the British Admiralty, namely in the year of the conclusion of the 1916 Anglo/Qatari Treaty, considered the Hawar Islands *as a part of Qatar,* adding that:

> "An island, *Jerizat Hawar*, lies 5 miles W. of *Ras Aburuk* on the W. coast, with which it is roughly parallel; it is about 10 miles long, *and has no permanent population*, but the Dawasir of Zallaq in Bahrain have houses used as shooting-boxes in winter, and a cistern for rain-water. The islets *Rubahd* and *Janan* lie to N. and S. of Hawar, those of *Ajirah* and *Suwad* in the channel between it and the mainland." (Reply of Qatar, Vol. 2, Ann. II.55, p. 317.)

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253. The above conclusions on original title to the Hawar Islands and Janan Island are corroborated by the *1913 and 1914 Anglo-Ottoman Conventions*. In the year preceding the conclusion of the *1913 Anglo-Ottoman Convention*, tensions between the British and Ottoman Governments came to a head, mainly because of the presence of Germany in the Gulf region (implementation of the Baghdad railroad scheme). In the light of the situation, both the British and Ottoman Governments considered that they should define and agree upon the extent of British and Ottoman control over Kuwait, the Hasa coast and the Qatar peninsula, Bahrain, and the independent Sheikhs from the south of Qatar up to the Indian Ocean, as well as of British maritime police measures in the waters of the Gulf. Negotiations began in 1911 and ended with the signature of the Convention on 29 July 1913. In so far as the Ottoman rights in Qatar are concerned, the annex to the Aide-Mémoire communicated by Tewfik Pasha to the British, dated 15 April 1912, is quite significant (Memorial of Qatar, Vol. 6, Ann. III.56, pp. 264-266).

254. The Anglo-Ottoman Convention drafted in French was entitled "Convention relative au golfe Persique et aux territoires adjacents". The relevant provisions relating to Qatar and Bahrain read as follows:

> "II. Al-Qatar
>
> ART. 11. The Ottoman sancak of Najd, the northern limit of which is indicated by the demarcation line defined in Article 7 of this convention, ends in the south at the gulf facing the island of al-Zakhnuniyah, which belongs to the said sancak. A line beginning at the extreme end of that gulf will go directly south up to the Rub'-al-Khali and will separate the Najd from the peninsula of al-Qatar. The limits of the Najd are indicated by a blue line on the map annexed to the present convention (annex Va). The Ottoman Imperial Government having renounced all its claims to the peninsula of al-Qatar, it is understood by the two Governments that the peninsula will be governed as in the past by the shaykh Jasim-bin-Sami and his suc-

cessors. The Government of His Britannic Majestic declares that it will not allow the interference of the shaykh of Bahrayn in the internal affairs of al-Qatar, his endangering the autonomy of that area or his annexing it.

ART. 12. The inhabitants of Bahrayn will be allowed to visit the island of al-Zakhnuniyah for fishing purposes and to reside there in full freedom during the winter as in the past, without the application of any new tax.

III. Bahrayn

ART. 13. The Ottoman Imperial Government renounces all its claims to the Islands of Bahrayn, including the two islets Lubaynat al-Aliya and Lubaynat al-Safliya, and recognizes the independence of the country. For its part, the Government of His Britannic Majesty declares that it has no intention of annexing the islands of Bahrayn to its territories . . ." (Memorial of Qatar, Vol. 6, Ann. III.58, pp. 280-281; for the "blue line" referred to in Annex Va to the 1913 Anglo-Ottoman Convention, see Reply of Qatar, Map Atlas, Map No. 84.)

255. Since the 1913 Convention had not been ratified at the outbreak of the War in 1914, it never formally came into force. However, its text provides irrefutable evidence of what the two main Powers in the region, Great Britain and the Ottoman Empire, acknowledged Qatar and Bahrain to be, politically and territorially, at the time of the conclusion of the Convention, namely in July 1913. Furthermore, Article 11 of the Convention is to be regarded as formally binding, since Article III of the "Anglo-Turkish Convention respecting the Boundaries of Aden" of 9 March 1914, whose ratifications were exchanged in London on 3 June 1914, contains a reference to Article 11 of the 1913 Convention, whereby the territory of Qatar was separated from the Ottoman Sanjak of Nejd. Article III of the 1914 Anglo-Turkish Convention reads as follows (for original French text, see opposite):

"Inasmuch as point No. 1 of the Wadi Bana marked on the first of the maps attached (Annex B) to this Convention is the last point deliberated on the eastern side of the territories, the high contracting parties agree and decide, in accordance with the said Protocol, and subject to the conditions and specifications contained therein, that the frontier of the Ottoman territories shall follow a straight line running from Lekemet-ul-Choub north eastwards to the desert of Ruba-al-Khali at an angle of 45°. In the Ruba-al-Khali, on the 20th parallel, this line will join the straight line running directly south from a point on the southern shore of the Gulf of Oudjeir, *which separates the Ottoman territory from the sanjak of Nejd in the El Katr territory in conformity with Article 11 of the Anglo-Ottoman Convention of 29 July 1913, respecting the Persian Gulf and sur-*

rounding territories." (Memorial of Qatar, Vol. 6, Ann. III.60, pp. 289-290; emphasis added.) *[Translation by the Registry.]*

256. The adjoining islands to the peninsula of Qatar are not mentioned in the text of the 1913 and 1914 Conventions. Nevertheless, the way of dealing with islands such as the Libainat islands (situated approximately halfway between Bahrain and the Hasa coast) and Zakhnuniya Island (situated just off the Hasa coast) strongly suggests that the Hawar Islands, Janan Island and other islands adjoining the peninsula fall within the expression "the peninsula of al-Qatar" used in the text of Article 11 of the 1913 Convention. This is further confirmed by the map attached as Annex V to the 1913 Convention showing the limits of Kuwait and adjacent countries (Reply of Qatar, Maps Atlas, Map No. 46; see Map No. 3 of this opinion, p. 449 below). The Hawar Islands and Janan Island are clearly represented on that map as belonging to Qatar.

257. To read "the peninsula of al-Qatar" as meaning, in the Convention, "Doha and its environs" as argued by Bahrain does not make sense. The 1913 Anglo-Ottoman negotiations concerned the territory of the whole peninsula, the former *kaza* of Qatar, and the ratified 1914 Convention refers to the line separating the territory of the Ottoman Sandjak of Nadjd and the "territory of al-Qatar", in accordance with Article 11 of the 1913 Convention. Concerning the non-ratification argument, Rendel of the Foreign Office in a letter to the India Office, dated 16 March 1934, made the point termed as "important" that "in view of the fact that the 1913 line is "adopted' and unmistakably defined, in Article 3 of the 1914 Convention, which was duly ratified, that line is from the point of view of international law perfectly valid . . ." (Counter-Memorial of Qatar, Vol. 3, Ann. III.41, p. 227).

258. To exclude from the expression the "peninsula of al-Qatar" its territorial sea and/or the islands off-lying wholly or partly in that territorial sea, the Convention would have needed to specify this expressly. But neither the Convention and related maps nor the records of the negotiations contain such a reservation, even in implied form. An interpretation made according to international law has therefore to conclude that in 1913 and 1914, for Great Britain and the Ottoman Empire as contracting States, the expression "peninsula of al-Qatar" means not only the mainland promontory as a whole, including Zubarah, but also the adjoining waters and islands, such as the Hawar Islands and Janan Island which are natural and legal "appurtenances" of the "peninsula of Qatar". It must also be recalled that by that time, namely in 1913-1914, no claim had been yet presented by Bahrain to the Hawar Islands or Janan Island although it had, in 1909, to Zakhnuniya Island (see above), which explains the reference to the rights of the inhabitants of Bahrain on the latter island. Nothing of the kind is provided for in the 1913 Convention with respect to the Hawar Islands and Janan Island.

259. To conclude, the 1913 and 1914 Anglo-Ottoman Conventions conventionally recognized Qatar's original title to the entire territory of the peninsula, including of course its adjoining islands and waters, in consolidation of which the conduct of Great Britain and the Ottoman Empire, together with the conduct of the Ruler of Qatar and of the Ruler of Bahrain, played a paramount role. The Conventions are respectful of the integrity of the territory of Qatar resulting from a process of historical consolidation and recognition initiated in 1868 and completed by 1913-1914. The unavoidable result is the definition of "Bahrain" by the said Anglo-Ottoman Convention as constituted by the "the Islands of Bahrayn", including the two islets of Lubaynat al-Aliya and Lubaynat al-Safliya, *but excluding the Hawar Islands and Janan Island.*

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260. To complete this description of the territory of Qatar, there remains the question of its relations with its southern neighbours. In 1913, Ibn Saud, at that time Ruler of Nejd, conquered Hasa and claimed that Qatar was part of his ancestral domains. However, by the end of 1913, the British persuaded him that non-interference with Qatar was a condition of maintaining friendly relations with the British Government. This understanding was embodied in the "Treaty between the British Government and the Ruler of Najd, El Hasa, Qatif, etc.," of 26 December 1915, Article VI of which provided that:

> "Bin Sa'ud undertakes, as his father did before him, to refrain from all aggression on, or interference with the territories of Kuwait, Bahrain, *and of the Sheikhs of Qatar* and the Oman Coast, who are under the protection of the British Government, and who have treaty relations with the said Government, and the limits of their territories shall be hereafter determined." (Memorial of Qatar, Vol. 5, Ann. II.46, p. 179; emphasis added.)

261. Since that undertaking, the south became for Qatar a matter of delimitation. It took time, however, to settle the question of the frontier line and many lines were proposed and considered down the years in the context of negotiations between the British Government and the Government of Saudi Arabia. There were several reasons for this, including the impact of oil. Some of the lines are reproduced on Map No. 84 of the Map Atlas submitted by Qatar with its Reply. These negotiations and lines also provide confirmatory elements of evidence for territorial questions in dispute in the present case, including with respect to the Hawar Islands and Janan Island.

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262. Following the departure of the Ottomans in January 1915, Great Britain and the Chief of Qatar, Sheikh Abdullah bin Jassim, successor of Sheikh Jassim, carried out direct negotiations concerning the conclusion of a bilateral treaty. The Treaty between the British Government and the Sheikh of Qatar was signed on 3 November 1916 by Sheikh Abdullah and the British Political Resident in the Persian Gulf, Lieutenant-Colonel Sir Percy Cox. It was also signed by the Viceroy and Governor-General of India and ratified on 23 March 1918 (Memorial of Qatar, Vol. 5, Ann. II.47, pp. 183-186).

263. The Treaty of 1916 — which began by recalling the Agreement of 12 September 1868 — reaffirmed the separate status of the territory of Qatar under Al-Thani rule. It is clear from its text, and from the circumstances surrounding its conclusion, that the provisions of the Treaty applied to the entire peninsula of Qatar and, therefore, to its coasts and adjoining islands. The obligation of the British Government under Article 10 of the Treaty to protect the Ruler of Qatar and his "subjects and *territory* from all aggression by sea" (emphasis added) indeed covered any possible Bahraini aggression across the sea on any part of the Qatar peninsula and adjoining islands, such as the Hawar Islands, just as much as did the 1868 Agreement. Under Article 11, the British Government also assumed the obligation to grant good offices should the Ruler of Qatar or his subjects "be assailed by land within *the territories of Qatar*" (emphasis added).

264. Bahrain's proposition in the current proceedings that the term "Qatar" in the 1916 Treaty does not cover the whole peninsula of Qatar is as inadmissible as the proposition mentioned above that the term "the peninsula of al-Qatar" in Article 11 of the 1913 Anglo-Ottoman Convention did not cover the whole peninsula and its adjoining islands. For a British understanding of the 1916 Treaty (as well as of the 1913 Convention) see "El-Katr 1908-16" in *Persian Gulf Historical Summaries, 1907-1928* (Counter-Memorial of Qatar, Vol. 3, Ann. III.57, pp. 335 *et seq.*). That in the 1916 Treaty the term "Qatar" means the whole Qatar peninsula is also confirmed by the 1916 British publication entitled *Handbook of Arabia* (Reply of Qatar, Vol. 2, Ann. II.55, p. 316 *in fine*). Article 2 of the formal "Proposals of British Delegation for Draft Treaty dealing with the Settlement of the Arabian Peninsula", Appendix (A) to a 1920 Foreign Office Memorandum on Arabian Policy, confirms that, *inter alia* (for the purpose of the Treaty), "the islands, whether previously Turkish or not" which lie within a red line drawn on a related attached map were part and parcel of the "Arabian Peninsula" for the purpose of the negotiation of the Treaty of Peace with Turkey (Reply of Qatar, Vol. 3, Ann. III.38, p. 222).

265. The map with the red line was originally prepared by the British Admiralty in 1917. But the Foreign Office memorandum mentioned above and the red line on the said map, are dated 1920. This suggests two

things: (1) that for years after the 1916 Anglo-Qatari Treaty the British position on the extent of the territory of Qatar was the same as at the time of the conclusion of the 1913 and 1914 Anglo-Ottoman Conventions (see above); and (2) that the guarantee concerning the integrity of the territory of Qatar of Articles X and XI of the 1916 Anglo-Qatari Treaty, particularly with respect to "all aggressions by sea", covers the Qatari mainland and its adjoining islands, as understood at the time of the conclusion of the above Anglo-Ottoman Conventions. (See Map No. 4 of this opinion, p. 449 below, a reproduction of the British Admiralty map concerned with the said line in red. Bahrain appears on that map as an enclave within the said red line.)

266. Bahrain had relied on a report of a meeting between the Ruler of Qatar and the British Political Resident, dated 12 March 1934(!), relating to the granting of an oil concession by Qatar in which the former, to be free to choose the oil company, contrasted the "interior" with the "coastline" by saying the 1916 Treaty did not include the "interior". The reply of the British Political Resident could not be clearer:

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

267. The obligations assumed by the Ruler of Qatar in the 1916 Treaty with the British Government are of the nature of those set forth in the so-called "*exclusive agreements*" previously concluded by Britain with other Arab Rulers in the Gulf, such as the Rulers of Bahrain (1880 and 1892) and of the Trucial States (1892). I shall revert to these "treaty obligations" in Section B of this part of the opinion in connection with the invocation by Bahrain of *uti possidetis juris*. But what should be mentioned here it is that the 1916 Treaty does not establish any relation between Qatar and Bahrain. By the 1916 Treaty, the Ruler of Qatar also assumed obligations in "Treaties and Engagements" relating to the suppression of the slave trade and piracy and generally in the maintenance of the Maritime Peace entered into before by the Sheikhs of the Trucial States (Dhabia, Dibai, Shargah, etc.), but curiously enough those entered into by the Rulers of Bahrain are not mentioned in the 1916 Treaty. The "treaty obligations" were not identical in the case of Qatar and in the case of Bahrain.

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268. Map evidence is considered by international courts and tribunals as confirmatory or corroborative evidence. It may in effect confirm recognition or general opinion or repute as to the fact of a given political or territorial situation. In the present case, Bahrain failed to match the map evidence submitted by Qatar in the Map Atlas annexed to its Reply, as well as in the presentation of map evidence in the hearings by counsel for the Parties. The highly reliable, uniform and copious map evidence from official publications and private map publishers of Turkey, Great Britain, the United States, France, Germany, Russia, Italy, Iran, Poland, Australia and Austria submitted to the Court by Qatar shows beyond any reasonable doubt a general recognition, opinion or repute which strongly confirms Qatar's thesis that the scope of its original title included the Hawar Islands and Janan Island and denies Bahrain's thesis to the contrary on the matter.

269. In the light of the map evidence referred to, Bahrain's assertion that the Al-Thani rule during the relevant period was limited to Doha or Bida and that Zubarah, the Hawar Islands and Janan Island were deemed to be part of Bahrain simply crumbled and collapsed. In my opinion this collapse is without any possible remedy because the historical record in the case file is fully consistent with the recognition, general opinion or repute provided by the maps of the nineteenth and twentieth centuries (until 1939) before the Court. Whether the map evidence is taken as a whole or individually, no doubt is possible. The virtual uniformity of the message coming from the map evidence certainly has legal significance for the scope of the respective original titles to territory of Qatar and Bahrain. The Judgment ignores it.

270. The general message of the cartographic evidence is that, after 1868, Qatar was recognized as a separate political entity encompassing the entire peninsula and its adjoining islands, including Zubarah, the Hawar Islands and Janan Island. The political and territorial integrity of Qatar as defined by the historical record is fully acknowledged by the maps. At the same time, also in conformity with the historical record, the territory of Bahrain is limited, in the maps, to the compact group of islands around the main Bahrain island and a number of islets and rocks in its vicinity, namely to the Bahrain archipelago proper (exactly as described by Lorimer and other documents before the Court).

271. The cartographic evidence therefore reflects like a mirror the scope of the respective title to territory of Qatar and of Bahrain, from 1868 onwards, as defined by the process of historical consolidation and general recognition considered above in this opinion. For example, in the case of Bahrain, it reflects the territorial definition of that State given in a series of documents in the case file such as, *inter alia*: *(a)* the confidential memorandum of 25 March 1874, printed for the use of the British

Foreign Service, on the separate claims of Turkey and Persia to sovereignty over the island of Bahrain (Memorial of Qatar, Vol. 6, Ann. III.28, p. 137); *(b)* the 1890 description by J. Theodore Bent of the British Royal Geographical Society (see Map. No. 1 of this opinion, p. 448 below); *(c)* the 1908 description of Lorimer referred to above; *(d)* the 1916 *Handbook of Arabia,* Vol. I, General (Reply of Qatar, Vol. 4, Ann. IV.1, p. 1); *(e)* the India Office confidential memorandum of 27 August 1928 signed J.G.L (Laithwaite) and entitled "Status of Certain Groups of Islands in the Persian Gulf" (*ibid.*, Vol. 4, Ann. IV.2, p. 5); *(f)* the India Office memorandum from Laithwaite of 14 July 1934 (*ibid.*, Vol. 2, Ann. II.61, p. 359); *(g)* the 1939 Military Report and Route Book for the Arabian States of the Persian Gulf (*ibid.*, Vol. 4, Ann. IV.3, p. 11); etc.

272. *There is no contradiction between the documentary evidence and the map evidence.* They support each other completely and uniformly during the relevant period, namely between 1868 and 1939, consistently depicting the Bahrain islands and Qatar (including Zubarah, the Hawar Islands and Janan Islands) in different colours. Moreover, maps such as Bent's map of 1890 (see Map No. 1 of this opinion, p. 448 below) and Tiverner's map of 1898 (Reply of Qatar, Map Atlas, Map No. 28) which depict the islands of Bahrain do not show the "maritime features" relied upon by in the current proceedings as part of the State of Bahrain. The same applies to Map No. 77 in the Map Atlas of the Reply of Qatar. Thus, Bahrain's assertions that it also has title to the said maritime features between the archipelago of Bahrain proper and the western side of the peninsula of Qatar finds no support either in the map evidence before the Court.

273. In contrast, practically the only map related to the dispute on the Hawar Islands introduced by Bahrain corresponding to the 70-year period between 1868 and 1939 is the sketch-map said to have been prepared by Captain Izzet of the Ottoman Army in 1878. It was also submitted *in full* by Qatar. This sketch-map is no more than an outline of the *Vilayet* of Basrah. As to the Ottoman techniques of colouring maps, see Reply of Qatar, Volume 1, pages 128 to 129, paragraph 4.117. Bahrain also presented a map of the United Kingdom's Ministry of Defence with a division of sovereignty line between the western coast of the Qatari mainland and the Hawar Islands (Map TPC H-6C), but it is a map of 1972 recording the British decision of 1939!

274. The Parties likewise presented some maps and sketches concerning oil concession negotiations. One submitted by Bahrain relating to 1924, by the Eastern and General Syndicate Limited concerning concession negotiations in Bahrain, Hasa (Saudi Arabia), the Neutral Zone and Kuwait, has a mark on the peninsula of Dukhan, an area of the mainland

territory of Qatar, but the Hawar Islands are not described on that map, only the Bahrain islands and the Saudi Zakhnuniya Island appear on it.

275. The map evidence consistently confirms from 1868 onwards that the Hawar Islands and their waters as an adjoining natural appurtenance of the peninsula of Qatar fall within the scope of the historically consolidated original title of Qatar. It must further be recalled that by 1873 the only part of the territory of Qatar constituting the subject of a claim by Bahrain was Zubarah. Bahrain's first formal claim to the Hawar Islands is dated 28 April 1936. A very late claim indeed to provide a basis for arguing in terms of *original title* according to the general standards of international law.

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276. Following the conclusion of the 1916 Anglo-Qatari Treaty, the Al-Thani Ruler of Qatar remained in control of the territory of the country as before and maintained relations with the British Government as per the Treaty, although these relations were much more distant than British relations with Bahrain. No Political Agent in Qatar was appointed by the British until 1949, while Bahrain had had a Political Agent since 1904. By the 1930s, Bahrain was a State protected by Great Britain, but not a British Protectorate. In 1926, the British adviser Belgrave was appointed by the Bahraini authorities to assist the Ruler of Bahrain in internal administration tasks. With the discovery of oil and the development of the oil economy, the situation would become detrimental to Qatar. It explains the British "decision" of 1939 on the Hawar Islands.

277. Oil development began considerably later in Qatar than in Bahrain. The Ruler of Bahrain granted a first concession to the Eastern and General Syndicate Limited (EGS) on 2 December 1925, which was subsequently transferred to BAPCO. Oil was first struck in Bahrain on 1 June 1932 and the first Bahraini oil shipment was made in 1934. A refinery was constructed in Bahrain and completed in 1937. Oil from other parts of the Gulf was brought to that refinery, etc. In contrast, the first oil concession agreement was not concluded by the Ruler of Qatar until 1935, the concession holder being the Anglo-Persian Oil Company (APOC), which promptly assigned its interest under the concession to Petroleum Concessions Limited (PCL). In 1938 the latter established its camp at Dukhan on the western side of Qatar and started drilling. It struck oil the following year, but during the Second World War the PCL closed down its operations on the orders of the British authorities. In fact the first shipment of Qatari oil was not until December 1949.

278. Thus, when in 1936 Bahrain claimed the Hawar Islands, its relations with Great Britain were closer than with Qatar and Bahrain was also a country better organized and richer than Qatar. But until the clandestine and unlawful occupation of the northern part of Jazirat Hawar in 1937, the Ruler of Qatar exercised his authority over the totality of the territory of Qatar without external interferences. Nobody questioned Qatar's original title either in the peninsula or in its adjoining islands.

279. There are several documents in the case file confirming the display of the Ruler of Qatar's authority over the whole territory of Qatar as defined by his original consolidated and recognized title. Some of them are very spectacular indeed. The first is the 1935 Concession Agreement with APOC itself. By Article 1 of this Agreement the Ruler of Qatar grants to the company various rights to explore, to prospect, to drill for and to extract petroleum and other substances *"throughout the principality of Qatar"*. The territorial scope of the 1935 Concession Agreement is further defined in Article 2 which states *inter alia*: "The State of Qatar means the whole area over which the Sheikh rules and which is marked on the north of the line drawn on the map attached to this Agreement." The map attached to the Concession Agreement shows that the Hawar group of islands is unmistakably included within the territory of the State of Qatar as so defined (Memorial of Qatar, Vol. 6, Ann. III.99, p. 529). There are also APOC/PCL technical prospecting reports indicating the areas explored and containing references to the Zubarah area and to the Hawar Islands.

280. Another example is the aerial reconnaissance of Qatar by the British Royal Air Force. In 3 May 1934, Loch, Political Agent in Bahrain, informed the Ruler of Qatar of this reconnaissance overflying and the Ruler answered on 14 May 1934 that there was no objection (Supplemental Documents of Qatar, doc. 14, p. 108). The Wing Commander's covering report of 30 May 1934 refers to the main Hawar Island and confirms that "the southernmost bay of Djeriza Hawar" would possibly afford good shelter (Memorial of Qatar, Vol. 6, Ann. III.94, p. 483). The report also includes a photograph of Hawar (*ibid.*, p. 488). The RAF survey of Qatar's territory was made in connection with the negotiation of the 1935 Qatari oil concession and the new British assurances of protection. The Hawar Islands were therefore surveyed as a part of the territory of Qatar *and with the consent of the Ruler of Qatar*. In this respect, it might also be mentioned that the *Military Report and Route Book for the Arabian States of the Persian Gulf 1939*, General Staff, India, listed "Hawar Island" as an observed possible landing ground or anchorage "on the coastline of Qatar", while the Sheikhdom of Bahrain continued to be described as the compact group of islands of the Bahrain archipelago proper (Reply of Qatar, Vol. 4, Ann. IV.3, pp. 14 and 15).

281. There are also other important confirmations that the Hawar Islands were part of the territory of Qatar during the period considered, such as the exclusion of the Hawar Islands as part of Bahrain on the 1923 map (signed by Major Holmes on behalf of BAPCO (see Map No. 5 of the present opinion, p. 450 below).

282. Account should also be taken of: *(a)* the absence of any reference to the Hawar Islands in the Bahrain concession Agreement of 1925; *(b)* the inclusion of the Hawar Islands in the territories of Qatar on the Iraq Petroleum Company's map of 1933, preceding the Qatar oil concession of 1935 (Counter-Memorial of Qatar, Vol. 3, Ann. III.35, p. 183); *(c)* the 1928 official British Report of the India Office entitled "Status of Certain Groups of Islands in the Persian Gulf", where the Bahrain archipelago is defined as consisting of specific named islands which do not include the Hawar Islands (Memorial of Qatar, Vol. 4, Ann. II.10, p. 276); *(d)* Laithwaite's India Office letter of 1933 in the same vein (*ibid.*, Vol. 6, Ann. III.84, p. 431); *(e)* the letter of 1933 from the acting Political Resident to the Secretary of State for India stating that "Hawar is clearly *not one of the Bahrain group*" (emphasis added), a view endorsed by the India Office (*ibid.*, Vol. 6, Ann. III.88, p. 449); *(f)* the note by G. W. Rendel of 30 December 1937 confirming that the Hawar Islands were geographically part of Qatar (Reply of Qatar, Vol. 3, Ann. III.56, p. 349); *(g)* the view expressed by Prior, Political Agent (1929-1932) and the Political Resident (1939-1945), that the Hawar Islands "belong to Qatar, a view supported by Lorimer" (Memorial of Qatar, Vol. 8, Ann. III.229, p. 127). The British Foreign Office marked or annotated version of a 1924 British War Office map (Reply of Qatar, Map Atlas, Map No. 77) also confirms that in 1933 the territory of Qatar recognized by Great Britain remained the same at the time of the 1913-1914 Anglo-Ottoman Conventions and of the negotiations in 1920 for the Peace Treaty with Turkey (see Map No. 6 of the present opinion, p. 450 below).

283. All the above confirms that from 1913-1914 until the 1936 undisclosed British "provisional decision" on the Hawar Islands Great Britain recognized Qatar's title to the whole of its territory, namely the Qatar peninsula and adjoining islands such as the Hawar Islands and Janan Island. Further confirmation of this is provided by the British documents relating to the proposed additional guarantee of protection for the Sheikh of Qatar as an inducement for the grant of the 1935 Concession to APOC, acting for IPC. See, for example, the note on "Qatar" by Rendel, attached to an India Office memorandum of 21 February 1934 (Counter-Memorial of Bahrain, Vol. 2, Ann. 67, p. 220). Rendel's Note pointed out that "we already pledged to protect the Sheikh against aggression by sea", so "the only dangers against which the Sheikh might need to be protected would come from either *(a)* Ibn Saud or *(b)* the tribes of the

hinterland" (Counter-Memorial of Bahrain, Vol. 2, Ann. 67, p. 221). The dangers from the sea were however about to emerge!

H. General Conclusion of Section A of Part I

284. In the light of all the above considerations, I conclude that the State of Qatar is the holder of an original title to the territory of the whole peninsula of Qatar and its adjoining islands and, consequently, to Zubarah, the Hawar Islands and Janan Island. That title was established by a process of historical consolidation and general recognition mainly between 1868 and 1913-1915, so that it includes the Ottoman period of Qatar, and was subsequently confirmed by Great Britain with no formal claims or challenge to the contrary from any State, until Bahrain's first written claim of April 1936, followed the British "provisional decision" and the clandestine occupation of the northern part of Jazirat Hawar in 1937.

285. Even before the 1868 Agreements, the Al-Khalifah Rulers of Bahrain had no effective possession, nor exercised any effective authority or control over any part of the Qatar Peninsula or over the adjacent islands lying wholly or partly in the territorial sea belt of the Qatar Peninsula. Moreover, during the process of historical consolidation and general recognition of the original title of the Al-Thani Rulers of Qatar to the entire peninsula of Qatar and its adjoining islands, the territory of the Al-Khalifah Rulers of Bahrain was already regarded and recognized, and had been for a long time, as being limited exclusively to the Bahrain archipelago, including its minor islands and islets. Therefore, I cannot but reject the plea by the State of Bahrain, in the present proceedings, according to which the Al-Khalifah Rulers of Bahrain were the holders, at the relevant time, of an original territorial title to Zubarah, the Hawar Islands and Janan Island.

286. It may be added that the 1913 and 1914 Anglo-Ottoman Conventions which were followed by the 1916 Treaty between Great Britain and Qatar, with mirror precision reflected the territorial state of affairs referred to above with respect to both Qatar and Bahrain and this is also confirmed by the documentation and map evidence submitted to the Court by the Parties. For example, the 1913 Anglo-Ottoman Convention uses terms such as "peninsula of Qatar" and "Bahrain Islands". The natural or ordinary meaning of these terms as stated by the Permanent Court with respect to "Greenland" in the *Legal Status of Eastern Greenland* (*P.C.I.J., Series A/B, No. 53*, p. 52), is "its geographical meaning as shown in the maps" which in the present case are, *inter alia,* those reproduced in Annexes V and V*(a)* to the 1913 Anglo-Ottoman Convention. According to these maps — which as annexes to the Convention are interpretative elements of the latter — and, in particular the map repro-

duced as Annex V, it is quite clear that Zubarah, the Hawar Islands and Janan Island were considered by Great Britain and the former Ottoman Empire as part and parcel of the "peninsula of Qatar" referred to in Article 11 of the said Convention and not of the "Bahrain Islands" referred to in Article 13 of the Convention. Thus, when in 1916 the Treaty concluded between Great Britain and Qatar makes reference to the "territory of Qatar", this term cannot be interpreted as excluding Zubarah, the Hawar Islands and Janan Island, except by proving either a change in Great Britain's position between 1913-1916 concerning the status of these territories or by proving that the terms "peninsula of Qatar" and "Bahrain Islands" of the 1913 Anglo-Ottoman Convention there have a special meaning different from its natural or ordinary geographical meaning.

287. Although the reasoning of the Court's present Judgment generally avoids determining who is the holder of the original title, the Judgment finds that the State of Qatar has sovereignty over Zubarah as well as over Janan Island, including Hadd Janan. It follows that these two findings of the Court in fact concur with my own conclusion that the State of Qatar has sovereignty over Zubarah and Janan Island, by virtue of the original title of the Al-Thani Rulers of Qatar to those territories. This dispenses the author of this opinion from any further discussion of Zubarah and Janan Island, including Hadd Janan. I would only add that, in the case of Zubarah, the reasoning of the Court follows a method which has some points in common with the method of ascertaining an original title established through historical consolidation and general recognition, but in the case of Janan Island, including Hadd Janan, the corresponding reasoning of the Court is based upon the British authentic interpretation of its 1939 "decision" on the Hawar Islands. I dissociate myself from this reasoning because, as explained below in this opinion, I consider that the 1939 British "decision" is invalid. For me Janan Island belongs to Qatar by virtue of Qatar's original title to the territory and the scope of that title.

288. With respect to the dispute over the Hawar Islands, my conclusion that the islands also belong to the State of Qatar because of the original title of the Al-Thani Rulers of Qatar to the entire peninsula and its adjoining islands and waters does not coincide with the Court's finding on the dispute over the Hawar Islands. However the State of Bahrain did not base its claim to the Hawar Islands exclusively upon an alleged original title to those islands, but also on alleged *derivative titles* such as *uti possidetis juris*, the 1939 British "decision" and *effectivités* understood as an autonomous mode of acquiring title to territory. Thus, we will see below whether or not the State of Bahrain has a derivative title to the Hawar Islands by virtue of these three legal arguments — which would be better and, therefore, prevail over the original title of the State of Qatar to the Hawar Islands.

SECTION B: DOES BAHRAIN HAVE A TITLE TO THE HAWAR ISLANDS OR TO SOME OF THEM SUPERIOR TO QATAR'S ORIGINAL TITLE TO THOSE ISLANDS?

A. Bahrain's Search for a "Derivative" Title

289. As already indicated, Bahrain has argued throughout the proceedings that it is in possession of an original title to all the Hawar Islands. This was indeed a daring argument in the light of the Al-Khalifah settlement in the Bahrain islands since 1783. A cursory reading of the historical documents and evidence submitted to the Court by the Parties is sufficient to make one realize that the Bahraini argument is founded on quicksand. As explained in Section A of Part I of the present opinion, Bahrain is not the holder of an international law original title to any of the islands in the Hawar group and *could not possibly be such at the relevant time*. Thus, already in the written phase of the proceedings, Bahrain tried to prop up its assertion of original title to the Hawar Islands with other considerations and arguments. In fact, Bahrain has all along been engaged in a search for as many *derivative titles* as possible to the Hawar Islands, without any particular regard for the possible contradictions so created between the alleged derivative titles to Hawar and its submissions in the case.

290. In effect, the Bahraini search for derivative titles focuses on the Hawar Islands. Thus, Bahrain first argued that it has a derivative title to the Hawar Islands by virtue of the 1939 British "decision" on those islands, a "decision" presented as an arbitration or adjudication with *res judicata* force. Janan Island would therefore be a kind of error or oversight of the 1939 British "decision" and British conduct concerning the so-called "Zubarah region" would be disregarded. In Zubarah, the Bahraini thesis of the original title would prevail over a long series of consistent and uniform British views, Bahrain's own admissions from the nineteenth century onwards, and the relevant conventions and agreements concluded by Great Britain with Bahrain, Qatar and the Ottoman Empire.

291. However, as indicated, the arbitral *res judicata* argument is not the only legal argument alleged by Bahrain in its search for a *derivative title* to the Hawar Islands. Bahrain also pleads *effectivités* and *uti possidetis juris*, giving the latter priority in the hearings. Thus, the *Independent State of Bahrain* and the *Al-Khalifah Independent Ruler of Bahrain* (terms used in the text of the 1861 and 1880 Agreements with Great Britain and in other British documents filed) pleaded before the International Court of Justice in the year 2000, and at the eleventh hour, that, after all, Bahrain was a mere territory or colony of the British Crown until 1971! Thus, the subjects, territories and dependencies of Bahrain so greatly emphasized in the argument relating to original title were subjects, terri-

tories and dependencies of the British Crown! The principle of *uti possidetis juris* is, however, an objective principle or norm of international law and not the product of subjective constructions of litigants in difficulties.

292. Thus, at the end of the oral phase, Bahrain offered the Court an à la carte menu of four dishes as a possible source of a derivative title to the Hawar Islands, namely: (1) *uti possidetis juris*; (2) the 1939 British decision on the Hawar Islands; (3) title; and (4) the *effectivités*. It is crystal clear that the first two dishes (possible derivative titles) are supposed to cover the poor quality, for Bahrain, of the original title and of the alleged *effectivités*. It is also clear that the object and purpose of this move was to maintain Bahrain's presence on the Hawars initiated by the clandestine occupation in 1937 of part of Jazirat Hawar, an occupation made without international legal title and in violation of Qatar's original title. In any case, it should be noted that in the à la carte menu, Bahrain's alleged original title to the Hawar Islands has already become just "title".

293. In fact, the à la carte menu is nothing more than *quieta non movere* in the Hawar Islands dispute. It is *a quieta non movere* which dares not speak its true name. It is also evident that the invocation of *uti possidetis juris* was an attempt to give effect to the British "decision" of 1939 on the Hawar Islands by other means. The obvious purpose of invoking *uti possidetis juris* is to caulk the leaks of the *res judicata* argument in the dispute over the Hawar Islands.

294. Because the Court's finding in the dispute over the Hawar Islands is based upon a certain interpretation of the 1939 British "decision", we will begin by considering that "decision". We will then go on to review the two other possible sources of derivative title invoked by Bahrain, namely *effectivités* and *uti possidetis juris*.

B. The 1939 British "Decision" on the Hawar Islands

1. The 1939 "decision" is not an arbitral award with the force of res judicata

295. In its search for a derivative title to the Hawar Islands, Bahrain invoked the 1939 British "decision" on the Hawar Islands. This decision was in fact notified to the Ruler of Qatar and the Ruler of Bahrain by letters dated 11 July 1939, signed by T. C. Fowle, British Political Resident in the Persian Gulf. These letters stated the following:

> "on the subject of the ownership of the Hawar Islands, I am directed by His Majesty's Government to inform you that, after careful con-

> sideration of the evidence adduced by [the Sheikh of Qatar and the Sheikh of Bahrain], they have decided that these Islands belong to the State of Bahrain and not to the State of Qatar" (Memorial of Bahrain, Vol. 5, Anns. 287-288, pp. 1182-1183).

296. Bahrain characterizes the above "decision" as an arbitral award with *res judicata* force. The à la carte menu even uses a single term to describe this plea: *res judicata.* Moreover, Bahrain questioned the Court's jurisdiction to decide the various matters raised by Qatar concerning the 1939 British decision on sovereignty over the Hawar Islands. The Judgment rejects the Bahraini characterization of the 1939 British "decision" as an arbitral award with the force of *res judicata* and, furthermore, confirms the Court's jurisdiction to adjudicate the Hawar Islands dispute in the present case, in the light of the text referred to in the 1990 Doha Minutes as the "Bahraini formula".

297. I share that conclusion in the Judgment. For the 1939 British "decision" to have definitively settled the issue of sovereignty over the Hawar Islands, the "decision", independently of its validity, should be a final legal binding decision for Qatar and Bahrain in international law. Short of that, the "decision" could not have definitively settled the dispute over the Hawar Islands raised by Bahrain's first written claim of 28 April 1936 and by the clandestine occupation in 1937 of the northern part of Jazirat Hawar. I therefore understand Bahrain's efforts to present the British "decision" as an international arbitral award or an adjudication with the force of *res judicata.*

298. The 1939 British "decision" does not qualify as a binding arbitral award because of the absence of several fundamental elements in the definition of an "*international arbitration*". Certainly, the declared formal object of the British "decision" was apparently the settlement of a "dispute between States", namely between Bahrain and Qatar. It must be so for Bahrain's argument on *res judicata.* But, if it was so, how can this proposition be reconciled with its *uti possidetis juris* plea? The *res judicata* plea and the *uti possidetis juris* plea are factual and legally incompatible. Nevertheless, both are pleaded by Bahrain in this case. The problem, however, is not Bahrain's thesis on each of those counts, *but the facts* relating thereto. Were Bahrain and Qatar in 1936-1939 "States" able as such to participate in an international arbitration and were they thereafter, in 1971, British colonial territories? Why? How did this transformation take place? Bahrain has not made any effort to explain this matter. However, these are facts which Bahrain should have clarified. Otherwise, one of the two pleas would necessarily have had to fail, because they are mutually exclusive.

299. Both Bahrain and Qatar were States under international law in 1936-1939 and in 1971 (and recognized by Britain as such on both dates). Therefore, Bahrain and Qatar could have been parties in the 1930s to an international arbitration. But, none of them was party to the alleged arbitration because there was no such arbitration in 1938-1939, the reason being that other essential elements of the definition of "international arbitration" were not present in the 1939 British "decision" and related procedure. The missing elements are broadly speaking: (1) the consent of the States parties to the dispute to submit to arbitration; (2) the choice of arbitrator or arbitrators by the States parties; (3) the definition by the States parties of the subject of the arbitration; (4) the application of procedural arbitral rules based upon the principle of equality of arms; and (5) the respect for international law as the basis of the arbitral decision, except to the extent that a non-existent *compromis* would have provided otherwise. Furthermore, the procedure was concluded without an award *(sentence)*. Thus, neither the opening nor the closing, nor the intervening procedure, was arbitral in character under international law.

300. To consider that the British Government and the British Government of India as a whole, together with their entire Administration, constituted an arbitral tribunal is something which defies my imagination. All I know for certain is that the gentlemen involved never drew any distinction between when they were acting in a diplomatic or political capacity or as arbitrators.

301. In any case, it should be pointed out that Weightman's Report to Fowle of 22 April 1939, entitled "Ownership of Hawar Islands", is considered to be the basis of the 1939 British "decision". This being so, Weightman signed that report as "Political Agent, Bahrain" and addressed it to "The Political Resident in the Persian Gulf", namely to Fowle. Thus, at that level at least, those involved in the so-called "arbitration" were the British political and diplomatic authorities in the field dealing in that capacity with the Ruler of Bahrain and the Ruler of Qatar, as well as with the Adviser to the Ruler of Bahrain, Mr. Belgrave, and the representatives of the interested oil companies! I have always been an admirer of George Scelle, and of his doctrine of *"dédoublement fonctionnel"*, but where "international arbitration" is concerned, an old and respectable institution in international law, there are limits which should never be ignored.

302. International arbitration, judicial settlement, and other peaceful means of settlement are based upon the principle of consensuality. The parties to the dispute must give their consent to the arbitration as well as to the definition of the other elements referred to above. But Qatar and Bahrain did not conclude a convention to arbitrate in 1938, did not choose their arbitrator or arbitrators, did not conclude a *compromis* gov-

erning the arbitration and defining its object, the applicable law, rules of procedure, etc. Yet if it was not an international arbitration, how could the 1939 British "decision" (independently of its validity) be *res judicata* or have become so in international law? In fact, the 1939 British "decision" is not the product of a jurisdictional organ or of a political organ acting *in casu* in a jurisdictional capacity. Thus the "decision" cannot have the finality of *res judicata*; it does not express the legal truth *(vérité légale) non-varietur*. Political decisions may have binding effects but not *res judicata* binding effects. For example, the binding decision which the Security Council of the United Nations may adopt under Chapter VII of the United Nations Charter are binding for Member States but they lack the force of *res judicata*. The Council may change those decisions at any moment.

303. The two separate letters of 11 July 1939 sent by the British political authorities in the Gulf to the respective Rulers of Qatar and Bahrain referred to above are mere diplomatic communications or notifications. They do not enclose or append any arbitral award *(sentence)*, whether reasoned or not. International arbitral awards, such as the Judgments of this Court, are however formal international documents and are the result of equally formal international procedures. *Res judicata* is precisely a notion of procedural law intrinsically linked to the form adopted by the procedure and decision concerned and the jurisdictional character of the organ adopting it. Independently of the name given to it (arbitration, adjudication, enquiry, etc.), the 1938-1939 British "procedure" was somewhat far removed from that, as recognized in British documents subsequent to the 1939 "decision". For example, the concluding paragraph of Long's confidential Foreign Office minutes of 10 June 1964 contains the following:

> "Neither of the two Rulers was asked beforehand to promise his consent to the award, nor afterwards to give it. HMG simply 'made' the award. Although it followed the form of an arbitration to some extent, *it was imposed from above*, and no question of its validity or otherwise was raised. It was quite simply a decision which was taken for practical purpose in order to clear the ground for oil concessions." (Reply of Bahrain, Vol. 2, Ann. 2, p. 4; emphasis added.)

304. The purpose was not therefore to decide the matter through an arbitration consented to by the Rulers of Qatar and Bahrain. There was no international arbitration between Qatar and Bahrain in 1938-1939 and the 1939 British "decision" communicated to the Rulers was not an international arbitral award carrying with it an international legal obliga-

tion to submit in good faith to the "decision". The main consequence of this conclusion for the present case is, in my view, that the 1939 British "decision" *is not applicable law between the States Parties to the present case.* Internationally, the "decision" is no more than an historical fact or event like many others in the present case. It does not make law governing the Parties' mutual relations. Within the British domestic order, it may be an act of the British Government or of the British Administration or something else, but at the international level it is certainly not a legally binding international arbitral award for any of the Parties to the present case.

305. However, notwithstanding its rejection of the Bahraini characterization of the 1939 British "decision" as an arbitral award or adjudication with the force of *res judicata*, the present Judgment finds that Bahrain has sovereignty over the Hawar Islands by virtue, precisely, of that British "decision". It does so through a construction based upon a formalistic reading of some letters which, in my opinion, is incomplete and legally erroneous. In effect, for the majority of the Court, the 1939 British "decision" (the Judgment does not add any epithet to the term "decision") is a decision with permanent legally binding effects for the Parties in the present case by virtue, apparently, of the *consent* given in 1938 — according to the Judgment — by the Ruler of Qatar and the Ruler of Bahrain to the British procedure of 1938-1939 relating to the Hawar Islands. There is no doubt that this finding poses a number of questions of international law. I intend to state my opinion in some detail on the major ones in the following paragraphs.

306. In the first place, it must be said that it is the manner in which the Judgment determines the consent of the Rulers in the 1938-1939 British procedure which leads to the conclusion of the majority. The method used to ascertain consent consists in approaching the question, in particular the issue of the Ruler of Qatar's consent, in a relatively abstract manner, in other words detached from the background to the 1938-1939 British procedure and the circumstances surrounding the participation of the Ruler of Qatar in that procedure. The significant events of 1936 and 1937 to which I will refer below play no major role in the determination by the Judgment of the Ruler of Qatar's consent to the said procedure. Moreover, the Judgment totally ignores the impact on this issue of a series of "legal details" such as, *inter alia*, the fact that the Ruler of Qatar was the holder of the original title to the Hawar Islands as recognized by Great Britain up to 1936, as well as the oil negotiations at the origin of the alteration, in 1936, of Britain's previous recognition of the Hawar Islands as a part of the territory of the Ruler of Qatar.

307. It is true that Bahrain's first written claim to the Hawar Islands in 1936 preceded the alleged consent to the British adjudication of 1938-

1939 by the Ruler of Qatar and, consequently, the fact of the lateness of Bahrain's claim does not intervene as such in the particular question of verifying the reality of the consent of the Rulers to the said procedure. But it is likewise true that the facts referred to above are of fundamental importance to analysing the validity of the 1939 British "decision", as well as the merits of Bahrain's related submissions and arguments. One should not confuse the 1938-1939 British procedure on the Hawar Islands with the present proceedings before the Court. In any case, the 1939 British "decision" is not by its very nature a decision binding the Court in the present case. International law speaks with a different voice on the dispute over the Hawar Islands than the 1939 British "decision" and the latter is by no means a legal obstacle preventing the Court from ruling on the merits of that dispute in accordance with international law.

2. Events to be taken into account in determining the legal effect of the 1939 "decision" for the Parties

308. Reverting to the analysis made in the Judgment, we first note with satisfaction that the reasoning of the Judgment begins by stating that: *"In order to determine the legal effect of the 1939 British decision, the events which preceded and immediately followed its adoption need to be recalled"* (para. 117 of the Judgment; emphasis added). Yet our satisfaction with that statement was short-lived, because the events actually taken into account by the Judgment began on 10 May 1938 (para. 118 of the Judgment) and ended on 18 November 1939 (para. 135 of the Judgment). No event before 10 May 1938 or after 18 November 1939 is taken into account by the Judgment for its determination of the issue of consent to the 1938-1939 British procedure. In the light of the information and evidence in the case file, I find this lacuna very surprising. That is to say that I have found no legal or logical explanation to justify such a lacuna because the case file contains quite a number of other relevant events having a bearing on the consent issue.

309. The need to take into consideration events before and after the above-mentioned dates is, in my opinion, quite fundamental to determining: (1) the scope of the British Government's power or competence to adopt a "decision" with binding legal effects for Qatar and Bahrain; and (2) the validity or invalidity of the Ruler of Qatar's consent to the 1938-1939 British procedure however it is characterized.

310. Recalling the relevant events of 1936 and 1937 is therefore fully in order. Without some information on them, the 1938-1939 British procedure and the 1939 British "decision" cannot be understood in the light of Great Britain's position for decades on the extent of the respec-

tive territories of Qatar and Bahrain. The purpose of the whole diplomatic operation beginning in 1936 was to enlarge the potential amount of "Bahrain oil" by artificially — and in the face of Qatar's original title — enlarging the "territory of Bahrain", on condition that a share of any new "Bahrain oil" would be allocated to the Anglo-Iranian Oil Company through its subsidiary the PCL. This explains why some aspects of the entire operation only began to be disclosed to the Ruler of Qatar in 1938, namely when the real decision (the British provisional decision of 1936) had already been taken and the situation in Jazirat Hawar was already somewhat modified by Great Britain thereby permitting the 1937 clandestine occupation of the northern part of that island by Bahrain. The reference in the minutes of *30 December 1937* by Rendel, of the Foreign Office, to the effect that "as regards to the Hawar Islands . . . I cannot help regretting that the India Office went so far as they seem to have done in *allotting these islands to Bahrain*" (Reply of Qatar, Vol. 3, Ann. III.56, p. 351; emphasis added) deprives the "British 1938-1939 procedure" of any legal import in international law as a meaningful procedure aimed at a "decision" with permanent binding legal effects for the participating Rulers.

311. Thus, the actual British decision on the Hawar Islands, namely the *1936* British "provisional decision", was taken without the consent and/or knowledge of the Ruler of Qatar. The confidential Foreign Office minutes of 10 June 1964, entitled "sovereignty over Hawar Islands" and signed by G. C. W. Long, retrospectively describe the events leading to the adoption of that decision as follows:

> "3. The first stage was from April to July, 1936. In a letter dated April 28, 1936, (E 3439) the Political Agent, Bahrain, reported that Bahrain, *stimulated by prospective oil concessionaires, had put forward a claim to Hawar*. He observes that "it *might . . . suit us politically to have as large an area as possible included under Bahrain*'. The Political Resident supported this *attitude and the matter was discussed, together with related oil questions, at a meeting in Whitehall.* As a result, in a letter to Mr. Skliros of Petroleum Concessions Limited, dated July 14, 1936, it was stated that "on the basis of *the evidence at present before H.M.G. it appears* that Hawar belongs to the Shaikh of Bahrain, and that the *burden of disproving his claim* would lie on any other potential claimant'. (E 4490)." (Reply of Bahrain, Vol. 2, Ann. 2, p. 2; emphasis added.)

Other documents in the case file confirm the accuracy of Long's description above.

312. In fact, no events prior to 1938 were disclosed to the Ruler of Qatar at the relevant time or to general public opinion either by the

British representatives or agents concerned or by the Ruler of Bahrain. Even the occupation by Bahrain in 1937 of the northern part of Jazirat Hawar made under the "umbrella" of the 1936 British "provisional decision" was a clandestine event. Regarding the actual conduct of the Ruler of Bahrain, a confidential letter of Gastrell, British Political Agent at Bahrain, to the British Political Resident in the Gulf, dated *30 July 1933*, indicates that, as regards the designation of the area of the new Bahraini concession, the Sheikh of Bahrain and his son objected to the "islands" being shown by name. They explained, according to the letter, that the islands off Qatar were the cause of this hesitancy (here the Sheikh added that the Foreign Office knew these islands were dependencies of Bahrain and that there was a 90-year-old agreement somewhere to this effect) and, therefore, to avoid any misunderstanding caused by the omission of these islands, they would like the area to be called "Bahrain Islands" (Memorial of Qatar, Vol. 6, Ann. III.87, p. 448). The Court has no evidence at all of the said 90-year-old Agreement mentioned in 1933 by the Ruler of Bahrain to the British Political Agent at Bahrain.

313. In any case, the denomination suggested by the Ruler of Bahrain was accepted by the Political Resident in a telegram of 31 July 1933 to the Foreign and Political Department of the Government of India, who pointed out however that "Hawar Island is clearly not one of the Bahrain group" (Memorial of Qatar, Vol. 6, Ann. III.88, p. 451). The written claim of Bahrain on the Hawars of 28 April 1936 enumerated a number of the claimed islands. But still on 5 July 1937, the British Political Agent in a memorandum asked Belgrave to inform him "what the Bahrain Government consider[s] the *Bahrain Archipelago* consists of" (Memorial of Bahrain, Vol. 6, Ann. 333, p. 1454; emphasis added). To this query, Belgrave answered that "in addition to the large islands forming the Bahrain archipelago, which are well known, the following islands belong to Bahrain", listing, *inter alia*: *"The H[a]war archipelago, consisting of nine islands near the Qatar coast"* (*ibid.*, Vol. 6, Ann. 334, p. 1455; emphasis added). The Ruler of Qatar was at no moment informed of these exchanges.

314. The Ruler of Qatar was not informed either of quite a number of other relevant events which took place after 1933 and before 1939, as proved by the evidence in the case file relating to the negotiations on the Bahraini "unallotted area" (see, for example, a letter from Belgrave with enclosed maps dated 8 June 1938, to the British Political Agent at Bahrain (Supplemental Documents of Bahrain, Ann. 9, p. 88)). In fact, the idea of claiming the Hawar Islands as part of the territory of Bahrain would appear to have been suggested to the Al-Khalifah Rulers probably in about 1933 by some representatives of the American oil companies participating in the negotiations concerning a new Bahraini oil concession relating to the so-called "unallotted area". At the time, those private

American interests believed that there was oil in the Hawar Islands. It took them some time to realize that this was not the case, but, by then, the 1936 Bahraini claim to the Hawar Islands and the 1936 British undisclosed "provisional decision" were already political facts of life. Thus, after about 150 years of silence by the Al-Khalifah Rulers of Bahrain concerning the Hawar Islands (see Section A of this part of the opinion), their silence was suddenly broken in 1936 for reasons which had nothing to do with Bahrain's original title to the Hawar Islands as claimed by it in the current proceedings. The 1936 Bahraini claim was a response to other reasons and expectations on the part of both Bahrain and Great Britain.

315. The evidence defeats any possible allegation of Bahrain's fairness in the events preceding the 1938-1939 British procedure. Belgrave, Adviser to the Ruler of Bahrain, was a participant in the British representatives' operation aimed at making the Hawar Islands part of the Bahraini "unallotted area". The letter from Skliros of the PCL of 29 April 1936 relating to negotiation with the Ruler of Bahrain on the "Bahrain unallotted area" confirms this. Skliros's letter indicates that the Ruler "has commenced by claiming that the Island of Hawar is part of his dominions" (Memorial of Qatar, Vol. 7, Ann. III.104, p. 21). It is precisely in this letter that Skliros asks Walton of the India Office the question: to whom does the island belong? At that moment, Skliros had no doubt that, because of its location, the island belonged to Qatar and that it was included in the 1935 Qatar oil concession to the PCL, and made the following interesting observation:

> "The island is shown on the official map of Qatar which was signed by the Sheikh of Qatar and by Mr. Mylles and which forms part of the Qatar Concession. *This map, I believe, was seen and approved by the Political Resident, and, perhaps, the India Office. All this points to its forming part of Qatar and not of Bahrain.*" (*Ibid.*; emphasis added.)

However, when in July 1936 Skliros was informed of the British "provisional decision" of 1936 the PCL decided to participate fully in the operation aimed at making of the Hawar Islands part of the "Bahraini unallotted area". The position adopted by BAPCO in response finally made the whole affair a complete fiasco for the British officials concerned and for PCL. The last letters in the case file exchanged between the British officials on this episode, with its various alternative proposals, are frankly pathetic, the practical result of the operation being a territorial truncation of the area of the 1935 Qatar PCL concession without compensation and, above all, an assault on the territorial integrity of the State of Qatar as hitherto recognized by Great Britain.

3. Was the British Government in 1938 empowered to make a "decision" with legally binding effects under international law for Qatar and Bahrain in their mutual relations?

316. In this connection, it must be underlined that, in the absence of an applicable principle of general international law (i.e., the *uti possidetis juris* principle, see below), or of a quite *specific* conventional rule (i.e., in the conventions and agreements then in force between Great Britain and Bahrain and Great Britain and Qatar), or of a previous agreement to that effect *between* Bahrain and Qatar (inexistent), the power or authority of the British Government to decide, in 1939, with legally binding effects under international law, title or sovereignty over the Hawar Islands had indeed to be based upon the *ad hoc* consent of both the Ruler of Qatar and the Ruler of Bahrain having the same object and purpose. And in both cases consent must be valid informed consent freely given according to international law.

317. The consent actually given by each of the two Rulers to the 1938-1939 British procedure is therefore, in the first place, an indispensable legal requirement for determining the power or authority of the British Government in 1939 to adopt a "decision" on the Hawar Islands, as well as the legal effects of the "decision". Thus, what is at stake in the consent issue is not only the question of the existence and validity of the Ruler of Qatar's consent to the 1938-1939 procedure but also, and above all, the legal power or authority of the British Government, on the outcome of the procedure concerned, to take a "decision" *with legally binding effects in international law* for Qatar and Bahrain regarding title or sovereignty over the Hawar Islands.

318. Moreover, I am unable to regard as legally correct a proposition to the effect that possible consent by a party to a given procedure of settlement implies, without further ado, consent to be legally bound by the outcome of the procedure concerned. I do not see in the Ruler of Qatar's letters referred to in the Judgment any consent on his part to be *legally* bound in international law by the future "decision" of the British Government on the Hawar Islands. Nor does the Court have any proof that the Ruler of Bahrain assumed such an undertaking vis-à-vis the British Government. That Bahrain consented to the British procedure, as stated in the Judgment, might be induced from its conduct, but there is no written evidence of Bahraini consent to the British procedure in writing. Furthermore, there is no evidence of any kind whatever of any agreement concluded between both Rulers defining the jurisdiction of the British Government and assuming the *inter se* obligation that the future British "decision" would be legally binding

for Qatar and Bahrain in their mutual relations.

319. In any case, the consent of the Ruler of Qatar was not given explicitly, as regards the British Government's power to adopt a decision which would be a legally binding decision for Qatar in international law. The passage in the Ruler of Qatar's letter of 27 May 1938 requesting Weightman, as British Political Agent in Bahrain:

> "to stop the activities and interferences which the Bahrain Government are undertaking in Hawar Islands until the matter is decided by His Majesty's Government in the light of justice and equity as you have said in your letter" (Memorial of Qatar, Vol. 7, Ann. III.157, pp. 289-290)

is by no means an undertaking to accept a political or other decision with legally binding effects in the international law on title or sovereignty over the Hawar Islands. What the Ruler was asking of Weightman was "to stop the activities and interferences which the Bahrain Government are undertaking in Hawar Islands", namely to stop the effects of Bahrain's clandestine occupation of the northern part of Jazirat Hawar in 1937. The second part of the sentence is a reference to Weightman's letter of 20 May 1938 and not an acceptance in advance by the Ruler of Qatar that the future decision of the British Government would be a *legally binding decision* on title or sovereignty under international law.

320. In its reasoning, the Judgment assumes that the consent of the two Rulers was a consent given by them to be legally bound in law by the future "decision" of the British Government. This is inferred by the Judgment through an interpretation of the relevant letters of the Ruler of Qatar and, apparently, from the conduct of the Ruler of Bahrain who took part in the 1938-1939 procedure. I cannot share this inference endorsed by the majority of the Court. What is at stake here is the *principle of consensuality*, namely a principle of international law of paramount importance for determining competence of a third, the British Government in this case, in matters relating to any kind of peaceful settlement of disputes between States, a principle in whose application and interpretation the Court has been particularly strict until the present Judgment. I am therefore in total disagreement with the implied conclusion of the Judgment on the scope of the power or authority of the British Government in 1939 to make a "decision" with legally binding effects for the Parties under international law.

4. Did the Ruler of Qatar accept the 1939 British "decision" as a legally binding decision for him under international law?

321. It follows from the above that, without the subsequent consent of the Rulers, the 1939 British "decision" is not internationally opposable as law to Qatar or to Bahrain before the International Court of Justice. Only by the acceptance of both Qatar and Bahrain could that "decision" become binding law in the relations between the two States; and this is not because the "decision" is an international arbitral award with the force of *res judicata,* which it is not, but as a result of the legal effects in international law of the *principle of consent.* However, the Ruler of Qatar protested immediately he was notified of the "decision" of 11 July 1939. Additional protests against the decision were subsequently made by the Ruler of Qatar, for example, on 4 August 1939 (Memorial of Qatar, Vol. 8, Ann. III.211, p. 49), on 18 November 1939 (*ibid.*, Vol. 8, Ann. III.213, p. 59), and again on 7 June 1940 (*ibid.*, Vol. 8, Ann. III.219, p. 85).

322. The Ruler of Qatar further protested against the 1939 British "decision" on the Hawars in a letter of 13 July 1946 (*ibid.*, Vol. 8, Ann. III.245, p. 203) and renewed his protest against the "decision" in a letter to the British Political Agent of 21 February 1948, on the occasion of the notification of the 1947 British sea-bed dividing line (*ibid.*, Vol. 8, Ann. III.259, p. 277), as well as in 1965. Thus, since 1939 the Ruler of Qatar has reiterated his protest at intervals and in any case, in his letter of 18 November 1939 to the British Political Resident, Prior, made a patently clear and comprehensive reservation of his rights to the Hawar Islands. Those protests, and subsequent Qatari efforts to put the dispute to peaceful international means of settlement (arbitration in the 1960s; mediation and judicial settlement later on) negate any implication of acquiescence on the part of the Ruler of Qatar in the 1939 British "decision" as a legally binding decision in international law independently of its characterization, as well as with respect to the clandestine occupation of the northern part of Jazirat Hawar by Bahrain in 1937.

5. Was the Ruler of Qatar's consent as determined by the Judgment informed consent to a meaningful procedure freely given?

323. Consent to any kind of peaceful settlement procedure, as to the Court's jurisdiction, must be explicit consent freely given. It is not to be presumed, in particular, where essential relevant information was all along concealed from the party giving consent. Is it reasonable to believe

that the Ruler of Qatar would have referred to "justice" and "equity" if he had been aware of the British "provisional decision" of 1936 and of the active contribution of some of the British representatives in the Gulf, including Weightman and Fowle, to the performance of that decision in the field as was the case in 1936-1937? Where the Ruler of Qatar is concerned, Great Britain recognized him, in May 1938 as before, namely as the Ruler of the whole of Qatar; and Britain had guaranteed the integrity of his territory by the 1916 Anglo-Qatari Treaty and the assurances of the 1930s linked to the 1935 Qatari oil concession. There was no informed and free consent by the Ruler of Qatar to the procedure. The procedure was imposed upon him through fraudulent conduct, political and diplomatic pressures by British political agents in the Gulf, and the fact that the British had allowed the clandestine occupation in 1937 of a part of his territory by Bahrain, namely Jazirat Hawar. Bad faith, fraud and coercion were very much present in this sad episode.

324. As shown by the letters quoted in the Judgment — and by other evidence in the case file — the so-called "consent" of the Ruler of Qatar to the 1938-1939 British procedure was undoubtedly imposed upon him as indeed recognized, after 1939, by certain British political representatives and officials, as well as legal advisers and officers of the British Foreign Office. Prejudgments, misinformation, fraudulent conduct and coercion are part and parcel of the circumstances surrounding this "consent". I find that all these circumstances are proved, beyond any reasonable doubt, by the British documentary evidence before the Court. Sixty years after 1939, this documentary evidence is also in the public domain. It is not possible for me to ignore this proof of misinformation, fraud and coercion.

325. The Ruler of Qatar was in fact forced to participate in the 1938-1939 British procedure. No alternative device was left to Him. Thus, "consent" without freedom of choice is no real or actual consent. It is something else. It is true that, in 1938, he submitted to the British Government a claim concerning the Hawar Islands, a part of his territory recognized by that Government until that very moment, yet he knew nothing about the British "preliminary decision" of 1936. Moreover, his "consent" to submit such a claim was the result of pressure put upon him by informing him of the following:

(1) that as a result of the formal occupation of the "Islands" for some time by the Bahrain Government, the latter possessed a prima facie claim to them;
(2) that His Majesty's Government did not intend to stop or put an end

to the interferences and activities of Bahrain in Jazirat Hawar, as requested by the Ruler of Qatar;

(3) that the only path which remained open to the Ruler of Qatar was to himself submit a formal claim to the Hawar Islands; and

(4) that His Majesty's Government would view with displeasure any direct action by the Ruler of Qatar to recover physical possession of the Islands.

I find that the interplay of these elements constitutes in international law what amounts to a form of coercion on a Head of State, the Ruler of Qatar in the present case.

326. If, as endorsed by the Judgment, there was consent, or implied consent, by the Ruler of Qatar, that "consent" would be clearly vitiated consent by any standards of contemporary international law and, consequently, without permanent legally binding effects (see in this respect the *Dubai/Sharjah* Arbitration). But the Judgment affirms not only the existence of such "consent" but also its legal *validity* (see paragraphs 139-145 of the Judgment).

327. I do not deny that "consent" was given by the Ruler of Qatar to participate in the 1938-1939 British procedure as the matter was presented to him by Weightman. But whatever the scope of that "consent" to participate, it is void in law because, as indicated, it was not informed and freely given. In addition, it was not "consent" without conditions. As stated in Weightman's letter of 20 May 1938 and in the Ruler of Qatar's letter of 27 May 1938, His Majesty's Government would decide the matter *"in the light of truth and justice"*. The evidence in the case file proves to me beyond any reasonable doubt, that from its very beginning, the 1938-1939 British procedure did not meet the dictates of "truth" and "justice". Facts were concealed from the Ruler of Qatar throughout the procedure, as already indicated, and "justice" was not respected because, for example, the equality of the parties in the procedure was flatly ignored.

328. To begin with, the Ruler of Qatar's letter of 10 May 1938, following his oral protest of February 1938, is not part and parcel of the 1938-1939 British procedure. In his letter of 10 May 1938, the Ruler of Qatar did not ask for any British decision on his sovereignty over the Hawar Islands. On the contrary, as indicated above, the letter is a complaint against the Bahrain Government's interferences at Hawar. What the Qatar Ruler was asking of the British authorities was to stop those interferences or activities of the Bahrain Government at Hawar, because the Ruler was supposed to do so under the 1916 British-Qatari Treaty. Consequently, the letter of 10 May 1938 is a reaffirmation by the Ruler of Qatar of his country's sovereignty over the Jazirat Hawar. Even in his letter of 27 May 1938 — Qatar's formal claim within the British pro-

cedure — the Ruler of Qatar stated: "*I would submit my formal complaint against the steps taken by the Bahrain Government in islands belonging to others . . .*" (Emphasis added.)

329. The purpose of the Ruler of Qatar's appeal to the British authorities was just that. He was unaware at that time that the Bahraini activities and interferences at Hawar were made under the umbrella of the 1936 British "provisional decision" and were allowed and encouraged by the very British authorities in the Gulf with whom he was exchanging correspondence. Thus, when in his letter of 20 May 1938 Weightman informs the Ruler of Qatar that:

> *"It is indeed a fact that by their formal occupation of the Islands for some time past the Bahrain Government possesses a prima facie claim to them, but I am authorized . . ."* (emphasis added),

Weightman knew perfectly well:

(1) the meaning of the expression "formal occupation of the Islands", and
(2) that such an occupation described as "for some time past" means in fact as from 1937, and
(3) that the conclusion on the possession of a *"prima facie claim"* by Bahrain had been decided by the British in 1936 without any consent or participation by the Ruler of Qatar whatever.

330. The British Political Agent in Bahrain, Mr. Weightman, met the Ruler of Qatar in Doha in February 1938. However, he did not reveal to the Ruler of Qatar that Bahrain had already made a written claim to the Hawar Islands on 28 April 1936 and that in July 1936 Great Britain had already adopted a "provisional decision" in favour of the Bahraini claim. These three facts are proved in the present proceedings not by hearsay or affidavits, but by original British documents. Moreover, the 1936 "provisional decision" was made known to Belgrave, the adviser of the Bahraini Government and, therefore, to the Ruler of Bahrain, and communicated by letter of 14 July 1936 to Skliros of the Petroleum Concession Limited. Of all the interested parties, the only uninformed one was the Ruler of Qatar, as recognized by paragraph 54 of the Judgment (a paragraph included in the part of the Judgment which gives a brief account of the history of the present dispute as a whole, but the Judgment makes no reference to that fact in the paragraphs concerning the Hawar Islands dispute).

331. Thus, during the *two years* preceding the 1938-1939 British procedure, highly relevant events were concealed from the Ruler of Qatar.

Weightman did not even report in writing to his superior, the British Political Resident in the Gulf, Fowle, that the Ruler of Qatar had protested against news of activities by the Bahrain Government building and drilling for water on Hawar, or the Ruler of Qatar's assertion, as early as February 1938, that the Hawar Islands belonged to Qatar and that the Bahrainis had no *de jure* rights in Hawar (Memorial of Qatar, Vol. 7, Ann. III.150, p. 255). Weightman later claimed to have reported all this verbally to the British Political Resident, but the only written record of it is a letter dated 15 May 1938 forwarding a copy of the Ruler of Qatar's written protest of 10 May 1938 (*ibid.*, Vol. 7, Ann. III.152, p. 263).

332. Still more self-explanatory is Weightman's report on Hawar included in his "Intelligence Summary", in which he stated:

> "I visited Hawar Island on the 15th April [1938] and inspected the new Bahrain Police Post there. *The fact that no complaint has been received from the Shaikh of Qatar* while this very solid building was under construction is an interesting omission, apparently indicating his acceptance of Bahrain's rights in Hawar." (Reply of Qatar, Vol. 3, Ann. III.60, p. 374; emphasis added.)

In April 1938, Weightman thus saw for himself the Bahraini construction activities on the main Hawar Island yet his remarks totally ignored the oral protest by the Ruler of Qatar of February 1938. It is only in his letter of 15 May 1938 to the Political Resident, Fowle, drafted some three weeks after he had approved his "Intelligence Summary", that Weightman finally confesses that: "It is true that on my visit to Doha *in February* Shaikh Abdullah bin Qasim stated that he had received information that the Bahrain Government were building and were drilling for water in Hawar, which they had no right to do." (Memorial of Qatar, Vol. 7, Ann. III.152, p. 263; emphasis added.) Thus Weightman himself was finally forced to admit the complaint by the Ruler of Qatar, but in the intervening period Bahrain, with the help of British officials in the Gulf such as Weightman, tried to strengthen its claim to Hawar by developing as much *de facto* presence as possible in the northern part of Jazirat Hawar occupied in 1937 with the full knowledge of the said officials.

333. Thus, not only was the consent of the Ruler of Qatar not requested at all between April 1936 and May 1938 but his protests against what was occurring were flatly ignored at the very moment when Bahrain was allowed to establish itself in Jazirat Hawar. The first formal British request asking for the Ruler of Qatar's position appears in Weightman's letter of 20 May 1938 and was drafted in a way not far short of an ultimatum considering the time constraints put on the Ruler of Qatar:

> "My friend, I am sure you will realise how important it is that your formal claim, supported by all evidence which you can produce, should be sent to me at *the earliest possible moment*, and I trust you will use your best endeavours to ensure that there shall be *no delay in this.*" (Memorial of Qatar, Vol. 7, Ann. III.156, p. 282; emphasis added.)

When the Ruler of Qatar replied to Weightman by letter of 27 May 1938 (*ibid.*, Vol. 7, Ann. III.157, p. 287), Weightman and other British officials were actively proceeding, according to the documentary evidence before the Court, on the clear assumption that, as approved in the July 1936 "preliminary decision", for the British authorities the Hawar Islands already appertained to Bahrain! And the Ruler of Bahrain did likewise, as proved by documentary evidence concerning oil negotiations relating to Bahrain's unallotted area (see, for example, in this respect the enclosed map from a letter of Belgrave of *8 June 1938* to the British Political Agent, Bahrain (Supplemental Documents of Bahrain, Ann. 9)).

334. It follows from the foregoing that if there was legally valid consent by the Ruler of Qatar in 1938, as determined by the present Judgment, it was indeed a purposeless "consent", because it was a "consent" *without any meaningful object and purpose* and the British officials (like the Ruler of Bahrain) knew it to be such. Yet "consent" without an object and purpose is also "consent" without legally binding effects. The British Government's "decision on the matter", to use the language of Weightman's letters to the Ruler of Qatar, was in fact devoid of any content. Indeed, the "matter" was at that time fictitious. It had been decided by the British authorities in 1936!

6. Is the 1939 British "decision" a valid decision in international law?

335. The Judgment also assumes that the 1939 British "decision" is a valid decision in international law. I am of a different opinion. In the following paragraphs, this opinion therefore analyses the 1939 British decision *itself* (not the Ruler of Qatar's "consent") from the point of view of both its *formal validity* and its *essential validity* in law, account also being taken of the *truth* and *justice* criteria as part and parcel of the "obligation" assumed by the British Government vis-à-vis the Ruler of Qatar in order to get his "consent".

(a) *The defects of the 1938-1939 British procedure as a ground of the formal invalidity of the 1939 British "decision"*

336. The validity of a decision, whatever its characterization (arbitral,

political, administrative, etc.) consists of both "formal validity" and "essential validity" aspects. Both elements should be present for a decision or agreement to be binding or to have binding legal effect. In the present case, *formal invalidity* involves consideration of the possible defects of the 1938-1939 British procedure which was supposed to be carried out in "truth" and "justice". A review of this procedure, as it was applied, is therefore essential for us to be in a position to conclude as to the formal validity or invalidity of the 1939 "decision".

337. In general, the procedure devised by the British authorities, Fowle, Weightman and others, in close co-operation with Belgrave, adviser of the Bahrain Government, was intended from the very beginning to invert the respective roles of Bahrain and Qatar. Bahrain's claim of 28 April 1936, the first written one relating to Hawar Island should have made Bahrain the claimant party and in effect the very first British documents refer to "the claim of Bahrain *to the island of Hawar*" (emphasis added; see, for example, Loch's letter of 6 May 1936 to the British Political Resident in the Gulf, Memorial of Qatar, Vol. 7, Ann. III.106, p. 29). Soon, however, that term would be avoided. After the "1936 provisional decision" and the "1937 physical occupation" of the northern part of Jazirat Hawar, Bahrain is never presented as the claimant by the British documentation. The purpose of the procedure organized from 1938 to the "decision" of 1939 was clearly directed towards making Qatar the claimant State, reserving for Bahrain the role of a "respondent" allowed to submit a "counter-claim". I also consider this a serious departure from the fundamental principles of procedure devised by Fowle, British Political Resident in the Gulf, as well as from good faith. On the advice of the legal adviser to the Foreign Office in London, the Ruler of Qatar was formally allowed to submit a rejoinder on the "counter-claim" of the Ruler of Bahrain. However, the procedure was flawed throughout by the role played in it by Belgrave, adviser to the Ruler of Bahrain, as shown by the evidence in the case file.

338. From that evidence it appears in fact that Belgrave was permanently in touch with the British Political Agent in Bahrain from beginning to end of the 1938-1939 procedure, as in the years immediately before it. There are also formal breaches of the adopted procedure, such as Belgrave's "preliminary statement" of 29 May 1938, entitled "The Hawar Islands" (Memorial of Bahrain, Vol. 5, Ann. 261, p. 1106, and Memorial of Qatar, Vol. 7, Ann. III.158, p. 291) never communicated to the Ruler of Qatar, but listed in the Weightman Report on the "Ownership of Hawar Islands" of 22 April 1939 "as a document in this case" (see para. 2 (3) of the Weightman Report).

339. In the light of the documentary evidence submitted by the Parties

relating to the 1938-1939 British procedure as applied, I consider that Qatar has proved the following assertions to my satisfaction:

(1) bias on the part of certain British officials involved in the decision-making process;
(2) the failure of the British authorities to give full effect to the principle *audi alteram partem* in that process, in particular the fact that the Ruler of Qatar was never shown
   (i) a copy of the (uninvited) "preliminary statement" of Bahrain's case submitted by Belgrave on 29 May 1938 (see above), and
   (ii) other evidence relied upon by Weightman in his final report to Fowle of 22 April 1939;
(3) the absence of notification to the Ruler of Qatar of the Bahraini claim of 28 April 1936 and of the British Government's "preliminary decision" of July 1936 in favour of Bahrain (an instance of pre-judgment);
(4) the disparity in the length of time accorded to the two Rulers to prepare their written materials in spite of the protests of the Ruler of Qatar;
(5) the fact that none of the "evidence" tendered by Belgrave to Weightman on behalf of Bahrain was apparently subjected to critical scrutiny (a second instance of pre-judgment). Belgrave himself subsequently rectified some of his initial assertions regarding the so-called *effectivités* of Bahrain at that time with respect to the Hawar Islands.

340. I therefore dissent from the relevant conclusions of the Judgment on the defects of the 1938-1939 British procedure recorded in paragraphs 136-138 of the Judgment. And I also dissent from paragraph 140 of the Judgment which would appear to imply that the causes or grounds of formal invalidity would apply only to international arbitral procedures and awards. It should also be recalled in this connection that from 1939 onwards, British officials in the Gulf, such as Prior and Alban, considered the 1938-1939 procedure and "decision" as most unfair to Qatar (see, for example, Memorial of Qatar, Vol. 8, Ann. III.229, p. 129) and, in 1965, even the British Government appeared to agree to refer the matter to what was sometimes called a "neutral" international arbitration (Memorial of Qatar, Jurisdiction and Admissibility, Vol. II, Ann. I.58, p. 365).

341. The 1939 British "decision" is therefore vitiated by formal invalidity because of the identified defects in the 1938-1939 British procedure as actually conceived and applied. The allocation of the Hawar Islands to Bahrain made by that "decision" is consequently not opposable in law to Qatar in the present proceedings. This should have spared me the task of

going into the question of the *essential validity* of the 1939 British "decision", because the absence of one of the two elements of validity indicated suffices to render a decision invalid in law, international law included. However, the Judgment having concluded as to the formal validity of the 1939 British "decision", I am obliged to add below some additional considerations in order to explain why the said "decision" is also invalid from the standpoint of the requirements governing essential validity.

(b) *The internal contradiction and arbitrariness of the 1939 Weightman Report as a ground of the essential invalidity of the 1939 British "decision"*

342. The 1939 British "decision" was supposed to be a decision taken by the British Government in the light of truth and justice and the procedure was inspired, to some extent, by arbitration procedures. The Parties submitted written claims and counterclaims as well as evidence. Generally, though not exclusively, Qatar's claim was based upon the concept of *contiguity* and Bahrain's claim upon the concept of *effectivités*. As already explained, these standards and procedures set forth by the British authorities doubtless constituted a commitment of their own vis-à-vis the Parties, which cannot be dissociated from the "consent" that the British authorities obtained from the respective Rulers of Qatar and Bahrain.

343. The letters of 11 July 1939 communicating the British "decision" to the Rulers of Bahrain and Qatar were not reasoned but stated that the decision was made *"after careful consideration of the evidence"*. Moreover, the Court knows the grounds on which the 1939 British "decision" was made, namely *the Report of H. Weightman, British Political Agent, Bahrain, to Lt. Col. Fowle, British Political Resident in the Gulf, dated 22 April 1939*. It is in this Report that the "evidence" is supposed to have been carefully considered. Both Parties to the present case submitted the Weightman Report as an annex to their respective written pleadings and both of them considered that the Report constituted the basis of the "decision" made by the British Government. Other documents in the case file also confirm this position of the Parties. Furthermore, Weightman himself informed his superiors that he had made an exhaustive study of the evidence submitted by the Rulers and that, consequently, there was no need for enquiries going further than the considerations and conclusions presented by him in his Report (see also the endorsement of the Weightman Report by Fowle, British Political Resident in the Gulf, in his letter of 29 April 1939 to the Secretary of State for India in London, Memorial of Bahrain, Vol. 5, Ann. 282, p. 1173). The "decision" of the British Government communicated by the letters of 11 July 1939 is indeed a decision made on the basis of the considerations and conclusions of the Weightman Report. In other words, the merits of the 1939

British "decision" are to be found in the Weightman Report endorsed by Fowle.

344. This being so, examination of the Weightman Report in the light of the criteria applied in it becomes a matter of importance for determining whether the 1939 British "decision" is essentially valid in international law. The Weightman Report contains however a manifest major internal contradiction which, in my considered opinion, affects the essential validity of the 1939 "decision". There is also arbitrariness. Internal inconsistency and arbitrariness, as well as incongruity, are in law a cause or ground which may affect the essential validity and, therefore, the applicability of the decision concerned. This is recognized in the various legal systems of the world to the point of being a general principle of law (Art. 38 of the Court's Statute). It must be added that internal inconsistency may vitiate a decision independently of its judicial, administrative or political character. In the case of administrative or political decisions, these causes or grounds apply whenever the decision is based upon legal reasoning or presupposition, as happens to be the case of the 1939 British "decision" in the light of the Weightman Report.

345. In my opinion, the Weightman Report — which is a report evaluating evidence in the light of legal principles and reasoning — reveals some generally accepted grounds of essential invalidity. I do not see any "*incongruity*" in it, but certainly *internal contradiction* (inconsistency) and *arbitrariness*. The Report has internal contradiction, or inconsistency, because the evaluation of evidence in the light of the principles applied is inconsistent with its resulting conclusion. The Report is also characterized by arbitrariness, because it does not apply the same principles in the same manner to each of the parties, therefore ignoring the principle of the equality of the parties in the procedure.

346. The Weightman Report, and therefore the 1939 British "decision", does not reveal internal contradiction or arbitrariness with respect to Jazirat Hawar. This is so because the reasoning and conclusion on Jazirat Hawar is consistent. There are no internal contradictions or arbitrariness in that respect. To consider that, in the circumstances of the case, physical possession should prevail over geographical contiguity may certainly be wrong or questionable because of the flawed nature of the alleged Bahraini *effectivités* prior to 1937, because the Bahraini occupation of the northern part of Jazirat Hawar in 1937 was indeed, *inter alia,* very recent in 1938-1939, as well as for other reasons to be explained below in this opinion. But there is nothing contradictory or arbitrary in the application made by the Weightman Report of the principle of effective possession. In this respect, the Report analyses in detail, point by point, the arguments and evidence submitted by the parties concerning Jazirat Hawar, reaching a consistent conclusion. The admission of the

existence of the Bahraini *effectivités* in Jazirat Hawar together with the finding of the absence of Qatari *effectivités* on that island leads the Report — without contradictions or arbitrariness — and in the light of the effective possession principle applied, to the conclusion that Jazirat Hawar belongs to Bahrain.

347. Where the Weightman Report errs, contradicts itself and discriminates between the parties is in the reasoning and conclusions concerning the Hawar Islands other than Jazirat Hawar. In this respect the Report limits itself to stating the following:

> "The small barren and uninhabited islands and rocky islets which form the complete Hawar group *presumably* fall to the authority of the Ruler establishing himself in the Hawar main island, particularly since marks have been erected on all of them by the Bahraini Government." (Paragraph 13 of the Weightman Report *in fine*; emphasis added.)

Here, the Weightman Report recognizes that there were no Bahraini *effectivités* or activities in the Hawar Islands other than Jazirat Hawar. But it applies to those islands the principle of proximity or contiguity to Jazirat Hawar, presuming effective possession by Bahrain of the other islands.

348. The benefits of presumed effective possession, based upon the principle of geographical proximity or contiguity, are however denied to Qatar notwithstanding:

(a) the contiguity or proximity of those Hawar Islands to the Qatar mainland;
(b) the absence of any Bahraini occupation or *effectivités* in those islands;
(c) the invocation by Qatar of that principle in the procedure, as recognized by the Weightman Report; and
(d) the presumption of international law concerning sovereignty over islands or groups of islands situated wholly or partly in the territorial maritime belt of a given State.

There is therefore an internal contradiction and a double standard in the application of the principle of presumed possession on the basis of geographical proximity or contiguity.

349. The proximity or contiguity of the other Hawar Islands to the Qatar Peninsula is not even considered or referred to in the Weightman Report. The internal contradictions and arbitrariness of the Weightman Report is therefore obvious in this respect and certainly affects in law the 1939 British "decision". The concept of "group" of islands referred to by Weightman in his own "presumption" does not make good the defects of the internal contradiction and double standard in applying the same principle of law to Qatar and Bahrain, because the occupation by Bahrain of

the northern part of Jazirat Hawar took place only in 1937; and, as stated by Huber in the *Island of Palmas* case:

> "As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, *the act of first taking possession, which can hardly extend to every portion of territory,* and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory." (United Nations, *Reports of International Arbitral Awards*, Vol. II, p. 855; emphasis added.)

350. In 1938-1939, the display of continuous and prolonged sovereignty by Bahrain was not possible on any island other than on Jazirat Hawar occupied in 1937; nor did it occur. The Weightman Report acknowledges this by mentioning only the "marks" erected by Bahrain on the islands. But beaconing is not accepted in international law as a display or manifestation of sovereignty, and the Weightman Report does not characterize those "marks" as *effectivités* either. In fact, several decades after the 1937 occupation of part of Jazirat Hawar, the *absence of Bahraini* effectivités *in the Hawar Islands other than Jazirat Hawar continued to be a fact, as recognized by Bahrain itself in the present case* (see Map No. 4 submitted by Bahrain in Vol. 7 of its Memorial). Since 1937, the *effectivités* of Bahrain on Jazirat Hawar have been considerably developed, including after the institution of the present proceedings, but none in relation to any of the other Hawar Islands. In the present proceedings, as in 1938-1939, no Bahraini *effectivités* on the Hawar Islands other than Jazirat Hawar have been submitted by Bahrain.

351. Moreover, the erroneous and discriminating application of the principle of presumed effective possession made by the Weightman Report cannot be explained by a lack of knowledge of the law. As already explained, Weightman was aware of the presumed effective possession principle of international law in the case of unoccupied islands or groups of islands located wholly or partly in the territorial maritime belt of a given State. However, he did not apply this standard to Qatar's claim in so far as the Hawar Islands other than Jazirat Hawar are concerned. He chose to apply proximity or contiguity to Jazirat Hawar and not to the Qatar Peninsula or mainland. In our opinion, such inconsistency and arbitrariness affect in law the essential validity of the 1939 British "decision".

352. The three grounds constituting essential invalidity referred to in paragraph 345 of this opinion are not supposed to operate in a cumulative manner. The verification of one of them suffices. We have found two,

namely internal contradiction (inconsistency) and arbitrariness. What in such circumstances is the sanction of the law? The invalidity of the decision as a whole and not only of those parts of the decision to which the inconsistency and/or arbitrariness relates. Consequently, from the standpoint of the legal requirements concerning essential validity, the 1939 British "decision" as a whole is an invalid decision in international law. In conclusion, I reject the plea of Bahrain based upon the 1939 British "decision" because such a decision is also essentially invalid, a point of law of the utmost importance for this case and one on which the present Judgment remains absolutely silent.

353. In conclusion, for all of the reasons explained above, I dissent from the finding of the present Judgment regarding sovereignty over the Hawar Islands, which is exclusively based upon the 1939 British "decision" relating to those islands.

C. *The* Effectivités *Alleged by Bahrain in the Hawar Islands Dispute as a Possible Source of Derived Title*

354. With respect to the Hawar Islands dispute, Bahrain invoked, pell-mell, a number of the most disparate events which it characterized as *effectivités* capable of somehow generating title to territory under international law and, among them, certain "private acts" and links with the Dowasir which, in a mysterious unexplained way, would replace in the case the principles of effectiveness as applied in international law for establishing a State's title to territory. Moreover, each alleged individual *effectivité* is expanded elastically in Bahrain's presentations like a kind of chewing gum in order to multiply its optical effects.

355. Bahrain's argument based on *effectivités* as a source of title over the Hawar Islands, does indeed pose legal questions. First, there is the question of the role played by the alleged *effectivités* in a title generating process when the territory concerned is not *terra nullius*. Bahrain certainly affirms that the *effectivités alleged by it* with respect to the Hawar Islands are able to generate title to the islands in favour of the State of Bahrain, a title which would prevail over the original title of the State of Qatar, as identified in Section A of the present Part of this opinion. But Bahrain did not put forward any legal argument as to how this might occur under international law, although it admits that the Hawar Islands were not *terra nullius* before 1937.

356. I am inclined to believe that, in fact, Bahrain tried simultaneously to attribute various legal effects to its alleged *effectivités* in the Hawar Islands. In Bahrain's general thesis on the Hawar Islands its alleged *effectivités* would be all-purpose *effectivités*, applying either to the process of ascertaining original title already considered, as well as to the determination of the existence of a Bahraini derived title. In this latter role, the

effectivités would as indicated above be an autonomous mode of acquiring title (or would be a title in themselves) without any major effort by Bahrain to identify the norm or norms to which those *effectivités* would have to be related to produce such a legal effect in international law.

357. This obliges me to recall the obvious, namely that even an admissible State *effectivité* is no more than a material manifestation of a given unilateral conduct of the State concerned, whose possible legal effects need to be defined *in concreto* in the light of the various circumstances and, first of all, of the operating norm or norms of international law relevant in the final analysis to an evaluation of the said unilateral conduct. The connection between the unilateral conduct manifest in an admissible *effectivité* and a given norm of international law is of paramount importance for ascertaining the possible legal effects of that unilateral conduct in international law. It is not at all the same thing to invoke an admissible *effectivité* in connection, for example, with the acquisition of title over a *terra nullius* through occupation as it is to invoke the same *effectivité* in order to transform an unlawful occupation of foreign territory into something else, namely into a lawful title under international law. (See in this respect the photographic evidence of construction development work by Bahrain on the main Hawar Island from 1958 onwards, in Reply of Qatar, Vol. 6, App. 4.)

358. In line with its all-purpose approach to the *effectivités*, Bahrain pays no attention to the moment, location, nature, etc., of the alleged ones. At the hearings, counsel for Bahrain argued, for example, that the most recent *effectivités* of that country in the Hawar Islands should be taken into account as an interpretation of Bahrain's title to the island, disregarding all manner of "critical dates", including the date of instituting the present proceedings before the Court, and the various status quo conventionally agreed by the Parties during the Saudi Arabia mediation. This obliges me also to draw attention to the long series of communications of *protest* submitted by Qatar to the Court concerning Bahraini activities in the Hawar Islands *pendente litis*. *I therefore reject Bahrain's argument based upon the assertion of its ties with the Hawar Islands since the 1939 British "decision".*

359. In this connection, it is also worthwhile recalling that, as already explained, the *effectivités* alleged by Bahrain in the Hawar Islands, are supposed to operate retroactively. Bahrain's first formal claim to those islands submitted to the British is dated 28 April 1936, a very late date indeed with respect to the period of consolidation and recognition of the original title of Qatar to the Hawar Islands. By 28 April 1936, Qatar's original title was already fully established and recognized as established, also by international conventions. In such circumstances, the first question which arises with respect to those *effectivités* — even if they were real and admissible — is how and why they could have the legal effect of displacing, without further ado, the previously established, consolidated

and generally recognized Qatari original title to the Hawar Islands without Qatar's consent.

360. As to *when* the alleged *effectivités* or activities were performed, the 80 items in the Bahraini list in the hearings are divided as follows: (1) pre-1900; (2) 1900-1930; (3) 1930-1938; and (4) 1939-2000. It is evident that those concerning 1939-2000 and some of those corresponding to the period 1930-1938, namely those resulting from the clandestine occupation on the main Hawar Island in 1937, are not admissible as evidence, quite independently of its proof. This already reduces the list of items to no more than about 30 at the most, including some duplications. Attention should mainly focus on the latter items because they relate to alleged activities prior to Bahrain's first written claim to the Hawars of 28 April 1936. Several of them have already been considered and rejected in this opinion in connection with the definition of Qatar's original title to the Hawar Islands, but we will not exclude them from further consideration in the present context. It should also be recalled that most of the listed items corresponding to the period between 1930 and April 1936 date from the period of the oil negotiations concerning the "Bahraini unallotted area", a very suspect period indeed in the light of the information provided in the case file.

361. Regarding the very important question of the *location* of the alleged *effectivités* or activities, it must be said that while Bahrain's arguments mention the Hawar Islands, namely the whole group, the evidence put forward by Bahrain in support of those arguments relates exclusively to *Jazirat Hawar*. Bahrain has not submitted any evidence of Bahraini *effectivités* or activities on any other islands in the Hawar group. In fact, it plainly admits that as regards those other islands, there are none, and have never been any Bahraini *effectivités*. Map No. 4 of Volume 7 of the Memorial of Bahrain (Merits), entitled "The Hawar Islands — Locations", already referred to above, is conclusive evidence for the present case of the location of the alleged Bahraini *effectivités* in the Hawar Islands. Even the "beacons" indicated on that map are not found on any of the islands forming the Hawar group.

362. It follows from the above that if the alleged Bahraini *effectivités* in Jazirat Hawar were real at the relevant time and admissible as generating title under international law, this conclusion would not apply to any islands in the group other than Jazirat Hawar. This is so, because the Hawar Islands are a coastal archipelago lying wholly or partly within the territorial sea belt of the peninsula of Qatar. In such circumstances, the treatment of the Hawar archipelago as a unit cannot be sustained in the face of the strong presumption of international law in favour of the sovereignty of the mainland State in the vicinity of the Hawar Islands. Thus,

in the present case, the Bahraini *effectivités* argument as an autonomous source of territorial title, if upheld, would lead directly to the attribution to the State of Qatar of all the islands in the group other than Jazirat Hawar. But, by its plea of *effectivités*, Bahrain is indeed claiming the Hawar archipelago as a whole!

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363. A few words on the definition of *effectivités* in international law before going on to analyse the nature of the activities alleged by Bahrain. A given *effectivité* may be invoked as a manifestation of title or as evidence of effective possession generating title. A typical example of the latter is the occupation of a *terra nullius*. But none of the Parties has pleaded that the status of the Hawar Islands was that of a *terra nullius*. Nor was this invoked either by Bahrain or by Qatar in the current proceedings or even during the procedure leading to the 1939 British "decision". Moreover, as stated by Charles De Visscher in his oral statement in the *Eastern Greenland* case: "*a region may only be considered as* terra nullius *if there is found to be a lack of general consent in favour of the exercise of some kind of sovereignty over this region*" (*P.C.I.J., Series C, No. 66*, p. 2794). For Charles De Visscher:

> "In law, the question whether a region must be considered as *terra nullius* or, on the contrary, must be considered as subject to a sovereignty is a question which, by its very nature, arises in connection with all States. It arises *erga omnes* and not from the standpoint of the particular relations which may exist between one State and another. When, for a long period, the community of States has consented to the exercise of the sovereignty of a State over a given territory, this sovereignty must be regarded as established; in fact, this general consent expresses the intention of the international community to consider this state of affairs legitimate. It implies that, in the eyes of the community of States, the sovereignty affirmed over a given territory by a State meets the required conditions; it is a form of international recognition. *It is deduced either from positive acts with a well-defined international scope, or from indisputable tacit consent.*" (*Ibid.*; emphasis added.)

364. We have already explained the "international recognition" in favour of Qatar's sovereignty over the Hawar Islands, manifested by positive acts and tacit consent, which existed long before the 1930s. It follows that, in the present case, any suggestion that the occupation of Jazirat Hawar by Bahrain since 1937 might be a possession capable of generating title — or of being considered equal to "title" (Huber's "as good as title") — must necessarily take into account, as a starting point

of the reasoning, the fact that, in 1937, the territory of the Hawar Islands was not *terra nullius*.

365. In the hearings, counsel for Bahrain underlined "*Bahrain's ties*" to the Hawar Islands, but this is not the true legal issue before the Court. The legal issue before the Court is "*Bahrain's title*" to the Hawar Islands, namely a question involving considerations of fact as well as of law. From a factual point of view, Bahrain invokes, for example, *(a)* different categories of acts and also *(b)* acts performed at different times. With respect to the law, as stated above, the *effectivités* are not title *per se*, but may come to generate title in given situations when so provided by international law.

366. The factual evidence of *effectivités* concerning the Hawar Islands presented by Bahrain is, to borrow the language of the *Eritrea/Yemen* Arbitral Award, "voluminous in quantity but . . . sparse in useful content" (para. 239). Most of the so-called examples of the exercise of authority are in fact examples of private activities, or questions relating merely to the existence or non-existence of ties of allegiance or nationality or recognitions invoked by third parties *rather than* acts of the exercise of authority by the State of Bahrain on the islands. Bahrain's presentation thus raises a problem of the definition of the term *effectivités*. Moreover, in many instances, the same factual event is presented under two or more different headings. And more often than not the evidence submitted in connection with a given event does not support the proposition for which it is relied upon by Bahrain. Bahrain also sometimes invokes as examples of "activities *on* the Hawar Islands" instances of activities performed in the Bahrain archipelago. In any case, as pointed out by the *Eritrea/Yemen* Arbitral Award, the *effectivités* alleged to be capable of generating title to territory must be measured against the following test of international law "an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis" (*Eritrea/Yemen* Arbitration (First Award), 9 October 1998, para. 239).

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367. The Hawar Islands being a territory *avec maître* in 1937, and the *maître* being Qatar, the invocation of *effectivités* as evidence of possession generating title, or capable of generating title, necessarily leads to an analysis of the circumstances surrounding the occupation concerned and, in the first place, to a consideration of its legality or illegality under international law. Bahrain's occupation of the northern part of Jazirat Hawar took place in 1937 and was effected by police or military forces and in a clandestine manner, under the "umbrella" of the undisclosed British "provisional decision" of July 1936, a decision known to the Ruler of Bahrain but never notified to the Ruler of Qatar.

368. This shows that the said occupation is not the result of a peaceful and continuous unchallenged exercise of State authority by the Ruler of Bahrain over the Hawar Islands before 1937, but something else. The events, as they occurred, prove at least four things: (1) there was no occupation of any Hawar island by Bahrain before 1937; (2) the effective possession of the northern part of Jazirat Hawar was not therefore continuous as from the eighteenth century or even from 1868 onwards; (3) the act of occupation of 1937 was not public and peaceful but a fraudulent clandestine act of force; and (4) the initial scope of effective possession resulting from the clandestine unlawful occupation of 1937 concerned only the northern part of Jazirat Hawar. Thus, ultimately, the Bahraini arguments based on *effectivités*, if upheld, would provide a ground not only for dividing the islands of the Hawar archipelago between the Parties, but also for the partitioning of Jazirat Hawar itself because the original title to the entire Jazirat Hawar belonged to Qatar.

369. The conduct adopted in 1937 by the Ruler of Bahrain was clearly, in my opinion, fraudulent conduct in international law by virtue of the manner, purpose and timing of the occupation. The duty to respect the territorial and political integrity of States was expressly mentioned in the Covenant and was well established in the general international law of the 1930s. It is not possible therefore to accept, in this respect, appeals to intertemporal law to remedy the illegality of the 1937 occupation. It is also hard to believe that the Ruler of Bahrain and also Belgrave did not know the territorial extent of the Ruler of Qatar's original title, in view of their close relations with the British officials in the Gulf involved in the operation concerning the unallotted area. In any case, the evidence before the Court allows us to conclude beyond any reasonable doubt that the British officials who tolerated or promoted the clandestine occupation of the northern part of Jazirat Hawar in 1937 knew perfectly well that the Hawar Islands fell within the scope of the original territorial title of the Ruler of Qatar *or were supposed to know it*. Indeed it is self-explanatory that the 1937 act of occupation of the northern part of Jazirat Hawar is the least recorded episode among those referred to in the contemporary voluminous documentation before the Court. Discretion is far from being a virtue in the present context.

370. Moreover, the 1937 occupation took place soon after Bahrain's first written claim submitted to the British on 28 April 1936. It was, therefore, an occupation based on a *pendente claim*. Bahrain did not wait for the 1939 British "decision", whatever its nature, validity or characterization, to occupy the northern part of Jazirat Hawar. It occupied the island by a clandestine act of force only a few months after its 1936 claim and a couple of years before the 1939 British "decision"! This also disqualifies that occupation — the assumption of a possible autonomous

source of title — as a title generating effective possession under international law.

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371. The principle of *consent* in its various forms and manifestations ("admission", "recognition", "acquiescence", other forms of "implied consent by conduct", etc.) may also, in international law, be a possible source of a derivative title to territory, perhaps capable of displacing a previous title of another State to the territory concerned. The practice of international courts and tribunals knows many instances of the application of the principle of consent as a source of a derivative title better than, or prevailing in the circumstances of the case over, a previous title. But of course, in no case may the principle of consent displace the previous title if the reality of such consent by the holder of the previous title is not proved in court.

372. For example, in the *El Salvador/Honduras* case, I applied the principle of consent when voting in favour of the sovereignty of El Salvador over the island of Meanguera in the Gulf of Fonseca. In that instance, Honduras was the holder of a previous 1821 *uti possidetis juris* title. Why did I conclude as I did? Because El Salvador, which claimed the island in 1854, manifested its presence in the island by a series of proven *State effectivités* during the last quarter of the nineteenth century and in the first half of the twentieth century without Honduras stating its opposition to El Salvador's presence in Meanguera as would be expected, in international law, of a State holding title to the island; and the case file was full of evidence of that absence of vigilant conduct on the part of Honduras. For me, Honduras's conduct amounted, in the circumstances of that particular case, to implied consent to or acquiescence in El Salvador's sovereignty over the island of Meanguera from the moment when such consent or acquiescence could be considered as established.

373. I see nothing of the sort in the present case. Qatar has always protested against Bahrain's illegal occupation of the Jazirat Hawar. There is not a single element of evidence of conduct by Qatar implying tacit consent to or acquiescence in the occupation of these islands by Bahrain. The Ruler of Qatar made an early verbal protest against both Bahraini interferences and activities in Jazirat Hawar as of February 1938 to Weightman, the British Political Agent, and a written one on 10 May 1938 and, later on, a protest against the 1939 British "decision" itself, as recorded in several documents filed and dated: 4 August 1939 (Memorial of Qatar, Vol. 8, Ann. III.211, p. 49); 18 November 1939 (*ibid.*, Vol. 8, Ann. III.213, p. 59); 7 June 1940 (*ibid.*, Vol. 8, Ann. III.219, p. 85); 13 July 1946 (*ibid.*,

Vol. 8, Ann. III.245, p. 203); and 23 February 1948 (Memorial of Qatar, Vol. 8, Ann. III.259, p. 277).

374. Qatar has continuously affirmed its title to the Hawar Islands and tried to find a peaceful means of settling this pending territorial question between Qatar and Bahrain. In the 1960s, there was even some British acknowledgment that the best solution would be to refer the matter to arbitration, but Bahrain did not accept this. The Court is aware of all the efforts since deployed by Qatar before and during Saudi Arabia's mediation to bring the question of sovereignty over the Hawar Islands before the International Court of Justice, as well as of all the objections raised by Bahrain regarding the jurisdiction of the Court and the admissibility of Qatar's Application. This is certainly not the conduct of a State having acquiesced in the 1937 occupation of Jazirat Hawar by Bahrain or in the 1939 British "decision".

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375. After filing its Memorial in the current proceedings, Bahrain no longer claimed the Hawar Islands on the basis of the evidence of "Arab historians from antiquity", because its main thesis was that it exercised sovereignty over the Hawar Islands as of the last quarter of the eighteenth century and not as of the eleventh and twelfth centuries or even before. Yet it continued to invoke as evidence the so-called "historical dominance over Qatar". However, the *Belgrave diaries* show that at no time during the ten years of his presence in Bahrain prior to 1936 (he assumed his first post in Bahrain in 1926) is there any mention of Belgrave's having anything to do with any Bahraini activity or *effectivités* relating to any of the Hawar Islands, nor is there any indication that Belgrave ever visited the islands prior to 1937. This is strong albeit indirect evidence that at that time the Ruler of Bahrain did not rule over any islands in the Hawars and was not interested in those islands, nor indeed ever was until 1936!

376. The Hawar Islands are mentioned for the first time in Belgrave's diaries on 23 April 1936, just when Bahrain decided to submit its first written claim in respect of the Hawar Islands to the British (Belgrave's letter of 28 April 1936). It was only after the "provisional decision" of July 1936 that Belgrave wrote of a number of visits to Hawar and of various Bahraini activities on Jazirat Hawar. All such activities stemmed from or were associated with Bahrain's clandestine and unlawful occupation in 1937 of the northern part of Jazirat Hawar. Thus, all activities or measures concerning the Hawar Islands involving Belgrave correspond to the *suspect period,* when fresh evidence was rapidly constructed in order to provide some formal basis for the forthcoming 1939 British "decision". I therefore reject the information concerning such activities and measures as admissible evidence of Bahrain's title to any of the islands. They were part and parcel of the 1937 occupation and shared with it the same unlawfulness in international law.

377. Furthermore, a comprehensive Administrative Report of the Government of Bahrain covering the years 1926-1937, prepared by Belgrave in 1937 and published in that year, makes no mention of the Hawars whatsoever either in relation to security, public works, agriculture or any other activities, in contrast with the islands forming the Bahrain islands group proper. Similarly, there is no mention of Hawar in any Official Annual Reports or Budgets of the Government of Bahrain until March 1937 to February 1938 (Reply of Qatar, Vol. 3, Ann. III.59, p. 361). These facts necessarily support Qatar's allegation that there was no Bahraini official presence or activity in the Hawar Islands before 1937. The Reports for subsequent years do record Bahraini activities on Hawar Jazirat following the clandestine and unlawful occupation of 1937. Until 1937, no estimates, no expenditures, no projects, no mosque, no fort, no barbed wire fence, no pier, no drilling of artesian wells, no water tanks, no surveying and mapping, no motor launch, etc., were necessary in the Hawars, simply because Bahrain was not present in the islands.

378. The above must be taken into account as must other elements, such as the fact that beaconing, aids to navigation and assistance to wrecked ships *(force majeure)* are not considered in international law as acts evidencing the exercise of sovereign authority over a given island or territory; that the testimony of Brucks's 1820 Report was written long before 1868; that the Ottomans who claimed the Bahrain islands for themselves never recognized the Hawar Islands as part of a Bahrain under British protection; that Great Britain held the same position from 1868 till 1936; and that, in addition, hearsay and affidavits of individuals not subject to cross-examination have no or minimal probatory force in the proceedings of this Court. If all this and other facts to be considered below are duly taken into consideration, one is entitled to ask: what remains of the alleged acts of authority evidencing the exercise of sovereignty by Bahrain on the Hawar Islands before 1937? The reply is clear: *the Dowasir* (as the Naim in Zubarah)!

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379. Some comments therefore on *the Dowasir*. Bahrain's thesis on the Dowasir and the Hawar Islands may be subdivided as follows: (1) the alleged occupation of the Hawar Islands by the Dowasir; (2) the Qadi's grant or permission to the Dowasir to occupy the Hawar Islands; (3) the Dowasir as subjects of Bahrain. As to the first question, Bahrain's contention is that the Dowasir tribe settled in Hawar at the beginning of the nineteenth century (more or less when the Wahhabis

were the dominant power in the whole area, including in the Bahrain islands).

380. There is no proof of the alleged Dowasir occupation of the Hawar Islands or of the recognition of such an occupation by anybody, except by Bahrain itself in the present case. Whether they were Bahraini "subjects" or not, there is no proof of the Dowasir's occupation in the case file. Nor has Bahrain proved that the Dowasir were the only fishermen to frequent the Hawar Islands. In international law seasonal visits and private activities cannot sustain a claim to sovereignty (see, as recent pronouncements on the matter, the Judgment of the Court in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* and the 1998 Arbitral Award in the *Eritrea/Yemen* case).

381. As to the second heading, the Qadi's grant of the Hawar to the Dowasir (the 1909 hearsay of Prideaux's letter), I have already expressed my opinion on this matter in other contexts. The Court has no evidence of such a grant and no such evidence was produced by Bahrain during the British "procedure" of 1936-1939, as recognized by Weightman. In such circumstances, as the International Court of Justice is not Mr. Weightman, the hearsay of the Dowasir Sheikh's cousin in Prideaux's letter cannot prove anything. On the other hand, Prideaux's letter also mentions that the island seems to be a dependency of the mainland State, as explained by Lorimer in the 1908 article on Qatar revised by Prideaux himself. In 1909, Qatar was the only "mainland State". The testimony of the cousin of the Dowasir Sheikh also mentioned that there was a Turkish gunboat in the area and that he was expecting an Ottoman visit.

382. There is also no proof whatsoever of the existence of an Al-Khalifah official in Zubarah in 1809 or thereabouts, a period of Wahhabi power and control, including over the Bahrain islands. The Al-Khalifah moved to the Bahrain islands in 1783, without leaving behind in Zubarah any kind of organized administration of their own. When describing the arrival of the Dowasir in the Bahrain islands in 1845, Lorimer makes no mention of Hawar, but states that the Dowasir who immigrated to Bahrain came from the Najd who arrived in Bahrain after spending several years on Zakhnuniya Island. Lastly, there is the question of the power of Qadis to make grants of land (not to mention grants of sovereignty!).

383. As regards the third heading referred to above, the Dowasir, according to Lorimer and others, were particularly independent as a community or tribe. They were certainly not at the relevant time in any kind of tribal "allegiance" with the Al-Khalifah Rulers of Bahrain, as proved by subsequent events. In any case, in 1923, because of encroachments on their status by the Ruler of Bahrain, the Dowasir simply left Budaiya and Zellaq on the main Bahrain island for the Dammam, a promontory in Saudi Arabia. This episode is interesting for several reasons.

384. For example, the Ruler of Bahrain did not prevent the Dowasir, his alleged "subjects", from leaving the country and the Dowasir did not go to their alleged granted land, namely to the Hawars. In fact, during the time that they remained at Dammam, the Dowasir fishermen would seem even to have ceased their seasonal fishing visits to Jazirat Hawar. No continuity either, therefore, in the seasonal visits to the Hawars by the Dowasir. After 1927 the Dowasir began to return to the Bahrain islands (not to Jazirat Hawar or to other islands of that archipelago) and they were still drifting back to Bahrain as late as 1933. The King of Saudi Arabia's letter of 6 April 1928 refers to the Dowasir as "our Duwasir subjects" (Counter-Memorial of Qatar, Vol. 3, Ann. III.34, p. 182).

385. In fact, the alleged allegiance of the Dowasir living on the main Bahrain island to the Ruler of Bahrain, which in any case is not in itself an act of authority in the Hawar Islands, is not mentioned in the only independent documentary evidence relied upon by Bahrain, namely the 1869 letter from the British Political Resident to the Dowasir tribe at Budaiya and Zellaq and the 1917 *Gazetteer of Arabia*. The alleged flying of the Bahraini flag by private individuals during the Eid festival is not an example either of the exercise of State authority, and there is no independent documentary evidence of that (beyond the affidavits submitted by Bahrain).

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386. In the Parties' pleadings, and during the hearings, the Dowasir argument and counter-argument is to some extent intermingled with a question of fact, namely with the question of the habitability at that time of the Hawar Islands and/or the permanent presence in Jazirat Hawar of a population (the so-called *"Hawar residents"*). Several items in Bahrain's list of "examples of the exercise of authority" are simply concerned with the alleged *presence* of the Dowasir and other non-Dowasir Bahrainis in Hawar. None of those items is therefore an example of acts of the exercise of authority by the State of Bahrain in the Hawar Islands. In Mallorca (Spain) there are several thousand permanent non-Spanish residents on the island without their residence generating title to the island in international law for their respective States.

387. One of the reasons for this alleged Bahraini evidence is to be found in the written claim of 28 April 1936 signed by Belgrave. In effect, Belgrave stated that "at least four of the larger islands are permanently occupied" (Memorial of Qatar, Vol. 7, Ann. III.103, p. 18). However, during the "procedure" of 1938-1939, Bahrain presented to the British alleged *evidence of presence only with respect to Jazirat Hawar*, namely on the island unlawfully occupied in part in 1937. This "little" contradiction, like several others in the 1938-1939 "procedure", had no effect at all on the conclusions of the Weightman Report which attributed not only

the Jazirat Hawar but the whole "group" to Bahrain, as had been decided by the British with effect from July 1936.

388. In the current proceedings, however, Bahrain concedes, contrary to Belgrave's claim on 28 April 1936 (and again on 22 December 1938 and 3 January 1939), 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." (Memorial of Bahrain, Vol. 1, p. 187, para. 419; see also p. 18, para. 52; the same is stated in affidavits.) Bahrain admits therefore that the visits to the Hawar Islands of the Dowasir living on the main island of Bahrain were only seasonal or for part of the year only. Qatar asserts also that the seasonal visits of certain Dowasir were not regular.

389. It appears that, for Bahrain, although the visits were seasonal, the settlement was nevertheless permanent. Very little indeed as a basis of title to territory, in particular when in accordance with tradition the islands of the Gulf could be visited by Arab fishermen or other persons from other Arab countries or tribes in the Gulf (see in this respect the Ruler of Qatar's statement of 27 May 1938, Memorial of Qatar, Vol. 7, Ann. III.157, p. 285). In his comments of 30 March 1939, the Ruler of Qatar also questioned the statement made by the Bahrain Government that the Hawar Islands were "inhabited by their subjects in a permanent manner" and described the situation in the Hawars as follows:

> "they are barren, without water and unfit as a pasturage for herds, and [were] in the past completely without inhabited buildings and by no any way can be called villages or anything that approaches the meaning of this word, and generally unfrequented except by fishermen who come from time to time, or who pull up their fishing boats (for a "dry' or repairs) temporarily . . . and who then leave" (Memorial of Qatar, Vol. 7, Ann. III.192, p. 453).

390. The *Persian Gulf Pilot* (1864-1932), Lorimer (1908) and Prideaux (1909) generally confirm the above description. In his marginal comments on the Ruler of Qatar's statement of 30 March 1939, Weightman himself admitted the widely prevalent custom that fishermen from around the Gulf followed the practice of visiting different islands to fish and were freely allowed to do so by the Rulers of the region. In any case, in his 1909 letter Prideaux did not mention having met in the Jazirat Hawar any group or groups of permanently resident Dowasir living in any kind of organized village.

391. Even Bahrain admits in the current proceedings that non-Dowasir Bahrainis were present in Hawar (Counter-Memorial of Bahrain,

Vol. 1, pp. 69-71, para. 159). Thus, the Hawars were not a kind of "domaine réservé" of the Dowasir who, in addition, lived there in villages and exercised jurisdiction and State functions on the island on behalf of the Ruler of Bahrain! Among those who temporarily frequented Jazirat Hawar were also Qatari fishermen, as evidenced by some references in documents and the Ruler of Qatar's complaint of 8 July 1938 regarding the detention by the Bahraini authorities of a Qatari subject and his boat (following the unlawful occupation) and Weightman's acknowledgment of it (Counter-Memorial of Qatar, para. 3.56). On the fishing activities in the Gulf governed by the Shariah/Islamic Law, see S. H. Amin, *Treatise on International and Legal Problems in the Gulf* (Reply of Qatar, Vol. 3, Ann. III.100, p. 617). In fact, the evidence produced by Bahrain to suggest permanent presence of the Dowasir at Hawar is the Weightman Report itself, a very suspect and contradictory document indeed! As to the presence of the "non-Dowasir Bahrainis" probably intended to show the continued presence of Bahraini subjects on the Hawars during the absence of the Dowasir, the members of the family referred to, the Al-Ghatam, seem to consider themselves as Dowasir.

392. Lastly, the example of the exercise of authority through the issuing of Bahraini passports to the "Hawar Islands residents" is only supported by Belgrave's unsubstantiated assertion made in the context of Bahrain's claim of the 1930s. Moreover, the persons concerned were also resident at Zellaq in the Bahrain islands. No evidence has been provided for Bahrain's assertion that the alleged "Hawar Island residents" were included in Bahraini censuses.

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393. In the light of the evidence submitted by the Parties on the matter, geographical information in the public domain and the oldest pictures taken on the Hawar Islands submitted to the Court, it is difficult to conclude other than that the Hawar Islands were quite barren and in the past unfit for permanent habitation. The main reason for this was probably the absence of any water supply in the islands. Bahrain's reply to this is that rainwater was collected in a number of cisterns and that additional needs were met by bringing water from Bahrain. In his report of 22 April 1939, Weightman simply accepted Bahrain's assertion (Memorial of Qatar, Vol. 7, Ann. III.195, p. 503). The number of cisterns alleged by Bahrain conflicts with the description of Lorimer and Prideaux. As to the water brought from Bahrain, the only evidence submitted is a letter from Belgrave to Weightman written during the suspect period.

394. That there were seasonal and temporary visits of fishermen to the

Hawar Islands seems proven to me. That among them were Dowasir fishermen resident on the main Bahrain islands and other fishermen from the Gulf, including Qataris, is also proven. That in addition the islands were also visited temporarily for hunting, like other areas on the mainland (e.g., Saudi Arabia or Qatar itself) is more than probable. But at the relevant times, there was no "genuine" population or tribe belonging to the islands, or Dowasir permanently resident in the Hawars, nor any activity or control by the State of Bahrain on any of the Hawar Islands before the limited occupation of 1937 (northern part of Jazirat Hawar).

395. The allegation that in 1873, the Ruler of Bahrain stayed on the Hawar Islands and helped to rescue some Ottoman soldiers is unproven. Belgrave's unsubstantiated note of 29 May 1938 and letter of 22 December 1938 were also drafted during the suspect period. Weightman reported questioning the old men on Hawar about the shipwreck incident. The evidence is only hearsay concerning an event which had perhaps happened 66 years previously. There is no evidence either that Sheikh Isa paid annual visits to Hawar or that such visits were in an official capacity and not, for example, for personal purposes such as hunting. The possible visits by Sheikh Salman bin Hamad (1942-1961) and the visits by Belgrave to Jazirat Hawar took place after 1937.

396. Furthermore, there is the evidence of the Alban's visit to the Hawar Islands in December 1940, after the British "decision" of July 1939 (Reply of Qatar, Vol. 3, Ann. III.94, p. 577). Alban reported seeing on the main Hawar Island 12 policemen ("naturs") and a few Dowasir in residence who apparently liked Jazirat Hawar in winter and returned to Zellaq in summer. No "permanent Dowasir residents" on the main Hawar Island even in 1940, nor the presence of a "genuine" population of the Hawar Islands, but a few seasonal residents, most probably Dowasir fishermen!

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397. As to the alleged British instance of recognition, the Bahraini items are the Brucks Report of the 1820s and the 1909 Prideaux letters. I have already stated my opinion on both. The first concerns a period before the emergence of Qatar as a separate political/territorial entity. The second expressed a personal view, not a "British recognition" of anything, as well as, in my opinion, providing a testimony completely at odds with Bahrain's proposition. The 1972 map of the British Director of Military Survey was of course published long after the 1939 "decision". The same applies to a 1991 map published by the US National Geographic Society. The Izzet map has no political significance as Ottoman recognition of the appurtenance of the Hawars to Qatar or Bahrain. An

Ottoman resolution of 19 April 1913 and the Secret Declaration annexed to the 1913 Convention relied upon by Bahrain mention only Zakhnuniya, and not Hawar. Lastly, it is hard to see how the Ruler of Qatar's letters of protest to Weightman on the occasion of Bahrain's clandestine and unlawful 1937 occupation can be read as instances of the recognition of Bahrain's jurisdiction and authority over any of the Hawar Islands.

398. The evidence of alleged instances of recognition by third States submitted by Bahrain is indeed very poor, to the point of being non-existent for the purpose of building up a positive case for Bahrain with respect to both original title and/or derivative title.

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399. Bahrain has also put forward some additional *miscellaneous general arguments* concerning economic activities, natural resources and wildlife preservation: trade with Bahrain; fishing; pearling; gypsum; water; oil exploration and exploitation; other natural resources; animal husbandry; and surveying. The associated evidence submitted is full of duplications. Pearling takes up some 4 items, gypsum 4 items, fishing 3 items, trade 2 items, water 2 items, oil 11 items, wildlife preservation 2 items. On trade with Bahrain the evidence provided is affidavits, a letter from Belgrave and the Weightman Report. I do not consider this to be independent evidence. As to pearling, it is admitted, even in the affidavits, that the Dowasir were in Zellaq for the pearling season. It is therefore quite natural that they were provided with logbooks and diving licences issued by Bahrain and with boats registered in Bahrain. As to fishing, it can hardly be said that fishing by private persons around or from Jazirat Hawar is an example of the exercise of authority by Bahrain. For the granting of rights, the only evidence (Belgrave's Note of January 1938) is subsequent to Bahrain's illegal occupation of 1937. With respect to the regulation of fishing, the evidence relied upon by Bahrain dates from after 1937 and, moreover, makes no mention of any such regulation.

400. Bahrain alleges that Hawar gypsum was quarried in the nineteenth and twentieth centuries, that it was sold in Bahrain, that gypsum-cutting permits were issued by the Bahrain Government, and that the trade in gypsum between the Hawars and Bahrain was regulated by the Government of Bahrain. The quarrying and sale of gypsum cannot be considered as acts of authority, as it was done by private individuals. There is no evidence either of any quarrying or of gypsum cutting before

1937-1938 and the later evidence consists only of affidavits, Belgrave's Note of 1938 and the Weightman Report. As to the water, the construction and maintenance of dams and water cisterns by the so-called "Hawar Island residents" is not an act of authority by Bahrain. The only evidence of governmental involvement dates from 1939, when "various cisterns were repaired". Similarly, the drilling for water occurred in 1938.

401. All the Bahraini activities invoked concerning oil exploration and exploitation occurred after the 1939 British "decision", such as the 1939 geological mapping of the Hawar Islands by BAPCO. In this connection, it should be noted that the APOC's geological mapping of the Hawars, as part of Qatar, was undertaken in 1933. It should also be noted that at least nine of the oil items in Bahrain's list are not at all examples of the exercise of authority by Bahrain on any Hawar island, but relate to the positions taken by various parties in the oil concession negotiations, including the 1936 British "provisional decision", or shortly before, in 1933, when a suggestion by Bahrain, already commented on, relating to the Hawar Islands and Qatar, prompted, *inter alia*, the British Political Resident's commentary that "Hawar Island is clearly not one of the Bahrain group". The general survey of Hawar was undertaken in 1939 and the document relied upon by Bahrain in connection with the alleged completion of a survey of villages and cultivated areas is a letter from the PCL which questions Bahrain's right to perform such a survey.

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402. Evidence of *public works*, about 14 items, relates to activities which occurred after Bahrain's occupation of the main Hawar Island in 1937. Some were made in support of Bahrain's claim during the British "procedure". They relate to houses and palaces, mosques, a guard post and fort, pier and navigational aids. The construction of houses by Sheikh Salman certainly dates from after 1939 because this Sheikh ruled from 1942 to 1961. The ruling family's palace was built in the 1940s, as acknowledged by Bahrain. The new mosque was built only in 1939. There is no evidence that the earlier mosque was built by the Bahrain Government. Bahrain admits that the new fort was built only in 1937 (it was completed by 1938). There is no evidence that the old fort was built by the Bahrain Government. The only mention of the ruins of an old fort occurs in the Weightman Report and the Costa Report. Lorimer does not mention the existence of a fort, nor does Belgrave in his various letters of claim. Nor is there any evidence either of the existence of a "guard post" before the new fort was built, namely before Bahrain's illegal occupation of 1937. Indeed, Belgrave acknowledged, in his letter of 22 December 1938, that "it is true that a military garrison was only posted there

recently, during the last two years" (Memorial of Bahrain, Vol. 5, Ann. 274, p. 1129). Bahrain admits that the pier was not constructed until 1937 (it was completed in 1938).

403. All the items concerning roads, a desalination plant, electricity, telecommunications, tourist facilities and the establishment of a sea shuttle service between Bahrain and Hawar, date from long after Bahrain's illegal occupation of Hawar in 1937. Regarding navigational aids, of which there are three items, the evidence shows that the markers were erected in 1937-1938 and not "during the 1930s" as sometimes stated by Bahrain. The evidence of the alleged "pipe" built north of Janan consists of affidavit statements by so-called "former residents" of Hawar.

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404. There is no evidence of a Bahraini *military or police presence* on the Hawars before 1937. The items which refer to a full defensive military complex and to the reinforcement of Bahrain's military presence date from 1941 and 1986 respectively. The earliest evidence provided with regard to coastguard activities dates from September 1991. There is no evidence for Bahrain's assertion that there was a police presence on Jazirat Hawar before the illegal occupation of 1937. The witness statement relied upon by Bahrain appears to refer to the post-1937 period. The visit of the Chief of Police would have occurred after 1937, since he "used to stay in the fort". There is no independent documentary evidence of either the public display of proclamations or orders regarding sick persons, the evidence relied upon by Bahrain being letters from Belgrave and statements of "former Hawar residents". As regards the "regulation of immigration", the instructions given in 1937 to the "head natur" — the police officer — and the protest by the Ruler of Qatar against interference and the treatment of Qatari nationals by people on Hawar concern events which occurred after the 1937 illegal occupation.

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405. There is no evidence of the origins of those buried in the earlier *graves*. It is unknown whether they belonged to the Dowasir or to another tribe or other tribes. Nor is there any evidence of the origin of old ruins. If this proved anything it would be the possibility that Jazirat Hawar, or some other islands in the group, had been inhabited in former times, but nothing else. It was certainly not permanently inhabited at the

relevant time, namely from 1868 until the unlawful and clandestine occupation of Jazirat Hawar in 1937.

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406. Lastly, the most interesting of the items alleged by Bahrain remains to be considered, namely the six items concerning *judicial activities*. The first three are dated 1909, 1910 and 1911 and the other three 1932 and 1936. No evidence of Bahraini judicial activities relating to the Hawar Islands has been submitted by Bahrain for any period before 1909 or for the period between 1911 and 1932. The lack of continuity is therefore obvious. It should also be pointed out that in 1909-1911 Qatar was a *kaza* or district of the Ottoman Empire and that only a couple of years later the Anglo-Turkish Conventions of 1913 and 1914 were concluded. The years 1932-1936 correspond to the period of oil negotiations for the first Qatar concession (concluded in 1935) and for the concession of the Bahraini area unallotted by the first Bahrain concession (concluded in 1925).

407. Only two of the six items concern actual judgments, namely those of 1909 and 1910. The judgments were made by a *qadi* of the Sharia Court in Bahrain. These two cases of course pre-date Bahrain's illegal occupation of the main Hawar Island in 1937 and are supported by documents other than, or in addition to, assertions by Belgrave and affidavits. The text of these judicial decisions, which is very short (one page each), describes the cases as disputes concerning "land and sea properties in Hawar", without further elaboration (Memorial of Bahrain, Vol. 5, Anns. 238-238 A, pp. 1049-1050).

408. Bahrain relies on the principle that the authority having jurisdiction over disputes concerning land ownership is the authority which has jurisdiction over the place where the property is located. I do not deny the validity of Bahrain's assertion as a general proposition in domestic law, but only up to a point. That proposition is far from absolute in the law of the different countries concerned. We know that even in criminal matters there are examples of the extraterritorial exercise of jurisdiction by the courts of a given country. It also appears that the extraterritorial exercise of civil jurisdiction over land ownership is not unknown in the Sharia Courts of Islamic countries in the region.

409. Qatar produced a legal opinion of Judge Wassel Alaa El Din (Reply of Qatar, Vol. 3, Ann. III.98, p. 601), according to which a *qadi* is competent to decide any dispute as long as none of the parties objects to pleading before him, which would presumably be the case with a Bahraini *qadi* if the parties were normally resident at Zellaq on the main island of Bahrain, as the Dowasir fishermen of Hawar were according to

documentary evidence submitted. Prior's letter of 26 October 1941 (Memorial of Qatar, Vol. 8, Ann. III.229, p. 127) and Burrows' letters of 2 and 5 May 1954 (Memorial of Bahrain, Vol. 4, Anns. 208-209, pp. 875 *et seq.*) support that view. British Political Resident Burrows, for example, suggests, with respect to the Al-Khalifah's claims to Zubarah, that conflicting claims to individual items of private property should be submitted to an impartial *qadi* from another part of the Gulf, for settlement in accordance with local law and custom (Memorial of Bahrain, Vol. 4, Anns. 208 *(a)* and 209, pp. 875 and 885). In his letter of 26 October 1941, Prior states that:

> "By agreement parties can take their cases to any Qadhi and two Iraquis on the Trucial Coast could take a dispute to Kerbala if they wished. It was only the easy sea journey and the Dowasir connection that made Bahrain a convenient forum as compared with a difficult and dangerous land journey to Dohah." (Memorial of Qatar, Vol. 8, Ann. III.229, p. 130.)

410. The 1909 and 1910 judgments were referred to in and enclosed with Belgrave's letter to Weightman of 22 December 1938 (Memorial of Bahrain, Vol. 5, Ann. 274, p. 1129). The Weightman Report relies heavily on the 1909 and 1910 judgments in the following passage:

> "These two judgments, dating from some thirty years ago, are of unquestionable authenticity and both of them relate to disputes in regard to ownership of "land and sea properties' in Hawar. The Shaikh of Qatar . . . seeks to show that these two judgments are of no evidentiary value since it is, he claims, common for Qadhis of one Moslem country to settle disputes between the subjects of another Moslem country. This statement is of course true up to a point in "personal' cases, but the Shaikh of Qatar would be the first to deny that a Nejdi Qadhi, for instance, could settle a dispute between two Qatar subjects in respect of landed properties in Doha." (Memorial of Bahrain, Vol. 5, Ann. 281, pp. 1170-1171.)

411. This analogy drawn by Weightman is of course not correct. In the 1910 case both parties were Dowasir and in the 1909 case at least one of the parties was Dowasir (see text of the judgments). Neither of the two judgments indicates that any of the parties before the *qadi* of the Sharia Court was a Qatari. This suggests that the parties were Dowasir, normally resident in Zellaq, without excluding the possibility that the 1910 case might also have involved Bahrainis other than Dowasir. If this is assumed to be the case, a proper analogy would be the settlement by a Nejdi *qadi* of a dispute *between two or*

more Nejdi subjects concerning property in Doha.

412. In any case, the judgments stated that the parties "appeared before" the *qadi* of the Sharia Court. In neither of the cases is there any indication that the parties were summoned by a court order or otherwise to appear before the court or that any of the parties appeared against his will. Both judgments are essentially declaratory with regard to rights and neither of them contains any provision for application or enforcement of the decision in the Hawar Islands.

413. The other item of 1911, dated 15 January, concerns a summons served in connection with a pearl-diving matter (Memorial of Bahrain, Vol. 5, Ann. 239 *(a)*, p. 1050). Bahrain suggests that the person concerned was a "Hawar Island resident" who was compelled to attend in a Bahraini civil court case at the request of Britain. However, there is no evidence of any arrest having being made in Hawar or indeed of the person concerned actually appearing in court, since the document states that "until now he has not arrived". The document also implies that the person was not always resident in Hawar, since it refers to him as "now residing" (in January) in Hawar.

414. The three items of the 1930s belong to the suspect period in the sense that the documents concerned appear to form part of Belgrave's efforts to collect evidence in support of Bahrain's 1936 claim to the Hawar Islands and against the Ruler of Qatar's assertions in 1938 that the Hawar Islands were part of the territory of Qatar. Although the way in which it is presented in the Bahraini Annexes is far from clear, it appears that the evidence concerned relates in fact to the following three cases:

— case 6/1351 of 1932 concerning a diving account (Memorial of Bahrain, Vol. 5, Ann. 244 *(a)* and *(b)*, pp. 1067-1068);
— case 264/1351 of 1932 concerning a mortgage and a diving debt (Memorial of Bahrain, Vol. 5, Anns. 242 and 243, pp. 1065-1066); and
— case 35/1355 of 1932/1936 concerning fish traps (Memorial of Bahrain, Vol. 5, Anns. 242 and 245, pp. 1065 and 1070).

415. The first two cases relate to matters other than "property rights". According to the evidence submitted, they concern summonses allegedly served on the defendants. In the 6/1351 case both parties are described as being "of Bahraini origin, living in Hawar and . . . Bahraini subjects". Since the document is dated March 1932, it may have been during the overwintering of the Dowasir in Hawar. Moreover, there is no evidence that the persons concerned did appear in court while they were "resident in Hawar", since it is recorded that the defendant was "summoned

again" and that the hearing was scheduled for May 1932, i.e., possibly when the Dowasir had returned to Bahrain after the winter season. Concerning case 264/1351, the heading of Annex 242 describes the case as "between Bahrain subjects living in Hawar", but according to the summary of the case in that Annex and the record of the case in Annex 243, it appears that only the defendant, a Dowasir, was living in Hawar.

416. Those living in Hawar were "ordered to come to Bahrain" by letter (see Ann. 243). There is no indication that the summonses were actually served in Jazirat Hawar. In both cases, the summonses were ineffective, Annex 243 listing no less than seven summonses served upon the Dowasir defendant in case 264/1351. There is no evidence of any arrest or compulsory attendance measures being carried out in Hawar by the Bahraini authorities. There is no Arabic text of Annexes 242 or 243 (case 264/1351).

417. In the third case (case 35/1355), the evidence described it, in Annex 242 dated 1932, as "inheritance in fish traps, etc., at Hawar" between "Bahrain subjects living in Hawar". However, the second piece of evidence concerning this case — a letter from the Bahraini Police Directorate to the Bahrain Court dated 14 April 1936 (Ann. 245) — describes the plaintiff as a Dowasir "of Zallaq" who came to the Police Directorate and said that "he had fish traps *between Bahrain and Qatar near to Hawar*" (emphasis added). He alleged that the defendants "took the traps away and went off to Hawar" and that "those who had attacked him were from Hawar". There is no evidence in this case of arrests or enforcement measures carried out in Hawar and no Arabic text of Annexes 242 and 245.

418. Over and above the foregoing, Bahrain's case on the alleged judicial activities concerning the Hawars relied *exclusively* upon Belgrave's letter of 28 April 1936 and his note of 29 May 1938, both of which make general assertions, in the context of Bahrain's claim to Hawar, about the sending of "fidawis" and "summonses" to arrest people of Hawar when they were required to appear before the Bahraini authorities or courts and about the Bahraini police arrests in Hawar for that purpose. The evidence submitted to the Court by Bahrain confirms that Belgrave's assertions were and are unsubstantiated. In his letter to Weightman of 20 April 1939, Belgrave refers only to the 264/1351 case and, apparently, to fish trap case 35/1355. No further evidence was provided. In fact, Belgrave in his letter of 20 April 1939 admitted that "Hawar fish traps" were *not* registered in Bahrain as had previously been asserted by him in May 1938.

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419. A number of additional points should be considered relating to certain aspects of the Bahrain and Qatar oil concessions and negotiations which could have a bearing on the disposal by this opinion of Bahrain's *effectivités* argument with respect to the Hawar Islands. I am referring to the Laithwaite (India Office) letters of 3 May 1933 (Memorial of Qatar, Vol. 6, Ann. III.84, p. 433) and 9 August 1933 (*ibid.*, Vol. 6, Ann. III.91, p. 463). These letters concern BAPCO's application in 1932 for an extension of its prospecting licence from the Ruler of Bahrain in respect of the "unallotted area" of the Ruler's dominions for which a concession was still to be granted.

420. In the first letter, Laithwaite defined the "dominions" of the Ruler of Bahrain as the Bahrain archipelago proper with its five main islands. Then, in his second letter, Laithwaite explained that the first licence by Bahrain under the Agreement of 2 December 1925 was in respect of "the whole of the territories under the Sheikh of [Bahrain]'s control" (Memorial of Qatar, Vol. 6, Ann. III.91, p. 467). Finally, Laithwaite concluded that "[t]his seems clearly to exclude areas in Qatar and presumably also would exclude the Hawar which belongs in any case geographically to Qatar, and is the westernmost and largest of a group of islands just off the Qatar coast on the west side of the entrance of Duhat-al-Adhwan" *(ibid.)*. This letter clearly implied that in 1933 the Ruler of Bahrain exercised *no authority or control over the Hawar Islands.*

421. Laithwaite's understanding of the territorial situation in 1933 is further confirmed by the War Office map annotated by the British Foreign Office (G. W. Rendel map, see Map No. 6 of this opinion, p. 451 below) and by the statement made in 1934 — during negotiations for the Qatar Oil Concession of 1935 — by the British Political Resident in the Gulf, to the effect that the Al-Thani Ruler of Qatar was the Ruler of all Qatar and that the 1916 Anglo-Qatari Treaty covered the whole of Qatar. The Political Resident made no exception in respect of the Hawar Islands. Laithwaite's second letter of 1933 did contain a reference to a "vague claim" by Bahrain, but that reference concerns Zubarah and not Hawar. The passage reads as follows:

> "We have been considering whether there is any risk, in view of the reference to the Sheikh [of Bahrain]'s 'territories' in the Agreement of December, 1925, [the first Bahrain concession] of a claim being put forward by the [American] Syndicate *to rights in respect of Hawar and the area in Qatar to which a vague claim is maintained by Bahrein and to which Colonel Loch refers in his telegram of 23rd July No. 27 to the Colonial Office.*" (*Ibid.*, p. 466; emphasis added.)

The text of the relevant passage of Loch's telegram (see Memorial of Qatar, Vol. 6, Ann. III.85, p. 440) in fact concerns Zubarah and not the Hawar Islands. Thus, the risk of a claim "to rights in respect of Hawar" referred to in Laithwaite's letter did not at that time come

from Bahrain but from the (American) Syndicate, namely from private oil interests.

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422. In conclusion, Bahrain has not proved to my satisfaction, by its alleged *effectivités* items", the intentional display of power and authority over the territory of the Hawar Islands *at the relevant time*, by the exercise of jurisdiction and State functions on a continuous and peaceful basis, as required by international law for *effectivités* to be able to generate title to territory (irrespective of the question of the status of the territory concerned, which in the present case was indeed a territory whose *maître was the Ruler of Qatar*). Moreover, the State's *effectivités* after the 1937 occupation — also relied upon by Bahrain — are self-defeating for the purposes of demonstrating "title" to the Hawar Islands before that date. As stated in Oppenheim:

> "The principle *ex iniuria ius non oritur* is well established in international law, and according to it acts which are contrary to international law cannot become a source of legal rights for a wrongdoer." (Reproduced in the Memorial of Qatar, Vol. 8, Ann. III.307, pp. 545-546.)

423. I therefore cannot uphold Bahrain's plea that the alleged *effectivités* generate a territorial title to the Hawar Islands or some of those islands or override the original title of Qatar to the Hawar Islands archipelago as a whole.

424. The evidence submitted by Bahrain of *effectivités* has failed to prove that the State of Bahrain has either an original title to the Hawar Islands or a prevailing derivative title to those islands. The 1937 occupation of Jazarat Hawar, a territory *avec maître* at that time, was not an occupation generating title, but an unlawful one, which as such cannot give rise in international law to any kind of title to territory opposable to the holder of the original title, namely to the State of Qatar in the present case.

D. Inapplicability of Uti Possidetis Juris *to the Present Case*

425. To invoke or apply a given principle or norm of international law it is necessary first to define the principle or norm concerned and its scope and then to ascertain whether the circumstances of the case are among those which attract the application of the principle or norm in question. It is my considered opinion that on both counts *uti possidetis juris* has no role to play in the present case. But since it has been invoked by Bahrain, I shall explain below in some detail the reasons for my conclusion as to the inapplicability of *uti possidetis juris*, even if it inevitably means lengthening this opinion.

426. As stated, the present case is one of general international law and *uti possidetis juris* is, in my view, one principle or norm of contemporary general international law among many others, although not a norm of *jus cogens*. My rejection of *uti possidetis juris* in the present case is not therefore based upon any hesitation on my part as to its normative character in present-day international law *when applicable*. This should be made clear from the outset. As I see it, the only question that arises is whether or not *uti possidetis juris* is applicable to the present case. I would add, to avoid any misunderstanding, that here I am talking about *uti possidetis juris* and not *uti possidetis* tout court. The latter is no more than a form of expressing *de facto* possession without regard for title. This clarification is necessary because Bahrain's oral arguments on the matter are not as clear in that respect as they should be. In fact, counsel for Bahrain used the term *"uti possidetis"* more often than the term *"uti possidetis juris"* and devoted part of the presentation to questions such as "the relationships between title and *effectivités* in the context of *uti possidetis* as applicable to the Hawar Islands" (CR 2000/13, p. 62). Fortunately, counsel for Bahrain clarified Bahrain's position on this matter in his subsequent argument when, at the meeting held on 27 June, he stated that "in principle and logic *uti possidetis juris* should be the alpha and the omega" (CR 2000/21, p. 9). I have therefore assumed that the principle invoked by Bahrain is *uti possidetis juris* and not just *uti possidetis*.

427. To begin with, the present case is one between two Arab States of the Persian Gulf, not between two Spanish American Republics, a case in which the Hawar Islands dispute crystallized before the Second World War. It is also a case in which both Parties claim to be the holders of an original international title to the islands as from about 1868 onwards (Qatar) or from the eighteenth century onwards (Bahrain). Thus, the first legal question to be answered is a *ratione personae* intertemporal law question. Was *uti possidetis juris* at the period of the formation, consolidation and recognition of the original title to the Hawar Islands a principle or norm of international law applicable between Bahrain and Qatar or accepted by Great Britain or even by the Ottoman Empire and other interested States of the region?

428. The reply to this question has to be "no", because *uti possidetis juris* became a norm of international law of general application (that is, beyond the confines of relations between Spanish American Republics) only after the Second World War, to be more precise around the time of the general decolonization of the African Continent. The *Eritrea-Yemen* Arbitral Award of 1998 rejected the claim of *uti possidetis* by one of the Parties noting, *inter alia*, that:

"Added to these difficulties is the question of the intertemporal

law and the question whether this doctrine of *uti possidetis*, at that time thought of as being essentially one applicable to Latin America, could properly be applied to interpret a juridical question arising in the Middle East shortly after the close of the First World War." (Para. 99 of the Award.)

429. There is a generally accepted rule of law, including international law, according to which the judicial evaluation of title resulting from historical consolidation (namely by a process, a *continuum*, a succession of acts, facts or situations over a given span of time) should be made on the basis of the international law in force at the time when such title ostensibly arose (see, for example, *Grisbadarna, Baie de Delagoa, Clipperton Island, Island of Palmas, Minquiers and Ecrehos*, etc.). It is true that in the *Island of Palmas* case, Huber qualified that non-retroactive principle by adding "that the existence of the right . . . its continued manifestation, shall follow the conditions required by the evolution of the law", but I do not see how it would be possible to conclude in the present case that the contemporary generalization of the *uti possidetis juris* of the 1960s could retroactively deprive either of the Parties of any territorial rights over the Hawar Islands when for both Parties those rights *in rem* already formed an established territorial order of things *before* the generalization of *uti possidetis juris* as a norm of general international law.

430. *Non-retroactivity* in the application of its norm is a well-established principle of customary international law and not only of the law of treaties. Retroactivity in the application of a norm of international law is admissible only where the norm itself is adopted with such an intention or where the interested parties are in agreement as to the retroactive applicability of the norm in their mutual relations. In the circumstances leading to the formulation of *uti possidetis juris* as a norm of general international law, I did not find anything in the State practice or *opinio juris* to suggest that the acceptance of *uti possidetis juris* as a norm of general application implied any intent to give the norm retroactive effect, so as to make it applicable also to any act or fact which took place or any situation which ceased to exist before the generalization of *uti possidetis juris*. Moreover, in the present case, Qatar rejects the application of *uti possidetis juris* in its relations with Bahrain. There is therefore no agreement between the Parties as to retroactive application of *uti possidetis juris* by the Court to the present case.

431. Having said that, I now come to the crux of the matter, namely to the substantive conditions which must be met for *uti possidetis juris* to apply to a specific case. *Uti possidetis juris* as a principle or norm of international law has two aspects in that it concerns the delimitation of boundaries (which is not particularly relevant in the present case) and the question of *title to territory*. For both aspects, there should exist a *situa-*

tion of succession which in my view (some legal writers think otherwise) should be related to decolonization in general international law. In any case, without an event entailing succession, *uti possidetis juris* is inapplicable as a principle or norm of general international law. Even when *uti possidetis juris* is invoked or applied by virtue of a particular rule (e.g., a binding treaty or agreement, established rules of an international organization, or even domestic constitutional provisions) there must be succession in international law. *I do not see any such succession in international law in the present case.* Bahrain and Qatar were subjects of international law long before 1971, participating as such in international relations and agreements, as well as making laws of their own, formulating international claims and assuming international obligations.

432. It must also be noted that a situation of succession may concern various matters (treaties, debts, nationality, territorial questions, etc.) and that the rules of international law applicable to those matters are by no means the same, let alone identical. For example, the 1978 Vienna Convention on Succession of States in Respect of Treaties contains no provisions concerning the operation in that field of *uti possidetis juris.* On the contrary, the Convention excludes "boundary regimes" and "other territorial regimes" (Arts. 11 and 12), which are not affected as such by a "succession of States", a term defined not in general but only *for the purposes of the said Convention* as meaning the replacement of one State by another in the responsibility for the international relations of territory (Art. 2, para. 1*(b)*, of the Convention). *I do not see any issue in the case before the Court concerning a situation of succession in respect of treaties.* These questions are not part of the subject of the dispute before the Court.

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433. If *uti possidetis juris* is invoked, as it has been by Bahrain, the succession must concern, as indicated above, either "delimitation of boundaries" or "title to territory". There is no other aspect of *uti possidetis juris.* The Court certainly has before it a case concerning "title to territory". There can be no question of this. Nor can there be any confusion between "succession in respect of treaties" and "*succession in respect of title to territory*". Under *uti possidetis juris,* as a principle or norm of general international law, the question of succession in respect of title to territory depends on two cumulative legal requirements: (1) the existence of an original international law title of a predecessor State in the territory or territories concerned on the date of the succession; and (2) the existence of two or more successor States which themselves assume, after the succession date, the status of "successors" to the predecessor State (sovereignty is involved here; succession between States is by no means

equivalent to succession between human beings). *In the present case neither of these two indispensable legal requirements is satisfied.*

434. The Court is not in possession of any document or evidence proving the existence of an original international title of Great Britain to the territories in dispute between Bahrain and Qatar, including the Hawar Islands. There is no British declaration, proclamation, legislation, treaty, etc., whereby the territories of Bahrain and Qatar were — at any time before 1971 — considered by Great Britain to be territories, colonies, protectorates, or mandate or trust territories of the British Crown. The information in the case file in fact suggests otherwise. For example, in a letter from Pelly, British Political Resident in the Persian Gulf, to the Secretary to the Government of Bombay, dated 25 September 1869, reference is made to a petition from some inhabitants and merchants of Bahrain asking that the British Government "receive the island of Bahrain and its people under its protection and as its subjects, and that the island may be considered as part of the Government possessions, and the inhabitants as British subjects", but Pelly replied as follows: "I have informed them that I can hold out no hope of this wish being acceded." (Supplemental Documents of Qatar, doc. 1, p. 5.) As Lord Curzon, Viceroy of India, stated in 1903: "We have not seized or held your territory. We have not destroyed your independence but have preserved it." (Passage quoted in the *Dubai/Sharjah* Arbitral Award.)

435. At the hearing, counsel for Bahrain quoted a passage from a draft brief by Rendel, dated 5 January 1933, in which it is stated that:

> "The other Persian Gulf States [other than Persia, Iraq and Saudi Arabia] have a peculiar status, since, while they are technically sovereign and independent principalities, they are in special treaty relations with His Majesty's Government, with the result that they are practically in the position of protected States." (Reply of Qatar, Vol. 2, Ann. II.58, p. 338.)

But in paragraph 4 of the same draft it is stated that: "*These territories do not form part of the British Empire or of India. They are independent States for the conduct of whose foreign relations H.M. Government are at present responsible.*" (*Ibid.*, p. 342; emphasis added.)

436. Moreover, nor is there any official statement by Bahrain and/or Qatar assuming the general status of successors to a non-existent international law title of Great Britain to their respective territories *before* the institution of the present proceedings. Furthermore, the international community never considered Bahrain and/or Qatar as territories or colonies of the British Crown. The case of Qatar is particularly revealing in this respect. The Ottomans left Qatar in January 1915 and yet, after the

First World War, the country did not become, under the League of Nations system, a mandate of the British Crown or any other Power, as happened to many other former Ottoman territories. The British Crown never assumed the sacred international obligations of a mandatory power in respect of Qatar or Bahrain. After the Second World War, neither Qatar nor Bahrain was subject to the trusteeship system of Chapter XII of the United Nations Charter or ever listed among the non-self-governing territories to which Chapter XI of the Charter applies. The United Kingdom never transmitted any information to the Secretary-General concerning Qatar and/or Bahrain pursuant to Article 73 *(e)* of the United Nations Charter.

437. In an official document of the United Nations Security Council (doc. S/9772, p. 5), dated 30 April 1970, reference is made to the views held at the time by the Government of Iran and the Government of the United Kingdom on the status of Bahrain. For Iran, Bahrain was a province of Iran, but for the United Kingdom Bahrain was *"a sovereign Arab state with which the Government of the United Kingdom are in special treaty relations"* (para. 12 of the document). Moreover, the document specifies that:

> "These 'special treaty relations' relate to the formal treaties of 1820, 1847, 1856, 1861 and the Exclusive Agreements of 1880 and 1892 between H.M. Government and the Ruler of Bahrain. From 1820 the Government of the United Kingdom have acted on the assumption that Bahrain is an independent sheikhdom and have recognized the authority of its Rulers." *(Ibid.)*

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438. As explained above, and generally in other publications in the public domain, relations between Great Britain and Bahrain and Great Britain and Qatar before 1971 were based upon "special treaty relations". By virtue of the treaties in question, Great Britain assumed a series of powers and functions of the independent Arab rulers in so far as their respective States or sheikhdoms were concerned, but none of the treaties established protectorates of a colonial nature. Under those treaties the Arab rulers did not transfer to Great Britain *their sovereignty over andlor title to the territory of their respective States.* The "special treaty relations" of the protected States of the Gulf with Great Britain did not alter either the sovereign authority in those States, which continued to belong to the Arab ruler or sovereign of the State concerned, or the title to the territory of the country, which continued to be held by that ruler or sovereign. The subjects, territories and dependencies remained subjects, territories and dependencies of the Arab rulers, of Bahrain and of Qatar in the present case. As was noted:

"the British Government has, in official statements made from time to time, described the Shaikhdoms as "independent States under British protection' or as "independent States in special treaty relations with Her Majesty's Government'" (H. M. Al-Baharna, *The Legal Status of the Arabian Gulf States*, 1968, p. 78).

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439. The texts of the agreements concluded by Great Britain with Bahrain in 1861, 1880 and 1892 and with Qatar in 1916 are quite clear. It follows that *during the whole of the relevant period Great Britain had no power, right or authority in law effectively to dispose of or cede the territory or territories of Qatar or the territory or territories of Bahrain.* The political and legal position of Great Britain in the Gulf before 1971 has absolutely nothing in common with the former Spanish Crown's position in America. The Spanish Crown in America had international sovereignty over and title to territory, while the British Crown in the Gulf, including Bahrain and Qatar, had no such sovereignty or title.

440. The object and purpose of the 1861 Agreement concluded by Great Britain with the Independent Ruler of Bahrain was a perpetual Convention of Peace and Friendship with the British Government. The provisions of the Convention refer to the subjects, possessions and territories of the Ruler (Arts. 2 and 3) and contain expressions such as "upon Bahrein or upon its dependencies in this Gulf" (Art. 3) or "in the territories of Bahrein" or "subjects of Bahrein" (Art. 4). There is even a recognition in trade matters of most favoured treatment in Bahrain "of British subjects" (also in Art. 4). Secondly, out of fear that an Ottoman presence would be established in the Bahrain islands, Britain secured an Agreement from the Ruler of Bahrain in 1880 in which the latter bound himself, his heirs and successors not to enter into negotiations of any kind with any power without the consent of the British Government. He also undertook not to accept the establishment of any kind of foreign agency in Bahrain without British approval. Treaty-making and the receiving of foreign diplomatic missions by the Ruler of Bahrain were curtailed by the 1880 Agreement, but the territory of the country continued to be the territory of the Ruler of Bahrain and not a British Crown territory of any kind.

441. This type of agreement culminated in 1892 in the so-called *"exclusive agreements"* signed by the Rulers of the Trucial States and by the Ruler of Bahrain. The former bound themselves, their heirs and succes-

sors to the same conditions as the Ruler of Bahrain had in 1880. In addition, all Rulers (of the Trucial States and Bahrain) signed *a non-alienation bond* with Britain whereby they could not cede, sell or lease *any part of their territories* to any power other than Britain. The non-alienation bond provides conclusive evidence that the territories of Bahrain were not territories of the British Crown. The Bahrain islands were always politically protected by Britain, *but Bahrain never became a colony or a colonial protectorate under international or British domestic law.*

442. This is confirmed in the 1913 Anglo-Ottoman Convention, Article III of which states that the Government of His Britannic Majesty has no intention of *annexing the Island of Bahrain to its territories.* This can only mean *a contrario* that on 29 July 1913, the date of the Convention, the Island of Bahrain was not considered a British territory by the Government of Great Britain. Moreover, I did not find in the case file any subsequent act of annexation or similar legal act of the British Government concerning the Bahrain islands.

443. Until 1916, Qatar remained outside the above-mentioned treaty relations system of the Arab Rulers of the Gulf with Great Britain. In that year, the Sheikh of Qatar joined the system by signing the 1916 Treaty with the British Government. It is a Treaty with some provisions similar to those of the "exclusive agreement" type. For example, it also contains a non-alienation bond concerning the territory of the Ruler of Qatar. The Treaty refers to "my territories and port of Qatar", "re-exported from my territories" and "maintenance of order in my territories" (Art. III), meaning the territories of the Sheikh of Qatar. Moreover, it also refers to "goods of British merchants imported to Qatar" (Art. VI), "to allow[ing] British subjects to reside in Qatar" (Art. VII), to British traders "residing in my ports or visiting them upon their lawful occasions" and to the transaction of such business "as the British Government may have with me" (Art. VIII) and to allowing "the establishment of a British Post Office and a Telegraph installation anywhere in my territory" (Art. IX).

444. Furthermore, Articles X and XI of the 1916 Treaty between Great Britain and Qatar provided for two *guarantees* by the British Government relating to the political and territorial integrity of Qatar. Those provisions are as conclusive as the non-alienation bond clause concerning the point under consideration, namely that the territory of Qatar has never been a territory of the British Crown in any form (colony, mandate, protectorate, non-self-governing territory, etc.). No State guaran-

tees by treaty the security of its own territory. Governments have a constitutional and international obligation to protect it, and that is all. As documented in the case file, those international guarantees, in particular the one concerning "land", were the subject of considerable attention by the British authorities during and after the conclusion of the 1916 Treaty (as well as in the 1930s). The text of the relevant articles of the 1916 Treaty reads as follows:

> "X. On their part, the High British Government, in consideration of these Treaties and Engagements that I have entered into with them, undertake to protect me and my subjects and territory from all aggression by sea and to do their utmost to exact reparation for all injuries that I, or my subjects, may suffer when proceeding to sea upon our lawful occasions.
>
> XI. They also undertake to grant me good offices, should I or my subjects be assailed by land within the territories of Qatar. It is, however, thoroughly understood that this obligation rests upon the British Government only in the event of such aggression whether by land or sea, being unprovoked by any act or aggression on the part of myself or my subjects against others." (Memorial of Qatar, Vol. 5, Ann. II.47, p. 185.)

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445. No State assumes such kinds of undertaking regarding its own metropolitan territory or its colonial territories. No Government undertakes to grant "good offices" for protection from aggression against its own territories, colonial or otherwise. It should be added that, under the 1916 Treaty with Great Britain, the Sheikh of Qatar also assumed the obligations set forth in "Treaties and Engagements" concluded previously by the friendly Arab Sheikhs of the Trucial States (today the United Arab Emirates). There is also an arbitral interpretation which is highly pertinent in the present context. I am referring to the Award of 19 October 1981 concerning the *Boundary between Dubai and Sharjah,* in particular to the following passages:

> "It is therefore clear that no treaty authorised the British authorities to delimit unilaterally the boundaries between the Emirates and that no British administration ever asserted that it had the right to do so. The Court has therefore come to the conclusion that the consent of the Rulers was necessary before any such delimitation could have been undertaken.
>
> . . . . . .
>
> The Court must emphasise that, in the absence of competence derived from conventional sources, the Tripp decisions can only have legal value to the extent that the Emirates had freely given their

consent to a determination of their boundaries by the British authorities." (*International Law Reports,* Vol. 91, pp. 567 and 569.)

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446. In the light of the above, I do not see how the *termination* in 1971 of the "special treaty relations" between Bahrain and the United Kingdom and between Qatar and the United Kingdom could involve any question of succession to "title to territory" that might make *uti possidetis juris* applicable as a principle or norm of general international law. "Title to territory" is one thing and "termination of treaties" and assumption of "full international responsibility for the conduct of foreign affairs" quite another. Even in colonial or similar situations, that distinction holds in contemporary international law. South Africa, for example, for decades had international responsibility for the conduct of the affairs of South West Africa (now the independent United Nations Member State of Namibia) but no title at all to its territory. The General Assembly, the Security Council and the International Court of Justice recognized precisely that several years ago.

447. More generally, within the context of the principle of self-determination under contemporary international law as applied by the United Nations to colonial countries and peoples, it is recognized that the "territory of a colonial or other non-self-governing territory" has a status separate and distinct from that of the territory of the State administering it (see, for example, the Friendly Relations Declaration). Thus, the way in which international law has evolved regarding even former colonial situations cannot justify depriving Bahrain and Qatar of the title to their respective territories that they had always possessed by combining both titles into a single title of the British Crown which the latter had never claimed!

448. The Parties' responses to the questions put by Judge Vereshchetin during the oral stage of the proceedings fully confirmed that Qatar and Bahrain were not considered to form part of the territories of the British Crown, colonial or otherwise. The British Government treated the Rulers of Bahrain, Qatar and other sheikhdoms in the Gulf as heads of independent governments, notwithstanding the special treaty relations referred to above. In this connection, it is of particular interest that, after the Second World War and before 1971, the State of Qatar concluded treaties in delimitation matters with Saudi Arabia, Abu Dhabi and Iran, as did Bahrain in 1958 with Saudi Arabia. I see nothing in those responses about any treaty concluded by the United Kingdom with third States on behalf of Bahrain and/or Qatar in matters relating to territory. The 1947 British sea-bed dividing line is not binding upon either Qatar or Bahrain, but how can Bahrain share this conclusion in the light of its *uti possidetis*

juris plea? It is significant that the extension by the United Kingdom to Bahrain, Qatar and the Trucial States of the 1949 Humanitarian Red Cross Conventions contains the following reservation *"to the extent of Her Majesty's Powers in relation to those territories"* (Ann. 2 to Bahrain's response). The United Kingdom thus recognized that "those territories" were not United Kingdom territories.

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449. The *concept of possession* embodied in *uti possidetis juris* as a principle or norm of general international law is not effective possession, holding or tenancy, but *the right to possess according to legal title.* Where, according to that principle or norm must that legal title be found? Not in general international law or in the actual occupation or effective possession of the territory concerned, but *in the law* of the common predecessor State or possibly, if there are two predecessor States, in a treaty between those States. This meant, in the case of the former Spanish American Republics, that their right to possess was defined by the *cédulas reales* and similar acts of legislation of the Spanish Crown after hearing the *Consejo de Indias*, not in individual political or administrative decisions of government.

450. Counsel for Bahrain correctly quoted in the hearings the passage in the Judgment of the Chamber in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* to the effect that "when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign" (*I.C.J. Reports 1992*, p. 559). But immediately after, the same counsel devalued the meaning of the quoted passage by adding:

> "So in the case of the Hawar Islands, as long as the situation was clearly disposed of *by the British administration*, for whatever reason, good or bad, the issue of title begins and ends right there" (CR 2000/21, p. 10; emphasis added).

Unfortunately for Bahrain, *uti possidetis juris* does not relate back to any given individual administrative or political act of government, but to *the constitutional or administrative law of the predecessor State*, as noted by the Chamber. Furthermore, a few pages later counsel stated, in the context of his argument on Bahrain's original title, the following: "Britain was not the title-holder; and one can only alienate what one has. *Nemo dat que non habet*" (*ibid.*, p. 15, para. 2).

451. This is the crux of the matter. In short, it explains why *uti possidetis juris* is not applicable in this case. The United Kingdom *non habet* territorial title in Bahrain or Qatar and consequently could not dispose of any part of the territory of those countries without the consent of their respective sovereigns or rulers.

452. Any application of *uti possidetis juris* inevitably implies a reference to the *law* of a common predecessor State. I am no expert on British law, but I do not see among the evidence submitted by Bahrain any item of British law defining before 1971 the respective territories of Bahrain and/or Qatar as British territories. I do not see any act of Parliament, or other form of British legislation or relevant secondary regulations in this matter. It does not do justice to the domestic constitutional order of the United Kingdom to believe that a single act of the British Government could dispose of British territories or territories of the British Crown. In fact, not a single British document of the 1936-1939 period relating to the Hawar Islands made any reference to British law. The 1936 and 1939 British "decisions" are not acts implementing or creating British law. As presented, they were adopted by the executive, that is by the British Government, as government decisions taken, like many others, in the context of the conduct of foreign relations.

453. The successive British Orders in Council regarding the organization of criminal and civil jurisdiction and the corresponding courts and procedures relating to Bahrain, Qatar and other States of the Persian Gulf (Kuwait, Muscat, Trucial States) confirm that those countries were not territories of Great Britain. All Orders begin by stating that: "Whereas by treaty, capitulation, grant, usage, sufferance and other lawful means His Majesty the King *has jurisdiction within the territories of the Sheikh of* . . ." According to explanatory notes sometimes published with the Orders in *British and Foreign State Papers*: "In the territories of all those States, *by agreement with their rulers*, His Majesty exercises jurisdiction over certain persons and property." (Vol. 165, p. 300.)

454. In 1971, the United Kingdom did not adopt any kind of *independence act* concerning Bahrain and/or Qatar, as it did in the case of its dependent territories or colonies. What the United Kingdom and Bahrain and the United Kingdom and Qatar did in 1971 was *to conclude treaties* concerning "the termination of the special treaty relations" that previously existed between them. That termination took place *by means of an instrument of international and not by British law*. Thus if the previous "special treaty relations" were terminated through the conclusion of a fresh treaty and not by British law, Bahrain and/or Qatar could not in 1971 have been British dependent territories or colonies of the British

Crown or colonial protectorates of the United Kingdom, but must have been States under international law.

455. The 1971 Treaties were registered and published in the United Nations *Treaty Series* and, under the 1969 Vienna Convention on the Law of Treaties, a "treaty" means "an international agreement *concluded between States* in written form and governed by international law" (emphasis added). This is further conclusive proof of the inapplicability of *uti possidetis juris* to the present case. By those Treaties Bahrain and Qatar "resume[d] full international responsibility as sovereign and independent States", *but were not established as sovereign and independent States by the Treaties*. They simply reassumed the powers exercised by the United Kingdom by virtue of the "special treaty relations" terminated in 1971.

456. Furthermore, Bahrain has always — until the current proceedings — rejected the proposition that it was subject to any type of colonial status under the British administration. The legal opinion of Sir Lionel Heald of 4 July 1963, communicated by the Government of Bahrain to the British Foreign Office, is quite correct and clear in that respect (Memorial of Qatar, Vol. 11, Ann. IV.248, p. 425; also in CR 2000/17, p. 14). If so, it must also have been correct and clear in 1971 and thereafter.

457. In conclusion, in the light of the considerations above, I reject Bahrain's *uti possidetis juris* plea because this principle or norm of general international law does not apply to the facts and circumstances of the present case. *Uti possidetis juris* is irrelevant in this case and therefore cannot become the source of a derivative title of Bahrain to the Hawar Islands. Through its *uti possidetis juris* plea Bahrain cannot avoid proving to the Court that it is in possession of an internationally valid legal title to the Hawar Islands. *Legal title* should exist to uphold a judicial determination based upon *uti possidetis juris*, because effective possession is by no means *uti possidetis juris* legal title.

E. General Conclusion of Section B of Part I

458. For the reasons set out above in this Section B of Part I of the opinion, I am unable to uphold any of the three pleas of the State of Bahrain to the effect that it is the holder of a derivative title to the Hawar Islands either because of the 1939 British "decision", Bahraini *effectivités* in the Hawars, or the *uti possidetis juris* principle.

459. In my view, the State of Bahrain is not the holder, on the basis of those pleas, of the invoked derivative titles to any of the islands of the Hawar group. The derivative titles relied upon by Bahrain are non-exist-

ent in law and in fact and consequently cannot prevail over the State of Qatar's original title to the Hawar Islands as a whole, particularly as the latter are an archipelago that geographically forms part of the Qatar peninsula, its islands lying off, wholly or partly, the territorial sea belt of that peninsula or being contiguous thereto.

Overall Conclusion concerning Part I of the Present Opinion

460. My general conclusion concerning the territorial questions in dispute between Qatar and Bahrain in the present case — derived from my previous conclusions in Sections A and B of this Part of the opinion — is that sovereignty over:

(a) Zubarah;
(b) the Hawar Islands; and
(c) Janan Island, including Hadd Janan,

belongs to the State of Qatar.

461. Consequently, I am in disagreement with the Judgment as to which of the two Parties has sovereignty over the Hawar Islands. It is my belief that such sovereignty appertains to the State of Qatar and not to the State of Bahrain and this explains, to my regret, my negative vote on the finding in paragraph 2 *(a)* of the operative part of the Judgment, which is based exclusively on a particular interpretation of the 1939 British "decision". I cannot share this finding because for me the said British "decision" is in international law an invalid decision on formal as well as essential grounds. That "decision" could not have generated binding legal effects in the relations between the Parties to the present case either in 1939 or subsequently with respect to any of the islands forming the Hawar Islands group.

PART II. THE MARITIME DELIMITATION

A. Introduction

1. The Bahraini "archipelagic State" argument

462. The main reason for the unusual and extraordinary differences between the maritime lines claimed by the Parties in the present case stems from the fact that Bahrain is claiming to be an "archipelagic State" within the meaning given to the term in Part IV of the 1982 Convention of the Law of the Sea. I have explained at the end of the General Introductory Observations of this opinion why I reject this claim of Bahrain. Bahrain should have declared itself before the current proceedings to be an archipelagic State, thereby assuming the corresponding rights *and obligations*, including those relating *to the right of innocent passage and*

the right of archipelagic sea lanes passage through archipelagic waters of ships of all States (Arts. 52 and 53 of the 1982 Convention). But Bahrain did not do so. The justification that it did not do so in order to avoid aggravating the present dispute for me lacks credibility, because the existence of a dispute on the Hawar Islands did not stop Bahrain from continuing activities on those islands even during the written and oral phases of the present proceedings!

463. Moreover, the contradiction between the alleged "archipelagic State" condition and the claim on the so-called "Zubarah region" is too obvious to go unnoticed. Under the 1982 Convention there are only "declared archipelagic States" and if, in future, Bahrain were to make a declaration to that effect it would have no consequences at all on the single maritime boundary between Qatar and Bahrain as defined with the force of *res judicata* by the present Judgment.

464. For the maritime task of the Court in the current case, the alleged "archipelagic State" condition of Part IV of the 1982 Convention is also irrelevant for a further reason. The general thesis of Bahrain on the matter is indeed based upon a conceptual confusion between the conventional right of such an "archipelagic State" to draw its own "straight archipelagic baselines" and the principles and rules governing maritime delimitation between States with coasts opposite or adjacent to each other. Delimitation of a maritime space or spaces is never a unilateral act in international law, but an operation requiring the full and equal participation of the two States concerned. The principle of the sovereign equality of all States, whether archipelagic or not, is obvious. *This explains why Part IV of the 1982 Convention contains not a single provision on maritime delimitation between an "archipelagic State" and any other State.*

465. What does this mean in legal terms? The answer is crystal clear. There are no special rules, conventional or customary, for those delimitations. The fundamental customary norm of the *Gulf of Maine* case and the particular principles and rules governing delimitation of the territorial sea, of the sea-bed, of the economic zone or of any other maritime zone or jurisdiction recognized by international law likewise apply to the maritime delimitations of an "archipelagic State" within the meaning of the 1982 Convention. Thus the Parties' arguments about the conventional or declaratory character of the provisions in Part IV of the 1982 Convention are, in my opinion, quite immaterial for the Court's maritime delimitation task in this case, *because the latter is not a case concerning the definition of the maritime outer limits of an alleged "archipelagic State of Bahrain", but a maritime delimitation between the State of Bahrain and the State of Qatar*, as provided for in the "Bahraini formula" approved by Qatar in the 1990 Doha Minutes. According to that formula, the Court should make the requested maritime delimitation between

the two States Parties by *drawing a single maritime boundary between their respective maritime areas of sea-bed, subsoil and superjacent waters.* Nothing less, nothing more.

466. I am therefore in agreement with the conclusion in the Judgment dismissing Bahrain's arguments based on the "archipelagic State" and "archipelagic baselines". Such assertions are alien to the maritime delimitation tasks facing the Court in the present case.

2. The Bahraini "historic title or rights" argument

467. A second factor in the differences between the respective lines claimed by the Parties Bahrain's contention that it is "a system of spatially proximate and economically interrelated islands and other relevant features" and the holder, apparently, of some kind of ill-defined historic title to all the insular and other maritime features and most of the waters situated between the Bahrain archipelago proper and the west coast of the Qatar peninsula. The purposes of Bahrain's contention here are clear, but the evidence advanced in support of it is indeed very poor. The contention is presented rather as something self-evident, namely as if the Al-Khalifah Rulers' historical "aims" to supremacy in the area were indeed a principle of international law. I therefore consider this Bahraini contention to be a mere political assertion.

468. However, the procedure of the Court requires proof of the facts and a convincing demonstration of the elements of law behind a given contention or plea, in particular when the other Party rejects those alleged, as Qatar did in the present case. Bahrain has failed altogether, in my opinion, to provide the Court with such a demonstration, probably because the judicial proof of meta-legal contentions is not an easy task. The historical explanation of this contention of Bahrain, as reflected in a one-page letter by Belgrave (Memorial of Qatar, Vol. 8, Ann. III.243, p. 195), appears to be the fact that, because the Al-Khalifah were in Zubarah before settling in the Bahrain islands in 1783, *they* considered that everything between the Qatar peninsula and the Bahrain archipelago proper belonged to them! This is all the justification I have found in support of the general Bahraini contention commented upon here.

469. The invocation by Bahrain of what could legally be described as an ill-defined historic title or rights in the delimitation area is nothing more that an attempt to reformulate in contemporary legal terms a political claim aiming at dominance in the maritime area situated between the

Bahrain archipelago proper and the Qatar peninsula. This claim was never accepted by Qatar and was always rejected at the relevant time by Great Britain. The case file proves furthermore that other interested States in the region have never recognized that Bahrain has any kind of historic title or rights in the maritime area concerned.

470. In other words, the waters of the relevant maritime area in the present case *are not territorial in character* (a term which should not be confused with the "territorial sea"). Not being territorial, the maritime waters in question are not subject to any particular territorial regime, as is the case for example of recognized historical waters, including historic bays. The maritime area to be delimited by the Court in the present case is not the Gulf of Fonseca! Bahrain was not historically in a position to establish an historic title of its own, territorial in character, over those maritime waters (their maritime features included) and the essential requirement of recognition or tolerance of other States is also lacking.

471. Bahrain's general proposition referred to also manifested itself in the northern part or sector of the maritime delimitation area; for example, in its argument on *"Bahraini pearling banks"*, which is rejected by the Judgment. It was an argument aimed at extending, by other means, the alleged Bahraini historic title or rights to the northern part or sector of the maritime delimitation area in the present case.

472. It follows from the above that we are in agreement with the Judgment in its non-recognition of Bahrain's ill-defined alleged historic title or rights in both the southern and northern parts or sectors of the delimitation area.

3. The Bahraini "de facto *archipelago or multiple-island State" argument*

473. In contradistinction to the former "archipelagic State" and "historical title or rights" contentions, Bahrain's "*de facto* archipelago or multiple-island State" argument seems, in the light of the relevant reasoning and conclusions of the Judgment, to have found some support within the Court. In any case, the Judgment is quite sensitive to Bahrain's *de facto* archipelago or multiple-islands contention. In fact, only if that contention is constantly borne in mind can the reader possibly understand a series of quite surprising conclusions of the Judgment and, ultimately, the course of the single maritime boundary drawn.

474. The concrete manifestations of the above contention are obvious in the reasoning of the Judgment, although the drafting and terminology used do not always make for a clear appreciation of it. Thus, for example, where the Judgment in several paragraphs uses expressions such as the

"relevant Parties' coasts" or "equidistance line" between those coasts, or "territorial sea", etc., it is not necessarily referring to the ordinary or natural meaning of those terms. In fact, the term "territorial sea" is used in the Judgment with more than one meaning. It sometimes refers back to the "territorial sea" generated by the mainland coasts of the Parties, but also, and more frequently, to the "territorial sea" resulting from the Judgment's own conclusions concerning sovereignty over a given island or other maritime features, such as low-tide elevations. This *superveniens* "territorial sea" explains the *unprecedented role* played in the Judgment by minor or tiny maritime features such as islets, reefs, sand-banks and low-tide elevations (and their corresponding "low-water lines") in the construction of its "equidistance line" and, consequently, in the course of the single maritime boundary defined.

475. We completely disagree with this approach. Our position is based upon considerations of substance as well as upon jurisdictional ones. As to the substance, the Judgment's approach is without precedent in the international jurisprudence relating to maritime delimitations which, since the *North Sea Continental Shelf* case onwards, has disregarded minor maritime features located between the mainland coasts of the States parties as a factor intervening *from the start* in the delimitation operation because of its obvious distorting effects for achieving an equitable result, without prejudice of course to taking them or some of them into account at a later stage as "special or relevant circumstances". As stated in the Judgment of the Chamber of the Court in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case:

> "the Chamber likewise would point out the potential disadvantages inherent in any method which takes tiny islands uninhabited rocks or low-tide elevations, sometimes lying at a considerable distance from terra firma, as basepoint for the drawing of a line intended to effect an equal division of a given area. If any of these geographical features possess some degree of importance, there is nothing to prevent their subsequently being assigned whatever limited corrective effect may equitably be ascribed to them, but that is an altogether different operation from making a series of such minor features the very basis for the determination of the dividing line, or from transforming them into a succession of basepoints for the geometrical construction of the entire line. It is very doubtful whether a line so constructed could, in many concrete situations, constitute a line genuinely giving effect to the criterion of equal division of the area in question, *especially when it is not only a terrestrial area beneath the sea which has to be divided but also a maritime expanse in the proper sense of the term, since in the latter case the result may be even more*

debatable." (*I.C.J. Reports 1984*, pp. 329-330, para. 201; emphasis added.)

476. The present Judgment's approach is just the opposite of the one described in the quotation above. As the quotation explains *in fine*, the fact that in the southern part or sector of the maritime delimitation area the single maritime boundary divides "territorial seas" is not a justification for proceeding otherwise without risking an inequitable result. What in fact happened in the present case is that the majority accepted one of the two following propositions or both of them, namely: (i) that in the case of an archipelago or multiple-island State the relevant principles and rules should be interpreted differently in their application to the case; or (ii) that when the maritime boundary line divides "territorial seas" the delimitation operation concerned should take into account from the very beginning of the process all minor or tiny maritime features without excluding low-tide elevations for the purpose of defining "basepoints".

477. In fact, the only explanation we found for the above is that the majority understood that the "maritime delimitation" to be effected encompasses the definition by the Court of the maritime frontiers of Bahrain as a State. In other words, that the Court should take upon its shoulders the constitutional task of defining the maritime frontiers of the State of Bahrain. We do not think that such a task properly belonged to the Court, but indeed to the State concerned.

478. Thus, the approach adopted by the Judgment likewise raises jurisdictional issues. The "Bahrain formula" mentions exclusively the drawing by the Court of a single maritime boundary between the respective maritime areas of the States Parties without reference to the status or condition of the "superjacent waters" ("territorial seas" or otherwise). In fact, when the present case was introduced in 1991 not all the superjacent waters of the respective "maritime areas" of the Parties in the southern part of the delimitation area were "territorial seas". A considerable part of those waters were high seas at the time of the adoption of the 1990 Doha Minutes. The Judgment disregards this temporal factor and draws its maritime boundary by in fact giving preference to the present "territorial sea" character of the waters concerned, although the boundary must be a *single* maritime boundary.

479. Bahrain is geographically an archipelago composed of the islands forming the compact group known as the "Bahrain islands" proper, an archipelago with all its minor islands, islets, rocks reefs and low-tide elevations and I agree that this is one of the "circumstances" to be borne in mind in the delimitation exercise, but I reject that such a geographical "circumstance" could alter the relevant principles, rules and methods applying to the delimitation of maritime spaces between States or allowing, without further ado, the use of the *"straight baselines"* system of

Article 7 of the 1982 Convention. The Judgment does not uphold such a system thereby avoiding its inbred internal waters effect. We agree fully with that. But the Judgment nevertheless gives a kind of *plus*, in any case initially, to Bahrain because it is geographically an archipelago. By doing so, it introduces a distinction in maritime delimitations between States with unforeseeable consequences[1].

B. Principles, Rules and Methods Applicable to the Maritime Delimitation in the Case

480. None of the Parties to the present case is a party to the 1958 Geneva Conventions on the Law of the Sea and only Bahrain is a party to the 1982 Montego Bay Convention. Consequently, the principles and rules applicable to the maritime delimitation aspect of the case are the relevant principles and rules of customary or general international law. The Chamber in the *Gulf of Maine* case stated that "what general international law prescribes *in every maritime delimitation* between neighbouring States" (emphasis added) is that the:

> "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographical configuration of the area and other circumstances, an equitable result" (*I.C.J. Reports 1984*, pp. 299-300, para. 112).

481. This is the "fundamental" customary norm applicable to maritime delimitations. The "equitable solution" as a legal requirement of *any delimitation process* was also stated by the Court, with reference to both continental shelf and exclusive economic zones, in the *Jan Mayen* case (*I.C.J. Reports 1993*, p. 59, para. 48, also p. 69, para. 70). It is true that the 1969 Judgment of the Court in the *North Sea Continental Shelf* case held that the delimitation is to be effected in accordance with equitable principles and taking account of all the relevant circumstances. It said no more. But, this Judgment is old with respect to the 1982 Convention and the Court's most recent jurisprudence on the continental shelf. In the *Libya/Tunisia Continental Shelf* and *Libya/Malta Continental Shelf* cases, the Court's Judgments refer to the: (1) application of equitable principles; (2) taking account of all relevant circumstances; and (3) achievement of an equitable result.

482. It must however be pointed out that in none of the above-

[1] Concerning the formation of international law rules on archipelagos, see, for example, C. B. Jiménez Piernas, *El proceso de formación del derecho internacional de los archipelagos* (thesis) (two volumes), Departamento de Derecho Internacional Público, Facultad de Derecho, Universidad Complutense de Madrid, 1982.

mentioned cases did the maritime delimitation to be made involve the delimitation of *territorial seas*. In the present case, as indicated, the delimitation of the whole area described by the Parties as the southern sector is today a delimitation of "territorial seas". Both Parties in effect extended their respective territorial sea belts to 12 miles, Qatar in 1992 and Bahrain in 1993. Moreover, the delimitation of the southern area of the Parties' northern sector likewise involves a division of "territorial seas".

483. It follows that the single maritime boundary requested by the Parties is a line that in part of its course is today a territorial sea dividing line and in the remaining part a sea-bed and economic zone dividing line. Thus, the maritime jurisdictions divided by the maritime boundary are not the same throughout all its course. Nevertheless, the boundary must be a *single maritime boundary* because this is what the Parties requested. It is therefore a single maritime boundary independently of the maritime jurisdictions divided in the different sectors of its course. This aspect of the maritime boundary should have been more present in the drawing of the boundary line than actually seems to have been the case in the light of the reasoning of the Judgment. The role of the fundamental customary norm defined in the *Gulf of Maine* case is enhanced, or should have been enhanced, by the requested *singleness* of the maritime boundary, in spite of textual differences in the rules expressing that fundamental norm in Article 15 on the one hand, and Articles 74 and 83 of the 1982 Convention, on the other.

484. In the case of the territorial sea, the rule in Article 15 of the Convention provides in effect that when the *coasts* of two States are opposite or adjacent to each other, *neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breath of the territorial seas of each of the two States is measured.* This first provision of Article 15 does not apply, however, where it is necessary by reason of *historic title* or of other *special circumstances* to delimit the territorial sea of the two States *in a way which is at variance therewith* (second provision of Article 15). The "median line" may therefore limit the "12-mile entitlement" to territorial sea, generated by the relevant coast of each of the two States concerned, and this brings into the picture the *"equidistance method"* in the case of territorial sea delimitations.

485. Regarding the exclusive economic zone and the sea-bed delimitations of the northern part of the delimitation area, the "equidistance method" is not as such part and parcel of the relevant delimitation rules of Articles 74 and 83 of the 1982 Convention, even for the purpose of drawing an initial provisional line, although recourse to the "equidistance method" is not excluded either by those rules. It could well be that in a given case the "equidistance method", or the drawing of a "provisional

equidistance line" subject to adjustments, would also be the best means of ensuring an "equitable solution", as expressly provided for in the said articles of the 1982 Convention.

486. I have no doubt that in the present case the "equidistance method" should be applied in the southern as well as the northern parts of the delimitation area for the purpose of the construction of a *"provisional equidistance" line* subject to adjustments in the light of Qatari or Bahraini special or relevant circumstances.

487. The Judgment, however, follows a different path for the construction of its own "equidistance line" (see below). This prompts me to underline two points. First, that my understanding of the interplay of the two provisions of Article 15 of the 1982 Convention does not coincide with the line of reasoning of the Judgment in that respect. Secondly, that the two provisions of Article 15 by no means exclude the normative principle of the "equitable solution" expressly referred to in Articles 74 and 83 of the 1982 Convention. On the contrary, I consider that the "equitable solution" principle is an integral part of Article 15 of the 1982 Convention when read as a whole. Therefore, I cannot accept that the "equitable solution" principle has no role to play in a delimitation of "territorial seas".

488. As to the first point mentioned in the preceding paragraph — the interplay of the two provisions of Article 15 of the 1982 Convention — I am of the opinion that the special circumstances of the Article's second provision are supposed to intervene in the delimitation operation *after* the establishment of the "median line" under the first provision *and not before or simultaneously*, as the Judgment does.

489. It follows from the above that, for me, the "equitable solution" principle should be present in the delimitation effected by the single maritime boundary in both the northern and southern parts of the delimitation area, as recognized by the fundamental customary delimitation norm identified by the Chamber of the Court in the *Gulf of Maine* case.

490. Lastly, regarding Article 13 of the 1982 Convention relating to *"low-tide elevations"*, the Judgment appears, in many respects, to view what is essentially a permissive rule as a kind of "legal obligation" for the Court. We disagree. The provision in question uses the verb "may" and not *"shall"*. A State may or may not apply that provision. The same applies to the Court in a maritime delimitation entrusted to it. Thus it is the Judgment which has chosen to apply the provision referred to, but the Court is not obliged to do so when, for example, an "equitable solution" in a given maritime delimitation could be jeopardised by the application of that permissive rule.

C. The 1947 British Decision and Its Sea-bed Dividing Line

491. The *British "decision" of 23 December 1947* (see letters of notification to both Rulers in the Memorial of Qatar, Vol. 10, Anns. IV.115 and IV.116, pp. 115 and 116) is not applicable law in the present case. Like the 1939 British "decision" on the Hawar Islands, the 1947 "decision" on the sea-bed dividing line between Qatar and Bahrain is a mere element of fact in the case. As such, both "decisions" are historical facts but not the source of legal "title" or "entitlements", although the 1947 line is described in the letters concerned as a "median line based generally on the configuration of the coast-line of the Bahrain main island and the peninsula of Qatar" *(ibid.)*. Great Britain was not the holder of a title to the respective land territories of Qatar and Bahrain and, consequently, had no title either to dispose of the sea-bed rights generated by those land territories without the consent of their respective Rulers. It is true that, in 1947, most of the superjacent waters concerned were high seas but the British line purported to divide the sea-bed appertaining to Bahrain and the sea-bed appertaining to Qatar. Without the *consent* of the Rulers of both Qatar and Bahrain the 1947 British line does not have, in international law, binding legal effects for any of the Parties to the present case. This conclusion applies of course to all aspects of that "decision", including the so-called "exceptions" concerning the shoals of Qit'at Jaradah and Fasht ad Dibal and the Hawar Islands.

492. I am, therefore, in agreement with the conclusions set out in paragraphs 237 and 238 of the Court's Judgment. Qatar and Bahrain did not accept the 1947 "decision" as a decision legally binding upon them. Moreover, both Parties maintained the same position in the current proceedings. For many years, British statements were somewhat equivocal as regards the legal status of that "decision". Sometimes the 1947 line was referred to as final and on other occasions as subject to revision. It also appears that, in 1965/1966, Great Britain was prepared to allow the subject-matter of both the 1939 and the 1947 "decisions" to be referred to international arbitration.

493. Thus, the only legal question before the Court concerning the 1947 British "decision" is, in my view, to determine whether that non-binding "decision" and its sea-bed dividing line to some extent constitutes a circumstance which the Court should take into account when determining the course of the single maritime boundary line. On this question the Parties disagree. Bahrain denies it, while Qatar considers that the delimitation should be effected with due regard to the 1947 British sea-bed dividing line.

494. For me, neither the 1947 British "decision" nor its "line" are "special circumstances" within the meaning of Article 15 of the 1982 Convention. This does not mean that the 1947 line is completely irrelevant to the Court's task, but it certainly means that the "line", as well as the "decision", are mere elements of fact and are not law applicable to the maritime dispute in the present case.

495. As an element of fact, the relevance of the 1947 line for the Court's task is that the British authorities at that time regarded it as a line drawn "in accordance with equitable principles" (Memorial of Qatar, Vol. 10, Anns. IV.115 and IV.116, pp. 71 and 75). In this sense the 1947 line certainly broadly speaking constitutes an example or point of reference from an early attempt to effect an equitable sea-bed delimitation of the area by a third State. Secondly, because the "conduct of the Parties" subsequent to the 1947 British line (for example, in matters relating to operating limits of their respective oil concessions and offshore exploration and exploitation; security zones; etc.) provide some clues to what the Parties themselves may have considered at certain times to be an equitable delimitation line. To the extent that this is so, such conduct would indeed constitute a circumstance deserving to be taken into account in the current determination of the single maritime boundary line requested by the Parties (see, for example, the *Libya/Tunisia Continental Shelf* case).

496. My general conclusion is, therefore, that the 1947 British "decision" is not binding and is not as such a "special circumstance" in the legal sense of Article 15 of the 1982 Law of the Sea Convention, but the "relevant conduct of the Parties" with respect to the 1947 British line could be such a circumstance. In practical terms, namely as a point of reference, the 1947 British line was certainly quite useful, for me at any rate, for understanding a number of questions raised by the maritime delimitation requested of the Court. To give a simple example, the course of the 1947 British line, as of the 1948 Boggs-Kennedy line, runs across the maritime feature of Fasht al Azm proving by that the very fact that for the authors of those lines Fasht al Azm was not considered in 1947/1948 to be a part of Sitrah Island.

D. The 1948 Boggs-Kennedy Sea-bed Dividing line

497. The *Boggs-Kennedy sea-bed dividing line* of 16 December 1948 (Memorial of Qatar, Vol. 10, Ann. IV.127, p. 123) is not a "special circumstance" either, but a very useful point of reference for working purposes contained in a report prepared by two highly-experienced and qualified experts, based exclusively upon objective geographical and tech-

nical considerations, prepared specifically for delimitations in the Persian Gulf and drafted without any connection with the present case or with any of the Parties thereto. As an illustration of the reasonable construction of a line based upon the equidistance method, the Boggs-Kennedy line, with its justifications, for me served as an important point of reference in the technical task of ascertaining how an "equidistance line" could or should be constructed in the geographical circumstances of the maritime delimitation area in the present case.

498. The Boggs-Kennedy Report, with its two appendices and its suggested line, carries with it a high degree of professional credibility for the construction on an "equidistance or provisional equidistance line" in that area. It is true that the Boggs-Kennedy line is a striking illustration of the unprecedented line claimed by Bahrain in the present case, but that illustration is not the result of any bias on the part of Boggs and Kennedy against Bahrain. It results from Bahrain's own unjustified maritime delimitation submissions in the case.

499. The Boggs-Kennedy Report confirms that, generally, the "provisional equidistance line" is to be constructed by means of the so-called mainland to mainland method and that the dividing lines were "derived from the shores, as we find them represented on hydrographic charts at the present time" (*ibid.*, p. 128, para. 3.2). It also refers to the difficulty of making a precise determination of "the low-water coastline" and to the various problems associated with the presence of numerous geographical features such as islands, in particular islands situated "on the wrong side of the boundary" (*ibid.*, App. B, p. 146, para. 6).

500. Moreover, in order to achieve fair delimitations, the Boggs-Kennedy Report takes account of the following three principles: (1) it used the equidistance method both for the longitudinal delimitation of the central part of the Gulf and for the lateral delimitations, notably in what the report calls the "Bahrain area"; (2) it established the equidistance line, as a general method, constructed as from the relevant mainland coastlines or fronts, disregarding all islands, islets, rocks, reefs and low-tide elevations *detached* from the mainland coastline; and (3) it constructed the equidistance line by relying upon *either* the low-water line, to which preference was given, or upon the high-water line, depending on the degree of available technical knowledge relating to the maritime sector or feature concerned.

501. Finally, a clarification and a reservation regarding the Boggs-Kennedy line, both linked to the date of the Report (1948). The clarification is that the territorial sea belt of both Bahrain and Qatar was then only 3 miles. The reservation relates to the Hawar Islands and Zubarah.

The Report assumes that the Hawar Islands belonged to Bahrain and that Zubarah, or the so-called "Zubarah region", belonged to Qatar, but both assumptions relate to territorial questions which are disputed in the present case.

502. It is regrettable that the Judgment does not follow the professional method of the Boggs-Kennedy Report on how an equidistance line should be constructed in the disputed maritime delimitation area in the present case. The Judgment prefers to base its technical conclusions on the Parties' expert reports rather than on the Boggs-Kennedy Report. I am of the contrary opinion.

E. Identification in the Judgment of the "Relevant Coasts" of the States Parties

503. Maritime delimitations are always effected mainly in accordance with geographical criteria. The first criterion is to determine the *"relevant coasts"* or *"coastal fronts"* on the basis of the geographical realities of the area to be delimited. The usual way of doing this is by identifying the "coast" or "coastal fronts" concerned by reference to the *"mainland"* coasts or coastal fronts of the States parties. A mainland is defined by the *Webster's Dictionary* as *"a continuous body of land constituting the chief part of a country or continent"* (1980, Vol. II, p. 1362).

504. The present Judgment applies the mainland coasts or coastal fronts criteria for identifying the "relevant coast of Qatar". But, *it does not do so* where the "relevant coast of Bahrain" is concerned. In the latter case, the mainland coast is disregarded. We have no other explanation for this than the assumption by the majority of the relevance in that respect of Bahrain's being an archipelago or multiple-island State. Thus, in the present case, the maritime delimitation is effected between two different kinds of relevant coasts or coastal fronts. A geographical one (Qatar) and an artificial one constructed by the Court (Bahrain). I consider this to be a patently unjustified innovation in comparison with past delimitations effected by the Court or by other international courts or tribunals.

505. In effect, certain paragraphs in the Judgment explain how the Court constructed "Bahrain's relevant coasts" for the purpose of the present maritime delimitation. It is an artificial construction in which all manner of minor maritime features play a paramount role. Bahrain's relevant coasts in the Judgment are not *a continuous body of land at all and is not naturally connected with or a natural appendage of the Bahraini mainland coast.* It is formed: (1) by some of the tiniest islands, islets, rocks or sand-banks, etc., quite separated from each other and in most cases distant from Bahrain's mainland coasts; *and* (2) *by water.* In other words, "Bahrain's relevant coasts" of the Judgment *are not a coast or a*

coastal front at all. In such circumstances, I do not consider it necessary to elaborate any further on "Bahrain's relevant coasts" in the Judgment or on my total rejection of the said construction as a true "coast". Geography has been refashioned. The minor Bahraini maritime features concerned have nothing to do with the "skjærgaard" along the Norwegian coast. In the present case, there is "clear dividing line between land and sea" (*I.C.J. Reports 1951*, p. 127). I will only add that the practical result of the above in the present case is that *la mer domine la terre*, in spite of the general statement to the contrary contained by the Judgment. It is by no means the only case in which a correct conclusion on a principle of law made by the Judgment is thereafter voided of legal meaning in its concrete applications.

F. Method Applied by the Judgment for the Construction of its "Equidistance Line"

506. An "equidistance line" is by definition a line between two lines, but there is no trace in the Judgment of those two *lines* required for the construction of the "equidistance line". Normally, those baselines are the mainland coasts or coastal front lines of the two States concerned. But the Judgment does not apply the "baselines" of the mainland to mainland method for the construction of its so-called "equidistance line".

507. On the other hand, once the "archipelagic baselines" and the "straight baselines" are excluded, the Judgment is *without any Bahraini line serving as a baseline* for the construction of its "equidistance line". What it does for this operation is to replace the coastal mainland baseline of Bahrain by a series of selected "basepoints" in the minor islets, rocks and sand banks already referred to and in and low-tide elevations considered to be in the territorial sea of Bahrain alone. These features are rather isolated from each other. They have been selected, according to the Judgment, bearing in mind the pleadings and arguments of Bahrain in the present proceedings and related rules invoked. No Bahraini "basepoint" is situated on the mainland coast of Bahrain.

508. Where Qatar is concerned, the main "basepoints" of the "equidistance line" in the Judgment are situated on the western mainland coast of Qatar, namely on the Qatar peninsula. But Qatar did not plead "basepoints" but a "baseline", namely its western mainland coastline which extends, north to south, from Ras Rakan to Ras Uwaynat. The replacement of the mainland coastline pleaded by Qatar with some selected

"basepoints" minimizes the western coast of Qatar as land territory generating territorial sea entitlements or rights.

509. In fact, the "equidistance line" of the Judgment is not an "equidistance line" in the ordinary sense of the term, but, as its very title indicates, an equidistance line *taking into consideration all the islands as well as low tide-elevations located in the territorial sea of one State only.* We are not, therefore, dealing with an equidistance or median line as this term is usually understood, but with something else.

510. I have the most serious doubts whether the "equidistance line" in the Judgment can be an appropriate instrument for making a fair maritime delimitation, even in the circumstances of the present case. A comparison between the "equidistance line" in the Judgment and the final course of the single maritime boundary adopted shows how many adjustments were required to define that boundary, not counting the several others which would have been necessary, in my opinion, to reach the overall legal goal of an "equitable solution".

511. As indicated, there is no doubt that, by using the described method for the construction of its "equidistance line", the Judgment had in mind the fact that the State of Bahrain is geographically an archipelago. But, these geographical circumstances could and should have been taken into account by adjusting a true "equidistance line", namely an equidistance line between the mainland coast or coastal fronts of Qatar and Bahrain. The danger for an equitable result posed by an "equidistance line" such as the one in the Judgment for one of the two Parties is obvious.

512. In the present case this danger was real. The equidistance line method as used has not led, in my opinion, to an equitable result in all the segments conforming to the single maritime boundary finally adopted. In fact, in the southern part of the delimitation area, at an early stage in the legal delimitation operation, the "equidistance line" in the Judgment already left Bahrain the totality of the overlapping area of the 12-mile territorial sea generated by the western mainland coast of Qatar and even more than that. In terms of the law of the sea, that result is not an equidistance line capable of producing an "equitable result". The resulting excess of the method used has, however, been somewhat corrected by the Judgment by other means, although the single maritime boundary adopted still left Bahrain with more extensive maritime areas than any previous terms of reference external to the Parties, namely the 1947 British line and the Boggs-Kennedy line.

513. The so-called "mainland to mainland method" for the purpose of defining a "provisional equidistance line" or an "equidistance line" is a

particularly reasonable method when, as in the Parties' southern sectors, the dividing line effects a territorial sea delimitation and the maritime area concerned is dotted with a great number of small islands, islets, rocks, reefs and low-tide elevations which could otherwise create a disproportionately distorting effect and ultimately lead to an inequitable result, or to jeopardizing the security interests of one Party or the other, or even to violations of the principle of non-encroachment. The small islands, islets, rocks, reefs and low-tide elevations referred to could even be "circumstances" justifying subsequent adjustments of a normal "equidistance line", but in no event could they be "basepoints" for the construction of the "median line" in the first provision of Article 15 of the 1982 Convention.

514. Moreover, the determination by an international court or tribunal of the "baselines" of an "equidistance line", constructed by it for the purpose of a maritime delimitation, is an operation which should by no means be confused with the one concerning the determination by a State of the baselines from which it measures the breadth of its own territorial sea. International jurisprudence is also quite clear in this respect. It follows that these baselines may coincide in some cases but not in others. The author, object and purpose and function of these two kinds of baselines are not the same. In the present case, the question of whether these two kinds of baselines coincide does not even arise. Both Parties have notified the Court that they have not yet established the baselines for measuring the outer limits of their respective territorial seas. The situation is therefore quite different from the *Jan Mayen* case in which both parties had already established those baselines before instituting proceedings before the Court, did not challenge them during the proceedings, and no territorial sea delimitation was at issue, as it is in the present case.

515. The "basepoints" of the "equidistance line" in the Judgment are located in the *low-water line* of the "relevant coasts" as constructed by the Judgment. This is the general rule and, consequently, it is acceptable for me *provided* that low-water lines concerned are clearly marked on large-scale charts officially recognized by the coastal State. However, this is far from being the situation in the present case. Consequently, the low-water line introduces into the present case a further subjective element in the delimitation operation effected by the Judgment.

G. Non-definition by the Judgment of the "Area of the Delimitation"

516. Contrary to general practice, the Judgment refrains from defining the maritime area of the delimitation to be effected. This is not too

important in the southern part of the area because in that area geography provides the answer. Furthermore, in so far as the southern limit of the southern part is concerned, there are Agreements which provide guidance. We refer to the 1958 Agreement between the Kingdom of Saudi Arabia and the State of Bahrain concerning the Delimitation of the Continental Shelf and to the 1965 Agreement on Determination of Land and Sea Boundaries between the Kingdom of Saudi Arabia and the State of Qatar.

517. In the northern part of the delimitation area the situation is quite different where its lateral lines are concerned. The northern limit of that sector is, however, defined by the continental shelf dividing lines set forth in the 1969 Agreement of Qatar with Iran and in the 1971 Agreement of Bahrain with Iran.

518. The uncertainties as to the lateral limits of the delimitation area in the northern part have a certain effect on the construction of the "equidistance line" in the Judgment because, as a "basepoint" of that line, the latter takes into account a point located on the low-tide elevation of Fasht al Jarim that I consider to be outside the delimitation area. However, the Judgment does not give effect to Fasht al Jarim as regards the course of the single maritime boundary adopted.

H. Special or Relevant Circumstances

519. In the present case, the special or relevant circumstances that a delimitation operation should take into account are mainly geographical. But there are others, of a different kind, such as security and maritime communication circumstances of both Qatar and Bahrain. Thus, security and access to ports of the State of Bahrain cannot be ignored in the delimitation. On the other hand, the attribution to Bahrain of the Hawar Islands does indeed create a maritime situation in that area which also needs to be resolved taking due account of the security and maritime communication interests of the State of Qatar.

1. Length of the "relevant coasts" of the Parties and general direction and configuration of those coasts

520. The *disparity in the lengths of the Parties' coasts* constitutes a "special circumstance" of the greatest importance in maritime delimitations *(la terre domine la mer)*. The jurisprudence of the Court and other international tribunals is crystal clear in this respect. It is, indeed, one of the most relevant "special circumstances" accepted and applied. In the present case, the disparity or disproportion of the respective coastal lengths alleged by Qatar amounts to a ratio of approximately 1.59 to 1 in favour of Qatar. If so, it is quite a "significant disparity" and should have been given effect. But how could the Judgment compare the length of the

relevant Parties' coasts in the light of its definition of "Bahrain's relevant coasts"?

521. The Judgment's reply to the above is that — because of the attribution of the Hawar Islands to Bahrain — the lengths of the relevant coasts of the Parties are the same or approximately the same, but no precise figures are given in the Judgment to support that conclusion. In this respect, as in others, the technique used by the Judgment consists in giving partial effect or no effect, in the delimitation, to certain minor islands and other maritime features, as reflected in the course of the single maritime boundary defined by the Judgment. Consequential on the lack of precise figures on the lengths of the relevant coasts of the Parties and on the non-definition of the "delimitation area" is the fact that the equitableness of the result of the delimitation effected by the Judgment cannot be verified by application of the *proportionality test.* There is no reference in the Judgment to any such verification or test. This is another of its innovations.

522. As to other relevant geographical criteria that should be pondered in a maritime delimitation, such as the general direction and configuration of the Parties' relevant true coasts, the relationship between those coasts, the location and distance of minor islands, islets, rocks, reefs and low-tide elevations with respect to those coasts and between themselves, etc., these are not geographical criteria to which the Judgment pays particular attention, although certain major distorting effects of not doing so are indeed corrected. For example, when defining the single maritime boundary adopted, the low-tide elevation of Fasht al Azm, which is a feature which does not follow the general direction of the Bahraini mainland coast — it is in fact vertical to that general direction — creates a considerable distortion which could seriously affect the equitableness of the delimitation. Again, all of this reveals that for the Judgment the main geographical concern was not the geography of the whole maritime delimitation area, but the geographical features of one of the Parties: the State of Bahrain. We reject, as unjustified in law, this general approach by the Judgment to the maritime delimitation task entrusted by both Parties to the Court.

2. The shoals of Qit'at Jaradah and Fasht ad Dibal

523. In the present case, these shoals raise a twofold issue, namely *(a)* their characterization as maritime geographical features; and *(b)* the determination of which of the two Parties has sovereignty over them.

524. Regarding the first issue, there is not a problem with Fasht ad

Dibal because both Parties agree that this shoal is a low-tide elevation. The matter is entirely different in the case of Qit'at Jaradah. Bahrain characterized it as an "island" and Qatar as a "low-tide elevation". The Judgment concludes that Qit'at Jaradah is an "island" on the basis of a comparison of the conclusions in the reports of each Party's experts submitted to the Court. However, navigational publications and maritime charts do not depict Qit'at Jaradah as an "island", but as a "low-tide elevation". For my part, in the light of the evidence, including photographic evidence, before the Court, I have the greatest difficulty in concluding that Qit'at Jaradah is geographically an island. I even have difficulty in considering a changing tiny sandbank such as Qit'at Jaradah a consolidated low-tide elevation. It may well be an incoming low-tide elevation in the process of becoming or not in the future a true islet. In no case does it appear to me at present to be a true island. In such situations, I am of the view that common sense must prevail over formal interpretations of general legal definitions in the light of objective physical data. In any case, the Court should itself have verified such data before adopting a judicial decision on them. The example of Fasht al Azam (see below) proves that an international court should be prudent in reaching findings on matters of physical geography.

525. In fact, Bahrain's original position was not so much that Qit'at Jaradah is actually a true island but rather that *it was to be treated as an island* (Memorial of Bahrain, para. 624). Bahrain argued that the feature became an island some years ago as a result of natural accretion and *that it would still be an island* if Qatar had not intervened in 1986 *and that it is in the process of again becoming an island* by means of natural accretion. According to Bahrain, Qatari bulldozers removed that part of Qit'at Jaradah exposed at high tide in 1986. Qatar is of a different view. According to Qatar, in 1985 Bahrain tried to modify the existing situation in both Jaradah and Dibal in order to improve its legal position in a manner contrary to the status quo agreements reached in 1978 and 1983 during the Saudi Arabian mediation and this provoked the intervention of Qatar on 26 April 1986. Thus, this Qatari intervention would have been an act to restore the status quo. Moreover, Qatar explained that the subsequent removal operations were not carried out by Qatari bulldozers but were the result of an international operation under the supervision of the Gulf Co-operation Council (GCC) and carried out in accordance with procedures previously agreed upon by that Council.

526. The Chamber in the *El Salvador/Honduras* case, of which I was a member, drew a distinction between an "island" and a "low-tide elevation" in so far as *appropriation* is concerned. The Chamber considered that Meanguerita was an island and not a low-tide elevation and, there-

fore, capable of appropriation by the modes of acquisition of land territory (*I.C.J. Reports 1992*, p. 570, para. 356). Dibal and Jaradah are however low-tide elevations. This is why I personally consider that sovereignty over Dibal and Jaradah is to be defined by the application of the applicable maritime delimitation rules of the law of the sea and not by operation of the law governing acquisition of land territory *(terra firma)*. The law of the sea takes into account the *location* of the low-tide elevation concerned and therefore its distance from the relevant mainland coast, for example, if the elevation is situated within or beyond the outer limits of the territorial sea of a given State. As stated in *Oppenheim's International Law* (ninth edition): "Since the high seas are free, no part of it can be the object of acquisition of sovereignty by occupation, nor can mere rocks or banks in the open sea, although lighthouses may be built on them" (Memorial of Qatar, Vol. 8, Ann. III.307, p. 543). Since 1992 the *shoals* of Jaradah and Dibal have geographically been within the reach of the 12-mile territorial sea of Qatar. Since 1993, Jaradah has been within the overlapping area of the 12-mile territorial seas of Qatar and Bahrain, but closer to the former than to the latter. In my opinion, both shoals should therefore fall under the sovereignty of the State of Qatar.

527. The 1947 British decision which refers to "sovereign rights" of Bahrain over Dibal and Jaradah (a decision not opposable to Qatar, as recognized by the present Judgment) is not based upon any accepted legal ground because at that time Dibal and Jaradah were in the high seas and, furthermore, on the Qatari side of the very British sea-bed dividing line. My position on the question of the sovereignty over those two low-tide elevations is that the matter should be settled by the course of the single maritime boundary once adopted by the Court in accordance with the law of the sea.

528. The Judgment's boundary line left Fasht ad Dibal on the Qatari side of that line and, therefore, finds that that low-tide elevation falls under the sovereignty of the State of Qatar. I agree with that unanimous decision of the Court. But, with respect to Qit'at Jaradah, characterized as an island by the majority, the Judgment attributed sovereignty to Bahrain on the basis of the rules of international law applicable to the acquisition of land territory *(terra firma)*. There is no evidence, however, in the case file to support this quite extraordinary finding of the Judgment. The "activities" of Bahrain referred to in the reasoning of the Judgment are not capable of generating title to any kind of land territory in international law. There are minimal and uncertain "activities" — not *"effectivités"* performed *à titre de souverain* by Bahrain.

529. I therefore consider that, regrettably, the finding of the Court concerning sovereignty over Qit'at Jaradah is not well founded either in geography or in law. In fact, and in law, sovereignty over Qit'at Jaradah should have been deemed to belong to the State of Qatar. There is no geographical or legal justification to conclude otherwise, as the Judgment does.

3. Is Fasht al Azm part of Sitrah Island or not?

530. I do not consider that Fasht al Azm is part of Sitrah Island as argued by Bahrain on the basis mainly of a report prepared by its own experts. Neither this report nor the aerial pictures nor the arguments submitted by Bahrain match the clear and neutral evidence to the contrary submitted by Qatar concerning the existence in the past of a natural channel between Sitrah Island and Fasht al Azm used by fishermen. This natural channel was filled in during the 1980s by reclamation and other works carried out by a private firm in the service of Bahraini governmental authorities. Among the proofs of its assertion submitted by Qatar was the Bahraini technical document entitled "Technical Circular No. 12. Dredging and land reclamation activities along the Bahrain coasts", dated March 1982 and signed by a Bahraini research office, Zahra Sadif Al-Alani.

531. The Judgment decides not to make a judicial determination on whether or not Fasht al Azm is part of Sitrah Island. Its conclusion here is difficult to explain because the Bahraini technical circular referred to above, by its very nature and date, is an objective and unimpeachable piece of evidence, which defeats any contrary evidence and arguments submitted by Bahrain in the current proceedings. In fact such a decision is a further confirmation of the minor role played by evidence in the reasoning of the Judgment. For us, the element of evidence provided by the above mentioned "Technical Circular No. 12" dispelled any doubts we may have had on the matter. Hence our conclusion that Fasht al Azm is not part of Sitrah Island. Fasht al Azm is a low-tide elevation which was separated from Sitrah Island by *a natural navigable channel traditionally used by fishermen* before Bahraini reclamation and other works of the 1980s mentioned in the said Technical Circular.

532. Since our conclusion in this respect is highly relevant for our assessment of the "equidistance line" in the Judgment and, ultimately, of the equitableness of the single maritime boundary adopted by the Court, we reproduce below *verbatim* what is stated, in this connection, on pages 15 and 18 of Bahraini Technical Circular No. 12 quoted in the Counter-Memorial of Qatar:

"A. GULF PETROCHEMICAL INDUSTRIES CO.:

The project site (Fig. 9) is scheduled to be completed by 2nd 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 1250 m long access causeway and to BAPCO causeway by a 500 m 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 7 m, and its length will be about 3.5 km. *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 3.5 m as a minimum over a distance of 1,100 m.* The quantity of material above that depth and within the channel section is approximately 110,000 m^3, the marked width of the channel will be 60 m. The dredged material will be located east of the channel forming one or more islands as required." (Counter-Memorial of Qatar, Vol. 1, p. 271, para. 8.50; emphasis added.)

533. It follows that I cannot agree with any conclusion to the effect that the low-water line of Sitrah Island is the easternmost limit of the low-water line on Fasht al Azm. This is not so. Consequently, Fasht al Azm cannot provide "basepoints" for the construction of an "equidistance line" such as the one constructed by the Judgment *because it is a low-tide elevation which is not located in the territorial sea of one State only but of the two States parties*. In any case, the Judgment has to provide alternatives in the area concerning the course of its own "equidistance line" proving, once more, the fragility of that "equidistance line" and of its conceptual foundations.

4. Delimitation in the Hawar Islands maritime area

534. As emphasized throughout this part of the present opinion, the result of any maritime delimitation, including a delimitation of territorial seas, should be "equitable". But to achieve such a result in the maritime area where the Hawar Islands are located is indispensable to the adoption of an imaginative legal solution.

535. Why is this so? Because, the Hawar Islands, and their shelf and

du titre originaire de Qatar — Reconnaissance du titre originaire de Qatar sur le territoire — La définition de « Bahreïn » donnée en 1889 par Bent — Autres définitions — Le témoignage faisant autorité formulé par Lorimer en 1908 — Son approbation par Prideaux — Lettres de Prideaux datant de l'année 1909 — Présomption, en droit international, selon laquelle les îles situées dans la mer territoriale d'un Etat doivent être considérées comme faisant partie de l'Etat en question — Rôle des facteurs de proximité ou de contiguïté dans l'établissement d'un titre sur des îles — Les conventions anglo-ottomanes de 1913 et 1914 — Le traité anglo-saoudien de 1915 — Le traité conclu en 1916 entre la Grande-Bretagne et Qatar — Les cartes en tant qu'éléments de preuve confirmant ou corroborant la reconnaissance, l'opinion générale ou la commune renommée — L'exercice par le souverain de Qatar de son autorité sur les îles dans les années vingt et trente.

Conclusion: Qatar détient le titre originaire sur l'ensemble de la péninsule, y compris sur Zubarah, les îles Hawar et l'île de Janan.

Question de savoir si Bahreïn possède sur les îles Hawar ou sur certaines d'entre elles un titre l'emportant sur le titre originaire de Qatar sur ces îles — La recherche par Bahreïn d'un titre « dérivé » — La « décision » britannique de 1939 relative aux îles Hawar — La « décision » de 1939 n'est pas une sentence arbitrale ayant l'autorité de la chose jugée — Evénements à prendre en considération pour déterminer l'effet juridique pour les Parties de la « décision » de 1939 — Compétence du Gouvernement britannique en 1938 pour rendre une « décision » ayant, en droit international, des effets juridiques contraignants pour Qatar et Bahreïn — Le consentement du souverain de Qatar et du souverain de Bahreïn comme seul fondement possible d'une telle autorité — Refus du souverain de Qatar d'accepter la « décision » britannique de 1939 en tant que décision juridiquement contraignante s'imposant à lui en vertu du droit international — Absence de consentement éclairé et donné librement par le souverain de Qatar à la procédure britannique de 1938-1939 — Invalidité en droit international de la « décision » britannique de 1939? Les vices de la procédure britannique de 1938-1939 en tant que motif de nullité de forme de la « décision » britannique de 1939 — La contradiction interne et l'arbitraire du rapport de Weightman de 1939 en tant que motif de nullité de fond de la « décision » britannique de 1939.

Les effectivités alléguées par Bahreïn comme source éventuelle d'un titre dérivé sur les îles Hawar — Définition des effectivités en droit international — Les îles Hawar n'étaient pas terra nullius *— L'occupation des îles Hawar ne découle pas d'un exercice pacifique et continu de l'autorité étatique par le souverain de Bahreïn — Le consentement en tant que fondement éventuel d'un titre territorial dérivé — L absence de consentement de Qatar à cet égard — Le rôle des Dowasir — Les îles Hawar étaient impropres à un habitat permanent — Insuffisance des preuves relatives aux prétendus cas de reconnaissance — Divers arguments généraux avancés par Bahreïn —Les prétendues activités judiciaires bahreïnites concernant les îles Hawar —Bahreïn n'a pas prouvé la manifestation intentionnelle d'autorité sur les îles Hawar à l'époque pertinente.*

*Inapplicabilité à la présente espèce du principe de l'*uti possidetis juris *— Distinction entre l'*uti possidetis juris *et l'*uti possidetis *tout court — Le principe de l'*uti possidetis juris *est devenu une norme de droit international d'application générale à la suite de la seconde guerre mondiale — Question de la rétroactivité de la norme — La situation de succession en tant que condition de fond pour l'applicabilité de la norme — La succession en matière de titres territoriaux est subordonnée à deux conditions cumulatives aux termes de l'*uti possidetis juris

en faveur de l'Etat exerçant sa souveraineté sur les côtes et non pas, comme le fait l'arrêt, la méthode de la demi-enclave en faveur du souverain lointain.

J'estime que les conclusions de la majorité de la Cour sur les points susmentionnés 1) ne tiennent pas compte du titre originaire de Qatar qui s'étend à l'ensemble de la péninsule et aux îles adjacentes et qui est établi par voie de consolidation historique et de reconnaissance générale; 2) font de la «décision» britannique de 1939 sur les îles Hawar la source d'un titre dérivé de Bahreïn primant le titre originaire de Qatar, bien que ladite «décision» soit dans la forme comme au fond nulle en droit international et bien que ces îles se situent dans la zone maritime de la péninsule de Qatar; 3) admettent qu'une formation maritime telle que Qit'at Jaradah peut faire l'objet d'une appropriation au même titre qu'un territoire terrestre par de prétendues activités de Bahreïn ne correspondant pas à des actes accomplis par l'Etat de Bahreïn à titre de souverain; et 4) font abstraction, dans le secteur sud de la zone de délimitation maritime, de circonstances spéciales très pertinentes propres à Qatar dont il aurait fallu tenir compte pour la délimitation si l'on voulait parvenir dans l'espace maritime des îles Hawar à une solution équitable ainsi que l'exige le droit de la mer.

Considérant que la Cour doit se prononcer sur chacun des points contestés mentionnés ci-dessus conformément au droit international, je suis convaincu à mon grand regret que l'arrêt, examiné dans cette perspective, présente de graves lacunes juridiques s'agissant des quatre questions susvisées. Pour le surplus, je fais miennes les conclusions de l'arrêt dans une affaire complexe, revêtant aussi une dimension historique qu'il n'est pas toujours facile d'apprécier.

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OBSERVATIONS LIMINAIRES GÉNÉRALES

1. Les deux aspects de l'affaire

1. Comme l'indique son intitulé, la présente affaire opposant Qatar et Bahreïn est tout autant d'ordre «territorial» que d'ordre «maritime». Ce n'est pas le premier différend dont la Cour est saisie, dans lequel se trouvent combinés en une seule instance des aspects tant territoriaux que maritimes. L'objet du différend, considéré dans son ensemble, se constitue des différentes demandes présentées par chacune des Parties dans le cadre de la «formule bahreïnite» acceptée par Qatar dans le procès-verbal de Doha de 1990. Selon cette formule, la Cour était priée:

a) de trancher toute question relative à un droit territorial ou à tout autre titre ou intérêt qui peut faire l'objet d'un différend entre [les Parties]; et

b) de tracer une limite maritime unique entre leurs zones maritimes respectives, comprenant les fonds marins, le sous-sol et les eaux surjacentes.

2. Les questions territoriales en litige portant toutes sur la souveraineté, la Cour est appelée à se prononcer sur la catégorie de différends territoriaux que la doctrine qualifie de *«différends relatifs à l'attribution de la souveraineté»*. Dans la première partie de la présente opinion (Les questions territoriales), je m'attacherai par conséquent à déterminer laquelle des Parties est titulaire du titre territorial sur Zubarah, les îles Hawar et l'île de Janan. Les deux Parties prétendent posséder un titre originaire sur ces zones et îles contestées, mais Bahreïn invoque également des titres dérivés tels que l'*uti possidetis juris*, la «décision» britannique de 1939 relative aux îles Hawar et les effectivités exercées dans ces îles en sus du prétendu titre originaire ou indépendamment de celui-ci.

3. La première partie se divise en deux sections. La première question fondamentale, qui est celle de déterminer le titulaire du titre originaire, est examinée dans la section A qui prend en considération comme il se doit les événements historiques, politiques et juridiques ayant une incidence sur le processus de formation, de consolidation et de reconnaissance de ce titre. Ayant conclu à la fin de la section A que Qatar est le titulaire du titre originaire sur Zubarah, les îles Hawar et l'île de Janan et ayant relevé que l'arrêt de la Cour affirme la souveraineté de Qatar sur Zubarah et l'île de Janan mais non sur les îles Hawar, j'expliquerai dans la section B de la première partie de la présente opinion les raisons pour lesquelles j'estime que la majorité de la Cour a conclu à tort dans le différend relatif aux îles Hawar que Bahreïn avait souveraineté sur celles-ci en vertu de la «décision» britannique de 1939. Bahreïn n'est pas titulaire d'un tel titre ou de tout autre titre dérivé fondé soit sur le principe de l'*uti possidetis juris*, soit sur les prétendues effectivités, soit sur les deux à la fois.

4. Enfin, dans la seconde partie de la présente opinion (La délimitation maritime), j'examinerai les principes, règles et méthodes de délimitation maritime appliquées par la Cour en l'espèce ainsi que certains des

est que le principe de l'*uti possidetis juris* est pertinent, la Cour ne peut l'appliquer en l'espèce qu'à titre de principe ou de norme du droit international général.

9. En l'espèce, des questions, telles que l'identité du titulaire du titre originaire sur les territoires en litige, l'exercice pacifique et continu de l'autorité de l'Etat dans un territoire donné à l'époque pertinente, la reconnaissance du titre territorial par des Etats tiers, etc., ne sont pas réglées de manière concluante par un traité liant les Parties. Pour trancher toutes ces questions, la Cour doit appliquer les règles du droit international général aux faits et circonstances de l'affaire en tenant compte de sa dimension historique.

10. Le droit international général trouve également à s'appliquer au volet maritime du différend. Bahreïn est certes partie à la convention de 1982 sur le droit de la mer, mais Qatar, lui, n'a pas ratifié celle-ci. De plus, ni Bahreïn ni Qatar ne sont parties à aucune des quatre conventions de Genève de 1958 sur le droit de la mer. Enfin, les Parties n'ont pas conclu d'accord entre elles au sujet de la délimitation de la mer territoriale, de la zone contiguë, des fonds marins et de la zone économique exclusive ou encore au sujet de zones de pêche exclusives ou préférentielles. La Cour doit dès lors appliquer au tracé de la limite maritime unique la ou les normes coutumières fondamentales régissant les délimitations maritimes, à la consécration de laquelle ou desquelles la Cour, de l'aveu général, a apporté un concours de premier plan. Ni Bahreïn ni Qatar ne considèrent la «décision» britannique de 1947 sur la ligne de partage des fonds marins comme une sentence arbitrale, même si Qatar voit dans certains volets de celle-ci — en raison des principes d'équité qui y sont inscrits — une circonstance méritant d'être prise en compte par la Cour pour le tracé de la limite maritime unique.

11. Il va sans dire que conclure à l'applicabilité du droit international général aux volets territorial et maritime du différend ne signifie nullement que les traités ou accords sont dénués de pertinence en l'espèce. Bien au contraire, il y a plusieurs traités et accords importants conclus par Qatar ou par Bahreïn avec la Grande-Bretagne et aussi, plus récemment, avec l'Arabie saoudite et l'Iran, ainsi que des traités très pertinents conclus entre des Etats tiers, tels que par exemple les conventions anglo-ottomanes de 1913 et de 1914 ainsi que certains accords conclus entre la Grande-Bretagne et l'Arabie saoudite. Quelques-uns de ces accords et conventions fournissent des éléments de preuve concluants sur certaines questions relatives au titre territorial tandis que d'autres circonscrivent les limites méridionale et septentrionale de l'aire de délimitation maritime. Il y a en outre les négociations menées et les accords de concession conclus soit par Bahreïn soit par Qatar avec des sociétés pétrolières, qui fournissent également des éléments documentaires et cartographiques sur certaines questions divisant les Parties.

12. Le présent arrêt applique comme il se doit le droit international général à l'affaire. Je n'ai par conséquent aucun reproche à lui adresser s'agissant de la détermination du droit applicable en tant que tel. Les

conformément au droit international compte tenu des conclusions des Parties et des éléments de preuve qui lui ont été soumis. Les éléments de preuve soumis par les Parties suffisent à mon avis pour trancher les questions qui se posent en l'espèce et il n'y a dès lors aucune justification pour invoquer ou appliquer à cet égard la maxime *quieta non movere*. L'écoulement du temps ne s'opposait pas à ce que fussent communiqués à la Cour des éléments de preuve sur des questions pertinentes dont certaines remontent au XIX[e] siècle.

16. La Cour ne se trouve pas dans la situation du tribunal arbitral constitué en 1908 dans l'affaire des *Grisbadarna*. De plus, la sentence dans cette affaire était régie par compromis qui — sans infirmer le rôle primordial reconnu au «titre» pour résoudre le différend — conférait en son article 3 aux arbitres le pouvoir de statuer à titre subsidiaire, notamment «en tenant compte des circonstances de fait» (Nations Unies, *Recueil des sentences arbitrales*, vol. XI, p. 153-154). L'arbitrage des *Grisbadarna* portait en outre sur une frontière maritime alors que les questions territoriales en litige en l'espèce concernent la souveraineté sur un territoire terrestre. L'importance de l'arbitrage des *Grisbadarna* au regard de la présente affaire réside d'ailleurs non pas dans le fait que la maxime *quieta non movere* s'y trouve invoquée, mais dans l'affirmation selon laquelle la propriété du territoire terrestre emporte automatiquement celle de la zone maritime qui en est l'accessoire (*ibid.*, p. 159).

17. Le principe de la stabilité et du caractère définitif des frontières internationales lorsque celles-ci ont fait l'objet d'un accord ou arrangement antérieur en vigueur entre les parties n'est pas en cause en l'espèce. Il s'agit de déterminer si la Partie possède un titre originaire consolidé et reconnu sur la région ou les îles faisant l'objet du différend territorial ou sur les deux à la fois. Ensuite, s'il faut en dernière analyse statuer sur l'existence d'un titre parfaitement opposable et sur l'identité de son titulaire, la maxime *quieta non movere* ne trouve pas à s'appliquer car elle a précisément pour objet et but de protéger les titres et frontières déjà consolidés et non de les remettre en question.

18. Dans le cas des îles Hawar, la Cour ne se trouvait nullement devant un état de choses existant, mais devant un différend international opposant les Parties depuis l'occupation clandestine de Jazirat Hawar en 1937 par Bahreïn, suivie de la «décision» britannique de 1939. L'état de choses existant aux îles Hawar depuis ces événements n'était pas incontesté et le différend qui en a résulté entre les Parties n'était pas réglé en 1991 lorsque Qatar a déposé auprès du Greffe de la Cour sa requête introductive d'instance. Aussi le différend relatif aux îles Hawar, tout comme tout autre différend international soumis à la Cour, doit-il être tranché au fond tout à fait indépendamment de l'application ou non par le juge de la maxime *quieta non movere*. La Cour ne devrait pas hésiter à se prononcer en faveur de la non-application de cette maxime lorsque le droit international dicte cette solution comme ce fut le cas par exemple dans des affaires telles que *Jamahiriya arabe libyenne/Tchad, Roi d'Espagne, El Salvador/Honduras*, etc.

culièrement étriquée des faits historiques qui présentent une certaine pertinence et importance pour se prononcer sur le processus de consolidation et de reconnaissance du *titre originaire* sur les territoires terrestres litigieux, alors qu'il adopte, semble-t-il, une attitude un peu plus ouverte quant à la recevabilité et aux effets potentiels d'événements mineurs isolés présentés comme preuves d'effectivités.

23. Je ne saurais m'associer à une telle démarche générale. D'après les règles du droit international régissant l'attribution de la souveraineté sur des territoires terrestres, la notion et la définition des effectivités ne se ramènent nullement à de simples *activités* concrètes d'intensité variable. Les activités concrètes doivent s'accompagner d'un élément subjectif, la volonté d'agir à titre de souverain et revêtir dans leur manifestation un caractère public, paisible et continu. De plus, le fait que le droit tienne éventuellement compte d'actes publics, pacifiques et continus exercés à titre de souverain dans un territoire donné ne donne pas nécessairement naissance à un titre territorial sur cet espace lorsqu'un autre Etat possède déjà sur celui-ci un titre territorial antérieur dûment consolidé et reconnu, opposable à ce nouvel Etat rival ou à tous les autres Etats.

24. La présente opinion part de la proposition contraire, à savoir que la primauté d'un titre consolidé et reconnu sur des effectivités prétendues ou réelles constitue en droit international un critère incontestable pour trancher entre des revendications territoriales concurrentes. La possession effective déploie ses pleins effets comme source potentielle de titre sur des territoires qui sont *res nullius*, mais non sur des territoires «avec maître» à moins que celui-ci ne donne son acquiescement ou fasse abandon de son titre antérieur. Il convient de rappeler à cet égard qu'aucune des Parties n'a soutenu en l'espèce qu'une portion quelconque des territoires terrestres litigieux était *terra nullius* au moment des faits.

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25. Dans les circonstances de l'espèce, il faut, pour se prononcer sur les droits territoriaux souverains respectifs des Parties, commencer par une étude approfondie et détaillée des faits historiques qu'elles invoquent comme source de leur prétendu titre originaire sur les territoires en cause. Ces faits historiques — de nature variée — ont une pertinence bien plus grande et une portée bien plus considérable pour résoudre les questions territoriales litigieuses que les faits invoqués au soutien des prétendues effectivités. Je considère par conséquent injustifiée la réticence dont fait preuve l'arrêt dans l'analyse des faits historiques prouvés comme source potentielle ou réelle d'un titre originaire, et ce plus particulièrement dès lors que Qatar et Bahreïn, en tant qu'Etats, sont le produit d'une évolution historique et qu'ils se disent tous les deux titulaires d'un titre originaire dont la formation et la consolidation auraient commencé, dans le cas de Bahreïn, à peu près à partir de la seconde moitié du XVIII^{e} siècle et, dans le cas de Qatar, à partir environ de la moitié du XIX^{e} siècle et, en tout état de cause, à partir de 1868-1871.

statuer sur la recevabilité de ces effectivités. Or l'arrêt s'abstient de définir une «date critique» à cet effet bien que Qatar ait prouvé que les prétendues effectivités exercées par Bahreïn dans les îles Hawar sont postérieures à l'occupation clandestine et illicite de la partie septentrionale de Jazirat Hawar en 1937 et à la «décision» britannique de 1939, c'est-à-dire postérieures à l'époque où pouvait être considéré comme né le différend opposant les Parties au sujet de la souveraineté sur les îles Hawar.

31. En outre, le fait que l'arrêt se fonde pour se prononcer à l'égard des îles Hawar sur la «décision» britannique de 1939 et non sur le moyen tiré des effectivités exercées par Bahreïn ne nous autorise pas à nous abstenir d'examiner certains aspects de cette question des effectivités car la «décision» britannique de 1939 est elle-même fondée sur le principe d'une possession effective réelle dans le cas de Jazirat Hawar et d'une possession effective présumée dans le cas des autres îles du groupe.

32. La plupart des prétendues effectivités de Bahreïn dans les îles Hawar sont d'ailleurs très récentes au point de contrevenir au *statu quo* dont étaient convenues les Parties dans le contexte de la médiation effectuée par l'Arabie saoudite. Le développement des activités bahreïnites à Jazirat Hawar n'est de toute façon pas opposable à Qatar qui a transmis régulièrement des notes diplomatiques de protestation à ce sujet et tenu la Cour informée en conséquence. De plus, l'agent de Qatar a déclaré lors des audiences que les Parties devraient, si la Cour venait à accueillir la thèse de la souveraineté de Qatar sur les îles Hawar, entreprendre directement des négociations bilatérales pour résoudre les problèmes qui pourraient surgir à l'occasion du retrait de Bahreïn des îles en ce qui concerne les investissements privés réalisés de bonne foi, comme ce fut le cas dans d'autres affaires du même genre. L'arrêt est de nouveau muet sur la question de la violation éventuelle du *statu quo* convenu du fait de l'exercice d'effectivités par Bahreïn à Jazirat Hawar, y compris après l'introduction de l'instance en l'espèce.

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33. Les «décisions» britanniques de 1939 sur les îles Hawar et de 1949 sur la délimitation du plateau continental entre les Parties soulèvent aussi des questions qui sont extrêmement pertinentes pour le règlement du différend, la toute première étant celle de leur qualification. Ces «décisions» britanniques sont-elles la loi des Parties ou sont-elles plutôt des éléments ou circonstances de fait se situant sur le même plan que plusieurs autres événements historiques de l'affaire? Pour les motifs que je développerai dans la suite de la présente opinion, j'estime que les deux «décisions» britanniques sont des éléments ou circonstances de fait, la loi des Parties étant, comme je l'ai déjà expliqué, le droit international général.

34. L'arrêt est d'un autre avis. Il considère que la «décision» britannique de 1939 sur les îles Hawar produit des effets juridiques s'imposant aux Parties, justifiant ainsi l'attribution des îles Hawar à Bahreïn. S'agis-

d'autres éléments, elle peut aider la Cour à élucider une question de fait, mais elle ne constitue pas une preuve en elle-même. De même un témoignage sur des points dont le témoin n'a pas eu personnellement connaissance directe, mais seulement par «ouï-dire», n'a pas grand poids; ainsi que la Cour l'a constaté à propos d'une déposition particulière dans l'affaire du *Détroit de Corfou*: «Quant aux propos attribués par le témoin à des tiers, la Cour n'en a pas reçu confirmation personnelle et directe et elle ne peut y avoir que des allégations sans force probante suffisante.» (*C.I.J. Recueil 1949*, p. 17.)»

37. Le poids des cartes en tant qu'éléments de preuve dépend de diverses considérations, telles que leur fiabilité technique et leur exactitude qui sont déterminées par leurs mode et date d'établissement, leur caractère officiel ou privé, la neutralité de leurs sources par rapport aux différends considérés et aux parties à ce différend, etc. En général, les cours et tribunaux internationaux les considèrent comme des preuves concordantes ou confirmant les conclusions auxquelles le juge est parvenu par d'autres moyens, indépendants des cartes, car celles-ci ne constituent pas en tant que telles un titre juridique. Mais si le matériau cartographique produit par des tierces parties est fiable, uniforme et volumineux, il peut même constituer un moyen de preuve fort important de reconnaissance ou de commune renommée quant à la réalité d'une situation territoriale à une époque donnée (voir par exemple le chapitre VIII de la sentence arbitrale rendue en 1998 dans l'arbitrage *Erythrée/Yémen*).

38. Il arrive parfois en outre que des cartes constituent l'expression de la volonté d'un ou de plusieurs Etats, par exemple, lorsqu'elles sont annexées à un titre juridique tel qu'un traité ou sont établies ou utilisées par un Etat en vue de négociations diplomatiques avec d'autres Etats ou encore font l'objet d'annotations écrites de la part de représentants ou de fonctionnaires des Etats. Il va de soi à tout le moins que des cartes exprimant la volonté d'Etats ont une valeur probante supérieure à celle de cartes ordinaires. De plus, lorsqu'elles sont annexées à un traité, les cartes constituent un contexte pour interpréter celui-ci. Il existe en l'espèce quelques cartes relevant de ces catégories. Dans son arrêt en l'affaire du *Différend frontalier*, la chambre de la Cour opère la distinction suivante entre ces deux catégories de cartes:

> «En matière de délimitation de frontières ou de conflit territorial international, les cartes ne sont que de simples indications, plus ou moins exactes selon le cas; elles ne constituent jamais — à elles seules et du seul fait de leur existence — un titre territorial, c'est-à-dire un document auquel le droit international confère une valeur juridique intrinsèque aux fins de l'établissement des droits territoriaux. Certes, dans quelques cas, les cartes peuvent acquérir une telle valeur juridique mais cette valeur ne découle pas alors de leurs seules qualités intrinsèques: elle résulte de ce que ces cartes ont été intégrées parmi les éléments qui constituent l'expression de la volonté de l'Etat ou des Etats concernés. Ainsi en va-t-il, par exemple, lorsque

dégage de ces éléments, notamment les effets juridiques éventuels d'un silence prolongé, des accords réciproques des Parties, des admissions faites contre leur propre intérêt et de la présomption *juris tantum* du droit international concernant la souveraineté de l'Etat côtier sur les îles se trouvant dans sa mer territoriale, sauf démonstration parfaitement claire de la thèse contraire.

6. La définition par Qatar de l'« Etat de Qatar » et par Bahreïn de l'« Etat de Bahreïn » en l'espèce

43. L'existence d'une péninsule dénommée «la péninsule de Qatar» et d'un archipel compact appelé «les îles de Bahreïn» sont des données objectives de la géographie physique. Il en va de même de leur emplacement respectif dans le secteur méridional du golfe Persique. Les Parties s'opposent toutefois sur l'étendue de leur territoire respectif en tant qu'Etats. De façon générale, pour Qatar, la géographie physique coïncide avec la géographie politique; Bahreïn ne partage pas cet avis. Ce qui veut dire sur le plan pratique que Qatar ne réclame à la Cour aucun territoire appartenant à l'archipel de Bahreïn dans son sens géographique alors que Bahreïn revendique, lui, des lieux, des îles, d'autres formations maritimes ainsi que la mer adjacente appartenant géographiquement à la péninsule de Qatar.

44. La péninsule de Qatar s'avance vers le nord dans le golfe Persique à partir de la baie Dawhat Salwah et, à l'est, au sud de Khor al-Udaid. Elle mesure environ 180 kilomètres de long du nord au sud et 85 kilomètres dans sa plus grande largeur; sa superficie, compte non tenu des îles, est de 14 000 kilomètres carrés environ. Ses ports principaux sont Doha, la capitale, et Umm Said à l'est de la péninsule. Pour Qatar, l'Etat de Qatar est territorialement constitué par la péninsule de Qatar, y compris évidemment Zubarah; les îles voisines de la péninsule situées entièrement ou partiellement dans la mer territoriale de Qatar, telles que les îles Hawar et l'île de Janan; et les autres formations maritimes situées dans cette mer territoriale, notamment les hauts-fonds de Fasht ad Dibal et de Qit'at Jaradah. Bahreïn conteste cette définition de l'étendue territoriale de l'Etat de Qatar.

45. Bahreïn, pour sa part, prétend être un «Etat archipel» qui, selon lui, englobe les «îles de Bahreïn» proprement dites, toutes les îles et autres formations maritimes et eaux situées entre cet archipel et la côte occidentale de la péninsule de Qatar, y compris les îles Hawar et l'île de Janan, les hauts-fonds de Fasht ad Dibal et de Qit'at Jaradah ainsi que la «région dite de Zubarah» dans la partie continentale de la péninsule de Qatar. Il revendique également quelques droits mal définis — affectant le tracé de la limite maritime unique dans le secteur nord de la zone — sur certains anciens bancs d'huîtres perlières du Golfe, qu'il qualifie de «bancs d'huîtres perlières de Bahreïn». Un certain nombre de ces bancs se situent à l'est d'une perpendiculaire idéale joignant le point le plus septentrional de la péninsule de Qatar et la ligne médiane du golfe Persique. Qatar

sique entre le flanc occidental de la péninsule de Qatar et la partie du littoral souvent appelée la côte du Hasa ou la côte de Qatif, qui va de Ras Tannurah au nord jusqu'à l'extrémité du Dawhat Salwah à la ville saoudienne de Salwah. Cet archipel se compose: 1) de l'île de Bahreïn elle-même (appelée autrefois «Awal») qui est l'île principale du groupe et qui mesure 43 kilomètres de longueur environ du nord au sud et 18,8 kilomètres de large dans sa plus grande partie; Al Manamah, la capitale, se trouve sur cette île; 2) de deux autres îles principales habitées, la plus grande étant Al Muharraq et l'autre Sitrah, qui se trouvent au nord-est et à l'est de l'île de Bahreïn; 3) des deux petites îles d'Umm Na'asan et Nabi Salih; et 4) d'un certain nombre d'îlots et autres formations maritimes voisines d'importance mineure. La superficie de cet archipel, définie par la géographie physique, est de 652,8 kilomètres carrés environ.

51. Ainsi se présente l'archipel de Bahreïn du point de vue de la géographie physique. Mais le terme «Bahreïn» seul s'est également vu conférer par le passé d'autres significations géographiques. Il a par exemple servi à désigner uniquement l'île de Bahreïn ou «Awal» ou le groupe des trois îles principales de l'archipel, à savoir l'île de Bahreïn, Al Muharraq et Sitrah, à l'exclusion des autres petites îles et îlots. En d'autres termes, le vocable «Bahreïn» a pu parfois désigner dans certains anciens documents ou contextes exclusivement une partie de «l'archipel de Bahreïn» proprement dit. Par exemple, les écrits relatant la conquête de Bahreïn par la Perse en 1783 mentionnent «l'île de Bahreïn» ou «Awal» comme seul territoire conquis. Il n'est pas fait état des autres îles de l'archipel. Le ou les modes par lesquels l'Etat de Bahreïn a acquis un titre sur les autres îles sont inconnus de la Cour. J'oserais aller jusqu'à affirmer que les thèses de la proximité ou contiguïté ne sont probablement pas étrangères à l'interprétation voulant que le titre de Bahreïn s'étendait à l'ensemble de l'archipel de Bahreïn dès lors que l'île principale de Bahreïn avait été conquise. La carte figurant dans l'article de J. Theodore Bent intitulée «Les îles de Bahreïn dans le golfe Persique», publiée en 1890 dans les *Proceedings of the Royal Geographical Society* (reproduction en réduction de cartes de l'Amirauté) définit l'archipel des «îles de Bahreïn» ainsi qu'il est indiqué au paragraphe précédent. (Voir ci-après, p. 448, carte n° 1 de la présente opinion.)

52. A l'inverse, il est aussi historiquement vrai que le nom «Bahreïn» a été utilisé par le passé dans son sens géographique, ainsi que le reconnaissent Lorimer et d'autres, comme visant à la fois «les îles de Bahreïn» et certaines régions sur le continent, telles que le Hasa, le Qatif et le promontoire de Qatar, et même comme visant toute la partie sud-ouest du golfe Persique de Ruus al-Jibal jusqu'à l'embouchure du Chatt al-Arab. On trouve confirmation de cet usage géographique du terme «Bahreïn» dans quelques-unes des plus anciennes cartes soumises à la Cour. Sur la carte accompagnant le rapport de 1879 du capitaine E. L. Durand, ce nom y revêt trois sens différents selon le contexte; il vise: 1) l'archipel de Bahreïn (le rapport a pour titre «Rapport sur les îles de Bahreïn»); 2) l'île de Bahreïn ou Awal (l'île principale de l'archipel est appelée

présente instance le paragraphe 9 de l'article 47 de la convention en ce qui a trait au tracé de lignes de base archipélagiques:

> «L'Etat archipel donne la publicité voulue aux cartes ou listes de coordonnées géographiques et en dépose un exemplaire auprès du Secrétaire général de l'Organisation des Nations Unies»

ainsi que des autres obligations que d'autres articles de la partie IV de la convention de 1982 mettent à charge des Etats archipels, obligations qui étaient des éléments essentiels de l'accord conclu dans cette partie de la convention.

56. Même si la partie IV de la convention de 1982 faisait déjà partie du droit international coutumier, les lignes de base archipélagiques de Bahreïn prétendument fondées sur cette partie IV ne seraient pas opposables à Qatar à quelque fin que ce soit, du point de vue territorial ou maritime. Le droit international conventionnel ou général ne connaît pas d'*« Etat archipel secret »*, alternant apparitions et disparitions sur la scène judiciaire internationale ou sur la scène des relations internationales en général. Se pose là une question de bonne foi. Quoi qu'il en soit, il vaut la peine de relever à ce stade que la partie IV de la convention de 1982 n'énonce aucune règle particulière pour la délimitation du territoire maritime d'Etats archipels avec d'autres Etats. En matière de *délimitation* maritime, les Etats archipels, tout comme les autres Etats, sont assujettis aux mêmes normes que celles que prévoient d'autres parties de la convention de 1982 et le droit international général.

57. De plus, l'Etat archipel autoproclamé de Bahreïn se singulariserait en l'espèce par le fait de revendiquer un titre territorial sur une région du continent, la «région dite de Zubarah», et d'y avoir toujours exercé son autorité et son contrôle (la thèse générale de Bahreïn au sujet de Zubarah). Dans de telles conditions, comment Bahreïn peut-il se qualifier d'«Etat archipel» au sens de la partie IV de la convention de 1982 sur le droit de la mer? La thèse et la revendication de Bahreïn sur Zubarah contredisent totalement la définition que l'article 46 de la convention de 1982 donne des termes «Etat archipel» et «archipel» car Bahreïn ne plaide pas à titre subsidiaire sa qualité d'«Etat archipel» autoproclamé au sens de la partie IV de la convention. Bahreïn fait valoir en l'espèce qu'il est un tel «Etat archipel» avec ou sans la «région dite de Zubarah». Une aussi monumentale contradiction demeure pour moi une énigme qui ne trouve aucune explication satisfaisante du point de vue logique ou juridique ou des deux points de vue à la fois.

58. Compte tenu de ce qui précède, je ne puis que rejeter, comme le fait l'arrêt, la prétention de Bahreïn à la qualité d'«Etat archipel» au sens de la partie IV de la convention de 1982 sur le droit de la mer et, par conséquent, tout droit qu'aurait l'Etat de Bahreïn à tracer des lignes archipélagiques droites comme le prévoit l'article 47 de cette convention.

62. Par exemple, la constitution ou la reconstitution d'un Etat doté d'un territoire donné n'est pas une question qui pourrait être tranchée en se contentant d'invoquer ou d'appliquer les critères définis dans l'affaire de l'*Ile de Palmas* ou dans d'autres affaires du même genre. D'où il suit qu'il convient d'aborder avec une très grande circonspection les questions, telles que le rapport existant entre le titre juridique et les effectivités le cas échéant, si l'opération juridique en cause vise à définir l'assise du territoire primitif d'un Etat donné ou d'une entité politique et territoriale donnée. Dans ce dernier cas de figure, le principe de l'effectivité, envisagé en tant qu'appréhension ou possession effective ou réelle, joue dans un premier temps un rôle plus discret que dans le cas de l'accroissement du territoire d'un Etat par voie de gains.

63. Les critères servant à définir le territoire d'un Etat à la date de sa constitution ou reconstitution ne sont pas nécessairement les mêmes que ceux retenus par Huber pour trancher la question du titre territorial sur une île située dans le Pacifique dans une affaire opposant les Etats-Unis et les Pays-Bas, et ils ne se limitent pas non plus exclusivement à ceux-ci. Par exemple, dans son avis consultatif sur la question de la *Jaworzina* (1923), la Cour permanente de Justice internationale a considéré la reconnaissance comme l'un des éléments constitutifs du titre territorial de la Pologne et de la Tchécoslovaquie reconstituées comme Etats indépendants (*C.P.J.I. série B n° 8*, p. 20). La reconnaissance n'a pas joué un rôle semblable dans l'arbitrage relatif à l'*Ile de Palmas* (1928).

64. La manière selon laquelle les cours et tribunaux internationaux sont normalement saisis de revendications territoriales tend à occulter la distinction dont il s'agit du fait que, dans la majorité des cas, les parties invoquent un *titre dérivé* plutôt qu'un *titre originaire*. Ce n'est certainement pas le cas en l'espèce car Qatar tout autant que Bahreïn ont développé leur argumentation comme s'ils étaient l'un et l'autre titulaires du *titre originaire* sur le territoire de Zubarah, des îles Hawar et de l'île de Janan. Les revendications originaires respectives des Parties reposaient sur l'affirmation selon laquelle les territoires en litige appartenaient à celui qui les revendique depuis leur origine même en tant qu'entités politiques ou Etats individualisés.

65. Dans la présente section de l'opinion, j'examinerai par conséquent un certain nombre d'événements historiques ainsi que d'autres éléments de fait et de droit pertinents afin d'être en mesure de tirer certaines conclusions sur le titre territorial originaire de Qatar et de Bahreïn à l'époque de leur constitution en deux entités politiques distinctes dans le contexte international du Golfe. Cette démarche permettra à mon avis d'élucider certaines questions et rendra par conséquent superflues les argumentations, propositions, revendications ou thèses en sens contraire de l'une ou de l'autre Partie. Je suis aussi convaincu qu'une analyse approfondie de la question de l'étendue territoriale du *titre originaire* en l'espèce contribuera en dernière analyse à la résolution des questions territoriales litigieuses car l'ensemble des éléments de

sance, du consentement et de la bonne foi. L'action conjuguée de ces règles peut transformer des titres relatifs en titres absolus. En règle générale, il [le titre] est l'aboutissement d'un processus progressif s'étalant dans le temps, que la Cour internationale de Justice a judicieusement qualifié de consolidation historique du titre.» (*International Law as Applied by International Courts and Tribunals*, vol. 1, 3e éd., 1957, p. 309.)

69. Les règles présidant à l'établissement d'un titre sur un territoire sont en fait des règles découlant dans la pratique des Etats de l'un ou l'autre des principes de droit international mentionnés dans la citation qui précède. C'est en analysant dans une perspective historique l'action conjuguée de ces règles dans les circonstances particulières de l'espèce qu'il est possible de conclure à la consolidation d'un prétendu titre originaire et à son opposabilité juridique à un ou plusieurs autres Etats. Il faut aussi tenir compte des facteurs liés au droit intertemporel car ces principes et les règles qui en découlent peuvent avoir évolué au fil du temps. On peut toutefois tenir pour acquis, en ce qui a trait aux aspects intertemporels de la présente instance, que des droits de souveraineté envisagés dans l'abstrait avaient déjà été supplantés en droit international par une notion de souveraineté fondée sur la possession effective telle que celle-ci a été définie par la doctrine et par la jurisprudence des cours et tribunaux internationaux à partir du XIXe siècle.

70. J'accepte toutefois naturellement la règle dont il s'agit dans son intégralité, c'est-à-dire avec toutes les conditions, présomptions et restrictions qui l'accompagnent. Par exemple, si le prétendu titulaire du titre sur un territoire abandonne celui-ci, l'exercice unilatéral de compétences sur ce territoire par un autre sujet de droit est un moyen efficace d'acquérir le titre territorial. Dans ce cas, comme dans celui d'un territoire sans maître, l'exercice unilatéral de la compétence territoriale, par exemple par l'occupation, peut constituer la source ou le fondement d'un titre territorial. S'agissant des présomptions, la règle prévoit que le titre sur le territoire englobe les *dépendances* de celui-ci, telles que ses espaces maritimes et les îles adjacentes situées entièrement ou partiellement dans sa bande de mer territoriale. Le titre sur ces dépendances n'exige pas l'exercice continu et pacifique de la compétence et de fonctions étatiques sur celles-ci, *mais bien sur le territoire principal dont elles relèvent*. La règle présume le contrôle effectif des dépendances. De plus, l'intensité et la continuité de l'exercice de l'autorité ou de l'emprise physique qu'exige la règle en général sont réduites dans certains cas en raison notamment de la nature du territoire, de la présence ou de l'importance numérique de sa population, des besoins effectifs, etc.

71. En plus des règles qui viennent d'être mentionnées, qui découlent du principe de la souveraineté, la présente opinion tiendra aussi compte de celles découlant des principes de la reconnaissance, du consentement et de la bonne foi en raison du rôle tout aussi fondamental qu'elles jouent dans la consolidation historique du titre sur un territoire. Il arrive parfois

mêmes même dans ces cas de figure. Pour déterminer si les effectivités valent «titre», il faut se reporter aux règles du droit international et tenir dûment compte des circonstances particulières de l'affaire (nature des actes, défaut de titre antérieur, etc.).

74. Par exemple, à défaut de titre, l'occupation en tant que manifestation de l'effectivité peut être considérée comme constitutive d'un «titre» ou comme «val[ant] titre» pour reprendre l'expression employée par Huber dans l'arbitrage relatif à l'*Ile de Palmas*. Mais ce n'est pas chaque forme d'occupation qui constitue une effectivité susceptible d'engendrer un titre ou de valoir titre en droit international. Comme l'explique Huber lui-même, il faut que cette occupation soit effective, pacifique et continue. Il faut en outre que le territoire occupé soit une *terra nullius* ou, comme l'a expliqué Rousseau, «un territoire soustrait par un acte juridique régulier à une compétence étatique antérieure» («Principes de droit international public», *Recueil des cours de l'Académie de droit international de La Haye*, t. 93 (1958), p. 415). En d'autres mots, l'occupation doit s'exercer sur une *terra nullius* ou un territoire sans maître pour être susceptible d'engendrer, si les autres circonstances le permettent, un titre territorial en droit international. Quant à la nature des actes eux-mêmes, la Cour a précisé dans sa jurisprudence que ceux-ci doivent être accomplis à titre de souverain. Ce qui exclut de la notion d'effectivités au sens du droit international les actes accomplis par des personnes physiques ou des groupes agissant à titre privé ou pour leurs propres fins.

75. Outre le cas où il y a occupation effective, pacifique et continue d'une *terra nullius*, les effectivités peuvent également avoir un rôle à jouer comme preuve d'un titre revendiqué sur un territoire acquis par un autre mode que l'occupation ou de l'exercice de ce titre. Mais encore une fois chaque acte invoqué comme effectivité ne constitue pas nécessairement en droit international une effectivité pouvant être admise en tant que preuve du titre ou de l'exercice de celui-ci. Les actes doivent être des actes publics et pacifiques de nature étatique, c'est-à-dire être une manifestation de l'autorité étatique attribuable à l'Etat en cause. L'acte en question, s'il n'a pas été accompli à titre de souverain ou n'est pas attribuable en tant que tel à l'Etat en cause, ne vaudrait pas preuve du titre territorial ou de l'exercice de celui-ci.

76. Au demeurant, les effectivités ne sont pas la seule manifestation ou le seul mode de preuve du titre dont il faille tenir compte. Le comportement général des parties, englobant le cas échéant les aveux et les actes de reconnaissance émanant de tierces parties intéressées, est plus souvent révélateur du titulaire du titre, surtout s'il s'agit d'un titre originaire, que de prétendues effectivités qui plus souvent que non laissent fortement à désirer. Reste enfin l'élément intertemporel. Les cours et tribunaux internationaux ont recours aux «dates critiques» et aux «périodes critiques» pour distinguer les effectivités recevables dans un cas donné d'autres prétendues effectivités éventuelles. Sans oublier que le *statu quo* dont conviennent les parties au différend entre lui aussi en ligne de compte.

et des Al-Jalahma), avec l'aide d'autres tribus arabes, y compris des tribus qataries, s'emparèrent de Bahreïn qu'elles enlevèrent aux Persans en représailles à des attaques lancées antérieurement contre la ville de Zubarah par le gouverneur persan de Bahreïn. A l'issue d'une lutte pour la conquête du pouvoir sur l'île, les Bin Khalifah devinrent la famille régnante à Bahreïn et s'installèrent sur l'île tandis que la branche des Al-Jalahma revint à Qatar. En d'autres mots, les Al-Khalifah abandonnèrent l'emplacement où ils s'étaient installés dans la région de Zubarah. Le premier souverain Al-Khalifah de Bahreïn fut Ahmad bin Khalifah, appelé par la suite Ahmad le conquérant.

81. Dans le «système tribal», les liens entre une tribu et un territoire s'établissaient par le fait même de l'«implantation». Si une tribu abandonnait le lieu où elle s'était installée, ses liens territoriaux disparaissaient bien qu'il se pût que subsistent des liens personnels avec d'autres cheikhs, tribus ou branches de tribus, mais à distance. En s'installant de leur plein gré sur l'île de Bahreïn en 1783, les Al-Khalifah ont quitté leur lieu d'implantation antérieur dans la région de Zubarah et par conséquent la seule base territoriale dont ils disposaient dans la péninsule de Qatar depuis leur arrivée en 1766. Les Al-Thani, par contre, n'ont pas quitté la région de Doha, ils ont toujours conservé cette base territoriale dans la péninsule de Qatar. C'est ainsi que les tribus locales se sont mises à considérer ceux qui exerçaient l'autorité à Doha et à Bida comme les chefs de Qatar bien qu'il ait fallu longtemps à ces derniers pour exercer effectivement leur autorité sur l'ensemble des tribus et du territoire de la péninsule. Ecrivant à une époque où les cheikhs de Bahreïn revendiquaient encore une certaine autorité symbolique sur Qatar, Palgrave signale, dans son *Narrative of a Year's Journey through Central and Eastern Arabia (1862-1863)*, que:

> «Bin Thani, le gouverneur de Biddah est généralement reconnu comme le chef de toute la province qui dépend elle-même du sultan d'Oman; et pourtant, le résident à Biddah n'a en fait que très peu d'autorité sur les autres villages, où les habitants règlent leurs affaires avec leur propre chef local, de sorte que Bin Thani n'est qu'une sorte de collecteur en chef, de percepteur général, dont l'activité se résume à percevoir le tribut annuel des pêcheurs de perles.» (Contre-mémoire de Qatar, vol. 2, annexe II.75, p. 415.)

82. L'installation de la famille des Al-Khalifah dans les îles de Bahreïn, les Al-Thani étant demeurés eux sur le continent, est un événement historique important pour bien comprendre la suite de l'évolution territoriale des deux pays. On peut même ajouter avec le recul qu'à partir de ce moment même la configuration territoriale future de Bahreïn et de Qatar en tant qu'entités politiques distinctes s'est ébauchée dans ses grandes lignes. Bahreïn a commencé à être considéré comme l'archipel formé des îles de Bahreïn et Qatar comme un pays continental situé dans la péninsule de Qatar, et ce non seulement par les habitants de l'endroit mais

86. Contentons-nous pour l'instant de souligner que ni le moyen tiré de l'*animus* ni celui tiré des liens d'allégeance ne signifiaient que les souverains Al-Khalifah de Bahreïn étaient en possession effective d'un territoire dans la péninsule de Qatar de 1783 à 1868. Bahreïn n'est entré en possession d'une partie de Jazirat Hawar qu'en 1937 à la suite d'une occupation clandestine opérée après la «décision provisoire» britannique de 1936 sur les îles Hawar. Il suffit ici de relever que cette occupation, du fait de la date même à laquelle elle s'est produite et indépendamment de sa qualification en droit international, ne saurait avoir d'effets rétroactifs interrompant le processus de formation et de consolidation du titre originaire des souverains Al-Thani sur le territoire de l'ensemble de la péninsule de Qatar et des îles qui lui sont adjacentes.

87. De plus, on ne trouve dans le dossier aucun élément attestant l'exercice par les Al-Khalifah d'une autorité territoriale — même pendant la période où ils étaient établis dans la région de Zubarah (de 1766 à 1783) — sur d'autres parties de la péninsule de Qatar. Bahreïn affirme cependant qu'un *qadi* de Zubarah, relevant de l'autorité des Al-Khalifah, avait attribué les îles Hawar aux Dowasir. On ne trouve nulle trace de ce prétendu acte juridictionnel dans les documents présentés à la Cour. Les conseils de Bahreïn se sont d'ailleurs efforcés de l'établir au moyen de preuves de seconde main, comme les prétendues «déclarations sous serment» et les témoignages de particuliers, peut-être intéressés, relatant ce qu'ils avaient entendu dire (ouï-dire).

88. La conclusion générale à laquelle je parviens à ce sujet, c'est que les Al-Khalifah, après être partis s'installer de leur plein gré dans les îles de Bahreïn en 1783, ont abandonné leur ancien titre territorial dans la région de Zubarah et n'ont acquis avant 1868 aucun nouveau titre de *nature territoriale* sur cette région ou toute autre région de la péninsule de Qatar ou sur les îles et étendues maritimes adjacentes à celle-ci. L'absence de possession effective en droit international, du fait de l'inexistence du *corpus possessionis*, est manifeste de 1783 à 1868, tout à fait indépendamment de l'éventuelle prééminence symbolique des Al-Khalifah parmi les tribus de la péninsule pour des raisons de prestige ou pour d'autres considérations. Il est aussi parfaitement clair que les Al-Khalifah, même lorsqu'ils étaient établis à Zubarah (1766-1783), n'étaient pas les souverains de Qatar. Ils ne constituaient pas, que ce soit avant ou après 1783, une dynastie régnant sur l'ensemble des tribus et du territoire de la péninsule de Qatar comme les conseils de Bahreïn se sont employés à le laisser entendre au cours de la procédure. Qatar n'a dès lors pas à prouver la perte par les Al-Khalifah de tout titre sur Qatar pour établir son propre *titre originaire*. Il incombe à Bahreïn — dans la mesure où il avance une proposition contraire — de prouver que le titre territorial existait réellement dans la mesure indiquée et n'est pas devenu caduc à la suite de l'installation des Al-Khalifah dans les îles de Bahreïn en 1783. Ce que «les Britanniques» pensaient ou non au cours de la première moitié du XIX^{e} siècle n'est pas en litige, ce qui l'est c'est ce qui constitue en ce siècle-là un titre territorial au regard du droit international.

ment leurs nouvelles obligations conventionnelles, parmi lesquelles figuraient l'adoption par les tribus d'un pavillon distinctif commun et la mise en place d'un régime d'immatriculation des navires pour en permettre l'identification.

93. Pour faire respecter le traité de 1820, les Britanniques postèrent des forces navales permanentes dans le Golfe, qui se chargèrent de réprimer directement les actes de piraterie commis par la suite, dont plusieurs, estimait-on, avaient été perpétrés par des tribus de Qatar et de Bahreïn. Mais les actes de piraterie et d'agression entre tribus arabes se poursuivirent, ce qui avait pour effet de désorganiser le commerce britannique et arabe. C'est ainsi que fut conclue en 1835, sur la proposition des Britanniques, une trêve maritime qui fut renouvelée d'année en année. En 1836, les Britanniques imposèrent aussi une ligne d'interdiction *de facto* entre la côte persane et la côte arabique, au-delà de laquelle les tribus ne pouvaient se livrer à des actes d'hostilité. Un traité de paix maritime perpétuel fut enfin signé en août 1853 par la Grande-Bretagne et les chefs des «émirats de la côte la Trêve».

94. La domination britannique a contribué au maintien de la paix maritime dans le Golfe. Les Britanniques ont par exemple infligé des amendes et aidé à la récupération de biens pillés. Ils ont aussi été amenés par la force des choses à intervenir dans des différends locaux, appuyant parfois un cheikh plutôt que l'autre. Mais l'influence dominante qu'ils ont exercée dans le Golfe à partir de 1820 sur les affaires des chefs arabes avait surtout un caractère concret et non juridique. Les initiatives prises pour établir et maintenir la paix maritime ainsi que d'autres mesures adoptées en 1838 et 1847 en ce qui concerne la traite des esclaves permirent aux Britanniques d'intervenir pour garantir l'exécution d'*obligations conventionnelles*. Mais la Grande-Bretagne n'a pas établi sa suprématie sur les chefs arabes pour ce qui est de leurs autres affaires intérieures ou extérieures. Elle n'a pas non plus revendiqué ou proclamé sa suzeraineté ou souveraineté sur eux par voie de traité ou par tout autre moyen. En 1892, un nouveau mécanisme de protection a vu le jour, celui des «accords exclusifs», mais les territoires des différents chefs arabes dans le Golfe ne sont jamais devenus des territoires de la Couronne britannique.

E. Rupture des liens historiques entre les souverains Al-Khalifah de Bahreïn et Qatar (1868-1871)

95. Les Al-Khalifah acquirent leur titre sur les îles de Bahreïn par conquête, mode d'acquisition de territoires que n'excluait pas le droit international du XVIII[e] siècle. Mais la consolidation de leur titre sur ces îles exigea un certain temps car les Al-Khalifah n'étaient point les seuls acteurs politiques dans la région, sans oublier non plus les luttes de pouvoir entre les cheikhs Al-Khalifah.

96. De 1783 jusque 1820 environ, les Persans, Mascate et plus particulièrement les Wahhabites s'affrontèrent pour exercer leur mainmise sur l'île de Bahreïn de sorte que les souverains Al-Khalifah furent parfois

de la péninsule de Qatar. La thèse contraire défendue par Bahreïn en l'espèce est encore moins probable si l'on tient compte de la situation politique interne existant à cette époque dans l'île de Bahreïn. La vie politique à Bahreïn avait été marquée par des luttes internes depuis la conquête de l'île. Les règles en matière de succession étaient si vagues qu'elles suscitaient souvent des antagonismes entre fils et neveux du souverain.

101. Du début de l'installation des Al-Khalifah sur l'île de Bahreïn jusqu'en 1860 environ, voire jusqu'au début du règne du cheikh Issa bin Ali en 1869, l'histoire de la domination des Al-Khalifah à Bahreïn fut entrecoupée de diverses tentatives de prise de pouvoir sur l'île, certaines couronnées de succès, d'autres non. Il y eut parfois aussi des cosouverains. Ce n'était certainement pas le meilleur moyen, même si l'intention pouvait y être, d'exercer une autorité territoriale effective sur le continent.

102. Ces luttes internes eurent souvent des répercussions au Qatar tout proche, mais cela ne signifie nullement que les souverains de Bahreïn exerçaient leur autorité sur le territoire de la péninsule — bien au contraire. C'est justement parce que cette autorité était inexistante ou ne se manifestait pas effectivement dans la péninsule que les cheikhs Al-Khalifah luttant pour s'emparer du pouvoir sur l'île de Bahreïn vinrent à Qatar. Le conflit opposant le cheikh Abdullah bin Khalifah à son petit-neveu, le cheikh Mohamed bin Khalifah, qui exerçaient en commun le pouvoir à l'époque, en est un bon exemple. Expulsé de Bahreïn en 1842, le cheikh Mohamed se réfugia au fort Murair à l'extérieur des murs de la vieille ville de Zubarah. Il resta là-bas jusqu'en avril 1843. Puis, avec l'aide des Qataris, il reprit Muharraq et renversa le cheikh Abdullah qui, expulsé à son tour de Bahreïn, chercha à nouer des alliances à la fois avec les Wahhabites et les Persans en vue de reprendre le pouvoir sur l'île de Bahreïn (voir Lorimer, mémoire de Qatar, vol. 3, annexe II.3, p. 206, 276-277 et 279-286).

103. Les souverains Al-Khalifah parvinrent à se maintenir dans les îles de Bahreïn en raison de la protection que leur assuraient les Britanniques. La protection des îles de Bahreïn devint un trait constant de la politique britannique. La Grande-Bretagne a toujours protégé Bahreïn, c'est-à-dire les «îles de Bahreïn», des menaces extérieures (par exemple dans les années 1820, de la menace que représentait Mascate; en 1835 et 1859 lorsque les tensions s'accrurent entre Bahreïn et l'émir wahhabite; en 1843 et 1869 lorsque la Perse revendiqua à nouveau la souveraineté sur l'île de Bahreïn, etc.), ainsi que d'autres menaces venant de la péninsule de Qatar. Mais, parallèlement, la Grande-Bretagne n'appuyait pas les interventions des souverains Al-Khalifah ou leurs revendications sur le continent et les îles adjacentes, à savoir la péninsule de Qatar et ses îles.

104. Lorsque le cheikh Mohamed de Bahreïn entreprit par exemple en 1861, en riposte à la menace wahhabite, de faire le blocus de la côte du Hasa et de harceler les pêcheurs de perles du Qatif et de Damman, les Britanniques firent intervenir leurs forces navales et le cheikh de Bahreïn fut contraint d'obtempérer. Un peu plus tard, en mai 1861, Felix Jones, le résident politique britannique dans le golfe Persique exigea du cheikh

108. En 1783, les Al-Khalifah se sont établis de leur plein gré sur l'île de Bahreïn et c'est ainsi qu'a cessé l'exercice continu de leur autorité territoriale effective sur la région de Zubarah dans la péninsule de Qatar. Ils ont perdu, sans jamais la récupérer, la région de Zubarah où ils étaient installés et n'ont dès lors plus été en mesure d'établir une nouvelle base territoriale dans la péninsule de Qatar ou sur les îles adjacentes ou sur les deux jusqu'aux «décisions» britanniques de 1936 et 1939. Ils semblent toutefois avoir continué de revendiquer épisodiquement une sorte de vague prééminence sur des tribus demeurant dans la péninsule de Qatar, mais cette intention ne s'est jamais traduite par la prise de possession matérielle d'une portion de territoire de la péninsule ou des îles adjacentes. A un moment donné, vers le milieu du XIX[e] siècle, les souverains Al-Khalifah de Bahreïn ont apparemment réussi à se faire reconnaître une sorte de prééminence symbolique parmi les tribus qataries mais sans occuper physiquement le territoire et sans mettre en place un gouvernement ou une administration dans la péninsule. Ce que fit parfois le souverain Al-Khalifah, c'est de disposer d'un représentant à Doha tel que l'émir wahhabite en 1852 et en 1866.

109. De plus, si l'on considère la période dans son ensemble (de 1783 à 1868), la prétendue prééminence *symbolique* des souverains Al-Khalifah dans la péninsule de Qatar se caractérise par son absence de *continuité* manifeste. Ce qui ressort de façon générale de l'histoire de l'époque, ce n'est pas du tout la continuité mais bien l'*absence de continuité* manifeste dans les rapports existants entre les Al-Khalifah et les tribus qataries, même sur le plan symbolique. C'est ce qu'a constaté le premier assistant du résident politique pour le golfe Persique en ce qui concerne la période antérieure à 1868:

> «D'après ce que j'ai entendu en vivant à Bahreïn, je dirais qu'il y a quelques années les Naim, de même que bien d'autres tribus de Qatar, étaient assujettis sous certains aspects à Bahreïn, mais le degré d'autorité exercé par les souverains de Bahreïn sur Qatar semble avoir varié selon les moyens de coercition dont ces souverains disposaient; si le chef de Bahreïn était fort, les tribus reconnaissaient sa suprématie; s'il était faible, ils la contestaient.» (Contre-mémoire de Qatar, vol. 3, annexe III.11, p. 75.)

110. En revanche, ceux qui exerçaient le pouvoir à Doha ont commencé à être considérés par les tribus qataries, ainsi que l'a souligné Palgrave (voir ci-dessus) et d'autres encore, comme les chefs ou souverains naturels des tribus de Qatar bien qu'ils n'exerçassent pas encore effectivement à cette période leur autorité sur toutes les tribus et l'ensemble du territoire de la péninsule. La suite des événements historiques, nous le verrons, confirmera qu'Al-Thani était bien le souverain de Qatar exerçant son autorité sur ses tribus et son territoire, et qu'il était reconnu à ce titre par les puissances étrangères et locales.

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remarque faite en 1829 par le capitaine Brucks au sujet des îles Hawar est quelque peu étonnante car le conseil de Bahreïn semble dans d'autres contextes écarter comme dépourvu de pertinence juridique le témoignage des hydrographes pour se prononcer sur les questions territoriales. Nous relevons par exemple dans l'édition de 1982 du *Persian Gulf Pilot*, publié par le directeur du service d'hydrographie de la marine britannique, que Bahreïn:

> «est une île mesurant environ 27 milles de long du nord au sud et 8 milles environ de large sur la plus grande partie de sa longueur. Elle se trouve à l'entrée du Dawhat Salwa. Il forme avec plusieurs petites îles et îlots proches de ses côtes l'Etat souverain indépendant de Bahreïn.» (Mémoire de Qatar, vol. 3, annexe II.1, p. 37.)

114. Par la conclusion des accords de 1868 entre les Britanniques et les souverains Al-Khalifah de Bahreïn et le chef Al-Thani de Qatar ainsi que par l'arrivée des Ottomans à Doha en 1871 (voir ci-dessous), le principe de l'effectivité a commencé à jouer en faveur du chef Al-Thani de Qatar. C'est en effet à partir de cette époque-là que l'ensemble de la péninsule de Qatar s'est transformé en un territoire placé sous l'autorité et l'emprise des Ottomans et du chef Al-Thani de Qatar, et ce avec l'accord et l'appui diplomatique de fait de la Grande-Bretagne, tandis que les souverains Al-Khalifah demeuraient eux établis dans les îles de Bahreïn sous la protection de la Grande-Bretagne, mais privés par traité de la faculté même d'intervenir sur le continent, notamment dans la péninsule de Qatar et les îles qui lui sont adjacentes, car cette faculté ne pouvait s'exercer que par la mer. En d'autres mots, l'objectif principal de la politique britannique dans le Golfe à cette époque était d'empêcher toute violation de la paix maritime. L'avion n'existait pas alors!

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115. Ce qui précède n'est qu'une description générale de l'histoire de l'époque en cause dont on trouvera le détail dans le dossier. Mais cette description est suffisante pour déterminer le moment à partir duquel il faut apprécier le titre originaire sur le territoire de l'Etat de Qatar pour les besoins de la présente affaire. Le passage suivant de Lorimer fournit selon moi des éléments décisifs pour déterminer ce moment qui revêt une importance fondamentale pour trancher les questions juridiques se posant en l'espèce. Selon Lorimer:

> «Avant 1766, la péninsule de Qatar — pense-t-on — faisait partie des possessions des cheikhs Bani Khalid, qui étaient établis à l'époque dans le Hasa et dont le pouvoir s'étendait alors vers le nord jusqu'au Koweït. Il est probable que, lorsque les Utub sont arrivés à Zubarah en 1766, les Al-Musallam occupaient une position prééminente, mais non suprême, dans le pays. Au cours des vingt années qui ont suivi, la prééminence des Al-Musallam semble être devenue

de personnes qui naviguent au large des côtes de cette mer ou résident sur ces côtes.

118. Après avoir reconnu comme valables et en vigueur tous les traités et conventions auparavant conclus entre les chefs de Bahreïn et le Gouvernement britannique, le souverain indépendant de Bahreïn convient, à l'article 2 de l'accord de 1861, de «[s']abstenir de toute agression maritime de quelque nature qu'elle soit ainsi que de pratiquer la guerre, la piraterie et l'esclavage sur la mer tant que nous recevrons l'appui du Gouvernement britannique pour maintenir la sécurité de nos propres possessions contre des agressions semblables dirigées à leur encontre par les chefs et tribus de ce Golfe». L'article 3 prévoit en outre que le souverain de Bahreïn accepte, pour permettre d'exécuter les engagements qui précèdent:

> «de faire connaître dès que possible au résident britannique dans le golfe Persique, arbitre en de tels cas, toutes les agressions et déprédations qui pourraient être projetées ou commises en mer contre nous-même, nos territoires ou nos sujets: nous promettons qu'aucun acte d'agression ou de rétorsion ne sera commis en mer par Bahreïn ou en son nom, par nous-même ou sous nos ordres, contre d'autres tribus sans son consentement ou celui du Gouvernement britannique, s'il est nécessaire de l'obtenir. Le résident britannique s'engage à prendre sur le champ les mesures nécessaires pour obtenir réparation de tous dommages infligés ou en train d'être infligés à Bahreïn ou à ses dépendances dans ce Golfe, pourvu que la preuve en ait été faite. De même nous, cheikh Mohamed bin Khalifah, assurerons l'entière réparation de toutes les infractions maritimes qui pourront être justement reprochées à nos sujets ou à nous-même, en qualité de souverain de Bahreïn.»

119. L'accord parle des «possessions», «territoires» et «sujets» du souverain de Bahreïn et distingue entre «Bahreïn», l'île principale de Bahreïn où l'accord a été conclu, et «ses dépendances dans ce Golfe» sans toutefois définir ces possessions, territoires ou dépendances. Il n'est absolument pas question de Qatar dans l'accord. Les tierces parties sont appelées «les chefs et tribus de ce Golfe» ou les «autres tribus». En 1868 — nous le verrons —, après l'attaque lancée par le souverain de Bahreïn sur la région de Doha, les Britanniques considérèrent les chefs et les tribus de Qatar comme protégés par l'accord de 1861 contre les attaques lancées par le souverain de Bahreïn et n'entrant par conséquent pas dans le champ d'application des termes «sujets», «possessions», «territoires» ou «dépendances» du souverain de Bahreïn dont il est question dans cet accord.

120. L'accord de 1861 revêt une importance particulière car sa violation par le souverain de Bahreïn a mené à la conclusion des accords de 1868 par lesquels la Grande-Bretagne a reconnu officiellement pour la première fois l'identité distincte de Qatar placé sous l'autorité de Mohamed bin Thani.

alliés ont alors pillé les villes d'Al-Wakrah et d'Al-Biddah...» (Contre-mémoire de Qatar, vol. 3, annexe III.1, p. 1. Voir aussi la lettre du 27 novembre 1867 adressée au résident politique par le premier assistant du résident politique, dans mémoire de Qatar, vol. 5, annexe II.25, p. 71.)

123. L'année suivante, en 1868, les tribus de Qatar organisèrent une attaque en représailles, franchirent également le Golfe et furent près de s'emparer par surprise de l'île de Bahreïn. Cet enchaînement d'événements créa une situation de *guerre* dans le Golfe — le terme «guerre» est d'ailleurs utilisé dans certains documents britanniques (voir par exemple mémoire de Qatar, vol. 5, annexe II.25, p. 73) — suscitant l'inquiétude de toutes les parties intéressées. Le 4 avril 1868, le lieutenant-colonel Pelly, le résident politique britannique dans le Golfe, informa le Gouvernement de Bombay que le sultan de Mascate et le lieutenant wahhabite s'étaient plaints à lui de la «violation flagrante de la paix maritime» par le chef de Bahreïn (contre-mémoire de Qatar, vol. 3, annexe III.2, p. 9). Il ne fait aucun doute, à la lumière des documents présentés, que celui qui était à l'origine de la situation et qui avait violé la paix maritime était le chef de Bahreïn dont le lieutenant-colonel Pelly dit dans la même lettre qu'il est «le plus gênant et le moins sûr des signataires de la trêve maritime» (*ibid.*), qualification reprise dans une autre lettre du 22 juin 1868 adressée au Gouvernement de Bombay où il est dit ce qui suit:

> «A l'origine, l'instigateur de ces troubles est le cheikh Mohammed bin Khalifah, le cheikh principal ou chef de Bahreïn, dont les actions ont fait l'objet de plaintes répétées de la part des résidents britanniques successifs durant le dernier quart de siècle.» (Contre-mémoire de Qatar, vol. 3, annexe III.4, p. 25.)

124. La situation mettant à l'épreuve la volonté de la Grande-Bretagne de maintenir la paix maritime, *les Britanniques se décidèrent à intervenir dans le conflit* motif pris de ce que le chef de Bahreïn avait violé les obligations qu'il avait contractées dans l'accord conclu avec la Grande-Bretagne en 1861. Comme l'a indiqué M. C. M. Aitchison, secrétaire en exercice auprès du gouvernement des Indes à l'époque dans un télégramme adressé au Gouvernement de Bombay au nom du vice-roi et du gouverneur général en conseil:

> «Il ne faut donc pas s'étonner que ... les tribus de Qatar se soient soulevées et aient riposté contre Bahreïn. Nos actions visant à prévenir les agressions, comme celles commises par Bahreïn et Abou Dhabi, ne procèdent pas simplement d'un choix politique, mais d'une obligation expresse. Le Gouvernement britannique est tenu, dès qu'il est informé d'un acte d'agression par voie de mer, de prendre tout de suite les mesures nécessaires pour obtenir réparation du préjudice causé.» (*Ibid.*, vol. 3, annexe III.5, p. 35.)

125. L'intervention britannique eut des conséquences historiques très importantes car elle aboutit à une nouvelle limitation conventionnelle de

contre vous, vous vous êtes battu en mer et avez envoyé là encore votre frère pour attaquer la côte de Qatar.

. . . . . .

Il est de mon devoir d'ajouter, aussi pénible que cela soit pour moi, que si vous refusez ou hésitez à vous conformer à ces exigences, elles seront mises à exécution...» (Contre-mémoire de Qatar, vol. 3, annexe III.6, p. 45.)

128. C'est dans ce contexte que Pelly se rendit à Bahreïn et à Qatar et parvint à faire accepter les accords de septembre 1868. Il se rendit tout d'abord sur l'île de Bahreïn. Lorsqu'il y arriva accompagné de trois bâtiments de la marine, le cheikh Mohamed bin Khalifah s'était déjà enfui. Le 6 septembre 1868, le résident politique britannique dans le Golfe conclut alors un accord réglant la question avec le cheikh Ali bin Khalifah qui était devenu le chef de Bahreïn après la fuite du cheikh Mohamed. En plus de prévoir la saisie de tous les moyens de guerre appartenant au cheikh Mohamed (il avait aussi détruit le fort et le canon et brûlé trois navires de guerre) et le versement au résident politique britannique d'une somme en espèces en réparation des dommages causés, l'accord signé le 6 septembre 1868 entre la Grande-Bretagne et le nouveau souverain de Bahreïn dispose:

«Nous, soussigné, Ali bin Khalifah, avec les habitants et sujets de Bahreïn en général, déclarons par les présentes qu'attendu que Mohamed bin Khalifah n'a cessé de commettre des actes de piraterie et d'autres irrégularités en mer, et qu'à la suite de son récent acte de piraterie il s'est enfui de Bahreïn, il se trouve déchu de tout droit de prétendre à son titre de cheikh et chef principal de Bahreïn; attendu qu'il n'existe à l'heure actuelle aucun autre cheikh, nous, Ali bin Khalifah, avons reçu la lettre du résident adressée à Mohamed bin Khalifah; nous avons compris ce qu'elle requiert et donnons notre consentement et accord aux conditions suivantes...» (Mémoire de Qatar, vol. 5, annexe II.26, p. 77.)

129. L'une des clauses de l'accord acceptées par le nouveau souverain de Bahreïn était de considérer Mohamed bin Khalifah comme exclu à titre permanent de toute participation aux affaires de Bahreïn et dépourvu de tout droit de prétendre à ce territoire et, au cas où il reviendrait à Bahreïn, de s'emparer de sa personne et de le remettre au résident britannique (art. 3 de l'accord). Afin de sauvegarder la paix en mer et de prévenir la survenance d'autres troubles, ainsi que pour tenir le résident britannique informé de ce qui se passait, le nouveau souverain de Bahreïn promit de désigner un agent à Bushire (siège à cette époque du résident britannique dans le Golfe) (art. 4 de l'accord).

130. Après avoir conclu cet accord avec le nouveau souverain de Bahreïn, Ali bin Khalifah, le lieutenant-colonel Pelly se mit directement en rapport avec Mohamed bin Thani en lui faisant parvenir à Wakrah une lettre en date du 11 septembre 1868. Ce document important, dans

(art. 5 de l'accord) (mémoire de Qatar, vol. 5, annexe II.28, p. 85; les italiques sont de moi).

L'accord «revêtu du sceau en notre présence par Mohamed bin Sani [Thani] *de Guttur*» était signé par Lewis Pelly, résident politique britannique, et R. A. Brown, capitaine commandant le navire de sa Majesté le *Vigilant*.

132. De plus, le 13 septembre 1868, le lieutenant-colonel Pelly, toujours en sa qualité de résident politique britannique dans le golfe Persique, fit un *discours adressé aux cheikhs et aux tribus de Qatar* les avertissant que celui qui violait de quelque façon que ce soit la paix maritime serait traité de la même façon que le cheikh Mohamed bin Khalifah de Bahreïn l'avait été. Il avertit solennellement les tribus de Qatar que le Gouvernement britannique était résolu à préserver la paix maritime dans le golfe Persique. Il fit également savoir ce qui suit à «tous les cheikhs et tribus de Qatar» (et non pas aux cheikhs et tribus de Bahreïn):

> «Que tous les cheikhs et autres personnes sur la côte de Qatar soient informés que Mohamed bin Sani de Qatar revient avec sa tribu pour s'installer dans sa ville de Dawka et qu'il s'est engagé à y vivre en paix et à ne pas agresser les tribus voisines. Nous espérons donc que tous les cheikhs et tribus de Qatar ne l'agresseront pas ni lui ni les membres de sa tribu.» (Mémoire de Qatar, vol. 5, annexe II.29, p. 89.)

133. Les relations pacifiques existant antérieurement entre Bahreïn et Qatar devaient se poursuivre, mais entre deux entités politiques distinctes et sans qu'il y ait subordination de l'une par rapport à l'autre. L'accord reconnaissait le chef de Qatar comme l'égal du chef de Bahreïn et non comme se trouvant lui-même ou en ce qui concerne une partie du territoire de Qatar dans une relation de subordination. La thèse contraire défendue par Bahreïn en l'espèce ne trouve aucune confirmation dans le texte des deux principaux accords de 1868, dans les documents et circonstances relatifs à leur conclusion ou dans le comportement de la Grande-Bretagne en ce qui concerne l'interprétation ou l'application pratique de ces accords. L'engagement de s'abstenir de violer la paix maritime, que Bahreïn avait déjà contracté dans la convention qu'il avait conclue en 1861 avec la Grande-Bretagne, a été étendu par les conventions principales de 1868 tant au chef de Bahreïn qu'à celui de Qatar, l'intégrité de leurs territoires respectifs, y compris leurs côtes et îles adjacentes, étant totalement respectée. La mer devait servir de zone tampon entre les îles de Bahreïn et la péninsule de Qatar, la Grande-Bretagne continuant de s'acquitter de l'obligation de maintenir la paix maritime.

134. En janvier 1869, et ce en dépit des termes de l'article 3 de l'accord conclu avec le cheikh Ali, les Britanniques permirent au cheikh Mohamed de retourner à Bahreïn. Ce retour se fit à la demande du cheikh Ali lui-même. Mais le cheikh Mohamed se mit bientôt à intriguer et le cheikh Ali le déporta au Koweït. En septembre 1869, le cheikh Mohamed se ren-

du tribut des Ottomans, lesquels, à leur tour, demandèrent des renseignements sur ce point aux Britanniques.

138. Evoquant les événements de 1867 et 1868, le lieutenant-colonel Pelly informa le Gouvernement de Bombay, dans une lettre du 12 septembre 1871, qu'à l'époque:

> «[l]e gouvernement intervint en tant qu'arbitre de la paix maritime et, ce faisant, il s'assura que, *pour prévenir tout conflit entre Guttur et Bahreïn* et écarter à l'avenir toute incertitude quant au paiement *par Guttur* du tribut annuel qu'il devait, celui-ci serait versé par l'intermédiaire de la résidence»;

et il ajouta:

> «je me suis toutefois abstenu cette année de demander le tribut, vu les troubles que connaît *Guttur* à la suite de l'invasion par les Turcs de la côte arabique»

et que,

> «[s]i j'avais demandé et obtenu paiement du tribut, la résidence l'aurait remis au *chef de Bahreïn* qui l'aurait transmis comme faisant partie du tribut qu'il paie à celui qu'il reconnaît comme iman des Wahhabites...» (contre-mémoire de Qatar, vol. 3, annexe III.8, p. 59; les italiques sont de moi).

139. Dans un autre rapport du 28 octobre 1871 adressé à M. Aitchison, secrétaire auprès du Gouvernement des Indes, service des affaires étrangères, par le département politique, il est indiqué ce qui suit:

> «il est démontré que l'arrangement relatif au tribut à verser par Guttur à Bahreïn doit être considéré comme ne mettant pas en cause l'indépendance de Guttur vis-à-vis de Bahreïn mais comme une contribution fixe de Guttur et de Bahreïn pour mettre leurs frontières à l'abri des menées des tribus naims et wahhabites, plus particulièrement pendant la saison de la pêche aux huîtres perlières» (contre-mémoire de Qatar, vol. 3, annexe II.9, p. 65).

140. Il est intéressant de relever que le souverain de Bahreïn a remis sur le tapis la question du tribut au cours des négociations engagées entre les Britanniques et les Ottomans au sujet de la convention anglo-ottomane de 1913, mais non la question de la souveraineté sur les îles Hawar! Le 13 juillet 1913, le Gouvernement des Indes donna les instructions suivantes au résident politique britannique dans le Golfe:

> «vous signalez que le cheikh de Bahreïn envisage d'exercer à nouveau la prérogative qui avait été la sienne de lever tribut sur les cheikhs de Qatar.
>
> 2. Cette prérogative qui n'a été exercée que deux ans et qui ne l'est plus depuis 1870 est, vu l'article 10 du projet de convention anglo-ottomane et en particulier la disposition suivante — «Le gouverne-

fut rapporté en mai 1871, selon le récit qu'en fit Saldanha, que: « La Porte ottomane ni[ait] expressément toute intention d'étendre sa suprématie sur Bahreïn, Mascate ou les tribus indépendantes d'Arabie méridionale et n'envisage[ait] aucune attaque contre eux.» (Mémoire de Qatar, vol. 4, annexe II.7, p. 48.)

144. Les Ottomans garantirent à nouveau que l'officier commandant l'expédition avait pour instructions de «ne tourner en aucun cas ses regards vers Bahreïn» (*ibid.*, p. 70). Par la suite, le *vali* de Bagdad, à qui les Britanniques avaient demandé si l'intervention ottomane à Doha avait été autorisée par le Gouvernement ottoman, «affirma que Qatar n'était pas couvert par l'assurance donnée par la Turquie qu'elle n'interviendrait pas à Bahreïn» (voir Lorimer, mémoire de Qatar, vol. 3, annexe II.5, p. 210).

145. Comme le montrent donc ces échanges, l'Empire ottoman et la Grande-Bretagne étaient parvenus à un accord de fait en 1871. Les Britanniques ne firent rien pour empêcher les Ottomans de se rendre maîtres de Qatar dès lors qu'ils eurent obtenu les garanties dont il est question ci-dessus et pour autant que la paix maritime ne fût pas perturbée. Même si l'Empire ottoman revendiquait aussi officiellement les îles de Bahreïn comme faisant partie de ses possessions, cette revendication est toutefois demeurée symbolique pendant toute la période de la présence ottomane à Qatar. Il faut également relever que les garanties données aux Britanniques par les Ottomans ne valaient pas pour Zubarah, les îles Hawar, l'île de Janan ou tout autre territoire continental ainsi que les étendues maritimes et îles adjacentes.

146. Ces éléments confirment que, pour la Grande-Bretagne en 1861 : 1) «Bahreïn» correspondait aux îles de Bahreïn et «Qatar» à la péninsule de Qatar, ainsi que cela avait été reconnu dans les accords de 1868; et 2) que «Bahreïn» et «Qatar» étaient des entités politiques et territoriales distinctes dans la région. La thèse générale avancée par Qatar en l'espèce trouve par conséquent confirmation pleine et entière dans l'attitude observée sur le plan diplomatique par les Britanniques devant l'arrivée des Ottomans à Qatar en 1871. La très nette concordance de vues entre la Grande-Bretagne et l'Empire ottoman sur ce qu'il fallait entendre par «Bahreïn» et «Qatar» en 1871 allait d'ailleurs devenir un élément de la plus grande importance pour la consolidation du titre territorial originaire de Qatar.

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147. Il vaut également la peine de relever que Bahreïn, contrairement à la thèse générale qu'il défend au sujet de la prétendue autorité effective et continue exercée par ses souverains sur la péninsule de Qatar jusque dans les années trente, s'est lui-même trouvé relégué au rôle de tiers spectateur en ce qui a trait à l'arrivée des Ottomans à Qatar en 1871 et à l'accord anglo-ottoman conclu à ce sujet. On ne

soumises à la Cour, comme la carte ottomane du «Vilayet de Bassorah», établie à la fin du XIX[e] siècle (carte n° 35 de l'atlas accompagnant la réplique de Qatar). Cette carte confirme aussi que, pour les Ottomans, Bahreïn (qu'ils revendiquaient aussi en théorie, mais qui était placé sous la protection de la Grande-Bretagne) était constitué du groupe compact d'îles formant l'archipel de Bahreïn proprement dit. L'étendue du *kaza* de Qatar et l'emplacement de sa *kasaba*, la ville de Doha, sont indiqués très clairement sur la carte ottomane reproduite dans l'atlas joint à la réplique de Qatar (carte n° 15) (voir carte n° 2 de la présente opinion, ci-après p. 448).

151. Contrairement à la thèse développée par Bahreïn au cours de la procédure, le *kaza* de Qatar ne se limitait pas aux yeux des Ottomans à la région de Doha ou d'Al-Bida et à ses environs, mais englobait l'ensemble de la péninsule, y compris Zubarah, mentionnée sur la carte n° 15, et les îles adjacentes, comme les Hawar. La thèse de Bahreïn confond l'étendue du *kaza* de Qatar avec celle de la région de la capitale ou de la *kasaba* du *kaza* de Qatar. La véritable étendue du *kaza* de Qatar est en outre confirmée par des documents ottomans soumis à la Cour. Il est dit ce qui suit dans un rapport sur l'Arabie, datant de 1895 environ, adressé au grand vizir par Kamil Pasha: «La région appelée Qatar, sur la côte à 100 milles du poste de débarquement d'Ojeir, est une langue de terre qui s'avance dans la mer entre Oman et l'île de Bahreïn.» (Réplique de Qatar, vol. 2, annexe II.45, p. 255.) Ce rapport précise en outre, que «[l]e centre administratif de ce *kaza* est la *kasaba* d'Al-Bida» *(ibid.)*; et que la *kasaba* d'Al-Bida «compte onze villages qui sont sur la côte» *(ibid.)*.

152. Les villages de la *kasaba* d'Al-Bida n'étaient par conséquent pas les seuls villages du *kaza* de Qatar qui englobait évidemment les autres villages de la péninsule, comme Zubarah. Des documents ottomans soumis par Bahreïn confirment aussi les conclusions susmentionnées (voir contre-mémoire de Bahreïn, vol. 2, annexes 25 *b)* et 35 *b)*, p. 73 et 113). Le dernier document précise: «Les districts de Zubarah et d'Odeid sont des prolongements de la subdivision de Qatar relevant de la province du Nedjd et occupent une position importante.»

153. En 1876, les Ottomans nommèrent le chef Al-Thani de Qatar *kaimakam* ou gouverneur du *kaza* de Qatar. Pendant la période ottomane (de 1871 à 1915), les Al-Thani se retrouvèrent à la tête de l'administration ottomane à Qatar tout en continuant d'être les chefs de Qatar comme avant l'arrivée des Ottomans. Cette période revêt la plus grande importance pour la consolidation du titre des chefs Al-Thani sur le territoire de Qatar. Et ce pour deux raisons principales: en premier lieu, parce que, même si les Ottomans avaient officiellement la mainmise sur l'ensemble de la péninsule, c'était le souverain de Qatar, le cheikh Jassim, qui exerçait le pouvoir sur le terrain, à savoir dans le territoire du *kaza* de Qatar; cette circonstance facilitait l'extension de sa propre autorité sur les tribus vivant dans la péninsule ainsi que l'exercice effectif de cette autorité sur celles-ci. En second lieu, parce que l'autorité exercée par les Ottomans sur l'ensemble de la péninsule de Qatar, alliée à

rité étatique par Bahreïn dans la péninsule de Qatar et les îles adjacentes, à savoir l'absence d'un des éléments essentiels exigés par le droit international pour qu'une prétendue autorité puisse éventuellement fonder un titre territorial. On ne trouve aucune trace d'un *corpus possessionis* exercé par les souverains Al-Khalifah sur une partie quelconque de la péninsule de Qatar ou sur les îles adjacentes à celle-ci ou sur les deux à la fois. De plus, la seule et unique manifestation d'intention *(animus)* est la revendication vague qu'ils ont formulée à l'égard de Zubarah en 1873 et qui fut rejetée par les Britanniques.

6. *Attitude de la Grande-Bretagne vis-à-vis du chef Al-Thani de Qatar pendant la période ottomane*

158. Les relations britanniques avec Qatar pendant la période ottomane furent marquées par le désir de continuer à faire respecter la paix maritime en empêchant les actes de piraterie commis à partir des ports de Qatar et à protéger les commerçants indiens de l'endroit contre les actes d'intimidation. Les Britanniques reconnaissaient en même temps que les Ottomans exerçaient une domination de fait sur la péninsule et ils étaient prêts à reconnaître cette domination. Les instructions données en 1882 par le Gouvernement britannique en réponse à une demande d'éclaircissements formulée par le Gouvernement des Indes sont un bon exemple de cette attitude. Selon ces instructions, le cheikh de Qatar, bien qu'il eût accepté d'être sous la dépendance des Ottomans sur terre, devait être encouragé à entretenir des relations étroites et directes avec les officiers du Gouvernement des Indes et à s'en remettre à ceux-ci dans toutes les affaires concernant la paix en mer (voir Lorimer, mémoire de Qatar, vol. 3, annexe II.5, p. 217).

159. Lorsque les Ottomans renforcèrent en 1889 leur contingent de troupes à Qatar, l'ambassadeur de la Grande-Bretagne à Constantinople fut chargé de rappeler au Gouvernement ottoman que le Gouvernement britannique ne pouvait demeurer indifférent devant toutes tentatives de la part des autorités turques d'intervenir à Oman ou d'attaquer celui-ci (aujourd'hui les Emirats arabes unis! voir Saldanha, mémoire de Qatar, vol. 4, annexe II.8, p. 221-222). Mais on ne relève pas le moindre mot sur Qatar lui-même ou sur son souverain Al-Thani. Les événements survenus en mars 1895 relativement à la tribu des Al-bin-Ali sont également très révélateurs de l'attitude britannique. La tribu était entrée en conflit avec le souverain de Bahreïn et était revenue s'installer à Qatar à proximité de Zubarah avec l'appui de Jassim bin Thani, le souverain de Qatar (autre élément démontrant que Zubarah ne se trouvait pas sous l'autorité et la domination des souverains Al-Khalifah de Bahreïn).

160. Le souverain de Bahreïn se plaignit au résident politique britannique de la menace que l'installation de cette colonie représentait selon lui pour Bahreïn. Le résident politique fit savoir au cheikh Jassim que la Grande-Bretagne ne pouvait accepter cette situation. Les Ottomans envoyèrent alors des soldats dans la région. Mais les Britanniques — sou-

atteste combien leur était utile cette extension du pouvoir local du cheikh Jassim. Ainsi, lorsque celui-ci voulut renoncer à sa charge de *kaimakam* en 1892, les Ottomans refusèrent sa démission. En 1893, le *vali* de Bassorah prit la tête d'une armée contre le cheikh Jassim, à la suite de prétendus actes d'insubordination, et leurs troupes s'affrontèrent à l'ouest de Doha, après quoi le cheikh Jassim renonça à ses fonctions de *kaimakam*; les Ottomans laissèrent néanmoins l'administration du *kaza* de Qatar aux mains de son frère Ahmed. En d'autres termes, la relation entre les Ottomans et les Al-Thani se révéla fructueuse pour les uns comme pour les autres.

165. Si les Britanniques firent parfois mine de contester la juridiction ottomane sur l'ensemble de Qatar (en tant qu'elle aurait été distincte de celle du souverain de Qatar), jamais ils n'affirmèrent leur propre juridiction sur une quelconque partie du territoire de Qatar ni ne cautionnèrent les prétentions de Bahreïn sur Zubarah. De fait, la Grande-Bretagne reconnut tacitement la présence ottomane à Qatar et ne remit jamais en cause, pendant la période ottomane, l'autorité des souverains Al-Thani de Qatar sur l'ensemble de celui-ci.

166. Les paragraphes 2.31 et suivants du contre-mémoire de Qatar et les annexes correspondantes témoignent de l'attitude adoptée par les Britanniques. Point n'est besoin d'examiner ces documents dans le détail. Qu'il nous suffise d'évoquer: 1) la lettre en date du 28 août 1873 du colonel Ross, résident politique britannique (contre-mémoire de Qatar, vol. 2, annexe II.3, p. 11, et une lettre postérieure du colonel Ross reproduite dans le mémoire de Bahreïn, vol. 2, annexe 20, p. 174); 2) le mémorandum du 22 mai 1879 du Gouvernement des Indes sur la juridiction ottomane le long de la côte arabique du Golfe, qui fait référence à la note en date du 28 juillet 1871 de M. Aitchison, secrétaire d'Etat aux affaires étrangères (contre-mémoire de Qatar, vol. 2, annexe II.1, p. 1); et 3) la lettre en date du 17 septembre 1879 de l'India Office, qui fait allusion aux vues exprimées par le colonel Ross (*ibid.*, vol. 2, annexe II.8, p. 35, et vol. 2, annexe II.7, p. 27).

167. Outre la présence ottomane, les Britanniques reconnaissaient aussi l'autorité du cheikh Jassim, qu'ils tenaient pour responsable du maintien de l'ordre à Qatar et de la prévention de la piraterie au départ des ports qataris. Certes, en une occasion, le cheikh Jassim se récusa lorsque les Britanniques lui demandèrent de maintenir l'ordre tout au long de la côte de Qatar. Les Parties ont chacune donné leur interprétation de cet épisode (voir notamment le mémoire de Bahreïn, vol. 1, p. 59, par. 133), également évoqué au cours des audiences par le conseil de Bahreïn. Citant Zahlan, Qatar a émis l'idée que, en agissant ainsi, le cheikh Jassim ne faisait qu'exploiter, à son habitude, la rivalité entre les grandes puissances (contre-mémoire de Qatar, vol. 1, p. 26-27, par. 2.34; en ce qui concerne Zahlan, voir *ibid.*, vol. 2, annexe II.82, p. 462-463).

168. Quoi qu'il en soit, les normes du droit international n'imposent pas à un pays, ou au dirigeant d'un pays, particulièrement dans les circonstances qui étaient celles de l'époque à Qatar, d'assumer la responsa-

173. Bahreïn reconnaît de fait que l'autorité et le contrôle qu'il aurait exercés sur la péninsule de Qatar reculèrent après l'arrivée des Ottomans en 1871, tandis que l'autorité et la domination des Al-Thani gagnaient du terrain. Mais cette extension du contrôle des Al-Thani sur la péninsule de Qatar, que Bahreïn ne conteste pas, se serait interrompue à la «limite de la région de Zubarah» telle que définie par Bahreïn dans la présente instance, sans que celui-ci n'explique à aucun moment ce phénomène, d'ailleurs absolument démenti par les preuves documentaires de l'époque produites devant la Cour.

174. Cet argument est repris au sujet des îles Hawar et de l'île de Janan, le titre originaire dont Bahreïn se prévaut ayant, selon lui, la même source ou le même fondement que son titre originaire sur Zubarah. En d'autres termes, l'autorité et la domination globales prétendument exercées par les Al-Khalifah sur Zubarah se seraient étendues aux îles Hawar et à l'île de Janan. Là encore, d'un point de vue territorial, aucune raison n'est avancée, car: 1) les îles Hawar et l'île de Janan ne sont pas adjacentes à la côte de la région dite «région de Zubarah» telle que définie par Bahreïn, ni situées dans une bande d'eaux territoriales de 3 milles qui serait mesurée à partir de cette côte; et 2) il n'y a pas de continuité territoriale terrestre entre la limite méridionale de la «région de Zubarah» et la côte continentale qui fait face aux îles Hawar et à l'île de Janan, mais une importante portion de territoire continental que Bahreïn ne revendique pas, reconnaissant ainsi son appartenance à Qatar.

175. Ainsi, le phénomène inexpliqué d'«interruption» de l'extension, par ailleurs reconnue, de l'autorité et du contrôle des souverains Al-Thani à partir de 1871 vaut aussi pour les îles susmentionnées. Mais pourquoi l'autorité et la domination des Al-Thani auraient-elles atteint la côte continentale faisant face aux îles adjacentes pour s'y arrêter, tout comme elles se seraient arrêtées à la «limite» de la «région de Zubarah»? J'estime que cette question, de par son importance, aurait mérité d'être éclaircie par Bahreïn, ainsi que dans l'arrêt. Invoquer des liens d'allégeance personnels ou autres entre tribus, branches ou encore familles de tribus aux XVIII^{e} et XIX^{e} siècles ne permet pas d'y répondre. En l'espèce, ces liens personnels pourraient tout au plus constituer un élément de preuve parmi bien d'autres à l'appui des titres territoriaux respectifs des Parties au regard des questions soumises à la Cour, mais non — en tant que tels et pris isolément — la source ou le fondement du titre territorial d'un Etat donné. La question à trancher concerne la souveraineté territoriale, et non des rapports tribaux, incertains, ambigus, et de nature personnelle.

176. Sur ce dernier point, ma conclusion générale est que, lorsque l'on essaye de traduire la notion d'«autorité» exercée par une société tribale du Golfe aux XVIII^{e} et XIX^{e} siècles en un concept de droit international contemporain tel que celui d'«autorité territoriale», il convient de tenir compte, avant toutes choses, de la notion d'«établissement». L'établissement d'une tribu, en ce qu'il permet à des liens territoriaux de se tisser

tion au colonel Ross, résident politique britannique dans le Golfe. Comme indiqué ci-dessus, il faisait valoir son autorité sur les Naim et affirmait également: 1) que Zubarah était un «bien» placé sous l'autorité de Bahreïn; 2) qu'en se reportant au traité *(sic!)* le résident politique constaterait que Zubarah était une «dépendance» de cette «île»; et 3) que le colonel Pelly avait admis ses prétentions sur Zubarah en 1868. Toutefois, le cheikh Issa convint de la nécessité d'examiner les archives du colonel Pelly pour cette année (contre-mémoire de Qatar, vol. 1, p. 152, par. 5.10). Toutes les ambiguïtés des futures revendications de Bahreïn à l'égard de Zubarah étaient déjà contenues dans cette première démarche, comme l'attestent la confusion entre «droits de propriété» et «droits de souveraineté» ainsi que, d'une part, l'admission du fait que Bahreïn était une «île» et, de l'autre, la prétendue reconnaissance par les Britanniques de l'appartenance de Zubarah à Bahreïn.

179. Les Britanniques exprimèrent d'emblée des doutes sur la réalité des droits invoqués par le souverain de Bahreïn sur Zubarah, les Naim ou le reste de la péninsule de Qatar. Après une première enquête, le major Grant écrivit en août 1873 au colonel Ross qu'il

> «n'avait pas les moyens de se forger une opinion sur les prétentions du cheikh de Bahreïn à une souveraineté quelconque sur la tribu des Naim mais que, des informations orales recueillies, il concluait que tout pouvoir exercé par Bahreïn au cours des dernières années sur cette tribu était *plutôt symbolique, pour autant qu'il y en ait jamais eu*» (mémoire de Qatar, vol. 4, annexe II.8, p. 188; les italiques sont de moi).

Ainsi, la seule chose que voulût bien admettre le major Grant était que l'autorité de Bahreïn sur cette tribu, si tant est qu'il en eût une, était purement nominale.

180. Dans sa réponse en date du 28 août 1873, le colonel Ross, résident politique britannique, chargea le major Grant de recommander au chef de Bahreïn de se tenir à l'écart de tout accroc qui pourrait survenir sur le continent avec les Turcs, les Wahhabites, etc. (nouvelle illustration de l'attitude générale des Britanniques évoquée précédemment), et insista en ces termes sur le principe de l'effectivité ainsi que sur la nature incertaine des droits de Bahreïn: «le cheikh de Bahreïn *n'[a] pas le pouvoir*, même s'il le voulait, de protéger les tribus résidant à Qatar et ... ne [peut] pas attendre du gouvernement qu'il intervienne alors que ses droits [ne sont] pas fixés» (*ibid.*, les italiques sont de moi). Ainsi, au rebours de la thèse générale avancée par Bahreïn en l'espèce, la personne la mieux au fait de la situation politique dans le Golfe, le résident politique britannique, affirmait en août 1873 que le chef de Bahreïn n'avait pas le pouvoir «de protéger les tribus résidant à Qatar».

181. Il convient également de noter que le major Grant chercha à se renseigner plus avant et obtint un rapport d'où il ressortait que, outre les *Naim*, nombre d'autres tribus vivaient à Zubarah: les *Chibisa*, les *Manamaneh*, les *Sadeh* et les *Hamadal* (ce rapport est reproduit dans son inté-

Bahreïn, s'y opposèrent, ce genre de questions faisant fréquemment l'objet de subtils arrangements diplomatiques entre la Grande-Bretagne et la Porte. Le dossier n'en contient pas moins trois exemples, sinon plus, attestant sans équivoque l'exercice direct de l'autorité étatique par les Ottomans sur la région de Zubarah : une première fois en 1873, en vue de soumettre les Naim, ce qui fut à l'origine des premières prétentions sur Zubarah avancées par le souverain de Bahreïn auprès des Britanniques (voir ci-dessus), puis de nouveau au moment des événements de 1878 et de 1895. Dans les trois cas, les Ottomans dépêchèrent des navires de guerre.

186. Toutefois, pour étayer la demande dont il a saisi la Cour, Bahreïn s'emploie à démontrer que certaines des tentatives faites par les Ottomans et les souverains Al-Thani pour exercer leur autorité sur la région dite «de Zubarah» échouèrent en raison de l'opposition de la Grande-Bretagne et de Bahreïn (mémoire de Bahreïn, vol. 1, par. 167 et suiv.). Il convient donc de se pencher aussi sur la documentation correspondante. Le premier événement invoqué par Bahreïn se produisit *en 1874*. Cette année-là, Nasir bin Mubarak — chef d'une branche rivale de la famille des souverains de Bahreïn qui s'enfuit vers le continent pour se placer sous la protection des Turcs — et les Beni Hajir, une tribu bédouine, menacèrent d'attaquer Bahreïn depuis la côte de Qatar, mais y renoncèrent en raison de la présence de bâtiments de guerre britanniques ainsi que sur ordre du chef de Qatar, le cheikh Mohamed bin Thani (mémoire de Qatar, vol. 4, annexe II.7, p. 59-60). A la fin de l'année, toutefois, le souverain de Bahreïn, craignant que Nasir bin Mubarak n'attaquât les Naim de Zubarah, demanda aux Britanniques l'autorisation de leur prêter main forte.

187. Dans un premier temps, le résident politique britannique autorisa le cheikh de Bahreïn à dépêcher des renforts «comme mesure purement défensive» (mémoire de Bahreïn, vol. 2, annexe 70, p. 293). Mais le Gouvernement des Indes manifesta sa réprobation dans les termes les plus explicites — le résident n'aurait pas dû encourager le chef de Bahreïn à déployer des troupes sur le continent pour venir en aide aux Naim, estimait-il, confirmant au passage que: «le cheikh de Bahreïn n'[a] aucune possession sur la terre de Qatar et que ses droits y [sont] d'une nature incertaine» (mémoire de Qatar, vol. 4, annexe II.8, p. 192). Comme l'attestent d'autres documents contemporains, «éviter toute ingérence dans les affaires du continent» revenait comme un leitmotiv dans les recommandations adressées par les Britanniques au souverain de Bahreïn.

188. Le deuxième exemple concerne un acte de piraterie grave commis en septembre *1878* par des habitants de Zubarah et au cours duquel plusieurs personnes trouvèrent la mort. Le colonel Ross fut chargé par le Gouvernement des Indes de demander aux autorités turques de sanctionner les coupables et proposa à cette fin l'aide de la flotte britannique. Entre-temps, les Qataris, qui avaient également été victimes de razzias sur terre et sur mer perpétrées par les Naim de Zubarah, assiégèrent le fort de Murair (près des ruines de Zubarah) sous le commandement du chef de Qatar, Jassim bin Thani, et de Nasir bin Mubarak, le membre dissident

souci d'assurer la protection de Bahreïn et la sécurité en mer. C'est ainsi que le colonel Ross estimait qu'encourager le dissident Nasir bin Mubarak à s'installer à Zubarah avec ses alliés de la tribu des Beni Hajir constituerait un danger pour Bahreïn. Il écrivait:

> «Il ne fait aucun doute que, si cette mesure était mise à exécution, elle constituerait une menace et un danger permanent pour Bahreïn et [que] l'objection émise par le cheikh de Bahreïn serait, *en supposant qu'il soit bien informé*, légitime.» (Mémoire de Bahreïn, vol. 2, annexe 41, p. 228).

Si l'établissement à Zubarah d'une colonie hostile représentait pour Bahreïn une menace et un danger permanent, il va de soi que «Zubarah» n'était pas «Bahreïn», tout comme il est manifeste que, contrairement à ce que prétend Bahreïn en la présente affaire, son souverain d'alors n'exerçait sur Zubarah aucune autorité ni contrôle.

192. En *1890-1891*, de nouvelles rumeurs selon lesquelles les Ottomans auraient tenté de reconstruire Zubarah donnèrent lieu à une intervention diplomatique britannique auprès de la Porte (mémoire de Bahreïn, vol. 2, annexe 70, p. 325) et les Ottomans abandonnèrent de nouveau leur projet. Les Britanniques refusaient une fois encore d'accepter une présence militaire turque à Zubarah mais ne contestaient pas l'autorité du souverain Al-Thani de Qatar dans la «région de Zubarah». Les observations de Lorimer, par exemple, ne laissent pas entendre que cet épisode ait conduit à une quelconque reconnaissance par les Britanniques de la souveraineté de Bahreïn sur Zubarah (*ibid.*, vol. 3, annexe 83, p. 471).

193. C'est également le souci britannique de préserver la sécurité des îles de Bahreïn et non la prétendue souveraineté exercée par Bahreïn sur Zubarah qui explique la destruction, en *1895*, des navires turcs et qataris par les Britanniques dans le port de Zubarah. Une fois encore, l'attitude des Britanniques visait à prévenir une attaque *à partir de* la région de Zubarah; cette intervention navale était clairement destinée à empêcher toute invasion de Bahreïn depuis Zubarah (voir la lettre du 13 septembre 1895 adressée au Gouvernement des Indes par le colonel Wilson (*ibid.*, vol. 2, annexe 62, p. 268), voir également ses précédents courriers datés de mai et juillet 1895).

194. C'est pour les mêmes motifs que les Britanniques objectèrent en *1903* à la nomination d'un *mudir* ottoman à Zubarah. A cette occasion, le lieutenant-colonel Kemball, résident politique britannique, estimait absolument indispensable pour la sécurité des îles de Bahreïn que Zubarah ne soit pas occupée militairement par les Turcs et se déclarait préoccupé par le prestige accru que ceux-ci pourraient tirer de leur éventuelle occupation de Zubarah (*ibid.*, vol. 2, annexe 67, p. 281). A ce propos, il convient de souligner que, dans le même temps, les Britanniques envisageaient de renforcer leurs liens avec les cheiks de Qatar (*ibid.*, vol. 3, annexe 83, p. 483).

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> «les Naim viennent ici de leur propre initiative et si je leur remets des présents, c'est que j'y suis contraint pour éviter qu'ils ne commettent quelque exaction, car je crains que, sinon, ils ne me cherchent querelle et s'allient avec mes ennemis, Nasir bin Mobarek et les autres; et le fait qu'ils se soient regroupés à Zubarah est pour moi source de grandes difficultés tant est courte la distance qui sépare cette ville de mon territoire» (mémoire de Bahreïn, vol. 2, annexe 35, p. 205).

197. La « proximité de Zubarah», pour reprendre les propres termes employés en 1877 par le major Grant (*ibid.*, p. 204), constituait donc une source permanente de danger pour Bahreïn, suffisant à justifier la nature des relations que les souverains de Bahreïn entretenaient avec certains des Naim installés à l'époque dans la région de Zubarah. Les souverains Al-Khalifah gratifiaient les Naim amicaux de présents et de provisions pour les maintenir dans de bonnes dispositions. A partir de 1868-1871, la principale motivation politique de l'intérêt des souverains Al-Khalifah pour Zubarah et de ses relations avec les Naim qui y étaient installés ne sera plus la «souveraineté», mais la «sécurité».

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198. En l'espèce, la revendication de souveraineté de Bahreïn sur la «région de Zubarah» se fonde principalement sur les prétendus «liens d'allégeance» des Naim vis-à-vis des souverains Al-Khalifah de Bahreïn. C'est la manière choisie par Bahreïn pour tenter de combler la lacune née de l'*absence de possession effective* de Zubarah par les souverains Al-Khalifah de Bahreïn, à la suite de leur départ et de leur installation sur l'île de Bahreïn en 1783. La thèse de Bahreïn semble dès lors se présenter ainsi: lorsque les Al-Khalifah sont partis pour l'île de Bahreïn, il y a quelque deux cent dix-sept ans de cela, les fidèles Naim sont restés en arrière pour exercer en leur nom une autorité réelle, continue et pacifique sur la région jusqu'à l'intervention du souverain de Qatar en 1937 contre la branche de la tribu des Naim vivant alors à Zubarah, geste caractérisé par Bahreïn comme un acte d'agression ou de conquête contraire au droit de la Société des Nations et du pacte Briand-Kellogg (mémoire de Bahreïn, vol. 1, p. 12, para. 31)! Par ce type d'affirmation, caractéristique de ses pièces et plaidoiries, *Bahreïn a tenté de mettre en doute et de modifier la date à laquelle le titre originaire de Qatar sur Zubarah a été définitivement consolidé et reconnu.*

199. Pour Bahreïn, la date critique à prendre en compte pour établir le non-exercice d'une autorité effective de Bahreïn sur Zubarah ne serait donc ni 1783 (départ des Al-Khalifah de Zubarah), ni 1868 (accords de Pelly), ni 1871 (arrivée des Ottomans à Qatar), ni 1873 (rejet par les Britanniques de la première revendication formulée en 1873 par Bahreïn sur Zubarah), ni 1913 (date de la convention anglo-ottomane), ni 1916 (date du traité anglo-qatari), ni 1934 (lorsque le résident politique britannique dans le golfe Persique rappelait au souverain de Qatar qu'il était le chef «de l'ensemble de Qatar»), mais précisément 1937, autrement dit l'année

par des Etats tiers. Les effets du «système tribal» et des «liens d'allégeance» entre les tribus ne sont pas les mêmes selon que l'on se place dans la seconde moitié du XVIII[e] siècle, dans la première ou dans la seconde moitié du XIX[e] siècle, ou au XX[e] siècle. Le caractère général de l'argument, tel qu'il est présenté, en compromet à lui seul la portée juridique, ne serait-ce que parce que, exposé en ces termes, il apparaît difficile à étayer. Or, au sein d'une cour de justice, une simple affirmation n'est pas suffisante si elle n'est pas accompagnée des éléments de preuve correspondants.

202. Je considère en outre que les prétendus «liens d'allégeance» des Naim, qui seraient la manifestation des effectivités des souverains Al-Khalifah de Bahreïn à Zubarah mais dont il n'existe pas de preuve, sont en la présente espèce à la fois infondés d'un point de vue historique et dépourvus de pertinence juridique aux fins de la détermination par la Cour de la souveraineté sur Zubarah, et notamment sur la «région de Zubarah». Ces prétendus «liens d'allégeance» n'empêchaient pas la consolidation et la reconnaissance du titre originaire du souverain de Qatar sur l'ensemble de la presqu'île de Qatar, y compris la région de Zubarah, bien avant les événements de 1937 et, quand bien même ils seraient vérifiables, ne sont pas en eux-mêmes de nature à créer pour Bahreïn un titre dérivé supérieur au titre originaire de Qatar sur Zubarah.

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203. Quelques considérations de fait et de droit devraient suffire à réfuter l'argumentation de Bahreïn fondée sur les liens d'allégeance des Naim. L'histoire de cette tribu bédouine *(bedou)* est loin d'être clairement retracée dans les pièces, sans doute parce que les Naim, que Lorimer qualifie de «fluctuants», ne l'étaient pas seulement au sens territorial, mais également en ce qui concerne leurs loyautés vis-à-vis des souverains ou cheikhs d'autres tribus. La présence de Naim est attestée à l'est (aujourd'hui les Emirats arabes unis) et à l'ouest (Hasa) de la base de la péninsule de Qatar, ainsi que sur les rives orientale (région de Doha) et occidentale (région de Zubarah) de la péninsule et dans les îles de Bahreïn. En outre, certains Naim effectuaient des migrations saisonnières entre les îles de Bahreïn et la péninsule de Qatar, tandis que d'autres étaient établis au sein de populations ou tribus sédentarisées *(hadar)*. La Cour sait encore, grâce aux informations communiquées par le major Grant, que d'autres tribus — sur lesquelles le souverain de Bahreïn n'avait aucun pouvoir — coexistaient en 1873 avec les Naim dans la région de Zubarah.

204. De la documentation historique relative à l'affaire, il ressort également que les Naim: aidèrent les Wahhabites à occuper la région de Zubarah, d'où ils menacèrent l'île de Bahreïn même; s'allièrent à d'autres tribus bédouines de Hasa contre certaines tribus qataries; étaient craints de tous pendant la saison de la pêche perlière; furent impliqués dans des

aux dires de Bahreïn, devaient allégeance au souverain de Bahreïn, tandis que la branche Al-Ramzan, présente elle aussi dans cette région, prêtait allégeance au souverain de Qatar. La reconnaissance de ces faits par Bahreïn a son importance, puisqu'elle indique à la Cour que, en fondant ses prétendues effectivités dans la «région de Zubarah» sur les «liens d'allégeance» qui auraient existé entre les Naim et les souverains Al-Khalifah, la Partie bahreïnite ne fait en réalité référence qu'à la *«section Al-Jabr de la tribu des Naim»*, à l'exclusion des autres sections ou familles de cette même tribu — et ce, indépendamment de leur lieu d'établissement. De fait, les Naim qui prirent part aux événements de 1937 appartenaient à la branche Al-Jabr. Ainsi, la tribu des Naim, dans l'argument invoqué par Bahreïn, se résume en fait à «la branche Al-Jabr». Tous les éléments qui viennent d'être évoqués concourent à prouver que Bahreïn n'est pas fondé à avancer cet argument à l'appui de ses prétendues effectivités à Zubarah de 1783 à 1937. Rien mieux que les faits ne démontre l'absurdité d'un argument.

208. Du point de vue du droit international, la jurisprudence de la Cour internationale de Justice et d'autres juridictions internationales a consacré certains principes juridiques relatifs aux conditions requises pour que des «liens d'allégeance» noués par des tribus puissent être pris en considération lors de l'examen de questions ayant trait à l'établissement, à la consolidation ou à la reconnaissance d'un titre territorial. En premier lieu, cette allégeance *doit incontestablement être effective et se manifester par des actes témoignant de l'acceptation de l'autorité politique du souverain, pour pouvoir être considérée comme un signe de sa souveraineté* (*Sahara occidental, C.I.J. Recueil 1975,* p. 44, par. 95).

209. Bahreïn n'a pas démontré que cette première condition — qui est une condition *sine qua non* — ait été remplie dans le cas des Naim. Il apparaît, en effet, *a)* que, en 1873, les Britanniques considéraient que les liens entre les Naim et les souverains de Bahreïn étaient, pour autant qu'ils existassent réellement, purement symboliques, et *b)* que diverses sections de la tribu des Naim vécurent, selon les époques, dans des régions ou lieux différents. En outre, comme indiqué précédemment, les Naim s'associèrent aux tribus qataries coalisées qui partirent en guerre contre le souverain de Bahreïn à la suite de l'attaque menée en 1867 contre Doha et Wakrah. Or, même dans l'affaire *Doubaï/Chardjah*, les arbitres, s'ils ont jugé que le changement d'une *alliance* conclue avec un cheikh n'impliquait pas nécessairement changement d'*allégeance*, ont toutefois ajouté *«pourvu que des hostilités ne fussent pas menées contre l'émir auquel l'allégeance était due»* (*International Law Reports,* vol. 91, p. 637; les italiques sont de moi). Ainsi, en l'espèce, Bahreïn doit démontrer à l'intention de la Cour l'existence d'actes effectifs et significatifs *postérieurs à 1868* et témoignant de l'acceptation par la tribu des Naim de l'autorité politique du souverain Al-Khalifah de Bahreïn.

210. Enfin, Bahreïn n'a pas non plus présenté à la Cour le moindre exemple d'acte accompli par les Naim à Zubarah pour le compte du sou-

marins établie en 1947 par la Grande-Bretagne. Or, cette ligne ne tenait nullement compte des prétentions avancées par Bahreïn, auquel n'était attribuée aucune zone maritime au large de Zubarah. Ainsi, la côte de la «région de Zubarah» n'était pas considérée par les Britanniques comme étant bahreïnite, état de fait alors accepté par Bahreïn, puisque son souverain n'émit pas la moindre protestation à l'égard de cet aspect particulier de la ligne de 1947.

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214. La consolidation historique et la reconnaissance générale du titre originaire de souveraineté de Qatar sur Zubarah et sa région se fondent sur: *a)* l'établissement des Al-Khalifah sur l'île de Bahreïn en 1783; *b)* la reconnaissance de l'autorité exercée par les Al-Thani sur Qatar, confirmée par les accords signés par les Britanniques respectivement avec Bahreïn et Qatar en 1868 à la suite d'actes de guerre commis en 1867; *c)* la présence ottomane à Qatar de 1871 à 1915; *d)* l'appartenance de Zubarah au *kaza* de Qatar, unité administrative de l'Empire ottoman; *e)* l'exercice de l'autorité par les Ottomans et le chef Al-Thani de Qatar à Zubarah; *f)* l'attitude générale des Britanniques à l'égard de Zubarah pendant cette période et leur rejet des prétentions émises par Bahreïn à partir de 1873; *g)* le fait que les souverains Al-Khalifah de Bahreïn aient reconnu, en différentes occasions, ne pas exercer d'autorité effective à Zubarah; *h)* le fait que les souverains Al-Khalifah eux-mêmes aient parfois considéré les prétentions mal définies qu'ils avaient formulées sur Zubarah comme des questions relevant du «droit privé ou des droits de propriété» plutôt que des droits de «souveraineté»; et *i)* la consécration par la Grande-Bretagne et l'Empire ottoman, dans la convention anglo-ottomane de 1913, du fait que la «presqu'île de Qatar» serait gouvernée *comme par le passé* par le souverain Al-Thani de Qatar, qui ne suscita pas, de la part des souverains Al-Khalifah de Bahreïn, la moindre objection ni réserve de droits.

215. Ainsi, bien avant les événements de 1937, *Qatar avait souveraineté sur Zubarah* par l'entremise des souverains de Qatar, qui étaient détenteurs d'un titre originaire sur la ville et son territoire, dûment consolidé au regard du droit international et généralement reconnu.

9. *Revendication tardive de Bahreïn sur les îles Hawar et l'île de Janan; les effets juridiques du silence de Bahreïn pendant la période de consolidation historique et de reconnaissance du titre originaire de Qatar sur le territoire; la définition de « Bahreïn» donnée en 1889 par Bent et les autres définitions; le témoignage faisant autorité formulé par Lorimer en 1908 et approuvé par Prideaux; les lettres de Prideaux datant de l'année 1909; la présomption en droit international concernant les îles situées dans la mer territoriale d'un Etat; le rôle des facteurs de proximité ou de contiguïté dans l'établissement d'un titre sur des îles; les conventions anglo-ottomanes de 1913 et 1914; le traité anglo-saoudien de 1915; la reconnaissance par la Grande-Bretagne en 1916 de l'appar-*

où les Ottomans exerçaient leur souveraineté sur Qatar, ni dans le cadre des conventions anglo-turques de 1913 et 1914 ou du traité anglo-saoudien de 1915, ni même lors de la conclusion du traité de 1916 entre la Grande-Bretagne et Qatar ou de l'octroi des concessions pétrolières qataries en 1935. En d'autres termes, les souverains de Bahreïn n'ont pas formulé leurs prétentions sur les îles Hawar et l'île de Janan pendant la période d'émergence de Qatar en tant qu'entité politique distincte ni durant le processus de consolidation historique et de reconnaissance de son titre originaire sur le territoire. Il s'ensuit qu'aucune de ces prétentions ne saurait avoir pour effet juridique d'interrompre ou de modifier le processus de consolidation historique et de reconnaissance du titre originaire de Qatar sur son territoire ni la portée de ce titre.

219. Le comportement des souverains de Bahreïn, à savoir le fait qu'ils ont gardé le silence, concernant les îles Hawar et l'île de Janan pendant soixante-huit ans n'est pas un comportement dont une cour ou un tribunal international peut faire abstraction, en particulier lorsque ce silence concerne des îles situées en totalité ou en partie dans la mer territoriale d'un autre Etat, à savoir Qatar dans le cas présent, et qu'il ne peut donc pas s'expliquer par une possession présumée en vertu de l'application d'un principe ou d'une norme de droit international. La souveraineté territoriale entraîne par ailleurs des obligations et, en premier lieu, celle de la maintenir et de la protéger en faisant preuve de vigilance face à d'éventuels empiètements juridiques ou matériels de la part d'autres entités politiques ou d'autres Etats (voir par exemple l'affaire de *l'Ile de Palmas*). Pourquoi Bahreïn n'a-t-il pas respecté ses obligations générales de vigilance avant 1936? Tout simplement parce que ses souverains ne revendiquaient pas à l'époque la possession de ces îles.

220. Entre 1868 et 1936, Bahreïn n'a pas adopté la conduite que l'on était en droit d'attendre d'un Etat qui revendique, avec effet rétroactif à compter de 1936, avoir détenu un titre originaire sur les îles Hawar et l'île de Janan. Compte tenu de la conjoncture dans le Golfe et de la situation géographique des îles concernées, sa conduite durant la période considérée n'a pas été à la hauteur des exigences du droit international. En tout état de cause, les Parties à la présente affaire sont censées savoir que l'établissement, l'obtention ou la détention d'un titre et sa conservation ne sont pas nécessairement équivalents en droit international. Ainsi, soit Bahreïn ne détenait pas de titre originaire sur les îles concernées avant 1868 ou bien, détenteur d'un tel titre, il n'a pas, du fait qu'il a gardé le silence, empêché la consolidation historique et la reconnaissance d'un titre originaire sur les îles au profit de Qatar («qui ne dit mot consent») (voir par exemple l'affaire du *Temple de Préah Vihéar, C.I.J. Recueil 1962*, p. 6).

221. Les souverains de Bahreïn n'étaient pas en possession — d'une manière effective ou présumée, acceptable en droit international — des îles Hawar ou de l'île de Janan pendant la période de consolidation historique et de reconnaissance du titre de Qatar sur l'ensemble de la péninsule et ses îles adjacentes. De surcroît, Bahreïn n'a manifesté aucun intérêt envers la revendication d'un titre sur les îles ou leur possession sur

fin de la période ottomane à Qatar. Ainsi, en 1928, Belgrave, le conseiller du Gouvernement bahreïnite qui, le 28 avril 1936, a signé au nom du souverain Al-Khalifah la première revendication écrite de Bahreïn sur les îles Hawar dans un article intitulé «Bahreïn» publié dans le *Journal of the Central Asian Society* (Journal de la Société d'Asie centrale), définit le pays comme «un groupe de petites îles à dix-sept milles environ au large de la côte arabe, au milieu du Golfe persique» (*ibid.*, vol. 2, annexe II.81, p. 570).

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225. Le témoignage de Lorimer, une autorité en la matière, est par ailleurs explicite quant au détenteur du titre sur les îles Hawar et l'île de Janan au cours de la première décennie du XX^{e} siècle. Dans son article de fond sur «la principauté de Bahreïn», Lorimer fait état: 1) des droits mal définis revendiqués par le souverain de Bahreïn *«sur la partie continentale de Qatar»* (Zubarah), ayant fait l'objet de discussions en 1905, et 2) «les possessions insulaires incontestées» du souverain de Bahreïn englobant l'archipel regroupant les îles de Bahreïn à proprement parler. L'utilisation par Lorimer de l'expression «partie continentale» excluait des territoires sur lesquels avaient porté les discussions en 1905 toute île et toute autre formation maritime adjacente à la péninsule de Qatar.

226. On pouvait en tirer une première conclusion importante, à savoir qu'en 1905 Bahreïn était un archipel mais que son étendue se limitait au groupe compact d'îles (dans cet article Lorimer utilise également l'expression «groupe d'îles») connu sous le nom d'«îles de Bahreïn» et non sous celui d'«Etat archipel» comme le prétend Bahreïn et qui couvrirait entre autres les îles Hawar et l'île de Janan. Il convient également de rappeler que, dans tous les éléments de preuve soumis à la Cour, «les îles de Bahreïn» et «les îles Hawar» sont systématiquement évoquées comme constituant deux «unités physiques» distinctes, la première n'ayant jamais inclus la seconde et *vice versa*. Or, Bahreïn revendique un titre général sur le territoire et sur les îles Hawar et l'île de Janan en particulier, au motif qu'il aurait détenu un «titre originaire» ininterrompu. Une telle allégation est en totale contradiction avec la définition donnée par Lorimer de l'étendue de la «principauté de Bahreïn» en 1908. Ainsi, si Bahreïn possédait alors un titre sur les îles Hawar et l'île de Janan comme il le prétend, il ne peut s'agir que d'un «titre dérivé» car en 1908 Bahreïn et Qatar étaient déjà reconnus comme étant deux entités politiques et territoriales distinctes. Etant donné que les travaux de Lorimer commandaient un respect absolu et étaient bien connus des responsables britanniques dans le Golfe, à New Delhi et à Londres, il est difficile de comprendre comment, juridiquement parlant, certains de ces responsables auraient pu conclure en 1936 et en 1939 que les îles Hawar appartenaient à son souverain, comme Bahreïn le fait, au mépris des annales historiques et des conventions anglo-turques de 1913 et 1914 ainsi que des autres traités et accords conclus par la Grande-Bretagne de même que du comportement antérieur des Britanniques, de la correspondance diplomatique et des preuves cartographiques.

trionale de Jazirat Hawar» et «dépourvu d'eau douce» (mémoire de Qatar, vol. 3, ann. II.4, p. 122) et *Suwad (Jazirat)* était une île se trouvant «entre Jazirat Hawar et Ras Aburuk» et était elle aussi «dépourvue d'eau douce» *(ibid.)*.

230. Enfin, il convient de souligner que les articles de fond de Lorimer sur la «principauté de Bahreïn» et sur «Qatar» ont été soigneusement rédigés avec la participation et l'approbation des agents politiques britanniques dans le golfe Persique et que des relevés ont été effectués sur le terrain comme en témoignent les notes détaillées accompagnant ces articles publiés dans le *Gazetteer of the Persian Gulf, Oman and Central Arabia* (Nomenclature géographique du golfe Arabo-Persique, d'Oman et d'Arabie centrale). Il est tout particulièrement intéressant de relever à la lumière de certains des arguments de Bahreïn que *le capitaine F. B. Prideaux*, agent politique britannique en poste à Bahreïn, a personnellement participé à la préparation et à la mise au point des deux articles. Compte tenu de l'importance que revêt ce fait en tant qu'élément de preuve, je rappellerai ci-après les points essentiels de ces notes. Dans celles qui accompagnent l'article de Lorimer sur la «principauté de Bahreïn», il est dit:

> «Cet article principal sur la principauté de Bahreïn et les articles secondaires relatifs à des sites de ladite principauté sont essentiellement fondés sur des études systématiques et minutieuses réalisées sur place au cours des années 1904-1905. Les informations livrées par des sources antérieures à 1904 ont été adaptées par l'auteur et elles ont été publiées en novembre de cette année... L'étude proprement dite a commencé au début de 1905, ... elle a principalement été réalisée par le lieutenant C. H. Gabriel, qui a voyagé dans la majorité des îles, ainsi que par le capitaine F. B. Prideaux, agent politique à Bahreïn, *qui a fourni des informations très complètes sur tous les lieux relevant de sa juridiction*. Une série de projets d'articles, basés sur les notes et rapports de 1905, ont ensuite été préparés par l'auteur. Ces projets d'articles ont été terminés en janvier 1906... Ils ont ensuite été envoyés au capitaine Prideaux, *qui les a soigneusement revisés* avec l'aide de ... l'interprète de l'agent politique... Au début de 1907, les projets d'articles ont été réimprimés, après modifications et ajouts, *et certains points qui étaient incertains ou obscurs ont été supprimés* par le capitaine Prideaux et son assistant au cours de cette même année...» (Mémoire de Qatar, vol. 3, annexe II.3, p. 87; les italiques sont de moi.)

Dans celles qui accompagnent l'article de Lorimer sur «Qatar» on peut lire:

> «Pour l'essentiel les informations figurant dans cet article de fond sur Qatar et dans les articles secondaires ont été obtenues expressément pour cet ouvrage au cours des années 1904 à 1907; auparavant on connaissait très peu de chose sur ce promontoire. Les données existant à cette époque ont été rassemblées par l'auteur en novembre

turc d'Ojair à Hasa, qui avait visité l'île de Zakhnuniya sous pavillon turc, avait entretenu une correspondance avec *les Dowasir* qui se rendaient périodiquement sur l'île de Zakhnuniya en partant de Bahreïn et avait suggéré que leur chef à Bahreïn accepte de les placer sous domination turque. Les Dowasir n'ont pas suivi ce conseil (par crainte de perdre leurs possessions à Bahreïn). Le mudir a alors entièrement détruit le fort de l'île de Zakhnuniya avant de quitter l'île, tandis que les Dowasir revenaient à Bahreïn. Dans une précédente lettre adressée à Cox le 20 mars 1909, Prideaux expliquait «qu'il est un fait que les Dowasir de Budaiya et de Zellaq sur la côte nord-ouest de Bahreïn *ont coutume* chaque hiver d'émigrer en partie vers Zakhnuniya et les îles Hawar pour la pêche» (mémoire de Qatar, vol. 6, annexe III.51, p. 235).

234. A la suite de ces événements, le capitaine Prideaux s'est rendu à Zakhnuniya pour observer la situation sur place. Il a remarqué que les pêcheurs «vivaient dans deux ou trois *huttes provisoires en fascine*» (les italiques sont de moi). Il a ensuite traversé la baie jusqu'à Jazirat Hawar où il a constaté que les Dowasir possédaient «deux villages du même type où ils hivernaient», c'est-à-dire deux «villages d'hiver» composés de huttes provisoires en fascine semblables à celles se trouvant sur Zakhnuniya. De fait, le capitaine Prideaux «a trouvé à un endroit un ensemble de quelque quarante grandes huttes placées sous l'autorité d'un cousin du principal cheikh de la tribu» (le cheikh principal des Dowasir). Le capitaine Prideaux continue en mentionnant que celui-ci lui aurait dit qu'«il avait d'abord cru que la vedette était une canonnière turque, dont ils s'attendaient à recevoir la visite» (mémoire de Bahreïn, vol. 5, annexe 236, p. 1042). La Cour peut en déduire que des canonnières turques croisaient dans cette zone et que les Turcs se rendaient non seulement sur Zakhnuniya mais aussi sur Jazirat Hawar. Cela est par ailleurs indirectement corroboré par l'épisode qui aurait eu lieu, sans qu'on en ait la preuve, du sauvetage par le cheikh Issa de Bahreïn d'un groupe de soldats turcs qui auraient fait naufrage à Hawar en 1878. La mer entre les îles de Bahreïn et la péninsule de Qatar n'était donc pas, même à cette époque, le «lac bahreïnite» dont il est fait mention dans la présente instance.

235. Après cette évocation des activités turques dans la région, notamment sur Jazirat Hawar ou aux alentours, le cousin du cheikh de la tribu des Dowasir aurait selon Prideaux déclaré que:

> «Zakhnuniya était indéniablement une possession du cheikh de Bahreïn, mais les Dowasir considéraient Hawar comme leur propre territoire indépendant, la propriété de cette île ayant été accordée à la tribu par le kazi de Zubarah plus de cent ans auparavant, aux termes d'une décision écrite qu'ils conservent encore.
>
> La tribu qui contestait ce titre, les Al bu Tobais, a apparemment disparu aujourd'hui mais étant donné que le kazi de Zubarah était à l'époque un haut responsable des Al-Khalifah, il semblerait que l'île soit une dépendance de l'Etat de l'île principale, que le cheikh revendique comme sienne, tant du point de vue moral que théorique.» *(Ibid.)*

Weightman ressemble fort à une occultation à la fois opportune et rétrospective de cette occupation. Il convient également de noter que l'allégation reposant sur l'«ouï-dire» faisait une distinction entre les «possessions» du souverain de Bahreïn (Zakhnuniya est la seule île évoquée à cet égard) et Jazirat Hawar en tant que «territoire indépendant» des Dowasir. Dans le titre de son rapport, Weightman utilise le terme «propriété» *(ownership)*, mais il conclut en considérant que les îles sont une des «possessions» *(possessions)* du souverain de Bahreïn. On ne trouve pas non plus de référence dans le rapport de Weightman à la «tribu contestataire» évoquée dans l'«ouï-dire». Or cet élément revêt une certaine importance dans la mesure où la présence sur les îles Hawar d'autres tribus avant l'arrivée des pêcheurs dowasir n'est pas exclue comme l'attestent certaines ruines.

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240. Il existe une norme de droit international, déjà en vigueur au XIX[e] siècle, selon laquelle les îles se trouvant entièrement ou en partie *dans la mer territoriale d'un pays donné doivent être considérées comme appartenant à ce pays*. Cette norme constitue une forte présomption simple, qui n'est donc pas irréfragable dans la mesure où elle peut être combattue par la preuve contraire d'un titre supérieur. Or, au cours de la période de consolidation historique et de reconnaissance du titre originaire de Qatar sur l'ensemble de la péninsule de Qatar et ses îles adjacentes (1868-1915), Bahreïn n'a pas combattu cette présomption en revendiquant ou en présentant la preuve d'un titre supérieur ni même quelque autre preuve. Comme déjà indiqué, Bahreïn a gardé le silence. Il est géographiquement incontestable que la majorité des îles et des îlots constituant les Hawar et Janan se situent entièrement ou en partie dans la mer territoriale de 3 milles de largeur bordant la péninsule de Qatar (limite reconnue pendant la période considérée) et que *toutes* se situent dans la mer territoriale de 12 milles de largeur bordant la péninsule revendiquée actuellement par Qatar conformément au droit international.

241. La carte n° 9 reproduite en regard de la page 145 du mémoire de Qatar indique l'emplacement des îles et îlots formant les îles Hawar par rapport à la limite de la mer territoriale de 3 milles nautiques mesurée à partir de la laisse de haute mer sur la côte de la péninsule de Qatar. L'étroite proximité des îles Hawar par rapport à la côte de la péninsule peut se constater sur la carte détaillée n° 5 reproduite en regard de la page 50 du mémoire de Qatar. Parmi les dix-sept îles et îlots revendiqués par Bahreïn comme constituant les îles Hawar dans sa «déclaration préliminaire» du 29 mai 1938, onze d'entre eux (y compris Jazirat Hawar) se situent entièrement ou en grande partie dans la limite des 3 milles. Une ceinture de 12 milles de largeur mesurée à partir de la côte de la péninsule de Qatar, même à partir de la laisse de haute mer plutôt que de la laisse de basse mer, engloberait la totalité des îles Hawar figurant sur la carte n° 9 du mémoire de Qatar. (Concernant la proximité des îles Hawar par

consolidation historique se posait également et une série d'arguments ont été présentés comme preuve de la manifestation d'une autorité effective, notamment les activités de pêcheurs. Le Yémen a même invoqué le principe de l'*uti possidetis juris* mais le tribunal d'arbitrage l'a rejeté (voir par. 96-100 de la sentence). Je n'ai aucun doute que Qatar détenait un titre originaire sur l'ensemble de la péninsule et les îles adjacentes, les îles Hawar et l'île de Janan incluses. Mais si l'on considère que les archives historiques relatives à l'affaire ne désignent que d'une manière «incertaine» le détenteur du titre originaire sur les îles Hawar et l'île de Janan, la norme de droit international précitée offre la solution en droit international, même si, à mon avis, elle ne fait que confirmer le titre originaire de Qatar tel qu'établi par voie de consolidation historique et de reconnaissance générale.

245. Entre 1936 et 1939, certains responsables britanniques n'ont tout simplement tenu aucun compte du droit de Qatar sur les îles Hawar dérivé de la présomption de droit international susmentionnée. En outre, Qatar a été placé dans une situation où la charge de prouver que les îles Hawar faisaient partie de son territoire lui incombait. Or Qatar n'avait rien à prouver de la sorte car il avait le droit pour lui. C'était à Bahreïn qu'aurait dû incomber la charge de la preuve contraire. Ainsi, non seulement le témoignage de Lorimer auquel avait souscrit Prideaux au sujet des îles et les éléments de preuve historiques, notamment la conduite de la Grande-Bretagne et de Bahreïn, ainsi que les instruments conventionnels ont-ils été écartés, mais de surcroît une norme fondamentale du droit international général, que les juristes britanniques connaissent très bien, a été écartée au préjudice de Qatar, au moyen d'arguments fallacieux et d'un ensemble de considérations peu probantes ou d'importance mineure, comme le rappelait Prior dans ses commentaires de 1940 sur les critères appliqués dans le rapport de Weightman (mémoire de Qatar, vol. 7, annexe III.195, p. 499, et mémoire de Bahreïn, vol. 5, annexe 281, p. 1165).

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246. Contrairement à ce qu'a déclaré le conseil de Bahreïn lors des audiences, le principe de proximité n'est pas dénué de conséquences juridiques dans l'établissement d'un titre. Cet argument est fallacieux. Certes, la proximité seule ne vaut pas titre en l'absence d'un Etat souverain voisin, mais le principe de proximité peut s'intégrer à une norme de droit international (comme dans la présomption évoquée ci-dessus) ou dans une disposition d'un traité définissant un titre, de même que, associé à d'autres éléments, il peut constituer la source d'un titre dans un cas donné ou un moyen de délimiter l'étendue d'un titre établi. La possibilité même pour un Etat côtier de revendiquer une étendue de «mer territoriale» repose sur le concept de proximité et il en va ainsi d'autres compétences maritimes nationales dépendant de la «distance». La «doctrine du portique» repose également sur la notion de contiguïté. Weightman lui-même le reconnaît dans son rapport dans les termes suivants:

> «Il est impossible d'examiner les décisions rendues dans les affaires visant la souveraineté territoriale sans observer que, dans beaucoup de cas, le tribunal n'a pas exigé de nombreuses manifestations de l'exercice de droit souverain pourvu que l'autre Etat en cause ne pût faire valoir une prétention supérieure.» (*C.P.J.I. série A/B n° 53*, p. 46.)

250. Le Groënland et la péninsule de Qatar sont certes très éloignés l'un de l'autre. Mais l'affaire du *Groënland oriental* présente un certain nombre de similitudes avec la présente affaire, en particulier en ce qui concerne les aspects relatifs à l'établissement du titre originaire sur le territoire. La proximité ou la contiguïté ont joué un rôle de premier plan dans l'affaire du *Groënland oriental* comme ce devrait être le cas en l'espèce en ce qui concerne par exemple l'allégation de Bahreïn selon laquelle l'autorité effective des souverains de Qatar ne s'étendait pas à l'époque à la côte occidentale de la péninsule de Qatar la plus proche des îles Hawar (contre-mémoire de Bahreïn, vol. I, p. 10, par. 23). La réponse la plus pertinente à ce type d'arguments se trouve dans le passage suivant de l'arrêt sur le *Groënland oriental*:

> «Même si l'on considère uniquement la période comprise entre 1921 et le 10 juillet 1931, sans se référer aux périodes antérieures, la conclusion à laquelle la Cour arrive est que, durant tout ce temps, le Danemark s'est considéré comme possédant la souveraineté sur le Groënland tout entier, et qu'il a manifesté et exercé ses droits souverains dans une mesure suffisante pour constituer un titre valable de souveraineté. Lorsque l'on examine cette période en rapport avec les faits de celles qui l'ont précédée, l'argument en faveur du Danemark se trouve confirmé et renforcé.» (*C.P.J.I. série A/B n° 53*, p. 63-64.)

251. En d'autres termes, la Cour permanente a considéré que les installations danoises sur la côte et autres manifestations d'autorité connexes constituaient des preuves suffisantes du titre du Danemark sur l'ensemble du Groënland considéré comme une seule «unité naturelle ou physique», y compris naturellement les îles se trouvant dans la mer territoriale du Groënland ou contiguës à celle-ci. Je ne vois par conséquent aucune raison pour laquelle les effectivités de Qatar sur la péninsule ou le promontoire de Qatar seraient ou devraient être exclues d'une évaluation des effectivités respectives des Parties concernant les îles Hawar ou l'île de Janan. Ces îles n'étaient pas des *terra nullius* et se trouvaient, du moins en partie, dans la mer territoriale de l'Etat côtier ou étaient contiguës à celui-ci. La manière dont entre 1936 et 1939 certains responsables britanniques ont abordé la question de la souveraineté sur les îles Hawar souffrait entre autres défauts de celui d'être absolument partiale et réductrice dans la définition des effectivités à prendre en compte en l'espèce.

252. Il convient également de souligner — au vu de l'importance attachée par Bahreïn au mémoire de Brucks de 1829 — que dans le *Manuel*

Djassim-bin-Sani et par ses successeurs. Le gouvernement de Sa Majesté britannique déclare qu'il ne permettra pas au cheikh de Bahreïn de s'immiscer dans les affaires intérieures d'El-Katr, de porter atteinte à l'autonomie de ce pays ou de l'annexer.

Article 12. Il sera permis aux habitants de Bahreïn de visiter l'île de Zahnounié pour la pêche et d'y demeurer en pleine liberté pendant l'hiver comme par le passé, sans qu'un nouvel impôt leur soit imposé.

III. Bahreïn

Article 13. Le Gouvernement impérial ottoman renonce à toutes ses réclamations concernant les îles Bahreïn, y compris les deux îlots Lubainat-el-Aliya et Lubainat-es-Safliya, et reconnaît l'indépendance de ce pays. De son côté, le gouvernement de Sa Majesté britannique déclare qu'il n'a aucune intention d'annexer à ses territoires les îles Bahreïn...» (Mémoire de Qatar, vol. 6, annexe III.58, p. 276-277; en ce qui concerne la «ligne bleue» figurant dans l'annexe Va à la convention anglo-ottomane de 1913, voir la réplique de Qatar, atlas, carte n° 84.)

255. La convention de 1913 n'ayant pas encore été ratifiée lorsque la guerre de 1914 a éclaté, elle n'est jamais entrée officiellement en vigueur. Toutefois, son texte apporte une preuve irréfutable de la reconnaissance par les deux principales puissances de la région, la Grande-Bretagne et l'Empire ottoman, de l'existence politique et territoriale de Qatar et de Bahreïn au moment de la conclusion de la convention en juin 1913. Par ailleurs, l'article 11 de la convention doit être considéré comme juridiquement contraignant étant donné que l'article III de la «convention anglo-turque sur la délimitation de la frontière d'Aden» du 9 mars 1914, dont les instruments de ratification ont été échangés à Londres le 3 juin 1914, contient une référence à l'article 11 de la convention de 1913, selon lequel le territoire de Qatar est séparé du sandjak ottoman de Nedjd. Le texte français original de l'article III de la convention de 1914 se lit comme suit:

«Le point n° 1 du Ouadi Bana indiqué sur la première des cartes annexées (annexe B) à la présente convention, étant le dernier point du côté de l'est délimité sur les lieux, il est convenu entre les Hautes Parties contractantes et arrêté, conformément audit protocole, et sous réserve des conditions et spécifications y contenues, que la frontière des territoires ottomans suivra une ligne droite qui ira du Lekemet-ul-Choub vers le nord-est au désert de Ruba-al-Khali avec une inclinaison de 45°. Cette ligne rejoindra dans la Ruba-al-Khali, sur le parallèle 20°, la ligne droite et directe vers le sud qui part d'un point sur la rive méridionale du golfe d'Oudjeir *et qui sépare le territoire ottoman du sandjak de Nedjd du territoire d'El Katr, en conformité à l'article 11 de la convention anglo-ottomane du 29 juillet 1913, relatif au golfe Persique et aux territoires environnants.*»

259. Pour conclure, dans les conventions anglo-ottomanes de 1913 et 1914, le titre originaire de Qatar sur l'ensemble du territoire de la péninsule, y compris naturellement sur les îles et les eaux adjacentes, était reconnu, la conduite du souverain de Qatar et du souverain de Bahreïn ayant joué un rôle prépondérant dans la consolidation de ce titre en même temps que le comportement de la Grande-Bretagne et celui de l'Empire ottoman. Les conventions respectent l'intégrité du territoire de Qatar tel qu'il résulte d'un processus de consolidation historique et de reconnaissance engagé dès 1868 et déjà achevé en 1913-1914. Il s'ensuit inévitablement que dans la convention anglo-ottomane «Bahreïn» désigne les «îles de Bahreïn», y compris les deux îlots de Lubainat al-Aliya et de Lubainat al-Safliya, *mais non compris les îles Hawar et l'île de Janan.*

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260. Pour achever cette description du territoire de Qatar, il reste à examiner la question de ses rapports avec ses voisins méridionaux. En 1913, Ibn Saud, à l'époque souverain de Nedjd, a conquis Hasa et déclaré que Qatar faisait partie de ses domaines ancestraux. Toutefois, à la fin de cette année-là, les Britanniques l'ont convaincu de ce que le maintien de relations amicales avec le Gouvernement était subordonné à la condition qu'il n'intervienne pas à Qatar. Cet accord a été scellé par le «traité conclu entre le Gouvernement britannique et le souverain de Nedjd, El Hasa, Qatif, etc.» du 26 décembre 1915, dont l'article VI dispose:

> «Bin Sa'ud s'engage, comme son père l'avait fait avant lui, à s'abstenir de toute agression ou intervention sur les territoires du Koweït, de Bahreïn *et des cheikhs de Qatar* et de la côte d'Oman, placés sous protectorat du Gouvernement britannique et qui ont des relations conventionnelles avec ledit gouvernement, et dont les limites des territoires seront ultérieurement fixées.» (Mémoire de Qatar, vol. 5, annexe II.46, p. 179; les italiques sont de moi.)

261. Depuis que cet engagement a été pris, seule demeurait pour Qatar la question de la fixation de sa frontière méridionale. Il a fallu un certain temps toutefois avant que celle-ci soit déterminée et de nombreuses lignes de démarcation ont été proposées et envisagées au cours des années dans le cadre des négociations engagées entre le Gouvernement britannique et le Gouvernement de l'Arabie saoudite. Ce retard tenait à plusieurs raisons, notamment les considérations relatives au pétrole. Certaines des lignes sont reproduites sur la carte n° 84 de l'atlas joint par Qatar à sa réplique. Ces négociations et les lignes de démarcation proposées apportent des éléments de preuve concluants pour les délimitations territoriales contestées dans la présente affaire, notamment eu égard aux îles Hawar et à l'île de Janan.

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rouge évoquée ci-dessus sont datés de 1920. Cela laisse à penser deux choses: 1) que pendant des années après le traité anglo-qatari de 1916 la position britannique sur l'étendue du territoire de Qatar était la même qu'à l'époque de la conclusion des conventions anglo-ottomanes de 1913 et 1914 (voir ci-dessus); et 2) que la garantie concernant la protection de l'intégrité du territoire de Qatar visée dans les articles X et XI du traité anglo-qatari de 1916, en particulier en ce qui concerne «toutes les agressions par voie de mer», couvre la péninsule de Qatar et les îles adjacentes, comme on l'entendait à l'époque de la conclusion des conventions anglo-ottomanes susmentionnées. (Voir ci-après, p. 449, carte n° 4 de la présente opinion, qui est une reproduction de la carte de l'Amirauté britannique portant ladite ligne rouge. Bahreïn apparaît sur cette carte comme une enclave à l'intérieur de cette ligne rouge.)

266. Bahreïn s'était appuyé sur le rapport d'une réunion entre le souverain de Qatar et le résident politique britannique daté du 12 mars 1934 (!), concernant l'octroi d'une concession pétrolière par Qatar dans lequel ce dernier, pour conserver la liberté de choisir la compagnie pétrolière, opérait une distinction entre l'«intérieur» et la «région côtière» du pays en disant que le traité de 1916 n'incluait pas l'«intérieur». La réponse du résident politique britannique ne saurait avoir été plus claire:

> «D'après le traité passé entre le Gouvernement britannique et Ibn Saoud, celui-ci ne peut s'immiscer dans vos affaires et c'est grâce à ce traité passé avec le gouvernement qu'il ne peut rien faire et, s'il fait quoi que ce soit, le gouvernement l'en empêchera. *Vous êtes le souverain de tout le Qatar et le traité s'étend à l'ensemble de Qatar.*» (Contre-mémoire de Bahreïn, vol. 2, annexe 122, p. 412; les italiques sont de moi.)

267. Les obligations assumées par le souverain de Qatar en vertu du traité de 1916 conclu avec le Gouvernement britannique sont de même nature que celles découlant des *«accords d'exclusivité»* précédemment conclus entre la Grande-Bretagne et les autres souverains arabes du Golfe, tels que les souverains de Bahreïn (1880 et 1892) et les Etats de la Trêve (1892). Je reviendrai sur ces «obligations conventionnelles» à la section B de cette partie de mon opinion à propos du principe d'*uti possidetis juris* invoqué par Bahreïn. Mais il faut rappeler ici que le traité de 1916 n'établit aucune relation entre Qatar et Bahreïn. Aux termes du traité de 1916, le souverain de Qatar a également assumé des obligations dans des «traités et engagements» concernant la suppression du commerce d'esclaves et la piraterie et d'une manière générale le maintien de la paix maritime, contractées précédemment par les cheikhs des Etats de la Trêve (Dhabia, Dibai, Shargah, etc.), mais, assez curieusement, les obligations conférées aux souverains de Bahreïn ne figurent pas dans le traité de 1916. Les «obligations conventionnelles» n'étaient pas les mêmes pour Qatar et pour Bahreïn.

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besoins du service des affaires étrangères britannique, concernant les revendications distinctes de la Turquie et de la Perse relatives à la souveraineté sur l'île de Bahreïn (mémoire de Qatar, vol. 6, annexe III.28, p. 137); *b)* la description datée de 1890 effectuée par J. Theodore Bent de la British Royal Geographical Society (voir ci-après, p. 448, carte n° 1 dans la présente opinion); *c)* la description de Lorimer datée de 1908, évoquée ci-dessus; *d)* le *Handbook of Arabia*, vol. I, *General*, de 1916 (réplique de Qatar, vol. 4, annexe IV.1, p. 1); *e)* le mémorandum confidentiel de l'India Office du 27 août 1928, signé J. G. L. (Laithwaite) et intitulé «Statut de certains groupes d'îles dans le golfe Persique» (*ibid.*, vol. 4, annexe IV.2, p. 5); *f)* le mémorandum de l'India Office établi par Laithwaite daté du 14 juillet 1934 (*ibid.*, vol. 2, annexe II.61, p. 359); *g)* le rapport militaire et recueil d'itinéraires pour les Etats arabes du golfe Persique, de 1939 (*ibid.*, vol. 4, annexe IV.3, p. 11); etc.

272. *Il n'existe aucune contradiction entre les preuves documentaires et les preuves cartographiques.* Elles se confortent mutuellement de manière complète et uniforme pour toute la période concernée, à savoir entre 1868 et 1939; les îles Bahreïn et Qatar (y compris Zubarah, les îles Hawar et l'île de Janan) y sont systématiquement représentées sous des couleurs différentes. En outre, les cartes comme celle de Bent datée de 1890 (voir ci-après, p. 448, carte n° 1 de la présente opinion) et celle de Tiverner de 1898 (réplique de Qatar, atlas, carte n° 28) qui représentent les îles de Bahreïn ne montrent pas «les formations maritimes» invoquées par l'Etat de Bahreïn lors de la présente procédure. Il en va de même de la carte n° 77 figurant dans l'atlas annexé à la réplique de Qatar. Ainsi, les affirmations de Bahreïn selon lesquelles il détiendrait aussi un titre sur ces formations situées entre l'archipel de Bahreïn à proprement parler et le littoral occidental de la péninsule de Qatar ne sont pas non plus corroborées par les preuves cartographiques que détient la Cour.

273. En revanche, pratiquement la seule carte présentée par Bahreïn ayant un rapport avec le différend sur les îles Hawar correspondant à la période de soixante-dix ans allant de 1868 à 1939 est le croquis qui aurait été préparé par le capitaine Izzet de l'armée ottomane en 1878. Celui-ci a également été présenté *dans sa totalité* par Qatar. Ce croquis représente simplement une esquisse des contours du *vilayet* de Basrah. Pour de plus amples informations sur les techniques ottomanes de coloriage des cartes, on se reportera à la réplique de Qatar, volume 1, pages 128 à 129, paragraphe 4.117. Bahreïn a également présenté une carte du ministère de la défense du Royaume-Uni présentant une ligne de partage de souveraineté entre la côte ouest et la péninsule de Qatar et les îles Hawar (carte TPC H-6C), mais il s'agit d'une carte de 1972 reflétant la décision britannique de 1939!

274. Les Parties ont également présenté certaines cartes et certains croquis utilisés dans le cadre des négociations sur les concessions pétrolières. L'un de ces documents présentés par Bahreïn dans le cadre des négociations menées en 1924, établi par l'Eastern and General Syndicate Limited et portant sur les concessions de Bahreïn, Hasa (Arabie saoudite), la zone

278. Ainsi, lorsqu'en 1936 Bahreïn revendiqua les îles Hawar, ses rapports avec la Grande-Bretagne étaient plus proches que ceux qu'il entretenait avec Qatar. Bahreïn était par ailleurs un pays beaucoup mieux organisé et plus riche que Qatar. Mais jusqu'à l'occupation clandestine et illégale de la partie septentrionale de Jazirat Hawar en 1937, le souverain de Qatar exerçait son autorité sur la totalité du territoire de Qatar sans interférence étrangère. Nul ne mettait en question le titre originaire de Qatar, que ce soit sur la péninsule ou sur les îles adjacentes.

279. Plusieurs documents versés au dossier de l'affaire confirment l'exercice par le souverain de Qatar de son autorité sur l'ensemble du territoire tel que défini par son titre originaire, consolidé et reconnu. Certains de ces actes sont tout à fait spectaculaires. Le premier est l'accord de concession de 1935 conclu avec l'APOC elle-même. Conformément à l'article premier de cet accord, le souverain de Qatar accorde à la compagnie divers droits d'exploration, de prospection, de forage et d'extraction du pétrole et d'autres substances *« dans l'ensemble de la principauté de Qatar »*. L'étendue territoriale de l'accord de concession de 1935 est définie de manière plus précise à l'article 2 qui dispose: « L'Etat de Qatar englobe toutes les zones sur lesquelles règne le cheikh et qui figurent au nord de la ligne tracée sur la carte jointe au présent accord. » La carte jointe à l'accord de concession montre que le groupe des îles Hawar est indéniablement inclus dans le territoire de l'Etat de Qatar tel que défini (mémoire de Qatar, vol. 6, annexe III.99, p. 529). On peut également consulter les rapports de prospection technique APOC/PCL indiquant les zones explorées et contenant des références à la région de Zubarah et aux îles Hawar.

280. Un autre exemple est la reconnaissance aérienne de Qatar effectuée par la Royal Air Force britannique. Le 3 mai 1934, Loch, agent politique à Bahreïn, a informé le souverain de Qatar de son survol de reconnaissance et le souverain a répondu le 14 mai 1934 qu'il n'y faisait aucune objection (documents supplémentaires de Qatar, doc. 14, p. 108). Le rapport d'accompagnement du lieutenant-colonel daté du 30 mai 1934 fait référence à l'île principale de Hawar et confirme que « l'extrémité sud de l'île Djezira Hawar » pourrait éventuellement fournir un bon abri (mémoire de Qatar, vol. 6, annexe III.94, p. 483). Le rapport contient également une photo de Hawar (*ibid.*, p. 488). La reconnaissance effectuée par la RAF du territoire de Qatar a été réalisée dans le cadre des négociations de la concession pétrolière de Qatar en 1935 et des nouvelles garanties britanniques de protection. Les îles Hawar ont donc fait l'objet d'une reconnaissance en tant que partie intégrante du territoire de Qatar et *avec le consentement du souverain de Qatar*. A cet égard on peut également mentionner que le *rapport militaire et recueil d'itinéraires pour les Etats arabes du golfe Persique daté de 1939* établi par l'état-major général (Inde) faisait figurer l'île de Hawar parmi les divers terrains d'atterrissage ou d'ancrages repérés sur la côte de Qatar, alors que l'émirat de Bahreïn continuait à être décrit comme correspondant au groupe compact d'îles de l'archipel de Bahreïn à proprement parler (réplique de Qatar, vol. 4, annexe IV.3, p. 14-15).

d'Ibn Saud ou *b)* des tribus de l'arrière-pays» (contre-mémoire de Bahreïn, vol. 2, annexe 67, p. 221). Des dangers devaient toutefois bientôt venir de la mer!

H. Conclusion générale de la section A de la première partie

284. A la lumière de ce qui précède, je conclus que l'Etat de Qatar est le détenteur d'un titre originaire sur le territoire de l'ensemble de la péninsule de Qatar et des îles adjacentes et par conséquent sur Zubarah, les îles Hawar et l'île de Janan. Ce titre a été établi par un processus de consolidation historique et de reconnaissance générale principalement entre 1868 et 1913-1915, une période recouvrant la domination ottomane de Qatar, et il a été par la suite confirmé par la Grande-Bretagne, aucune revendication ou contestation officielle contraire n'ayant été émise par aucun Etat avant la première revendication écrite de Bahreïn en avril 1936, à la suite de la «décision provisoire» britannique et de l'occupation clandestine de la partie septentrionale de Jazirat Hawar en 1937.

285. Même avant les accords de 1868, les souverains Al-Khalifah de Bahreïn n'avaient aucune possession effective ni n'exerçaient aucune autorité ou contrôle effectif sur une partie quelconque de la péninsule de Qatar ou des îles adjacentes situées en totalité ou en partie dans la ceinture maritime territoriale de la péninsule de Qatar. En outre, au cours des processus de consolidation historique et de reconnaissance générale du titre originaire des souverains Al-Thani de Qatar sur l'ensemble de la péninsule de Qatar et les îles adjacentes, le territoire des souverains Al-Khalifah de Bahreïn était déjà considéré et reconnu, et s'était, de longue date, limité exclusivement à l'archipel de Bahreïn y compris les petites îles et îlots. Par conséquent, je ne peux que rejeter l'argument avancé par Bahreïn, selon lequel les souverains Al-Khalifah de Bahreïn étaient les détenteurs, pendant la période considérée, d'un titre originaire sur le territoire de Zubarah, des îles Hawar et de l'île de Janan.

286. On peut ajouter que les conventions anglo-ottomanes de 1913 et 1914, suivies par le traité de 1916 conclu entre la Grande-Bretagne et Qatar, reflètent à l'identique la situation territoriale évoquée ci-dessus en ce qui concerne tant Qatar que Bahreïn, et cet état de fait est également confirmé par les preuves documentaires et cartographiques présentées à la Cour par les Parties. Ainsi, dans la convention anglo-ottomane de 1913 des termes tels que «péninsule de Qatar» et «îles de Bahreïn» sont utilisés. Le sens naturel ou ordinaire de ces termes comme indiqué par la Cour permanente de Justice internationale à propos du Groënland dans l'affaire du *Statut juridique du Groënland oriental* (*C.P.J.I. série A/B n° 53*, p. 52) est «son sens géographique, tel qu'il ressort des cartes» lesquelles sont entre autres, dans la présente espèce, celles reproduites aux annexes V et V *a)* à la convention anglo-ottomane de 1913. D'après ces cartes — qui en tant qu'annexes à la convention sont des éléments

SECTION B. BAHREÏN POSSÈDE-T-IL SUR LES ÎLES HAWAR OU SUR CERTAINES D'ENTRE ELLES UN TITRE SUPÉRIEUR AU TITRE ORIGINAIRE DE QATAR SUR CES ÎLES?

A. La recherche par Bahreïn d'un titre «dérivé»

289. Comme déjà indiqué, Bahreïn n'a cessé de soutenir tout au long de la procédure qu'il possède un titre originaire sur toutes les îles Hawar. C'est un argument qui ne manquait assurément pas de hardiesse si l'on songe que les Al-Khalifah sont établis sur les îles de Bahreïn depuis 1783. Il suffit d'un coup d'œil aux documents et éléments de preuve historiques que les Parties ont soumis à la Cour pour constater que l'argument bahreïnite ne tient pas. Ainsi qu'il est expliqué ci-dessus, à la section A de la première partie, au regard du droit international, Bahreïn ne détient de titre originaire sur aucune des îles du groupe des Hawar et *ne pouvait absolument pas en détenir un à l'époque considérée*. C'est pourquoi, dès la phase écrite de la procédure, Bahreïn s'est attaché à avancer à l'appui de sa thèse du titre originaire sur les îles Hawar d'autres considérations et d'autres arguments. En fait, il s'est évertué depuis le début à rechercher autant de *titres dérivés* sur les îles Hawar qu'il était possible de le faire, sans même se soucier d'éventuelles contradictions entre les prétendus titres dérivés sur les îles Hawar et ses conclusions en l'espèce.

290. En effet, Bahreïn centre sa recherche de titres dérivés sur les îles Hawar. C'est ainsi qu'il a commencé par prétendre détenir un titre dérivé sur les îles Hawar en vertu de la «décision» britannique de 1939 relative à ces îles, «décision» présentée comme constituant un arbitrage ou un règlement judiciaire ayant l'autorité de la chose jugée. La «décision» britannique de 1939, dans ces conditions, pécherait en quelque sorte, s'agissant de la question de l'île de Janan, par erreur ou omission, et il serait fait abstraction du comportement de la Grande-Bretagne à l'égard de la prétendue «région de Zubarah». En ce qui concerne Zubarah, la thèse bahreïnite du titre originaire l'emporterait sur une longue série de positions adoptées par la Grande-Bretagne avec constance et uniformité et de faits admis par Bahreïn lui-même depuis le XIX^{e} siècle, de même que sur les conventions et accords pertinents conclus par la Grande-Bretagne avec Bahreïn, Qatar et l'Empire ottoman.

291. Mais, comme indiqué, l'argument de l'autorité de la chose jugée ainsi attribuée à ce qui serait un arbitrage n'est pas le seul moyen de droit que Bahreïn fait valoir dans sa recherche d'un *titre dérivé* sur les îles Hawar. Bahreïn invoque aussi les effectivités et le principe de l'*uti possidetis juris*, en accordant la priorité à celui-ci dans ses plaidoiries. Ainsi, l'*Etat indépendant de Bahreïn* et le *souverain indépendant de Bahreïn [cheikh Mohamed bin Khalifah]* (expressions utilisées dans le texte des accords de 1861 et 1880 conclus avec la Grande-Bretagne et dans d'autres documents britanniques versés au dossier) ont plaidé devant la Cour internationale de Justice en 2000, et à la dernière minute, que somme toute Bahreïn n'était qu'un simple territoire ou une simple colonie de la Couronne britannique

des preuves fournies par [le cheikh de Qatar et le cheikh de Bahreïn], il a décidé que ces îles appartenaient à l'Etat de Bahreïn et non à l'Etat de Qatar» (mémoire de Bahreïn, vol. 5, annexes 287 et 288, p. 1182-1183).

296. Bahreïn qualifie la «décision» susmentionnée de sentence arbitrale revêtant de l'autorité de la chose jugée. Dans le menu à la carte, ce moyen est même appelé tout simplement: chose jugée. Qui plus est, Bahreïn a contesté que la Cour fût compétente pour connaître des diverses questions soulevées par Qatar à propos de la décision britannique de 1939 relative à la souveraineté sur les îles Hawar. L'arrêt rejette la qualification de sentence arbitrale possédant l'autorité de la chose jugée donnée par Bahreïn à la «décision» britannique de 1939 et confirme en outre que la Cour est compétente pour connaître en l'espèce du différend relatif aux îles Hawar, à la lumière du texte mentionné dans le procès-verbal de Doha de 1990 sous l'expression «formule bahreïnite».

297. Je partage cette conclusion de l'arrêt. Pour que la question de la souveraineté sur les îles Hawar fût définitivement réglée par la «décision» britannique de 1939, il eût fallu que la «décision», abstraction faite de sa validité, fût une décision définitive, juridiquement contraignante au regard du droit international pour Qatar comme pour Bahreïn. Sinon, la «décision» ne pouvait pas régler définitivement le différend relatif aux îles Hawar, posé par Bahreïn dans sa revendication écrite initiale du 28 avril 1936 et par l'occupation clandestine en 1937 de la partie septentrionale de Jazirat Hawar. Je comprends dans ces conditions que Bahreïn ait ainsi tenté de présenter la «décision» britannique comme constituant une sentence arbitrale internationale ou un règlement judiciaire ayant l'autorité de la chose jugée.

298. La «décision» britannique de 1939 ne peut être qualifiée de sentence arbitrale contraignante car en sont absents plusieurs éléments fondamentaux qui entrent dans la définition d'un *«arbitrage international»*. Sans doute, la «décision» britannique avait apparemment et officiellement pour objet déclaré de régler un «différend entre Etats», à savoir Bahreïn et Qatar. Il devait en être ainsi pour que l'argument bahreïnite tiré de la chose jugée tienne. Mais alors, comment cet argument peut-il être concilié avec celui de l'*uti possidetis juris*? L'argument de la chose jugée et l'argument de l'*uti possidetis juris* sont incompatibles en fait comme en droit. Il n'empêche qu'en l'espèce Bahreïn les fait valoir tous les deux. Le problème, toutefois, tient non pas à la thèse développée par Bahreïn à propos de chacun de ces arguments, *mais aux faits* qui s'y rapportent. Bahreïn et Qatar étaient-ils en 1936-1939 des «Etats» à même en tant que tels à participer à un arbitrage international et étaient-ils après cette date, en 1971, des territoires coloniaux britanniques? Pourquoi? Comment cette transformation s'est-elle opérée? Bahreïn n'a aucunement tenté d'expliquer ce point. Or, ce sont des faits qu'il aurait dû préciser, faute de quoi un des deux arguments tomberait nécessairement, parce que les deux s'excluent mutuellement.

tres, pas plus qu'ils n'ont conclu de compromis régissant l'arbitrage et définissant son objet, le droit applicable, les règles de procédure, etc. Donc, s'il ne s'agissait pas d'un arbitrage international, comment la «décision» britannique de 1939 (indépendamment de sa validité) pouvait-elle avoir l'autorité de la chose jugée ou avoir acquis l'autorité de la chose jugée selon le droit international? En fait, la «décision» britannique de 1939 n'émane ni d'un organe juridictionnel ni d'un organe politique agissant *in casu* en qualité d'organe juridictionnel. Aussi, la «décision» ne peut-elle avoir la finalité de la chose jugée; elle n'est pas l'expression de la vérité légale *ne varietur*. Les décisions politiques peuvent avoir des effets obligatoires, mais elles ne peuvent avoir les effets obligatoires de la chose jugée. Par exemple, une décision obligatoire que le Conseil de sécurité des Nations Unies adopterait en vertu du chapitre VII de la Charte des Nations Unies s'impose aux Etats Membres mais n'a pas la force de la chose jugée. Le Conseil de sécurité peut la modifier à tout moment.

303. Les deux lettres susmentionnées du 11 juillet 1939 adressées par les autorités politiques britanniques dans le Golfe, l'une au souverain de Qatar et l'autre à celui de Bahreïn, sont de simples communications ou notifications à caractère diplomatique. Elles ne sont accompagnées d'aucun texte de sentence arbitrale, motivée ou non. Or, les sentences arbitrales internationales, à l'instar des arrêts de la Cour, sont des documents internationaux formels, et elles sont l'aboutissement de procédures internationales tout aussi formelles. La chose jugée est précisément une notion de droit processuel étroitement liée à la forme de la procédure et de la décision en question et au caractère juridictionnel de l'organe qui la rend. Quelle que soit l'appellation qu'on lui donne (arbitrage, règlement judiciaire, enquête, etc.), la «procédure» britannique de 1938-1939 en était bien éloignée, ainsi que l'attestent des documents britanniques postérieurs à la «décision» de 1939. Par exemple, il est indiqué au dernier paragraphe de la note confidentielle dite «minutes confidentielles» du Foreign Office en date du 10 juin 1964 et établie par Long:

> «Aucun des deux souverains n'a été invité à s'engager au préalable à reconnaître la sentence, ni à le faire par la suite. Le gouvernement de Sa Majesté a simplement «rendu» la sentence. Si celle-ci a pris la forme d'un arbitrage dans une certaine mesure, elle a néanmoins été imposée d'en haut, et aucune question n'a été soulevée quant à sa validité par exemple. Il s'agissait simplement d'une décision prise pour des raisons pratiques afin de préparer le terrain pour les concessions pétrolières.» (Réplique de Bahreïn, vol. 2, annexe 2, p. 4; les italiques sont de moi.)

304. Il ne s'agissait donc pas de trancher la question par un arbitrage accepté par les souverains de Qatar et de Bahreïn. Il n'y a pas eu d'arbitrage international entre Qatar et Bahreïn en 1938-1939, et la «décision» britannique de 1939 communiquée aux souverains n'était pas une sentence arbitrale internationale donnant naissance à une obligation inter-

Qatar aurait donné à la procédure britannique de 1938-1939, et il s'ensuit que le caractère tardif de la revendication bahreïnite n'entre pas en jeu en tant que tel quand on veut établir si les souverains ont véritablement donné leur consentement à ladite procédure. Mais il est vrai également que les faits évoqués ci-dessus revêtent une importance capitale quand on analyse la validité de la «décision» britannique de 1939 ainsi que le bien-fondé des conclusions et arguments avancés sur ce point par Bahreïn. Il ne faut pas confondre la procédure britannique de 1938-1939 concernant les îles Hawar avec la présente instance devant la Cour. En tout état de cause, la «décision» britannique de 1939 n'est pas, par sa nature même, une décision qui lie la Cour en la présente affaire. Sur le différend relatif aux îles Hawar, le droit international ne concorde pas avec la «décision» britannique de 1939, et celle-ci n'est en aucune manière un obstacle juridique qui empêcherait la Cour de trancher ce différend au fond conformément au droit international.

2. Les événements à prendre en considération pour déterminer l'effet juridique pour les Parties de la «décision» de 1939

308. Revenant à l'analyse développée dans l'arrêt, nous constatons tout d'abord avec satisfaction qu'elle débute par la proposition suivante: *«Pour apprécier quel est l'effet juridique de la décision britannique de 1939, il est nécessaire de rappeler les événements qui en précédèrent, puis en suivirent immédiatement l'adoption»* (par. 117 de l'arrêt; les italiques sont de moi). Mais notre satisfaction est de courte durée, parce que les événements pris effectivement en considération dans l'arrêt sont ceux survenus au cours de la période comprise entre le 10 mai 1938 (par. 118 de l'arrêt) et le 18 novembre 1939 (par. 135 de l'arrêt). Dans l'arrêt, il n'est tenu compte d'aucun événement survenu avant le 10 mai 1938 ou après le 18 novembre 1939 pour trancher la question du consentement à la procédure britannique de 1938-1939. Au vu des informations et éléments de preuve qui figurent dans le dossier, je juge cette lacune extrêmement surprenante. En d'autres termes, je n'ai trouvé aucune explication juridique ni logique pour justifier cette lacune, parce que le dossier fait état de nombreux autres événements pertinents qui ont une incidence sur la question du consentement.

309. A mon avis, il est absolument indispensable de prendre en considération des événements survenus avant et après les dates susmentionnées pour déterminer: 1) la portée des pouvoirs ou de la compétence dont jouissait le Gouvernement britannique pour adopter une «décision» juridiquement contraignante pour Qatar et Bahreïn; et 2) la validité, ou le défaut de validité, du consentement du souverain de Qatar à la procédure britannique de 1938-1939, quelle que soit sa qualification.

310. Il sied donc tout à fait de rappeler les événements pertinents survenus en 1936 et 1937. En effet, faute de disposer de renseignements sur eux, il est impossible de comprendre la procédure britannique de 1938-1939 et la «décision» britannique de 1939 dans le contexte de la position

considérée ou à l'opinion publique d'événements antérieurs à 1938. Même l'occupation par Bahreïn en 1937 de la partie septentrionale de Jazirat Hawar conduite sous le «couvert» de la «décision provisoire» britannique de 1936 le fut clandestinement. Quant à la conduite effective du souverain de Bahreïn, Gastrell, agent politique britannique à Bahreïn, indique dans une lettre confidentielle datée du *30 juillet 1933* adressée au résident politique britannique dans le Golfe que, s'agissant de la désignation de la nouvelle concession bahreïnite, le cheikh de Bahreïn et son fils s'opposaient à ce que les «îles» soient désignées individuellement par leur nom. Ils expliquèrent, selon la lettre, que les îles au large de Qatar étaient la cause de cette hésitation (à ce stade, le cheikh ajouta que le Foreign Office savait que ces îles étaient des dépendances de Bahreïn et qu'il existait même, quelque part, un accord vieux de quatre-vingt-dix ans corroborant cette version) et que, par conséquent, pour éviter tout malentendu pouvant naître de l'omission de ces îles, ils aimeraient que la zone s'appelle «îles de Bahreïn» (mémoire de Qatar, vol. 6, annexe III.87, p. 448). La Cour n'a aucune preuve de l'existence dudit accord vieux de quatre-vingt-dix ans mentionné en 1933 par le souverain de Bahreïn à l'agent politique britannique à Bahreïn.

313. Quoi qu'il en soit, par télégramme en date du 31 juillet 1933 adressé au département des affaires étrangères et politiques du Gouvernement des Indes, le résident politique accepta la désignation suggérée par le souverain de Bahreïn, tout en soulignant que «l'île Hawar ne fait manifestement pas partie du groupe de Bahreïn» (mémoire de Qatar, vol. 6, annexe III.88, p. 451). Dans sa revendication écrite sur les Hawar du 28 avril 1936, Bahreïn énuméra un certain nombre des îles revendiquées. Mais le 5 juillet 1937, dans un aide-mémoire, l'agent politique britannique demanda à Belgrave de l'informer «de ce que le Gouvernement de Bahreïn considère comme faisant partie de l'*archipel de Bahreïn*» (mémoire de Bahreïn, vol. 6, annexe 333, p. 1454; les italiques sont de moi). Belgrave répondit que, «outre les grandes îles qui forment l'*archipel de Bahreïn*, et qui sont bien connues, les îles suivantes appartiennent à Bahreïn», citant en particulier «*L'archipel H[a]war, comprenant neuf îles dans le voisinage de la côte de Qatar*» (*ibid.*, vol. 6, annexe 334, p. 1455; les italiques sont de moi). Le souverain de Qatar n'a été à aucun moment informé de ces échanges.

314. Le souverain de Qatar n'a pas été informé non plus d'un certain nombre d'autres événements pertinents survenus après 1933 et avant 1939, comme il ressort des éléments de preuve figurant dans le dossier concernant les négociations sur le «secteur non attribué» de Bahreïn (voir, par exemple, une lettre, accompagnée de cartes, adressée le 8 juin 1938 par Belgrave à l'agent politique britannique à Bahreïn (documents supplémentaires de Bahreïn, annexe 9, p. 88)). Il semblerait en fait que ce sont des représentants des sociétés pétrolières américaines participant aux négociations sur une nouvelle concession pétrolière bahreïnite dans le prétendu «secteur non attribué» qui soufflèrent aux dirigeants Al-Khalifah, probablement vers 1933, l'idée de revendiquer les Hawar comme

3. Le Gouvernement britannique était-il en 1938 habilité à rendre une «décision» ayant, en droit international, des effets juridiques contraignants pour Qatar et Bahreïn dans leurs relations mutuelles?

316. Il convient de souligner à cet égard qu'en l'absence d'un principe de droit international général applicable (par exemple le principe de l'*uti possidetis juris*; voir plus loin), ou d'une règle conventionnelle *spécifique* (c'est-à-dire une règle énoncée dans les conventions et accords alors en vigueur entre la Grande-Bretagne et Bahreïn et entre la Grande-Bretagne et Qatar) ou d'un accord antérieur à cet effet conclu *entre* Bahreïn et Qatar (inexistant), le pouvoir ou la compétence du Gouvernement britannique pour trancher en 1939, avec des effets juridiquement contraignants en droit international, la question du titre ou de la souveraineté sur les îles Hawar devaient nécessairement se fonder sur le consentement *ad hoc* à la fois du souverain de Qatar et du souverain de Bahreïn dans le même sens et avec le même objet. Et, dans les deux cas, le consentement devait être un consentement valide éclairé et donné librement, conformément au droit international.

317. Le consentement effectif de chacun des deux souverains à la procédure britannique de 1938-1939 est par conséquent, en premier lieu, une condition juridique indispensable pour déterminer si le Gouvernement britannique jouissait en 1939 du pouvoir ou de l'autorité voulue pour adopter une «décision» sur les îles Hawar et pour déterminer également les effets juridiques de la «décision». Ainsi, ce qui est en jeu au sujet de ce consentement, c'est non seulement la question de l'existence et de la validité du consentement du souverain de Qatar à la procédure de 1938-1939, mais aussi et surtout le pouvoir ou la compétence en droit du Gouvernement britannique pour prendre au sujet du titre ou de la souveraineté sur les îles Hawar, à l'issue de ladite procédure, une «décision» *ayant des effets juridiquement contraignants en droit international* pour Qatar et Bahreïn.

318. De plus, je ne saurais tenir pour fondée en droit l'idée que le consentement éventuel d'une partie à une procédure de règlement donnée emporte, sans autre formalité, consentement à être juridiquement lié par l'issue de la procédure en question. Je ne vois dans les lettres du souverain de Qatar dont mention est faite dans l'arrêt nul consentement de sa part à être *juridiquement* lié au regard du droit international par la future «décision» du Gouvernement britannique relative aux îles Hawar. De même, la Cour ne dispose d'aucune preuve attestant que le souverain de Bahreïn a pris pareil engagement vis-à-vis du Gouvernement britannique. Le consentement de Bahreïn à la procédure britannique, ainsi qu'il est dit dans l'arrêt, pourrait être déduit de son comportement, mais il n'existe aucune preuve écrite du consentement par écrit de Bahreïn à la procédure britannique. En outre, il n'y a aucune preuve de quelque nature que ce soit de l'existence d'un quelconque accord conclu entre les deux souverains et par lequel ceux-ci auraient défini la compétence du Gouverne-

4. Le souverain de Qatar a-t-il accepté la «décision» britannique de 1939 en tant que décision juridiquement obligatoire s'imposant à lui en vertu du droit international?

321. Il s'ensuit des observations exposées ci-dessus que, à défaut de consentement ultérieur des souverains, la «décision» britannique de 1939 n'est pas, du point de vue international, juridiquement opposable à Qatar ou à Bahreïn devant la Cour internationale de Justice. Seule l'acceptation donnée à la fois par Qatar et Bahreïn pouvait rendre cette «décision» juridiquement contraignante dans les relations entre les deux Etats; il en est ainsi non pas parce que la «décision» est une sentence arbitrale internationale dotée de la force de la chose jugée, ce qu'elle n'est pas, mais en raison des effets juridiques en droit international du *principe du consentement*. Or, le souverain de Qatar éleva une protestation immédiatement après avoir été informé de la «décision» du 11 juillet 1939. Il éleva également d'autres protestations ultérieurement, par exemple le 4 août 1939 (mémoire de Qatar, vol. 8, annexe III.211, p. 49), le 18 novembre 1939 (*ibid.*, vol. 8, annexe III.213, p. 59) et une autre le 7 juin 1940 (*ibid.*, vol. 8, annexe III.219, p. 85).

322. Le souverain de Qatar protesta de nouveau contre la «décision» britannique de 1939 relative aux Hawar dans une lettre datée du 13 juillet 1946 (*ibid.*, vol. 8, annexe III.245, p. 203) et réitéra une fois de plus sa protestation contre la «décision» dans une lettre adressée à l'agent politique britannique en date du 21 février 1948 à l'occasion de la notification de la ligne britannique de 1947 de délimitation des fonds marins (*ibid.*, vol. 8, annexe III.259, p. 277), et encore en 1965. C'est ainsi que, depuis 1939, le souverain de Qatar n'a cessé de réitérer sa protestation; et en tout état de cause, dans la lettre qu'il adressa le 18 novembre 1939 au résident politique britannique Prior, il réserva de façon très claire et exhaustive ses droits sur les îles Hawar. Ces protestations et les efforts déployés ultérieurement par Qatar pour soumettre le différend à un moyen de règlement pacifique international (arbitrage dans les années soixante; médiation et règlement judiciaire ultérieurement) réduisent à néant tout argument donnant à entendre que le souverain de Qatar avait acquiescé à la «décision» britannique de 1939 en tant que décision juridiquement obligatoire au regard du droit international, indépendamment de sa qualification, de même qu'à l'occupation clandestine par Bahreïn en 1937 de la partie septentrionale de Jazirat Hawar.

5. Le consentement du souverain de Qatar tel qu'établi par l'arrêt était-il un consentement éclairé et donné librement à une procédure concrète?

323. Tout consentement donné à quelque procédure de règlement pacifique que ce soit, tout comme à la compétence de la Cour, doit être un consentement exprès librement donné. Il ne doit pas être présumé, en particulier lorsque des renseignements pertinents essentiels ont d'un bout

terme aux ingérences et aux activités de Bahreïn à Jazirat Hawar, comme le souverain de Qatar le demandait;

3) la seule voie qui s'offrait au dirigeant de Qatar était de soumettre lui-même une revendication officielle sur les îles Hawar; et
4) le gouvernement de Sa Majesté prendrait mal toute action directe, quelle qu'elle soit, qu'engagerait le souverain de Qatar pour reprendre concrètement possession des îles.

A mon sens, ces éléments, pris ensemble, constituent en droit international ce qui équivaut à une forme de contrainte exercée sur un chef d'Etat, en l'occurrence le souverain de Qatar.

326. S'il y a eu, comme il est reconnu dans l'arrêt, consentement, ou consentement implicite, de la part du souverain de Qatar, ce «consentement» est indubitablement un consentement vicié au regard du droit international contemporain et, partant, dépourvu d'effet juridiquement contraignant permanent (voir à cet égard l'arbitrage en l'affaire *Chardjah/Doubaï*). Or, l'arrêt consacre non seulement l'existence d'un tel «consentement», mais encore sa validité juridique (voir paragraphes 139-145 de l'arrêt).

327. Je ne nie pas que le souverain de Qatar ait donné son «consentement» à participer à la procédure britannique de 1938-1939 à la lumière de la présentation de l'affaire faite par Weightman. Mais quelle qu'en soit la portée, ce «consentement» à participer est entaché en droit de nullité parce que, comme indiqué, il ne s'agissait pas d'un consentement éclairé donné librement. Il ne s'agissait pas non plus d'un «consentement» inconditionnel. Comme on peut le lire dans la lettre de Weightman datée du 20 mai 1938 et dans la lettre du souverain de Qatar datée du 27 mai 1938, le gouvernement de Sa Majesté statuerait sur l'affaire *«dans un esprit de vérité et de justice»*. J'ai l'intime conviction, à la lecture des éléments de preuve au dossier, que, d'emblée, la procédure britannique de 1938-1939 ne répondait pas aux critères de «vérité» et «justice». Des faits ont été tout au long de la procédure tus au souverain de Qatar, comme je l'ai déjà dit, et la «justice» n'a pas été respectée, parce que, par exemple, l'égalité des parties à la procédure a été purement et simplement ignorée.

328. Tout d'abord, la lettre du 10 mai 1938 adressée par le souverain de Qatar après sa protestation orale élevée en 1938 ne fait pas partie intégrante de la procédure britannique de 1938-1939. Dans cette lettre du 10 mai 1938, le souverain de Qatar n'a pas demandé à la Grande-Bretagne de se prononcer sur sa souveraineté sur les îles Hawar. Bien au contraire, comme indiqué plus haut, il se plaint dans cette lettre des ingérences du Gouvernement bahreïnite à Hawar. Ce que le souverain de Qatar demandait aux autorités britanniques, c'était de mettre fin à ces ingérences ou activités du Gouvernement bahreïnite à Hawar, parce qu'il était censé le faire en vertu du traité de 1916 conclu entre la Grande-Bretagne et Qatar. En conséquence, dans sa lettre du 10 mai 1938, le souverain de Qatar ne fait que réaffirmer la souveraineté de son pays

furent dissimulés au souverain de Qatar. Weightman ne fit même pas part par écrit à son supérieur, le résident politique britannique dans le Golfe, Fowle, de la protestation élevée par le souverain de Qatar après avoir été informé des travaux de construction et de forage de puits artésiens entrepris par le Gouvernement bahreïnite à Hawar, ni de l'affirmation par le souverain de Qatar, dès février 1938, que les îles Hawar appartenaient à Qatar et que les Bahreïnites n'avaient aucun droit *de jure* à Hawar (mémoire de Qatar, vol. 7, annexe III.150, p. 255). Weightman prétendit plus tard avoir rendu compte de tout cela, oralement, au résident politique britannique, mais le seul document écrit est une lettre du 15 mai 1938 transmettant copie de la protestation écrite du souverain de Qatar datée du 10 mai 1938 (*ibid.*, vol. 7, annexe III.152, p. 263).

332. Encore plus révélateur est le rapport de Weightman sur Hawar, qui figure dans son «Rapport de renseignements», et dans lequel il déclara:

> «J'ai visité l'île Hawar le 15 avril [1938] et inspecté le nouveau poste de la police de Bahreïn. *Le fait qu'aucune plainte n'ait été reçue du cheikh de Qatar* pendant la construction de ce bâtiment imposant constitue une omission intéressante et semblerait indiquer de sa part une reconnaissance des droits de Bahreïn sur l'île.» (Réplique de Qatar, vol. 3, annexe III.60, p. 374; les italiques sont de moi.)

C'est ainsi qu'en avril 1938 Weightman constate par lui-même les travaux de construction entrepris par Bahreïn sur l'île Hawar proprement dite, mais il ne fait aucune allusion à la protestation élevée oralement par le souverain de Qatar en février 1938. Ce n'est que dans sa lettre du 15 mai 1938 adressée au résident politique, Fowle, et rédigée environ trois semaines après l'approbation de son «Rapport de renseignements» que Weightman finit par admettre: «Il est exact que, lors de ma visite à Doha *en février*, le cheikh Abdullah bin Qasim m'a déclaré avoir été informé que le Gouvernement de Bahreïn a entrepris à Hawar des travaux de construction et de forage pour trouver de l'eau, ce qu'il n'avait pas le droit de faire.» (Mémoire de Qatar, vol. 7, annexe III.152, p. 263; les italiques sont de moi.) Weightman lui-même fut donc finalement contraint d'admettre la plainte du souverain de Qatar, mais, dans l'intervalle, Bahreïn, avec l'aide d'agents britanniques dans le Golfe comme Weightman, essayait d'affermir sa revendication sur Hawar en renforçant de fait autant que faire se pouvait sa présence sur la partie septentrionale de Jazirat Hawar, occupée en 1937 au su desdits agents.

333. Ainsi, non seulement le consentement du souverain de Qatar n'avait nullement été sollicité entre avril 1936 et mai 1938, mais encore ses protestations face à ce qui se passait furent purement et simplement ignorées alors qu'au même moment Bahreïn était autorisé à s'établir à Jazirat Hawar. La première demande formelle présentée par la Grande-Bretagne au souverain de Qatar pour s'enquérir de sa position figure dans la lettre de Weightman du 20 mai 1938 et était rédigée en des termes qui confinaient à un ultimatum vu les délais imposés au souverain de Qatar:

sion arbitrale, politique, administrative, etc.), fait intervenir deux aspects: l'aspect «formel» et l'aspect «substantiel». Pour qu'une décision ou un accord soit obligatoire ou ait un effet juridique obligatoire, il faut que ces deux éléments soient réunis. Dans la présente affaire, pour se prononcer sur la question de la *nullité formelle* de la procédure britannique de 1938-1939 censée être conduite dans un esprit de «vérité» et de «justice», il importe de voir si cette procédure n'était pas éventuellement viciée. Pour pouvoir conclure à la validité ou à la nullité formelles de la «décision» de 1939, il est essentiel d'analyser comment cette procédure s'est déroulée dans la pratique.

337. En substance, la procédure conçue par les autorités britanniques, Fowle, Weightman et d'autres encore, en coopération étroite avec Belgrave, conseiller auprès du Gouvernement de Bahreïn, visait dès le départ à inverser les rôles respectifs de Bahreïn et de Qatar. La revendication de Bahreïn du 28 avril 1936, la revendication écrite initiale concernant l'île de Hawar, aurait dû faire de Bahreïn le demandeur; et en effet les tout premiers documents britanniques font état de la «revendication de Bahreïn *sur l'île de Hawar*» (les italiques sont de moi; voir, par exemple, la lettre de Loch du 6 mai 1936 adressée au résident politique britannique dans le Golfe, mémoire de Qatar, vol. 7, annexe III.106, p. 29). Mais cette expression ne tarde pas à être écartée. Après la «décision provisoire de 1936» et l'«occupation concrète de 1937» de la partie septentrionale de Jazirat Hawar, Bahreïn n'est jamais présenté dans les documents britanniques comme le demandeur. La procédure suivie à partir de 1938 et jusqu'à la «décision» de 1939 avait clairement pour objectif de faire de Qatar l'Etat demandeur, en réservant à Bahreïn le rôle de «défendeur» autorisé à faire valoir une «prétention en réponse». J'estime qu'il s'agit là d'une dérogation grave aux principes fondamentaux de la procédure conçue par Fowle, résident politique britannique dans le Golfe, de même qu'au principe de bonne foi. Sur avis du conseiller juridique du Foreign Office à Londres, le souverain de Qatar fut formellement autorisé à présenter des observations sur la «prétention en réponse» du souverain de Bahreïn. Il se trouve que cette procédure fut d'un bout à l'autre viciée en raison du rôle qu'y joua Belgrave, conseiller du souverain de Bahreïn, comme les preuves versées au dossier l'attestent.

338. Il ressort de ces preuves qu'en fait Belgrave était en contact permanent avec l'agent politique britannique à Bahreïn, du début jusqu'à la fin de la procédure de 1938-1939, de même que durant les années qui la précédèrent immédiatement. La procédure adoptée est entachée également de vices de forme: par exemple, l'«exposé préliminaire» de Belgrave daté du 29 mai 1938 et intitulé «Les îles Hawar» (mémoire de Bahreïn, vol. 5, annexe 261, p. 1106, et mémoire de Qatar, vol. 7, annexe III.158, p. 291) ne fut jamais communiqué au souverain de Qatar, alors qu'il est répertorié dans le rapport de Weightman du 22 avril 1939 sur la «propriété des îles Hawar» parmi les «documents dans cette affaire» (voir par. 2 3) du rapport de Weightman).

339. Au vu des preuves écrites produites par les Parties au sujet de la

je n'aurais pas eu à aborder le problème de la *validité substantielle* de la «décision» britannique de 1939, parce que l'absence de l'un des deux aspects de la validité suffit à rendre une décision nulle en droit, y compris en droit international. Mais, comme il a été conclu dans l'arrêt à la validité formelle de la «décision» britannique de 1939, je suis dans l'obligation d'ajouter quelques observations supplémentaires pour expliquer pourquoi ladite «décision» est également nulle du point de vue des conditions qui régissent la validité substantielle.

b) *La contradiction interne et l'arbitraire du rapport de Weightman de 1939 en tant que motif de la nullité substantielle de la «décision» britannique de 1939*

342. La «décision» britannique de 1939 était censée être une décision rendue par le Gouvernement britannique dans un esprit de vérité et de justice, et la procédure s'inspirait dans une certaine mesure des procédures d'arbitrage. Les Parties soumirent par écrit leurs revendications et leurs prétentions en réponse aux revendications de la Partie adverse, de même que des preuves. Généralement, mais non exclusivement, la revendication de Qatar reposait sur la notion de *contiguïté*, et celle de Bahreïn sur la notion d'effectivités. Comme déjà expliqué, les règles et procédures établies par les autorités britanniques constituaient à n'en pas douter un engagement de leur part vis-à-vis des Parties, qui ne saurait être dissocié du «consentement» que les autorités britanniques obtinrent des souverains respectifs de Qatar et de Bahreïn.

343. Les lettres du 11 juillet 1939 par lesquelles la «décision» britannique fut communiquée aux souverains de Bahreïn et de Qatar n'exposaient aucun motif, mais il y était précisé que la décision avait été rendue *«après examen attentif des preuves fournies»*. De plus, la Cour sait sur quoi repose la «décision» britannique de 1939, à savoir le *rapport en date du 22 avril 1939 adressé par M. H. Weightman, agent politique à Bahreïn, au lieutenant-colonel Fowle, résident politique britannique dans le golfe Persique*. C'est dans ce rapport que les «éléments» de preuve sont censés avoir fait l'objet d'un examen attentif. Les deux Parties à la présente affaire ont joint en annexe à leurs écritures respectives le rapport de Weightman, et toutes deux ont considéré que le rapport était à la base de la «décision» rendue par le Gouvernement britannique. D'autres documents figurant dans le dossier confirment de leur côté cette position des Parties. En outre, Weightman lui-même a fait savoir à ses supérieurs qu'il avait procédé à un examen exhaustif des preuves fournies par les souverains et que, en conséquence, point n'était besoin d'aller au-delà des considérations et conclusions exposées par lui dans son rapport et de procéder à des enquêtes (voir également la lettre du 29 avril 1939 que Fowle, résident politique britannique dans le Golfe, a adressée au secrétaire d'Etat pour les Indes, à Londres, dans laquelle il entérinait le rapport de Weightman; mémoire de Bahreïn, vol. 5, annexe 282, p. 1173). La «décision» du Gouvernement britannique communiquée par les lettres en date

parties à propos de Jazirat Hawar, d'où découle une conclusion cohérente. Une fois reconnue l'existence des effectivités bahreïnites sur Jazirat Hawar, et constatée l'absence d'effectivités qataries sur l'île, l'auteur du rapport est amené à conclure — sans contradiction ni arbitraire —, et en application du principe de la possession effective, que Jazirat Hawar appartient à Bahreïn.

347. Là où le rapport de Weightman contient des erreurs et des contradictions et où les parties ne sont pas traitées sur un pied d'égalité, c'est dans le raisonnement et les conclusions relatives aux îles Hawar autres que Jazirat Hawar. Sur ce point, l'auteur du rapport se contente de déclarer ce qui suit:

> «Les petites îles arides et inhabitées et les îlots rocailleux qui forment l'ensemble du groupe des Hawar sont *probablement* sous l'autorité du souverain qui s'est établi sur l'île principale d'Hawar, en particulier depuis que des repères y ont été construits par le Gouvernement de Bahreïn.» (Paragraphe 13 du rapport de Weightman, *in fine*; les italiques sont de moi.)

Dans ce passage du rapport de Weightman, il est reconnu qu'il n'existait ni effectivités ni activités bahreïnites sur les îles Hawar autres que Jazirat Hawar. Mais Weightman applique à ces îles le principe de proximité ou de contiguïté par rapport à Jazirat Hawar pour présumer la possession effective par Bahreïn des autres îles.

348. Or, Qatar se voit refuser le bénéfice de la présomption de possession effective fondée sur le principe de proximité ou de contiguïté géographiques, nonobstant:

a) la contiguïté ou la proximité de ces îles Hawar par rapport au territoire continental de Qatar;
b) l'absence de toute occupation ou effectivité bahreïnites dans ces îles;
c) l'invocation par Qatar de ce principe au cours de la procédure, comme il est d'ailleurs reconnu dans le rapport de Weightman; et
d) la présomption reconnue en droit international concernant la souveraineté sur des îles ou des groupes d'îles situées en tout ou en partie dans la mer territoriale d'un Etat donné.

Il y a donc contradiction interne et partialité dans l'application du principe de la présomption de possession fondée sur la proximité ou la contiguïté géographiques.

349. La proximité ou la contiguïté des autres îles Hawar par rapport à la péninsule de Qatar n'est pas même examinée ou mentionnée dans le rapport de Weightman. Les contradictions internes et l'arbitraire du rapport de Weightman sont donc sur ce point patents et portent assurément atteinte du point de vue juridique à la «décision» britannique de 1939. La notion de «groupe» d'îles à laquelle Weightman se réfère dans sa propre «présomption» ne rachète pas les vices tenant à la contradiction interne et à l'application partiale du même principe de droit à Qatar et à Bahreïn,

tion interne (absence de cohérence) et l'arbitraire. Quelle est dans ces conditions la sanction du droit? La nullité de la décision dans son ensemble et non uniquement celle des parties de la décision qui laissent apparaître cette absence de cohérence et/ou cet arbitraire. En conséquence, au regard des conditions juridiques qui régissent la validité substantielle, l'ensemble de la «décision» britannique de 1939 est une décision nulle en droit international. En conclusion, je rejette le moyen de défense invoqué par Bahreïn sur la base de la «décision» britannique de 1939 parce que cette décision est également dénuée de validité substantielle, ce qui est un point de droit de la plus haute importance en l'espèce mais sur lequel le présent arrêt garde un silence total.

353. En conclusion, pour tous les motifs exposés plus haut, je suis en désaccord avec la conclusion du présent arrêt concernant la souveraineté sur les îles Hawar, conclusion fondée exclusivement sur la «décision» britannique de 1939 relative à ces îles.

C. Les effectivités alléguées par Bahreïn dans le différend relatif aux îles Hawar comme source éventuelle de titre dérivé

354. En ce qui concerne le différend sur les îles Hawar, Bahreïn a invoqué pêle-mêle un certain nombre d'événements fort disparates qu'il a qualifiés d'effectivités susceptibles de créer en quelque sorte un titre sur un territoire en droit international, parmi lesquels figurent certains «actes de particuliers» et des liens avec les Dowasir qui, de façon mystérieuse et inexpliquée, réintroduiraient dans l'affaire les principes de l'effet utile tels qu'appliqués en droit international pour établir le titre d'un Etat sur un territoire. De plus, chacune de ces effectivités est, dans les exposés de Bahreïn, étirée comme un élastique ou une sorte de chewing-gum pour multiplier ses effets sur l'œil.

355. L'argumentation de Bahreïn fondée sur les effectivités comme source de titre sur les îles Hawar pose bel et bien des questions d'ordre juridique. Premièrement, celle du rôle joué par les effectivités alléguées dans un processus de création de titre lorsque le territoire concerné n'est pas un territoire sans maître. Bahreïn affirme certes que les *effectivités alléguées par lui* à l'égard des îles Hawar sont susceptibles de créer sur ces îles en sa faveur un titre qui l'emporterait sur le titre originaire de l'Etat de Qatar, tel que défini dans la section A de la présente partie de cette opinion. Mais Bahreïn n'a avancé aucun argument juridique en ce qui concerne la façon dont cela pourrait se produire en droit international, bien qu'il admette que les îles Hawar n'étaient pas un territoire sans maître avant 1937.

356. Je suis porté à croire qu'en fait Bahreïn a essayé d'attribuer simultanément divers effets juridiques à ses allégations d'effectivités dans les îles Hawar. Selon sa thèse générale concernant ces îles, les effectivités qu'il allègue seraient polyvalentes puisqu'elles s'appliqueraient aussi bien au processus déjà examiné de mise en évidence du titre originaire qu'à la détermination de l'existence d'un titre dérivé bahreïnite. Dans cette

avoir l'effet juridique de se substituer, sans autre forme de procès, au titre originaire déjà établi, consolidé et généralement reconnu de Qatar sur les îles Hawar sans le consentement de celui-ci.

360. Pour ce qui est de savoir *quand* les effectivités ou activités alléguées ont eu lieu, les quatre-vingt exemples de la liste donnée par Bahreïn lors des audiences se répartissent comme suit: 1) avant 1900; 2) entre 1900 et 1930; 3) entre 1930 et 1938; 4) entre 1939 et 2000. Il est évident que ceux qui portent sur la période 1939-2000 et certains de ceux qui correspondent à la période 1930-1938, à savoir ceux résultant de l'occupation clandestine de l'île Hawar proprement dite en 1937, ne sont pas recevables comme éléments de preuve, tout à fait indépendamment de ce qu'ils attestent. Cela réduit déjà la liste d'exemples à une trentaine au maximum, avec certains doubles emplois. C'est surtout sur les derniers qu'il faut se concentrer parce qu'ils se rapportent à des activités qui auraient été menées bien avant la date du 28 avril 1936, qui est celle de la première revendication écrite de Bahreïn sur les Hawar. Plusieurs d'entre eux ont déjà été examinés et rejetés dans cette opinion à l'occasion de la définition du titre originaire de Qatar sur les îles Hawar, mais je ne les exclurai pas d'un nouvel examen dans le présent contexte. Il convient aussi de rappeler que la plupart des exemples de la liste qui concernent des faits intervenus entre 1930 et avril 1936 datent de la période des négociations pétrolières relatives au «secteur non alloué de Bahreïn», période vraiment très suspecte à en juger par les renseignements figurant dans le dossier.

361. En ce qui concerne la question très importante du *lieu où se situent les effectivités et activités alléguées*, il faut dire que si Bahreïn mentionne dans son argumentation les îles Hawar, c'est-à-dire tout le groupe, les éléments de preuve qu'il avance pour l'étayer se rapportent exclusivement à *Jazirat Hawar*. Il n'a produit aucun témoignage ou pièce ayant trait à des effectivités ou à des activités bahreïnites sur l'une quelconque des autres îles du groupe des Hawar. Il admet d'ailleurs franchement que pour ces autres îles, il n'y a et n'y a jamais eu aucune effectivité barheïnite. La carte n° 4 du volume 7 du mémoire de Bahreïn (fond), intitulée «Les îles Hawar — Lieux», déjà mentionnée plus haut, témoigne d'une façon qui est en l'espèce décisive de l'emplacement des effectivités alléguées par Bahreïn sur les îles Hawar. Même les «balises» indiquées sur cette carte ne se rencontrent sur aucune des îles formant le groupe des Hawar.

362. Il s'ensuit que si les effectivités alléguées de Bahreïn sur Jazirat Hawar étaient réelles à l'époque considérée et recevables comme créatrices de titre en droit international, cette conclusion ne s'appliquerait à aucune des îles du groupe, à l'exception de Jazirat Hawar. Cela tient au fait que les îles Hawar sont un archipel côtier qui se trouve entièrement ou partiellement dans la zone de mer territoriale de la presqu'île de Qatar. Dans ces conditions, le traitement de l'archipel des Hawar en tant qu'unité ne peut être soutenu face à la forte présomption du droit international en faveur de la souveraineté de l'Etat continental situé à proxi-

en compte, comme point de départ du raisonnement, le fait qu'en 1937 le territoire des îles Hawar n'était pas un territoire sans maître.

365. Lors des audiences, le conseil de Bahreïn a mis l'accent sur les *«liens de Bahreïn»* avec les îles Hawar, mais ce n'est pas le vrai point de droit soumis à la Cour, qui est celui du *«titre de Bahreïn»* sur les îles Hawar, à savoir une question englobant des considérations de fait aussi bien que de droit. Du point de vue factuel, Bahreïn invoque, par exemple, *a)* différentes catégories d'actes et *b)* des actes accomplis à des moments différents. En ce qui concerne le droit, comme cela est indiqué plus haut, les effectivités ne sont pas un titre *per se*, mais peuvent devenir créatrices de titre dans des situations données lorsque cela est prévu par le droit international.

366. Pour reprendre les termes utilisés dans la sentence arbitrale *Erythrée/Yémen*, les preuves concrètes d'effectivités concernant les îles Hawar qui ont été présentées par Bahreïn «sont fort nombreuses mais leur contenu utile est bien modeste» (par. 239). La plupart des prétendus exemples de l'exercice d'autorité sont en fait des exemples d'activités de particuliers ou de questions qui ne se rapportent qu'à l'existence ou la non-existence de liens d'allégeance, de nationalité ou de reconnaissance invoqués par des tierces parties *et non* à des actes par lesquels se serait exercée l'autorité de l'Etat de Bahreïn sur les îles. Les écritures de Bahreïn posent donc un problème de définition du terme effectivités. De plus, il est fréquent que les mêmes faits y soient rapportés sous deux ou plus de deux rubriques différentes. Et les éléments de preuve relatifs à un événement donné ne corroborent pas toujours, tant s'en faut, la thèse à l'appui de laquelle Bahreïn en fait état. Il invoque aussi parfois comme exemple «d'activités *sur* les îles Hawar» des actes accomplis dans l'archipel de Bahreïn. En tout état de cause, comme le souligne la sentence arbitrale *Erythrée/Yémen*, les effectivités qui seraient susceptibles de créer un titre sur un territoire doivent être évaluées par rapport au critère suivant du droit international: «une manifestation intentionnelle de pouvoir et d'autorité sur le territoire, par l'exercice continu et pacifique de la compétence et des attributs de la puissance publique» (arbitrage *Erythrée/Yémen* (première sentence), 9 octobre 1998, par. 239).

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367. Les îles Hawar étant en 1937 un territoire avec maître, et le maître étant Qatar, l'invocation des effectivités comme preuve d'une possession créatrice de titre ou susceptible de créer un titre amène nécessairement à analyser les circonstances dans lesquelles s'est inscrite l'occupation en question et, en premier lieu, à examiner si celle-ci était licite ou non au regard du droit international. L'occupation par Bahreïn de la partie nord de Jazirat Hawar est intervenue en 1937 et a été le fait de la police ou de l'armée opérant clandestinement sous le «couvert» de la «décision provisoire» britannique non divulguée de juillet 1936, qui était connue du souverain de Bahreïn mais n'a jamais été notifiée à celui de Qatar.

1939! Cela aussi disqualifie cette occupation — l'usurpation d'une possible source autonome de titre en tant que possession effective créatrice de titre en droit international.

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371. Le principe du *consentement* sous ses diverses formes et manifestations («aveu», «reconnaissance», «acquiescement», autre forme de «consentement tacite découlant d'une conduite», etc.) peut aussi, en droit international, être source de titre dérivé sur un territoire, peut-être susceptible de se substituer à un titre précédemment détenu par un autre Etat sur le territoire en question. La pratique des cours et tribunaux internationaux offre de nombreux exemples d'application du principe du consentement comme source d'un titre dérivé meilleur qu'un titre antérieur ou l'emportant sur celui-ci dans les circonstances propres à l'affaire. Mais, bien entendu, le principe du consentement ne saurait en aucun cas se substituer au titre antérieur si la réalité de ce consentement du détenteur du titre antérieur n'est pas prouvée devant un tribunal.

372. Ainsi, dans l'affaire *El Salvador/Honduras*, j'ai appliqué le principe du consentement lorsque j'ai voté en faveur de la souveraineté d'El Salvador sur l'île de Meanguera dans le golfe de Fonseca. Dans cette instance, le Honduras était depuis 1821 le détenteur d'un titre antérieur résultant de l'*uti possidetis juris*. Pourquoi ai-je conclu comme je l'ai fait? Parce qu'El Salvador, qui a revendiqué l'île en 1854, y a manifesté sa présence par une série d'*effectivités d'Etat* avérées au cours des vingt-cinq dernières années du XIX^{e} siècle et de la première moitié du XX^{e} sans que le Honduras indique qu'il s'opposait à la présence d'El Salvador à Meanguera comme on se serait attendu, au regard du droit international, à ce qu'un Etat détenant le titre sur l'île le fasse, et que cette absence de comportement vigilant de la part du Honduras était abondamment prouvée dans le dossier. Pour moi, la conduite du Honduras équivalait, dans les circonstances propres à cette affaire-là, à un consentement ou un acquiescement tacite à la souveraineté d'El Salvador sur l'île de Meanguera à partir du moment où ce consentement ou cet acquiescement ont pu être considérés comme établis.

373. Je ne vois rien de tel en l'espèce. Qatar a toujours protesté contre l'occupation illicite de Jazirat Hawar par Bahreïn. Il n'y a pas un seul élément de preuve d'un comportement de Qatar dénotant un consentement ou un acquiescement tacites à l'occupation de ces îles par Bahreïn. Le souverain de Qatar a protesté oralement dès février 1938 auprès de Weightman, l'agent politique britannique, aussi bien contre les ingérences que contre les activités de Bahreïn à Jazirat Hawar, puis par écrit le 10 mai 1938 et a protesté ultérieurement contre la «décision» britannique de 1939 elle-même, comme en témoignent plusieurs documents déposés et datés: 4 août 1939 (mémoire de Qatar, vol. 8, annexe III.211, p. 49); 18 novembre 1939 (*ibid.*, vol. 8, annexe III.213, p. 59); 7 juin 1940 (*ibid.*,

377. En outre, un rapport administratif complet du Gouvernement de Bahreïn couvrant les années 1926-1937, rédigé par Belgrave en 1937 et publié cette année-là, ne traite pas les Hawar comme les îles formant le groupe de Bahreïn proprement dit puisqu'il ne les mentionne jamais, que ce soit du point de vue de la sécurité, des travaux publics, de l'agriculture ou de toute autre activité. De même, on ne trouve aucune indication relative à Hawar dans aucun des rapports et budgets annuels officiels du Gouvernement de Bahreïn jusqu'à celui qui porte sur la période allant de mars 1937 à février 1938 (réplique de Qatar, vol 3, annexe III.59, p. 361). Ces faits ne peuvent qu'étayer l'allégation de Qatar selon laquelle il n'y avait aucune présence ou activité officielle bahreïnite dans les îles Hawar avant 1937. Les rapports concernant les années suivantes rendent compte, en revanche, d'activités de Bahreïn à Jazirat Hawar à la suite de l'occupation clandestine et illicite de 1937. Jusqu'à cette année-là, aucun budget, aucune dépense, aucun projet, aucune mosquée, aucun fort, aucune clôture barbelée, aucune jetée, aucun forage de puits artésiens, aucun réservoir d'eau, aucun levé et aucune opération de cartographie, aucun canot à moteur, etc., n'ont été nécessaires dans les îles Hawar, tout simplement parce que Bahreïn n'y était pas présent.

378. Il faut prendre tout cela en compte ainsi que d'autres éléments, par exemple le fait que le balisage, les aides à la navigation et l'assistance aux navires naufragés (force majeure) ne sont pas considérés en droit international comme des actes attestant de l'exercice de l'autorité souveraine sur une île ou un territoire donné; que les témoignages du rapport de Brucks datent de 1820, soit longtemps avant 1868; que les Ottomans qui ont revendiqué les îles de Bahreïn pour eux-mêmes n'ont jamais reconnu les îles Hawar comme faisant partie d'un Bahreïn sous protection britannique; que la Grande-Bretagne a eu la même position de 1868 à 1936; et qu'en outre les déclarations faites en se fondant sur la parole d'autrui ou sous serment d'individus qui ne sont pas soumis à un contre-interrogatoire n'ont pas ou guère de force probante dans les procédures devant cette Cour. Si tous ces faits et d'autres qui seront examinés ci-après sont dûment pris en considération, on est en droit de se demander ce qui reste des actes d'autorité qui témoigneraient de l'exercice de la souveraineté par Bahreïn sur les îles Hawar avant 1937. La réponse est claire: *les Dowasir* (comme les Naim à Zubarah)!

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379. Suivent donc quelques observations sur *les Dowasir*. La thèse de Bahreïn en ce qui les concerne peut se décomposer comme suit: 1) l'allégation selon laquelle les Dowasir auraient occupé les îles Hawar; 2) l'attribution des îles Hawar aux Dowasir par le cadi ou la permission de les occuper qu'il leur a accordée; 3) leur qualité de sujets de Bahreïn. S'agissant de la première question, Bahreïn soutient que la tribu des Dowasir s'est installée à Hawar au début du XIX^{e} siècle (vers l'époque où

384. Le souverain de Bahreïn n'a pas, par exemple, empêché les Dowasir, ses soi-disant «sujets», de quitter le pays, et ces derniers ne sont pas allés sur la terre qui leur aurait été attribuée, à savoir les Hawar. En fait, il semblerait même que, tant qu'ils sont restés à Dammam, les pêcheurs dowasir ont cessé d'aller pêcher en saison à Jazirat Hawar. Aucune continuité non plus, par conséquent, dans les séjours saisonniers des Dowasir aux Hawar. Après 1927, les Dowasir ont commencé à retourner sur les îles de Bahreïn (et non sur Jazirat Hawar ou d'autres îles de cet archipel) et ils continuaient à se réinstaller peu à peu à Bahreïn à une date aussi tardive que 1933. La lettre du 6 avril 1928 du roi d'Arabie saoudite mentionne les Dowasir comme «nos sujets dowasir» (contre-mémoire de Qatar, vol.3, annexe III.34, p. 182).

385. D'ailleurs, l'allégeance alléguée des Dowasir vivant sur l'île principale de Bahreïn à son souverain qui, en tout état de cause, n'est pas en elle-même un acte d'autorité sur les îles Hawar, n'est pas mentionnée dans les seules pièces émanant de source indépendante dont a fait état Bahreïn pour confirmer ses dires, à savoir la lettre de 1869 du résident politique britannique à la tribu dowasir à Budaiya et Zellaq et le *Gazetteer of Arabia* de 1917. La déclaration selon laquelle le drapeau bahreïnite aurait été hissé par des particuliers au cours de la fête de l'Aïd n'est pas un exemple d'exercice de l'autorité étatique et n'est attestée dans aucune pièce émanant d'une source indépendante (hormis les déclarations écrites sous serment produites par Bahreïn).

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386. Dans les pièces écrites des Parties et au cours des audiences, les arguments et contre-arguments relatifs aux Dowasir sont dans une certaine mesure mêlés à une question de fait, à savoir celle de l'habitabilité à cette époque des îles Hawar et/ou de la présence permanente à Jazirat Hawar d'une population (les soi-disant *«résidents de Hawar»*). Plusieurs points de la liste «d'exemples d'exercice de l'autorité» fournie par Bahreïn n'ont trait qu'à la *présence* alléguée des Dowasir et d'autres Bahreïnites à Hawar. Aucun de ces exemples ne correspond donc à un acte par lequel l'Etat de Bahreïn exerçait son autorité sur les îles Hawar. On trouve sur l'île de Majorque (Espagne) plusieurs milliers de résidents permanents non espagnols dont la présence ne crée pas, en droit international, de titre sur l'île pour leurs Etats respectifs.

387. Ces allégations de Bahreïn relatives à des preuves s'expliquent notamment par la revendication écrite du 28 avril 1936 signée par Belgrave. Celui-ci a en fait déclaré qu'«au moins quatre des plus grandes îles étaient occupées de manière permanente» (mémoire de Qatar, vol. 7, annexe III.103, p. 18). Toutefois, au cours de la «procédure» de 1938-1939, les preuves alléguées de présence que Bahreïn a présentées aux Britanniques ne concernaient que *Jazirat Hawar*, c'est-à-dire l'île occupée en partie de façon illicite en 1937. Cette «petite» contradiction, comme plusieurs autres dans la «procédure» de 1938-1939, n'a eu absolument

Bahreïn, vol. 1, p. 69-71, par. 159). Les Hawar n'étaient donc pas une espèce de «domaine réservé» des Dowasir qui, en outre, y auraient vécu dans des villages et auraient exercé une compétence et des attributs de la puissance publique sur l'île au nom du souverain de Bahreïn! Parmi les personnes qui fréquentaient temporairement Jazirat Hawar figuraient aussi des pêcheurs qataris, comme en témoignent certaines indications que l'on trouve dans des documents ainsi que la plainte du 8 juillet 1938 du souverain de Qatar concernant la détention par les autorités bahreïnites d'un sujet qatari et de son bateau (à la suite de l'occupation illicite) et la reconnaissance de ce fait par Weightman (contre-mémoire de Qatar, par. 3.56). Au sujet des activités de pêche dans le Golfe régies par la charia ou loi islamique, voir S. H. Amin, *Treatise on International and Legal Problems in the Gulf* (réplique de Qatar, vol. 3, annexe III.100, p. 617). En fait, la pièce produite par Bahreïn pour donner à entendre que les Dowasir étaient présents en permanence sur Hawar est le rapport de Weightman lui-même, soit un document vraiment très suspect et plein de contradictions! Quant à la présence des «Bahreïnites non dowasir» probablement mentionnée pour montrer que des sujets bahreïnites restaient présents sur les Hawar en l'absence des Dowasir, les membres de la famille en question, les Al-Ghatam, semblent se considérer comme des Dowasir.

392. Enfin, l'exemple de l'exercice d'autorité représenté par la délivrance de passeports bahreïnites aux «résidents des îles Hawar» n'est étayé que par l'affirmation gratuite de Belgrave dans le contexte de la revendication bahreïnite des années trente. De plus, les personnes dont il s'agit résidaient aussi à Zellaq dans les îles de Bahreïn. Aucun élément de preuve n'a été fourni pour étayer l'assertion de Bahreïn selon laquelle les personnes qui auraient été des «résidents des îles Hawar» étaient incluses dans les recensements auxquels il a procédé.

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393. Compte tenu des éléments de preuve présentés par les Parties sur la question, des données géographiques publiquement disponibles et des plus anciennes photographies prises sur les îles Hawar et communiquées à la Cour, il est difficile de conclure que ces îles n'étaient pas très arides et, dans le passé, impropres à un habitat permanent. Cela tenait probablement surtout à l'absence de toute source d'eau. Bahreïn rétorque à cela que de l'eau de pluie était recueillie dans plusieurs citernes et que les besoins restés insatisfaits étaient couverts par de l'eau apportée de Bahreïn. Dans son rapport du 22 avril 1939, Weightman s'est borné à accepter l'affirmation de Bahreïn (mémoire de Qatar, vol. 7, annexe III.195, p. 503). L'allégation de Bahreïn quant au nombre de citernes est contredite par la description de Lorimer et Prideaux. Quant à l'eau apportée de Bahreïn, le seul élément de preuve soumis est une lettre de Belgrave à Weightman écrite au cours de la période suspecte.

394. Il me paraît avéré que des pêcheurs se rendaient en saison, tem-

La carte d'Izzet ne saurait être considérée comme impliquant que les Ottomans avaient reconnu que les îles Hawar étaient rattachées à Qatar ou à Bahreïn. Une résolution ottomane du 19 avril 1913 et la déclaration secrète annexée à la convention de 1913, dont fait état Bahreïn, ne mentionnent que Zakhnuniya, et non Hawar. Enfin, on voit mal comment les lettres que le souverain de Qatar a adressées à Weightman pour protester contre l'occupation clandestine et illicite de 1937 par Bahreïn peuvent être interprétées comme des exemples de reconnaissance de la compétence et de l'autorité de Bahreïn sur l'une quelconque des îles Hawar.

398. Les indications données par Bahreïn qui attesteraient d'exemples de reconnaissance par des Etats tiers sont on ne peut plus vagues, au point de n'étayer en rien ses thèses concernant aussi bien le titre originaire que le titre dérivé.

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399. Bahreïn a également avancé toutes sortes d'*arguments complémentaires de caractère général* concernant les activités économiques, les ressources naturelles et la préservation de la faune, le commerce avec lui, la pêche, les huîtres perlières, le gypse, l'eau, l'exploration et l'exploitation du pétrole et les autres ressources naturelles, l'élevage et les levés. Les éléments de preuve qui s'y rapportent sont souvent répétés. Les huîtres perlières reviennent environ quatre fois, le gypse aussi, la pêche trois fois, le commerce deux fois, l'eau aussi, le pétrole onze fois, la préservation de la faune deux fois. En ce qui concerne le commerce avec Bahreïn, il s'agit de déclarations écrites sous serment, d'une lettre de Belgrave et du rapport Weightman. Je ne considère pas ces pièces comme des sources indépendantes. Pour ce qui est des huîtres perlières, il est admis, même dans les déclarations sous serment, que les Dowasir étaient à Zellaq pour la saison de la pêche aux perles. Il est donc tout à fait naturel que leur aient été fournis par Bahreïn des journaux de bord et des permis de plongée et qu'ils aient utilisé des bateaux enregistrés à Bahreïn. Quant à la pêche, on ne peut guère dire que cette activité pratiquée par des particuliers autour ou à partir de Jazirat Hawar soit un exemple d'exercice de l'autorité par Bahreïn. S'agissant des droits accordés, le seul élément de preuve (la note de Belgrave de janvier 1938) est postérieur à l'occupation illicite par Bahreïn en 1937. Pour ce qui a trait à la réglementation de la pêche, les éléments de preuve sur lesquels se fonde Bahreïn sont postérieurs à 1937 et, en outre, ne font mention d'aucune réglementation dans ce domaine.

400. Bahreïn allègue que le gypse des Hawar était extrait aux XIX^{e} et XX^{e} siècles, qu'il était vendu à Bahreïn, et que des permis de tailler le gypse ont été délivrés par son gouvernement, qui réglementait aussi le commerce du gypse entre les Hawar et Bahreïn. L'extraction et la vente de gypse ne sauraient être considérées comme des actes d'autorité, puisqu'ils étaient le fait de particuliers. Rien n'atteste non plus que du gypse ait été extrait ou taillé avant 1937-1938 et les éléments de preuve

garde» avant que le nouveau fort soit construit, c'est-à-dire avant l'occupation illicite par Bahreïn en 1937. Belgrave a d'ailleurs reconnu, dans sa lettre du 22 décembre 1938, qu'«il est vrai qu'une garnison militaire a seulement été établie il y a peu, au cours des deux dernières années» (mémoire de Bahreïn, vol. 5, annexe 274, p. 1129). Bahreïn admet que la jetée n'a pas été construite avant 1937 (elle a été achevée en 1938).

403. Tous les exemples concernant des routes, une installation de dessalement, l'électricité, les télécommunications, les infrastructures touristiques et l'établissement d'un service de navette maritime entre Bahreïn et Hawar sont très postérieurs à l'occupation illicite de Hawar par Bahreïn en 1937. En ce qui concerne les aides à la navigation, pour lesquelles trois exemples sont donnés, les éléments de preuve montrent que les repères ont été érigés en 1937-1938 et non «au cours des années trente» comme le dit parfois Bahreïn. Les pièces relatives à la «canalisation» qui aurait été construite au nord de Janan sont des déclarations sous serment de soi-disant «anciens résidents» de Hawar.

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404. Rien ne prouve qu'il y ait eu une *présence militaire ou policière* bahreïnite sur les Hawar avant 1937. Les exemples qui se rapportent à un dispositif de défense complet et au renforcement de la présence militaire de Bahreïn datent respectivement de 1941 et de 1986. Les plus anciens éléments de preuve fournis en ce qui concerne les activités de garde-côtes datent de septembre 1991. Rien ne vient étayer l'affirmation de Bahreïn selon laquelle il y avait une présence policière à Jazirat Hawar avant l'occupation illicite de 1937. Le témoignage invoqué semble se rapporter à une période postérieure à 1937. La visite du chef de la police aurait eu lieu après 1937 puisqu'il «avait l'habitude de s'installer dans le fort». Aucune pièce provenant d'une source indépendante n'atteste de l'affichage public de proclamations ou d'arrêtés concernant des malades puisque les éléments de preuve sur lesquels se fonde Bahreïn sont des lettres de Belgrave et des déclarations d'«anciens résidents de Hawar». Quant à la «réglementation de l'immigration», les instructions données en 1937 au «chef des naturs» — l'officier de police — et la protestation du souverain de Qatar contre les ingérences et le traitement de ressortissants qataris par des personnes se trouvant sur Hawar concernent des événements qui se sont produits après l'occupation illicite de 1937.

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405. Il n'existe aucun élément de preuve relatif à l'origine des personnes enterrées dans les *tombes* les plus anciennes. On ne sait pas s'il s'agissait de Dowasir ou de membres d'une autre ou de plusieurs autres tribus. Rien ne fournit non plus aucune indication sur l'origine des vieilles ruines. Si cela prouvait quelque chose, ce serait la possibilité que Jazirat Hawar ou certaines autres îles du groupe aient été habitées autrefois,

des Hawar d'après les preuves écrites présentées. La lettre de Prior du 26 octobre 1941 (mémoire de Qatar, vol. 8, annexe III.229, p. 127) et celles de Burrows des 2 et 5 mai 1954 (mémoire de Bahreïn, vol. 4, annexes 208-209, p. 875 et suiv.) corroborent ce point de vue. Burrows, résident politique britannique, donne par exemple à entendre, en ce qui concerne les prétentions des Al-Khalifah sur Zubarah, que des revendications opposées concernant la possession de biens privés déterminés devraient être soumises à un *cadi* impartial d'une autre partie du Golfe, pour être réglées conformément au droit et aux coutumes locaux (mémoire de Bahreïn, vol. 4, annexes 208 *a)* et 209, p. 875 et 885). Dans sa lettre du 26 octobre 1941, Prior écrit que:

> «Les parties ont la faculté, en vertu d'un accord, de porter leurs affaires devant n'importe quel cadi et deux Iraquiens de la Trêve pourraient faire juger un différend à Karbala s'ils le souhaitaient. Seuls la facilité du voyage par mer et les liens avec les Dowasir faisaient de Bahreïn une instance appropriée par comparaison à un voyage par terre difficile et dangereux jusqu'à Doha.» (Mémoire de Qatar, vol. 8, annexe III.229, p. 130.)

410. Les décisions judiciaires de 1909 et 1910 ont été mentionnées dans la lettre adressée par Belgrave à Weightman le 22 décembre 1938 et jointes à cette lettre (mémoire de Bahreïn, vol. 5, annexe 274, p. 1129). Le rapport Weightman fait, dans le passage suivant, grand cas des décisions judiciaires de 1909 et 1910:

> «Ces deux jugements, remontant à quelque trente ans, sont d'une authenticité indiscutable et les deux portent sur les litiges concernant des «droits terrestres et maritimes» à Hawar... Le cheikh de Qatar cherche à démontrer que ces deux jugements sont sans valeur car il est courant, dit-il, que des cadis d'un pays musulman se prononcent sur les différends entre sujets d'un autre pays musulman. Cette affirmation est exacte jusqu'à un certain point dans les «affaires personnelles» mais le cheikh de Qatar serait le premier à dénier à un cadi du Nedjd, par exemple, le droit de juger un litige sur des questions immobilières à Doha entre deux sujets de Qatar.» (Mémoire de Bahreïn, vol. 5, annexe 281, p. 1170-1171.)

411. Cette analogie mise en avant par Weightman est évidemment inexacte. Dans l'affaire de 1910, les deux parties étaient des Dowasir et dans celle de 1909 au moins une des parties l'était (voir le texte des décisions judiciaires). Ni l'une ni l'autre de ces décisions judiciaires n'indique que l'une quelconque des parties ayant comparu devant le *cadi* du tribunal de la charia était un Qatari. Cela laisse penser que les parties étaient des Dowasir, résidant en règle générale à Zellaq, sans exclure la possibilité que l'affaire de 1910 pourrait aussi avoir concerné des Bahreïnites qui n'étaient pas des Dowasir. Si on part de l'hypothèse que tel était le cas,

reçu une «nouvelle citation à comparaître» et que l'audience avait été fixée à mai 1932, c'est-à-dire peut-être une fois les Dowasir revenus à Bahreïn après l'hiver. En ce qui concerne l'affaire 264/1351, le titre de l'annexe 242 la décrit comme «relative à des sujets de Bahreïn résidant à Hawar» mais, selon le résumé qui en est fait dans cette annexe et le dossier la concernant qui figure à l'annexe 243, il semble que seul le défendeur, un Dowasir, vivait à Hawar.

416. Des lettres ont été envoyées aux personnes habitant Hawar pour leur «ordonner de se rendre à Bahreïn» (voir annexe 243). Rien n'indique que ces assignations aient été effectivement notifiées à Jazirat Hawar. Dans ces deux affaires, elles n'ont pas été suivies d'effet: l'annexe 243 n'énumère pas moins, pour l'affaire 264/1351, de sept citations du défendeur dowasir à comparaître. Il n'y a aucune preuve d'une quelconque arrestation ou de mesures obligeant les intéressés à comparaître qui auraient été mises en œuvre à Hawar par les autorités bahreïnites. Il n'existe pas de version arabe des annexes 242 ou 243 (affaire 264/1351).

417. Quant à la troisième affaire (affaire 35/1355), la pièce datée de 1932 qui fait l'objet de l'annexe 242 la décrit comme une affaire d'«héritage concernant les pièges à poisson, etc., à Hawar» entre des «sujets de Bahreïn résidant à Hawar». Mais la seconde pièce concernant cette affaire — une lettre de la direction de la police de Bahreïn au tribunal de Bahreïn datée du 14 avril 1936 (annexe 245) — indique que le plaignant était un Dowasir «de Zellaq» qui s'est présenté à la direction de la police et a déclaré qu'il «avait placé des pièges à poisson *entre Bahreïn et Qatar, à proximité de Hawar*» (les italiques sont de moi). Il a allégué que certaines personnes «ont emporté les pièges et sont parties à Hawar» et que ces «personnes qui l'avaient attaqué venaient de Hawar». Il n'y a dans cette affaire aucune preuve qu'une arrestation aurait été opérée ou que des mesures d'exécution auraient été prises à Hawar et il n'existe aucune version arabe des annexes 242 et 245.

418. En outre et surtout, la thèse de Bahreïn relative aux activités judiciaires alléguées concernant les Hawar repose *exclusivement* sur la lettre de Belgrave du 28 avril 1936 et sur sa note du 29 mai 1938, qui formulent l'une et l'autre des affirmations générales dans le contexte de la revendication de Bahreïn sur Hawar, au sujet de l'envoi de «fidawis» et de «citations» pour arrêter des personnes se trouvant à Hawar lorsqu'elles devaient comparaître devant des autorités ou des tribunaux de Bahreïn, et d'arrestations opérées à Hawar à cette fin par la police bahreïnite. Les éléments de preuve présentés à la Cour par Bahreïn confirment que les assertions de Belgrave n'étaient et ne sont pas étayées. Dans sa lettre à Weightman en date du 20 avril 1939, Belgrave ne mentionne que l'affaire 264/1351 et, semble-t-il, l'affaire 35/1355 relative aux pièges à poisson. Aucun élément de preuve n'a été fourni. En fait, Belgrave a admis dans sa lettre du 20 avril 1939 que les «casiers et nasses de Hawar» n'étaient *pas* enregistrés à Bahreïn, contrairement à ce qu'il avait affirmé antérieurement (en mai 1938).

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époque de Bahreïn mais du *Syndicate* (américain), c'est-à-dire d'intérêts pétroliers privés.

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422. En conclusion, Bahreïn n'a pas prouvé de manière à me convaincre, par ses allégations relatives à des exemples d'effectivités, de la manifestation intentionnelle de pouvoir et d'autorité sur le territoire des îles Hawar *à l'époque considérée*, par l'exercice de la compétence et des attributs de la puissance publique, de manière continue et pacifique, comme l'exige le droit international pour que des effectivités puissent créer un titre sur un territoire (indépendamment de la question du statut du territoire concerné, qui, en l'espèce, était en fait un territoire dont *le maître était le souverain de Qatar*). De plus, les effectivités de l'Etat après l'occupation de 1937 — également invoquées par Bahreïn — tendent à démontrer, contrairement au but recherché, que Bahreïn n'avait pas de «titre» sur les îles Hawar avant cette date. Comme cela est indiqué dans Oppenheim:

> «Le principe *ex injuria jus non oritur* est bien établi en droit des gens: il interdit aux actes contraires au droit international de devenir le fondement des droits juridiques de l'auteur du préjudice.» (Reproduit dans le mémoire de Qatar, vol. 8, annexe III.307, p. 545-546.)

423. Je ne puis donc retenir l'argument de Bahreïn selon lequel les effectivités alléguées créent un titre territorial sur les îles Hawar ou sur certaines de ces îles ou l'emportent sur le titre originaire de Qatar relatif à l'archipel des Hawar dans son ensemble.

424. Les preuves d'effectivités produites par Bahreïn n'ont pas démontré que cet Etat a un titre originaire ou un titre dérivé généralement admis sur les îles Hawar. L'occupation de Jazirat Hawar en 1937, époque où c'était un territoire *avec maître*, n'était pas une occupation créatrice de titre, mais une occupation illicite, qui, en tant que telle, ne peut donner naissance en droit international à aucune sorte de titre sur un territoire opposable au détenteur du titre originaire, à savoir, en l'espèce, l'Etat de Qatar.

*D. Inapplicabilité à la présente espèce du principe de l'*uti possidetis juris

425. Pour invoquer ou appliquer un certain principe ou une certaine norme de droit international, il faut d'abord définir ledit principe ou ladite norme ainsi que sa portée et établir ensuite si les circonstances de l'espèce sont de celles qui appellent l'application dudit principe ou de ladite norme. Après mûre réflexion, je dis que, d'un côté comme de l'autre, l'*uti possidetis juris* n'a aucun rôle à jouer en l'espèce. Mais comme le principe a été invoqué par Bahreïn, je suis tenu d'expliquer assez en détail pourquoi je conclus à l'inapplicabilité de l'*uti possidetis juris*, même si je dois dans ces conditions allonger d'autant mon opinion.

aussi la question de savoir si cette doctrine de l'*uti possidetis*, qui, à l'époque, semblait devoir s'appliquer essentiellement à l'Amérique latine, pourrait véritablement servir à interpréter une question juridique se posant au Moyen-Orient peu de temps après la fin de la première guerre mondiale.» (Par. 99 de la sentence.)

429. Il existe une règle de droit généralement acceptée, qui s'étend au droit international, et qui est que le juge, pour évaluer un titre résultant d'une consolidation historique (c'est-à-dire issue d'un processus, d'un *continuum*, d'une succession d'actes, de faits ou de situations ayant occupé un certain laps de temps), doit se fonder sur le droit international en vigueur au moment où est manifestement né le titre en question (voir, par exemple, les affaires des *Grisbadarna*, de la *Baie de Delagoa*, de *Clipperton Island*, de l'*Ile de Palmas*, des *Minquiers et Ecréhous*, etc.). Il est vrai que, dans l'affaire de l'*Ile de Palmas*, Huber a nuancé ce principe de non-rétroactivité en ajoutant: «le même principe ... exige que l'existence de ce droit, ... sa manifestation continue, suive les conditions requises par l'évolution du droit». Mais je ne vois pas comment il serait possible de conclure en l'espèce que la généralisation, de nos jours, de l'*uti possidetis juris* des années soixante pouvait rétroactivement priver l'une ou l'autre des Parties de droits territoriaux quelconques sur les îles Hawar quand, pour les deux Parties, ces droits *in rem* constituaient d'ores et déjà un ordre territorial établi *avant* que l'*uti possidetis juris* se généralise sous forme de norme de droit international général.

430. La *non-rétroactivité* dans l'application de ses normes est un principe bien établi du droit international coutumier et non pas seulement du droit des traités. La rétroactivité n'est autorisée pour l'application d'une norme de droit international que si la norme elle-même est adoptée avec cette intention ou que les parties intéressées conviennent l'une et l'autre que la norme sera rétroactivement applicable dans leurs relations réciproques. Or, dans l'histoire de l'*uti possidetis juris* en tant que norme de droit international général, je n'ai rien trouvé dans la pratique des Etats ni dans la doctrine qui permette de penser qu'accepter d'en faire une norme d'application générale s'accompagnait implicitement de l'intention de donner à ladite norme un effet rétroactif, de façon qu'elle s'applique aussi à un acte ou fait ayant eu lieu avant la généralisation de l'*uti possidetis juris* ou à une situation quelconque ayant cessé d'exister avant cette généralisation. En outre, Qatar en l'espèce refuse que l'*uti possidetis juris* puisse s'appliquer à ses relations avec Bahreïn. Les Parties ne sont donc nullement convenues que la Cour puisse appliquer rétroactivement le principe à la présente espèce.

431. Cela dit, j'en arrive au cœur du problème, c'est-à-dire aux conditions de fond qu'il faut remplir pour que l'*uti possidetis juris* s'applique à une affaire donnée. Ledit principe ou norme de droit international revêt deux aspects, car il porte sur la délimitation de frontières (question qui n'est pas particulièrement pertinente en l'espèce) et sur la question du *titre sur un territoire*. Pour les deux aspects, il doit exister une *situation de*

en jeu ici; la succession d'Etat n'est pas du tout l'équivalent d'une succession entre des êtres humains). *En l'espèce, aucune de ces deux conditions juridiques indispensables n'est remplie.*

434. La Cour n'a entre ses mains aucun document ni élément de preuve attestant l'existence d'un titre international originaire de la Grande-Bretagne sur les territoires qui sont en litige entre Bahreïn et Qatar, y compris les îles Hawar. Il n'existe aucune déclaration, proclamation, texte de loi, traité, etc., de source britannique attestant qu'à un moment quelconque avant 1971 les territoires de Bahreïn et de Qatar aient été considérés par la Grande-Bretagne comme des territoires, des colonies, des protectorats, voire des territoires sous mandat ou sous tutelle de la Couronne britannique. Les informations versées au dossier vont en fait dans le sens opposé. Par exemple, dans une lettre que le résident politique britannique dans le golfe Persique, Pelly, adresse le 25 septembre 1869 au secrétaire du gouvernement à Bombay, il est question d'une pétition dans laquelle certains habitants et marchands de Bahreïn demandent au Gouvernement britannique de «prendre l'île de Bahreïn et sa population sous sa protection et d'en faire ses sujets, de façon que l'île puisse être considérée comme faisant partie des possessions du Gouvernement britannique et ses habitants considérés comme des sujets britanniques», mais Pelly répond: «Je leur ai dit que je ne peux pas compter que ce vœu puisse être exaucé.» (Documents supplémentaires de Qatar, doc. 1, p. 5.) Comme l'a dit lord Curzon, le vice-roi de l'Inde, en 1903: «Nous n'avons pas saisi ou pris vos territoires, nous n'avons pas détruit votre indépendance, mais l'avons préservée.» (Passage cité dans la sentence arbitrale *Doubaï/Chardjah*.)

435. A l'audience, le conseil de Bahreïn a cité un extrait d'un projet de rapport de Rendel daté du 5 janvier 1933 dans lequel on lit ceci:

> «Les autres Etats du Golfe [autres que la Perse, l'Iraq et l'Arabie saoudite] ont un statut particulier, car, bien qu'il s'agisse de principautés souveraines et indépendantes sur le papier, elles ont avec le gouvernement de Sa Majesté des relations conventionnelles spéciales qui, dans la pratique, les mettent dans la position d'Etats protégés.» (Réplique de Qatar, vol. 2, annexe II.58, p. 338.)

Mais au paragraphe 4 du même projet de rapport on lit: *«Ces territoires ne font pas partie de l'Empire britannique ni de l'Inde. Il s'agit d'Etats indépendants dont la conduite des relations étrangères revient actuellement au gouvernement de Sa Majesté.»* (*Ibid.*, p. 342; les italiques sont de moi.)

436. De surcroît, ni Bahreïn ni Qatar n'a officiellement dit assumer en général le statut de successeur d'un titre de droit international non existant détenu par la Grande-Bretagne sur leurs territoires respectifs *avant* l'introduction de la présente instance. En outre, la communauté internationale n'a jamais considéré que Bahreïn et/ou Qatar fussent des territoires ou des colonies de la Couronne britannique. L'histoire de Qatar est tout particulièrement révélatrice à cet égard. Les Ottomans ont quitté

«le Gouvernement britannique a, dans des déclarations officielles faites de temps à autre, qualifié les cheikats d'«Etats indépendants sous protection britannique» ou d'«Etats indépendants ayant des relations conventionnelles spéciales avec le gouvernement de Sa Majesté» (H. M. Al-Baharna, *The Legal Status of the Arabian Gulf States*, 1968, p. 78).

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439. Le texte des accords conclus par la Grande-Bretagne avec Bahreïn en 1861, 1880 et 1892 et avec Qatar en 1916 est très clair. C'est-à-dire que, *pendant toute la période pertinente la Grande-Bretagne n'a eu en droit ni le pouvoir, ni le droit, ni l'autorité voulue pour disposer du territoire ou des territoires de Qatar ou céder ledit territoire ou lesdits territoires ou bien pour disposer du territoire ou des territoires de Bahreïn ou pour céder ledit territoire ou lesdits territoires.* Sur le plan politique et juridique, la situation de la Grande-Bretagne dans le Golfe avant 1971 n'a rigoureusement rien de commun avec la position de l'ancien royaume d'Espagne en Amérique. La Couronne d'Espagne en Amérique exerçait sur le plan international la souveraineté sur le territoire et elle détenait le titre sur ce territoire, tandis que la Couronne britannique dans le Golfe, y compris en ce qui concerne Bahreïn et Qatar, n'exerçait pas cette souveraineté et ne détenait pas ce titre.

440. L'accord conclu par la Grande-Bretagne avec le souverain indépendant de Bahreïn en 1861 avait pour objet et pour finalité de passer un traité perpétuel de paix et d'amitié avec le Gouvernement britannique. Les dispositions de ce traité visent les sujets, les possessions et les territoires du souverain (art. 2 et 3) et l'on peut relever des expressions telles que «à Bahreïn ou dans ses dépendances du Golfe» (art. 3) ou bien «dans les territoires de Bahreïn» ou encore «les sujets de Bahreïn» (art. 4). Il est même reconnu, en matière commerciale, que «les sujets britanniques» bénéficieront du traitement de la nation la plus favorisée à Bahreïn (art. 4 également). Puis, craignant l'établissement d'une présence ottomane dans les îles bahreïnites, la Grande-Bretagne a passé accord avec le souverain de Bahreïn en 1880 et celui-ci s'est alors engagé ainsi que ses héritiers et successeurs à ne rien négocier avec aucune puissance sans avoir au préalable obtenu le consentement du Gouvernement britannique. Le souverain s'est également engagé à ne jamais accepter l'établissement à Bahreïn d'un agent étranger quelconque sans avoir l'approbation du Gouvernement britannique. Le souverain de Bahreïn voyait ainsi l'accord de 1880 limiter ses pouvoirs quant à la conclusion de traités et quant à l'accueil de missions diplomatiques, mais le territoire du pays était toujours le territoire du souverain de Bahreïn et nullement un territoire de la Couronne britannique à quelque titre que ce fût.

441. La conclusion de ce type d'accords a atteint un sommet en 1892 avec ce que l'on a appelé les *«accords exclusifs»* signés par les souverains des Etats de la Trêve et par le souverain de Bahreïn. Les premiers sou-

territoire non autonome, etc.). Aucun Etat ne garantit par voie de traité la sécurité de son propre territoire. Les Etats ont constitutionnellement et internationalement l'obligation de protéger leur territoire et cela s'arrête là. Or, à en croire le dossier, ces garanties internationales, en particulier, celles qui concernent le «territoire», ont considérablement mobilisé les autorités britanniques pendant la négociation du traité et après sa conclusion en 1916 (tout comme dans les années trente). Les articles pertinents de ce traité de 1916 se lisent comme suit:

> «X. De son côté, le Gouvernement britannique, en contrepartie des traités et engagements que j'ai conclus avec lui, s'engage à me protéger ainsi que mes sujets et le territoire de Qatar de toute agression par la mer et à faire tout son possible pour exiger réparation de tous les préjudices que moi ou mes sujets pourrions subir en nous rendant à la mer pour des raisons licites.
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> XI. Le Gouvernement britannique s'engage également à prêter ses bons offices au cas où moi ou mes sujets serions attaqués par voie terrestre sur le territoire de Qatar. Cependant, il est bien entendu que cette obligation n'incombe au Gouvernement britannique que dans le cas d'agression par voie terrestre ou par mer qui n'aura pas été provoquée par un acte ou une agression quelconque que moi-même ou mes sujets aurions commis contre des tiers.» (Mémoire de Qatar, vol. 5, annexe II.47, p. 185.)

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445. Il n'y a pas d'Etat qui assume ce type d'engagement en ce qui concerne son propre territoire métropolitain ou ses territoires coloniaux. Il n'y a pas de gouvernement qui s'engage à prêter ses «bons offices» pour protéger contre toute agression ses propres territoires, qu'il s'agisse de territoires coloniaux ou d'autres types de territoire. Il convient d'ajouter qu'en vertu du traité conclu en 1916 avec la Grande-Bretagne le cheikh de Qatar assumait aussi les obligations énoncées dans les «traités et engagements» précédemment conclus par les cheikhs arabes des Etats de la Trêve (aujourd'hui les Emirats arabes unis) qui étaient des alliés. Il existe aussi une interprétation arbitrale qui est éminemment pertinente ici. Je veux parler de la sentence rendue le 19 octobre 1981 au sujet de la *Frontière entre Doubaï et Chardjah*, s'agissant en particulier des extraits ci-après:

> «Il est clair par conséquent qu'aucun traité n'autorisait les autorités britanniques à délimiter unilatéralement les frontières entre les Emirats et que l'administration britannique n'a jamais affirmé qu'elle avait le droit de procéder ainsi. La Cour est donc parvenue à la conclusion qu'il fallait recueillir le consentement des souverains avant qu'il ne puisse être procédé à pareille délimitation.
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> . . . . . .
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> La Cour se doit de souligner que, en l'absence de compétence découlant des sources conventionnelles, les décisions de Tripp ne peuvent être juridiquement valables que dans la mesure où les Emi-

marins tracée en 1947 par les Britanniques ne lie ni Qatar ni Bahreïn, mais comment Bahreïn peut-il partager cette conclusion en plaidant l'*uti possidetis juris*? Il est significatif de constater que le Royaume-Uni, en étendant à Bahreïn, à Qatar et aux Etats de la Trêve l'application des conventions humanitaires de la Croix-Rouge datant de 1949, a formulé une réserve dans les termes suivants: «*dans la mesure des pouvoirs exercés par Sa Majesté en ce qui concerne ces territoires*» (annexe 2 à la réponse de Bahreïn). Le Royaume-Uni a donc reconnu que «ces territoires» n'étaient pas des territoires du Royaume-Uni.

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449. La *notion de possession* inhérente à l'*uti possidetis juris* en tant que principe ou norme de droit international général n'est pas celle de possession, détention ou occupation à bail effective, c'est *le droit de posséder conformément à un titre juridique*. Où, d'après ce principe ou norme, faut-il trouver ce titre juridique? Non pas dans le droit international général ni dans l'occupation réelle ou la possession effective du territoire intéressé, mais *dans la loi* de l'Etat prédécesseur commun ou peut-être, s'il y a deux Etats prédécesseurs, dans un traité conclu entre lesdits Etats. S'agissant des anciennes républiques hispano-américaines, cela signifiait que leur droit de posséder était défini par les *cédulas reales* et actes législatifs du même ordre dus à la Couronne espagnole après qu'elle eut entendu le *Consejo de Indias*; ce droit ne relevait pas de décisions politiques ou administratives individuelles.

450. Le conseil de Bahreïn a eu raison de citer, au cours de la procédure orale, l'arrêt rendu par la chambre de la Cour saisie du *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant))* qui a dit: «quand le principe de l'*uti possidetis juris* est en jeu, le *jus* en question n'est pas le droit international mais le droit constitutionnel ou administratif du souverain avant l'indépendance» (*C.I.J. Recueil 1992*, p. 559). Mais, aussitôt, le même conseil ôte beaucoup de valeur au passage cité en ajoutant:

> «Par conséquent, en ce qui concerne les îles Hawar, du moment que *l'administration britannique* avait clairement réglé le problème, pour quelque motif que ce soit, bon ou mauvais, la question du titre de souveraineté est à peine posée qu'elle s'arrête là.» (CR 2000/21, p. 10; les italiques sont de moi.)

Malheureusement pour Bahreïn, l'*uti possidetis juris* ne se rapporte pas en l'occurrence à une quelconque décision administrative ou politique individuelle du pouvoir, mais au *droit constitutionnel ou administratif de l'Etat prédécesseur*, comme la chambre de la Cour l'a bien noté. En outre, quelques pages plus loin, le même conseil déclare, lorsqu'il traite de la question de titre originaire de Bahreïn: «La Grande-Bretagne n'était pas détentrice de ce titre et l'on ne saurait aliéner que ce que l'on possède. *Nemo dat que non habet.*» (*Ibid.*, p. 15, par. 2.)

et/ou Qatar ne pouvaient pas en 1971 avoir été des territoires dépendants britanniques ou des colonies de la Couronne britannique ou encore des protectorats coloniaux du Royaume-Uni, mais devaient nécessairement avoir été des Etats selon le droit international.

455. Les traités de 1971 ont été enregistrés et publiés dans le *Recueil des traités des Nations Unies* et, aux termes de la convention de Vienne de 1969 sur le droit des traités, un «traité» s'entend d'«un accord international *conclu* par écrit *entre Etats* et régi par le droit international» (les italiques sont de moi). Voilà à nouveau une preuve concluante de l'inapplicabilité à la présente espèce de l'*uti possidetis juris*. Par ces traités, Bahreïn et Qatar «[assument à nouveau] leur entière responsabilité internationale en tant qu'Etats souverains et indépendants», *mais ils n'ont pas été créés comme des Etats souverains et indépendants par lesdits traités*. Ils n'ont fait qu'assumer à nouveau les pouvoirs que le Royaume-Uni exerçait en vertu de «relations conventionnelles spéciales» qui ont pris fin en 1971.

456. En outre, Bahreïn a toujours, jusqu'à la présente instance, rejeté l'idée qu'il avait sous administration britannique un statut colonial quelconque. L'avis juridique de sir Lionel Heald du 4 juillet 1963 que le Gouvernement de Bahreïn a communiqué au Foreign Office britannique est tout à fait juste et parfaitement clair à cet égard (mémoire de Qatar, vol. 11, annexe IV.248, p. 425; voir également CR 2000/17, p. 14). Dans ces conditions, le même avis doit avoir été tout aussi juste et clair en 1971 et par la suite.

457. En conclusion, compte tenu des considérations ci-dessus, je récuse l'argument de l'*uti possidetis juris* plaidé par Bahreïn, parce que ce principe ou norme de droit international général ne s'applique pas aux faits et circonstances de la présente espèce. L'*uti possidetis juris* est sans pertinence en l'espèce et ne peut par conséquent pas devenir la source d'un titre dérivé de Bahreïn sur les îles Hawar. En plaidant l'*uti possidetis juris*, Bahreïn ne peut échapper à l'obligation de démontrer à la Cour qu'il possède sur les îles Hawar un titre juridique qui soit valable internationalement. Le *titre juridique* doit exister pour étayer une décision judiciaire fondée sur l'*uti possidetis juris*, car la possession effective ne correspond nullement au titre juridique au principe *uti possidetis juris*.

E. Conclusion générale de la section B de la première partie

458. Pour les raisons exposées ci-dessus dans cette section B de la première partie de la présente opinion, je suis dans l'impossibilité de souscrire à aucun des trois arguments de l'Etat de Bahreïn qui soutient détenir un titre dérivé sur les îles Hawar en raison soit de la «décision» britannique de 1939, soit des effectivités bahreïnites dans les îles Hawar elles-mêmes, soit en vertu du principe de l'*uti possidetis juris*.

459. A mon avis, l'Etat de Bahreïn ne détient, sur la base de ces arguments, aucun des titres dérivés invoqués sur aucune des îles faisant partie du groupe des Hawar. Les titres dérivés auxquels Bahreïn fait appel sont

obligations concernant *le droit de passage inoffensif ainsi que le droit de passage archipélagique assurés dans les eaux archipélagiques aux navires de tous les Etats* (articles 52 et 53 de la convention de 1982). Mais Bahreïn s'est abstenu. Justifier cette abstention par le souci d'éviter d'aggraver le présent litige ne me paraît guère crédible, car l'existence du litige relatif aux îles Hawar n'a pas empêché Bahreïn de poursuivre ses activités sur les îles en question pendant la phase écrite et la phase orale de la présente procédure!

463. En outre, la contradiction qui existe entre le statut allégué d'«Etat archipel» et la revendication formulée sur la région dite «région de Zubarah» est trop évidente pour passer inaperçue. Aux termes de la convention de 1982, il n'existe que des «Etats archipels déclarés» et si, à l'avenir, Bahreïn devait faire la déclaration prévue à cet effet, cela n'aurait aucune conséquence sur la limite maritime unique entre Qatar et Bahreïn telle qu'elle a été définie dans le présent arrêt et revêt désormais l'autorité de la *res judicata*.

464. Pour la délimitation maritime à opérer par la Cour en l'espèce, le prétendu statut d'«Etat archipel» au sens de la partie IV de la convention de 1982 est également dénué de pertinence pour une autre raison. La thèse générale de Bahreïn sur la question repose en fait sur une confusion intellectuelle entre le droit conventionnel reconnu à cet «Etat archipel» de tracer ses propres «lignes de base archipélagiques droites», d'une part, et les principes et les règles régissant la délimitation maritime entre Etats dont les côtes sont adjacentes ou se font face, de l'autre. La délimitation d'un espace ou de plusieurs espaces maritimes n'est jamais un acte unilatéral en droit international, c'est une opération qui fait appel à la participation intégrale, sur un pied d'égalité, des deux Etats intéressés. Le principe de l'égalité souveraine de tous les Etats, qu'ils soient ou non des Etats archipels, est évident. *Cela explique pourquoi la partie IV de la convention de 1982 n'énonce pas une seule disposition sur la délimitation maritime entre un «Etat archipel» et n'importe quel autre Etat.*

465. Qu'est-ce que cela veut dire sur le plan juridique? La réponse est limpide. Il n'y a pas de règles spéciales, conventionnelles ou coutumières, qui s'appliquent à ces délimitations. La norme coutumière fondamentale de l'affaire du *Golfe du Maine* ainsi que les principes et règles particuliers régissant la délimitation de la mer territoriale, des fonds marins, de la zone économique ou de n'importe quelle autre zone ou juridiction maritime reconnue par le droit international s'appliquent aussi aux délimitations maritimes d'un «Etat archipel» au sens de la convention de 1982. C'est pourquoi l'argumentation des Parties sur le caractère conventionnel ou déclaratoire des dispositions de la partie IV de la convention de 1982 ne présente à mon sens aucun intérêt pour la délimitation maritime que la Cour doit opérer en l'espèce, *parce que la Cour n'a pas à statuer au sujet de la définition des limites maritimes extérieures d'un prétendu «Etat archipel de Bahreïn», mais doit opérer une délimitation maritime entre l'Etat de Bahreïn et l'Etat de Qatar*, comme le prévoit la «formule bahreïnite» approuvée par Qatar ainsi qu'il est consigné dans le procès-

maritime situé entre l'archipel bahreïnite proprement dit et la péninsule de Qatar. Or, cette revendication n'a jamais été acceptée par Qatar et a toujours été rejetée pendant la période pertinente par la Grande-Bretagne. Le dossier prouve en outre que d'autres Etats intéressés de la région n'ont jamais reconnu à Bahreïn le moindre titre historique ni les moindres droits historiques de quelque ordre que ce soit dans l'espace maritime en question.

470. Autrement dit, les eaux de l'espace maritime pertinent en l'espèce *n'ont pas de caractère territorial* («territorial» ayant ici un sens qu'il ne faut pas confondre avec celui qu'il revêt dans la formule «mer territoriale»). N'étant donc pas territoriales, les eaux maritimes en question ne sont pas assujetties à un quelconque régime territorial particulier comme c'est par exemple le cas pour les eaux historiques reconnues comme telles, notamment les baies historiques. L'espace maritime que la Cour doit délimiter en l'espèce n'est pas le golfe de Fonseca! Bahreïn n'a pas été historiquement en mesure de créer à son profit un titre historique, de caractère territorial, sur ces eaux maritimes (et sur les formations qui y sont situées) et la condition fondamentale de la reconnaissance ou de la tolérance manifestée par des Etats tiers n'est pas non plus remplie.

471. Bahreïn a également plaidé dans le même sens au sujet de la partie (ou secteur nord) de la zone maritime à délimiter, par exemple, en présentant l'argument des *«bancs de pêche perlière bahreïnites»*, argument qui est récusé dans l'arrêt. Cet argument visait à étendre par d'autres moyens à cette partie ou secteur nord de la zone maritime à délimiter en l'espèce le titre historique ou les droits historiques allégués par Bahreïn.

472. Eu égard aux considérations ci-dessus, nous souscrivons à l'arrêt quand celui-ci dit ne pas reconnaître le titre historique ou les droits historiques mal définis que Bahreïn prétend détenir tant dans la partie ou secteur sud que dans la partie ou secteur nord de la zone à délimiter.

3. *L'argument bahreïnite de «l'Etat archipel* de facto *ou de l'Etat pluri-insulaire»*

473. Par opposition aux précédentes thèses de «l'Etat archipel» et du «titre historique ou droits historiques», l'argument de «l'Etat archipel *de facto* ou de l'Etat pluri-insulaire» défendu par Bahreïn a, si l'on considère le raisonnement exposé et les conclusions de l'arrêt, trouvé un certain appui au sein de la Cour. De toute façon, l'arrêt est très sensible à cette thèse de l'Etat archipel *de facto* ou de l'Etat pluri-insulaire. En fait, le lecteur doit garder cette thèse constamment présente à l'esprit pour pouvoir comprendre toute une série de conclusions très surprenantes qui sont formulées dans l'arrêt et comprendre aussi en définitive le tracé de la limite maritime unique qui a été retenue.

474. Les manifestations concrètes de la thèse ci-dessus sont manifestes dans l'exposé du raisonnement suivi dans l'arrêt, même si la rédaction et la terminologie ne nous permettent pas toujours de nous en rendre clairement compte. Par exemple, quand, dans plusieurs paragraphes, l'arrêt

encore plus contestable.» (*C.I.J. Recueil 1984*, p. 329-330, par. 201; les italiques sont de moi.)

476. La méthode adoptée dans le présent arrêt est exactement contraire à celle qui est décrite dans la citation ci-dessus. Comme il est expliqué *in fine* dans l'extrait cité, le fait que, dans le secteur ou partie sud de l'espace maritime à délimiter, la limite maritime unique divise des «mers territoriales» n'autorise pas à procéder autrement sans risquer de parvenir à un résultat inéquitable. Ce qui s'est passé en fait en l'espèce, c'est que la majorité a accepté l'une des deux propositions ci-après, ou les a acceptées toutes les deux, à savoir: i) s'agissant d'un Etat archipel ou d'un Etat pluri-insulaire, il faut adopter une autre interprétation des principes et règles pertinents pour les appliquer à l'espèce; ou ii) quand la ligne de la frontière maritime divise des «mers territoriales», il faut prendre en compte dès le départ de l'opération de délimitation toutes les formations maritimes mineures ou minuscules sans exclure les hauts-fonds découvrants aux fins de la définition de «points de base».

477. En fait, la seule explication que nous ayons trouvée pour que la majorité ait adopté cette attitude, c'est qu'elle a cru comprendre que la «délimitation maritime» à opérer comprend la définition par la Cour des frontières maritimes de Bahreïn en tant qu'Etat. Autrement dit, la Cour doit assumer la tâche constitutionnelle qui consiste à définir les frontières maritimes de l'Etat de Bahreïn. Nous ne pensons pas que pareille tâche incombait véritablement à la Cour, elle incombait bien plutôt à l'Etat intéressé.

478. Dans ces conditions, la méthode adoptée dans l'arrêt soulève également des questions juridictionnelles. La «formule bahreïnite» vise exclusivement le tracé par la Cour d'une limite maritime unique entre les espaces maritimes respectifs des Etats Parties sans faire mention du statut ni de l'état des «eaux surjacentes» (qu'il s'agisse des «mers territoriales» ou d'autre chose). En fait, quand l'instance a été introduite en 1991, les eaux surjacentes des «espaces maritimes» respectifs des Parties dans le secteur sud de la zone à délimiter ne relevaient pas toutes des «mers territoriales». Pour une part considérable, ces eaux se situaient en haute mer à l'époque où a été adopté le procès-verbal de Doha de 1990. L'arrêt ne tient aucun compte de cette chronologie et, pour tracer la frontière maritime, donne en fait la préférence au caractère de «mer territoriale» que les eaux en question revêtent actuellement alors qu'il faut que la limite soit une limite maritime *unique*.

479. Bahreïn est, géographiquement, un archipel composé des îles qui constituent le groupe compact connu sous le nom des «îles de Bahreïn» à proprement parler, c'est-à-dire un archipel doté de toutes les îles mineures, îlots, rochers, récifs et hauts-fonds découvrants qui l'accompagnent, et je reconnais qu'il s'agit là de l'une des «circonstances» à ne pas oublier lors de l'opération de délimitation, mais je rejette l'idée que ladite «circonstance» géographique puisse modifier les principes, règles et méthodes pertinentes qui s'appliquent à la délimitation des espaces maritimes situés entre des

citées ci-dessus, la délimitation maritime à opérer ne revenait à délimiter des *mers territoriales*. Or, en l'espèce, comme on l'a vu, la délimitation de toute la zone décrite par les Parties comme constituant le secteur sud est aujourd'hui une délimitation de «mers territoriales». Les Parties ont en effet l'une et l'autre étendu à 12 milles la largeur de leur mer territoriale, Qatar en 1992 et Bahreïn en 1993. En outre, la délimitation de la zone sud du secteur nord des Parties consiste de même, elle aussi, à diviser des «mers territoriales».

483. La limite maritime unique demandée par les Parties est donc une ligne qui, sur un tronçon de son parcours, est aujourd'hui une ligne de partage de mers territoriales et, pour le reste de son parcours, une ligne de partage des fonds marins et de la zone économique. Dans ces conditions, les juridictions maritimes partagées par la frontière maritime ne sont pas les mêmes sur tout le parcours de la frontière. Il n'empêche que celle-ci doit être une *limite maritime unique* parce que c'est ce que les Parties ont demandé. Il s'agit par conséquence d'une limite maritime unique indépendamment des juridictions maritimes que la limite partage dans les différents secteurs de son parcours. Cet aspect de la limite maritime aurait dû être plus visible dans le tracé de la ligne de délimitation que cela ne paraît avoir été le cas d'après le raisonnement suivi dans l'arrêt. Le rôle de la norme coutumière fondamentale définie dans l'affaire du *Golfe du Maine* est renforcé ou aurait dû l'être par le *caractère unique* qu'il est demandé de conférer à la limite maritime, malgré les divergences apparaissant dans l'énoncé des règles qui expriment cette norme fondamentale à l'article 15 de la convention de 1982, d'une part, et dans les articles 74 et 83 de ladite convention, de l'autre.

484. S'agissant de la mer territoriale, la règle définie à l'article 15 de la convention revient à prévoir que, lorsque les *côtes* de deux Etats sont adjacentes ou se font face, *ni l'un ni l'autre de ces Etats n'est en droit, sauf accord contraire entre eux, d'étendre sa mer territoriale au-delà de la ligne médiane dont tous les points sont équidistants des points les plus proches des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale de chacun des deux Etats*. Cette première disposition de l'article 15 ne s'applique toutefois pas dans le cas où, en raison de l'existence de *titres historiques* ou d'autres *circonstances spéciales*, il est nécessaire de délimiter *autrement* la mer territoriale des deux Etats (seconde disposition de l'article 15). Par conséquent, la «ligne médiane» risque d'amputer la largeur autorisée de 12 milles de la mer territoriale qui est mesurée à partir de la côte pertinente de chacun des deux Etats intéressés, d'où l'entrée en jeu de la «méthode de l'équidistance» dans les délimitations de mer territoriale.

485. En ce qui concerne la délimitation de la zone économique exclusive et des fonds marins dans le secteur nord de la zone à délimiter, la «méthode de l'équidistance» n'est pas en tant que telle partie intégrante des règles de délimitation définies par les articles 74 et 83 de la convention de 1982, même aux fins du tracé d'une première ligne provisoire, encore que ces règles n'excluent pas non plus la «méthode de l'équidistance». Mais, il se pourrait fort bien que, dans un cas déterminé, la «méthode de

C. La décision britannique de 1947 et sa ligne de partage des fonds marins

491. La *«décision» britannique du 23 décembre 1947* (voir les lettres de notification adressées aux deux souverains dans le mémoire de Qatar, vol. 10, annexes IV.115 et IV.116, p. 115 et 116) ne représente pas le droit applicable en l'espèce. Tout comme la «décision» britannique de 1939 relative aux îles Hawar, la «décision» de 1947 relative à la ligne de partage des fonds marins entre Qatar et Bahreïn n'est qu'un simple élément de fait à prendre en compte. En tant que telles, les deux «décisions» sont des faits historiques mais non pas la source d'un «titre» ni d'un «droit» au sens juridique, même si cette ligne de 1947 est qualifiée dans les lettres en question de «ligne médiane reposant en général sur la configuration de la côte de l'île principale de Bahreïn et de la péninsule de Qatar» *(ibid.)*. La Grande-Bretagne ne détenait pas de titre sur les territoires terrestres respectifs de Qatar et de Bahreïn et, par suite, n'avait pas non plus de titre lui permettant de disposer des droits relatifs aux fonds marins engendrés par ces territoires terrestres en l'absence du consentement des souverains. Il est vrai qu'en 1947 la plus grande partie des eaux surjacentes ainsi visées se trouvait en haute mer, mais la ligne britannique était censée partager les fonds marins relevant de Bahreïn et les fonds marins relevant de Qatar. En l'absence du *consentement* des souverains de Qatar et de Bahreïn, cette ligne britannique de 1947 n'a pas en droit international de force obligatoire pour aucune des Parties à la présente espèce. Cette conclusion s'applique évidemment à la «décision» en question sous tous ses aspects, y compris ce qu'il est convenu d'appeler les «exceptions» relatives aux hauts-fonds de Qit'at Jaradah et Fasht ad Dibal et aux îles Hawar.

492. Je souscris par conséquent aux conclusions énoncées aux paragraphes 237 et 238 de l'arrêt de la Cour. Qatar et Bahreïn n'ont pas accepté cette «décision» de 1947 comme une décision ayant pour eux force obligatoire. En outre, les Parties ont l'une et l'autre gardé la même attitude pendant la procédure actuelle. Pendant des années, les Britanniques se sont montrés assez équivoques dans leurs déclarations au sujet de la valeur juridique de ladite «décision». Cette ligne de 1947 a parfois été qualifiée de définitive et d'autres fois de sujette à revision. Il semble aussi qu'en 1965/1966 la Grande-Bretagne ait été disposée à accepter de voir soumettre à arbitrage international l'objet des deux «décisions» de 1939 et de 1947.

493. Dans ces conditions, la seule question d'ordre juridique dont la Cour soit saisie au sujet de cette «décision» britannique de 1947 consiste à mon avis à établir si cette «décision» non contraignante et la ligne de partage des fonds marins qui en découle constituent ou non jusqu'à un certain point une circonstance que la Cour doit prendre en considération quand elle définit le tracé de la limite maritime unique. Sur cette question, les Parties s'opposent. Bahreïn refuse de s'engager dans cette voie tandis que Qatar considère qu'il faut opérer la délimitation compte dûment tenu de cette ligne de partage des fonds marins définie par les Britanniques en 1947.

fondé exclusivement sur des considérations géographiques et techniques objectives, a été conçu tout exprès pour les délimitations à tracer dans le golfe Persique et est rédigé sans avoir le moindre lien avec la présente espèce ni avec l'une ou l'autre des Parties. Exemple de construction raisonnable d'une ligne de délimitation fondée sur la méthode de l'équidistance, cette ligne de partage Boggs-Kennedy, assortie de ses justifications, m'a servi utilement à comprendre techniquement comment il était possible de construire une «ligne d'équidistance» dans les conditions géographiques propres à l'espace maritime à délimiter dans la présente espèce ou comment il fallait construire ladite délimitation.

498. Le rapport Boggs-Kennedy, accompagné de deux annexes et de son projet de délimitation, est professionnellement extrêmement crédible quand il montre comment on peut construire dans cet espace une «ligne d'équidistance ou ligne d'équidistance provisoire». Il est exact que la ligne Boggs-Kennedy montre de façon frappante que la ligne revendiquée par Bahreïn dans la présente espèce est sans précédent, mais cette démonstration ne résulte nullement d'un préjugé quelconque dont Boggs et Kennedy s'inspireraient à l'encontre de Bahreïn. La démonstration résulte des conclusions présentées par Bahreïn qui sont en matière de délimitation maritime injustifiées en l'espèce.

499. Le rapport Boggs-Kennedy confirme que, en règle générale, la «ligne d'équidistance provisoire» doit être construite au moyen de ce que l'on appelle la méthode de masse terrestre à masse terrestre et que les lignes de partage sont «dérivées des côtes telles qu'elles sont actuellement représentées sur les cartes hydrographiques» (*ibid.*, p. 128, par. 3.2). Le rapport évoque également les difficultés éprouvées quand on veut établir avec précision quelle est la «laisse de basse mer» ainsi que les divers problèmes liés à la présence de nombreux éléments géographiques tels que les îles, en particulier les îles situées «du mauvais côté de la ligne» (*ibid.*, app. B., p. 146, par. 6).

500. En outre, pour opérer des délimitations équitables, Boggs et Kennedy ont suivi trois principes dont ils font état dans leur rapport: 1) ils ont appliqué la méthode de l'équidistance tant pour la délimitation longitudinale de la partie centrale du Golfe que pour les délimitations latérales, en particulier dans ce que le rapport appelle la «zone de Bahreïn»; 2) ils ont établi la ligne d'équidistance, dont ils ont fait leur méthode générale, en la construisant à partir de la côte ou de la façade continentale pertinente et en laissant délibérément de côté toutes les îles, îlots, rochers, récifs et hauts-fonds découvrants *détachés* de la côte du continent; et 3) ils ont construit cette ligne d'équidistance en se fondant *ou bien* sur la laisse de basse mer à laquelle ils donnaient la préférence, *ou bien* sur la laisse de haute mer, en fonction des connaissances techniques disponibles sur le secteur ou la formation maritime intéressée.

501. Pour terminer, je formulerai une précision et une réserve sur cette ligne Boggs-Kennedy, qui sont l'une et l'autre liées à la date du rapport, soit 1948. La précision est que la largeur de la mer territoriale n'était à l'époque que de 3 milles tant pour Bahreïn que pour Qatar. La réserve,

Autrement dit, «les côtes pertinentes de Bahreïn» de l'arrêt *ne sont nullement une côte ni une façade côtière*. Dans ces conditions, je n'estime pas nécessaire de m'étendre plus longuement sur «les côtes pertinentes de Bahreïn» figurant dans l'arrêt ni sur le fait que je rejette totalement ladite construction en tant qu'elle serait une «côte» véritable. On a refait la géographie. Les formations maritimes bahreïnites de caractère mineur dont il s'agit n'ont rien à voir avec le «skjærgaard» qui longe la côte norvégienne. En l'espèce, il existe «une ligne de séparation nette de la terre et de la mer» (*C.I.J. Recueil 1951*, p. 127). J'ajouterai simplement que le résultat concret, en l'espèce, de ce que je viens d'indiquer est que *la mer domine la terre* [en français dans le texte] bien que l'arrêt énonce le contraire sous la forme d'un principe général. Et ce n'est nullement le seul cas où l'on voit une conclusion correcte énoncée dans l'arrêt à la suite d'un principe de droit vidée plus tard de toute signification juridique dans ses applications concrètes.

F. La méthode utilisée dans l'arrêt pour construire la «ligne d'équidistance»

506. Une «ligne d'équidistance» est par définition une ligne située entre deux lignes, mais il n'y a dans l'arrêt aucune trace des *deux lignes* qui sont nécessaires à la construction de la «ligne d'équidistance». Normalement, ces lignes de base sont la ligne côtière de la masse terrestre ou la ligne de la façade côtière des deux Etats intéressés. Mais il n'est pas fait appel dans l'arrêt aux «lignes de base» de la méthode de masse terrestre à masse terrestre pour la construction de ce que l'arrêt appelle la «ligne d'équidistance».

507. Par ailleurs, une fois que sont exclues les «lignes de bases archipélagiques» et les «lignes de base droites», l'arrêt est *dépourvu de toute ligne bahreïnite servant de ligne de base* pour la construction de la «ligne d'équidistance» qui va être retenue. Aux fins de cette construction, l'opération menée dans l'arrêt consiste à remplacer la ligne de base de la côte continentale de Bahreïn par une série de «points de base» sélectionnés et situés sur les îlots, rochers et bancs de sable mineurs déjà évoqués et sur les hauts-fonds découvrants censés être situés dans la mer territoriale de Bahreïn seul. Ces formations maritimes sont plutôt éloignées l'une de l'autre. Elles ont été sélectionnées, d'après ce que dit l'arrêt, compte tenu des pièces de procédure et des arguments développés par Bahreïn dans la présente instance et des règles connexes qui ont été invoquées. Il n'y a pas de «point de base» bahreïnite qui soit situé sur la côte continentale de Bahreïn.

508. En ce qui concerne Qatar, les principaux «points de base» de la «ligne d'équidistance» qui figurent dans l'arrêt sont situés sur la côte continentale occidentale de Qatar, c'est-à-dire sur la péninsule qatarie. Mais Qatar n'a pas plaidé l'adoption de «points de base» mais plutôt l'adoption d'une «ligne de base», c'est-à-dire de sa côte continentale occidentale qui s'étend du nord vers le sud à partir de Ras Rakan et va

d'équidistance» est une méthode tout particulièrement raisonnable quand, comme c'est le cas dans le secteur sud de l'espace maritime des Parties, la ligne de partage opère une délimitation de mer territoriale et que l'espace maritime intéressé est couvert de multiples petites îles, îlots, rochers, récifs et hauts-fonds découvrants qui risqueraient par ailleurs de produire un effet de distorsion disproportionné pour aboutir finalement à un résultat inéquitable, ou qui risqueraient de mettre en danger la sécurité de l'une ou l'autre des Parties, voire de violer le principe de non-empiétement. Ces petites îles, îlots, rochers, récifs et hauts-fonds découvrants pourraient même être des «circonstances» justifiant des ajustements à apporter ultérieurement à une «ligne d'équidistance» normale, mais en aucun cas ne pourraient-ils servir de «points de base» pour la construction de la «ligne médiane» visée dans la première disposition de l'article 15 de la convention de 1982.

514. En outre, il ne faut absolument pas confondre l'opération par laquelle une juridiction ou tribunal international détermine les «lignes de base» d'une «ligne d'équidistance» construite par le tribunal aux fins d'une délimitation maritime, d'une part, et l'opération par laquelle un Etat détermine les lignes de base à partir desquelles il mesure la largeur de sa propre mer territoriale, de l'autre. La jurisprudence internationale est également tout à fait claire à cet égard. Il en découle que ces lignes de base coïncident peut-être parfois mais ne coïncident pas dans d'autres cas. Ces deux types de lignes de base n'ont pas le même auteur, ni le même objet, ni la même fin, ni la même fonction. En l'espèce, la question de savoir si ces deux types de lignes de base coïncident ne se pose même pas. Les Parties ont toutes les deux fait savoir à la Cour qu'elles n'ont pas encore établi les lignes de base voulues pour mesurer la limite extérieure de leurs deux mers territoriales. On ne se retrouve par conséquent pas du tout dans la situation de l'affaire *Jan Mayen* dans laquelle les deux Parties avaient déjà établi les lignes de base en question avant d'engager leur instance devant la Cour, n'ont pas contesté ces lignes de base au cours de la procédure et dans laquelle il n'y avait pas de délimitation de mer territoriale en litige, alors que c'est le cas en l'espèce.

515. Les «points de base» de la «ligne d'équidistance» adoptée dans l'arrêt sont situés sur la *laisse de basse mer* des «côtes pertinentes» telles que celles-ci sont construites dans l'arrêt. C'est là la règle générale et, par suite, je peux accepter qu'il en soit ainsi *à condition que* ces laisses de basse mer soient clairement indiquées sur les cartes marines à grande échelle reconnues officiellement par l'Etat côtier. Or, telle n'est vraiment pas la situation en l'espèce. Par suite, la laisse de basse mer introduit dans l'instance un nouvel élément subjectif qui intervient dans l'opération de délimitation réalisée dans l'arrêt.

G. La «zone de la délimitation» n'est pas définie dans l'arrêt

516. Contrairement à la pratique générale, l'arrêt s'abstient de définir l'espace maritime dans lequel la délimitation doit être opérée. Cela n'a

significative» et il aurait fallu en tenir compte. Mais comment l'arrêt peut-il comparer les côtes pertinentes des Parties du point de vue de leur longueur, vu la définition qu'il donne des «côtes pertinentes de Bahreïn»?

521. La réponse qui est donnée dans l'arrêt à la question ci-dessus est que, puisque les îles Hawar sont attribuées à Bahreïn, les côtes pertinentes des Parties ont la même ou environ la même longueur, mais il n'est pas donné dans l'arrêt de chiffre précis à l'appui de cette conclusion. A cet égard comme à d'autres, la technique retenue dans l'arrêt consiste à donner partiellement effet ou à ne pas donner d'effet du tout, lors de la délimitation, à certaines îles mineures et à d'autres formations maritimes, comme en témoigne le tracé de la limite maritime unique définie dans l'arrêt. Et parce qu'il n'est pas communiqué de chiffre précis sur la longueur des côtes pertinentes des Parties et que «l'espace à délimiter» n'est pas défini, il n'est pas possible de vérifier par application du *critère de proportionnalité* si le résultat de la délimitation opérée dans l'arrêt est bien équitable. Il n'est fait aucune allusion dans l'arrêt à une telle vérification ou test, ce qui est encore une de ses innovations.

522. Quant à certains autres critères géographiques pertinents dont il convient d'évaluer le poids lors d'une délimitation maritime, par exemple l'orientation générale et la configuration des côtes véritablement pertinentes des Parties, le rapport entre ces côtes, l'emplacement de petites îles, îlots, rochers, récifs et hauts-fonds découvrants et la distance qui sépare ces formations desdites côtes et qui les sépare entre elles, etc., ce ne sont pas des critères géographiques auxquels l'arrêt s'intéresse particulièrement, encore que certaines distorsions importantes précisément imputables à la non-prise en compte de ces éléments soient par ailleurs corrigées. Par exemple, lors de la définition de la limite maritime unique finalement adoptée, le haut-fond découvrant de Fasht al Azm, formation qui ne suit pas l'orientation générale de la côte continentale de Bahreïn — elle est en fait verticale par rapport à cette orientation générale —, crée un effet de distorsion considérable qui pourrait gravement compromettre l'équité de la délimitation. Là encore, toutes ces indications montrent que, du point de vue de l'arrêt, le souci géographique principal ne correspondait pas à la géographie de l'espace maritime à délimiter dans son ensemble, mais correspondait aux caractéristiques géographiques de l'une des Parties: l'Etat de Bahreïn. Nous nous opposons parce qu'elle n'est pas justifiée en droit à cette technique générale adoptée dans l'arrêt pour procéder à la délimitation maritime confiée à la Cour par les deux Parties.

2. *Les hauts-fonds de Qit'at Jaradah et Fasht ad Dibal*

523. Dans la présente espèce, ces hauts-fonds posent un double problème: *a)* quelle est leur qualification en tant que formation géographique maritime? et *b)* comment déterminer laquelle des deux Parties a souveraineté sur ces deux hauts-fonds?

524. En ce qui concerne le premier point, Fasht ad Dibal ne fait pas

fond découvrant et était par conséquent susceptible d'appropriation selon les modes d'acquisition de territoires terrestres (*C.I.J. Recueil 1992*, p. 570, par. 356). Dibal et Jaradah sont toutefois des hauts-fonds découvrants. C'est pourquoi j'estime personnellement qu'on doit définir qui exerce la souveraineté sur Dibal et Jaradah en faisant appel aux règles du droit de la mer applicables, en l'occurrence à la délimitation maritime et non à celle du droit régissant l'acquisition de territoires terrestres (*terra firma*). Le droit de la mer prend en considération l'*endroit où est situé* le haut-fond découvrant intéressé et par conséquent la distance qui le sépare de la côte pertinente du continent, c'est-à-dire que l'on tiendra compte, par exemple, du fait que le haut-fond sera situé dans la mer territoriale de l'Etat considéré ou bien au-delà de la limite extérieure de ladite mer territoriale. Comme il est dit dans l'ouvrage d'Oppenheim intitulé *International Law* (9e éd.): «La haute mer étant libre, elle ne saurait faire l'objet d'acquisition de souveraineté par occupation; il en va de même pour les simples récifs ou bancs situés en mer libre, même s'il est permis d'y ériger des phares.» (Mémoire de Qatar, vol. 8, annexe III.307, p. 543.) Depuis 1992, les *hauts-fonds* de Jaradah et Dibal sont géographiquement situés dans la mer territoriale de Qatar dont la largeur est désormais de 12 milles. Depuis 1993, Jaradah est situé dans la zone de chevauchement des mers territoriales de 12 milles de Qatar et de Bahreïn, mais est plus proche de Qatar que de Bahreïn. A mon avis, ces deux hauts-fonds devraient par conséquent relever de la souveraineté de l'Etat de Qatar.

527. La décision britannique de 1947 qui fait état des «droits souverains» de Bahreïn sur Dibal et Jaradah (ladite décision n'étant pas opposable à Qatar, comme le présent arrêt le reconnaît) ne repose sur aucun motif juridique accepté comme tel puisqu'à l'époque Dibal et Jaradah étaient situés en haute mer et, de surcroît, du côté qatari de la ligne de partage des fonds marins elle-même, qui était due aux Britanniques. En ce qui concerne la question de la souveraineté sur ces deux hauts-fonds découvrants, je suis d'avis qu'il faut y répondre par le tracé de la limite maritime unique une fois que celle-ci sera adoptée par la Cour conformément au droit de la mer.

528. La limite retenue dans l'arrêt laisse Fasht ad Dibal du côté qatari de ladite limite, c'est-à-dire que, selon l'arrêt, ce haut-fond découvrant relève de la souveraineté de Qatar. Je souscris à cette décision unanime de la Cour. Mais, en ce qui concerne Qit'at Jaradah, que la majorité qualifie d'île, l'arrêt en a attribué la souveraineté à Bahreïn en s'appuyant sur les règles de droit international applicables à l'acquisition de territoires terrestres (*terra firma*). Or aucun élément de preuve versé au dossier ne conforte cette conclusion tout à fait extraordinaire de l'arrêt. Les «activités» qui sont évoquées dans le raisonnement exposé dans l'arrêt ne sont pas susceptibles d'engendrer selon le droit international le moindre titre sur un quelconque territoire terrestre. Il s'agit d'«activités» minimales, irrégulières — et non pas d'«*effectivités*» réalisées par Bahreïn à titre de souverain.

«A. GULF PETROCHEMICAL INDUSTRIES CO.:

Il est prévu que le site du projet (fig. 9) sera achevé le 2 février 1982.

L'entreprise Van Oord (International) a été désignée comme entrepreneur pour procéder à l'assèchement et au dragage du site.

Le site asséché sur lequel on a construit l'installation du site pétrochimique est d'approximativement 600 mètres de large par 1 000 mètres de long, il est relié à Sitrah par une chaussée d'accès d'une longueur de 1 250 mètres et à la chaussée construite par la BAPCO par une chaussée de service de 500 mètres de long.

Les matériaux nécessaires à l'assèchement et à l'installation du site ont été pris dans une zone située entre les jetées de la BAPCO et de l'ALBA.

Deux chenaux seront dragués, l'un pour le refroidissement de l'eau, dont la profondeur sera d'environ 7 mètres et la longueur d'environ 3,5 kilomètres. *L'autre chenal doit servir à remplacer le chenal existant qu'empruntaient les pêcheurs et qui a été comblé dans certaines parties par des matériaux utilisés pour l'assèchement (fig. 9); il sera dragué à une profondeur de 3,5 mètres au minimum, sur une distance de 1100 mètres.* La quantité de matériaux au-dessus de cette profondeur et à l'intérieur de la section du chenal est d'approximativement 110 000 mètres cubes, et la largeur balisée du chenal sera de 60 mètres. Les matériaux dragués seront placés à l'est du chenal, pour former une ou plusieurs îles, selon que de besoin.» (Contre-mémoire de Qatar, vol. 1, p. 271, par. 8.50; les italiques sont de moi.)

533. Il suit de là que je ne peux pas souscrire à une conclusion quelconque dont l'effet est que la laisse de basse mer sur l'île de Sitrah correspond à la limite située la plus à l'est de la laisse de basse mer sur Fasht al Azm. Ce n'est pas le cas. C'est-à-dire que Fasht al Azm ne peut pas fournir de «points de base» aux fins de la construction d'une «ligne d'équidistance» telle que celle qui est construite dans l'arrêt *parce qu'il s'agit d'un haut-fond découvrant qui n'est pas situé dans la mer territoriale d'un seul Etat mais dans celle des deux Etats parties.* Il faut de toute façon que l'arrêt propose diverses solutions dans la zone aux fins du tracé de sa propre «ligne d'équidistance», ce qui prouve une fois encore la fragilité de ladite «ligne d'équidistance» et de ses fondements théoriques.

4. La délimitation dans la zone maritime des îles Hawar

534. Comme je le souligne dans toute cette partie de la présente opinion, n'importe quelle délimitation maritime, y compris une délimitation de mers territoriales, doit produire un résultat «équitable». Mais, pour produire pareil résultat dans l'espace maritime où sont situées les îles Hawar, il est indispensable d'adopter une solution juridique qui fasse preuve d'imagination.

535. Pourquoi? Parce que les îles Hawar ainsi que leur plateau et les

surrounding waters, are *geographically* part and parcel of the coast of the peninsula of Qatar and are located in the shelf and territorial sea of the State of Qatar. More precisely, they naturally form the western coast of the State of Qatar, conforming indeed to the geographical configuration of that coast. There cannot be the slightest geographical doubt that this is the case; especially as all the islands of the group also lie within the 12-mile territorial sea belt measured from the said mainland coast and wholly or partly within a 3-mile belt measured from the same mainland coast (including half of Jazirat Hawar). Moreover, the Hawar Islands are situated in the middle of, or mid-way along, the western mainland coast of Qatar dividing the part of that coast to the north of the Hawar Islands and the part of that coast to the south of the Hawar Islands.

536. It follows from this geographical situation that the attribution by the present Judgment of the Hawar Islands to Bahrain creates a *special circumstance* of the highest political and security importance, as well as for maritime communications, which should have been duly taken into account so as to achieve an equitable maritime delimitation. The attribution to Bahrain not only of the Hawar Islands as such, but also of the waters between the western coast of Jazirat Hawar and other smaller northern islands of the group and the eastern coast of Bahrain island as Bahraini territorial waters, leads indeed to an *extraordinary disproportionate effect* in the maritime delimitation of that area *because the Hawar Islands are too close to, indeed they are in fact part of, the Qatari mainland coast facing them.* It also means that the mainland coast of Qatar facing the Hawar Islands is altogether excluded in practice from generating territorial sea rights. We do not think that the general law of the sea governing maritime delimitations permits such situations.

537. In fact, the relevant international jurisprudence provides legal remedies (criteria as well as practical methods) for the solution in an equitable and balanced manner of situations of this kind when they occur in given maritime delimitations. As stated in the 1977 Award of the British/French Arbitral Tribunal concerning the delimitation of the continental shelf in the English Channel *(Canal de la Manche)* in connection with the Channel Islands *(Iles anglo-normandes)*:

> "The existence of the Channel Islands close to the French coast, if permitted to divert the course of that mid-Channel median line, effects a radical distortion of the boundary creative of inequity. The case is quite different from that of small islands on the right side of or close to the median line, and it is also quite different from the case where numerous islands stretch out one after another long distances from the mainland. The precedents of semi-enclaves, arising out of

> such cases, which are invoked by the United Kingdom, do not, therefore, seem to the Court to be in point. The Channel Islands are not only "on the wrong side' of the mid-Channel median line but wholly detached geographically from the United Kingdom." (*RIIA*, Vol. XVIII, p. 94.)

538. A similar *mutatis mutandis* geographical/political situation exists in the present case. The Hawar Islands, and their shelf and surrounding waters, are both geographically Qatari and "wholly detached geographically from" the State of Bahrain. In such circumstances, since, according to the Judgment, they are politically Bahraini territory, an equidistance or median line between the Hawar Islands and the Qatari mainland coast facing the group in effect creates "a radical distortion of the boundary creative of inequity". The Judgment should have avoided such an extraordinary distortion by making the Hawar Islands *an enclave*, as the Anglo/French Arbitral Tribunal did in the case of the Channel Islands *(Iles anglo-normandes)*.

539. In my opinion, the Hawar Islands constitute a "special circumstance" which is *superviniens* to the attribution by the Judgment of those Islands to Bahrain. In other words, it is a "special circumstance" created by the very Judgment itself. Until the reading of the Judgment, sovereignty over the Hawar Islands was *in dispute* and the waters between the Hawars and Bahrain island were the territorial sea of the State of Qatar or an area of overlapping territorial seas of both States parties. Moreover, it is not possible to ignore either the fact that until 1992/1993 part of the waters to the east of the Hawar Islands were high seas, for example at the time of the 1947 British Boggs-Kennedy sea-bed dividing lines.

540. The Judgment should have avoided the extraordinary distortion described above by applying in the Hawar Islands maritime area the solution applied to the Channel Islands *(Iles anglo-normandes)* in 1977 by the Anglo/French Arbitral Tribunal, namely making the Hawar Islands maritime area an enclave. The present Judgment does not do that. It applies to the delimitation in the Hawar Islands maritime area *the semi-enclave method*, which may be appropriated in the case of *national coastal islands*, but creates inequity in the case of *foreign coastal islands*. I wholeheartedly disagree with the Judgment in this respect. Moreover, the fact that in the present case the semi-enclave method applied concerns a territorial sea area is a source of more inequitable effects than in the Channel Islands *(Iles anglo-normandes)* case. It is never a good solution in international law to divide the territorial extent of a given neighbouring coastal sovereignty when this could, wholly or partly, be avoided.

541. Furthermore, when the United Kingdom proposed to apply the

semi-enclave method to the British Channel Islands *(îles anglo-normandes)*, it underlined, *inter alia*, that the Channel Islands had been a dependency of the British Crown for several hundred years, have their own legislative assemblies, fiscal and legal system, courts of law and systems of local administration, as well as their own coinage and postal service. In other words, that the Channel Islands enjoy an important degree of political, legislative, administrative and economic independence of ancient foundation. Nothing of the kind applies to the Hawar Islands. Moreover, most of these islands are today still uninhabited. This is to say that, in the case of the Hawar Islands, the historical, political demographic, etc., circumstances do not justify at all, in my view, the application of the semi-enclave method to the above-mentioned coastal islands as the Judgment does in favour of Bahrain.

542. For an equitable delimitation in the Hawar Islands maritime area — following the decision of the majority on sovereignty over those islands — it would have been necessary to evaluate the situation from the standpoint of equity. However the Judgment disregards the Hawar Islands as a "special circumstance" for the purpose of defining the course of the single maritime boundary in that area, giving an additional dimension to the attribution of the Hawar Islands to Bahrain on the basis of a "decision" that, as explained in Part I of this opinion, we consider to be an invalid "decision" in international law.

543. The remedy for avoiding such a result would have been to apply the *enclave method* in the area concerned and this could have been done in several ways. For example, by defining to the west of the Hawar Islands an area of common territorial sea or by creating a Qatari corridor of territorial sea between the Hawar Islands and Bahrain island. The first of these two alternatives would not pose any problem of overflight. A Qatari territorial sea corridor poses that problem, but it could have been solved by giving Bahrain the right to freely overfly over the said corridor. These kinds of alternative solutions should have been achieved through a balance of equities approach.

544. However, although none of these alternatives was decided upon, the Judgment recognizes that, in the Hawar Islands maritime area, the course of the single maritime boundary raises a particular problem, and this explains operative subparagraph 2 of the Judgment, which reads as follows:

> "THE COURT,
>
> *(a)* *Finds* that the State of Bahrain has sovereignty over the Hawar Islands;
>
> *(b)* *Recalls that vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law*" (emphasis added).

545. The right of innocent passage of the vessels of the State of Qatar in the whole of the maritime area defined above therefore falls within the

scope of the *res judicata* of the present Judgment concerning the Hawar Islands. As such, that right cannot be questioned or jeopardized in its concrete applications in the relations between the State of Bahrain and the State of Qatar defined by the present Judgment.

I. Some Concluding Considerations on the Course and Equitableness of the Single Maritime Boundary in the Judgment

546. The single maritime boundary of the Judgment as a whole gives Bahrain more extended maritime areas than the 1947 British sea-bed dividing line and the Boggs-Kennedy sea-bed dividing line. This is certainly the case in the Parties' southern sector of the delimitation area with respect to these terms of reference. However, Qatar's gains in the Parties' northern sector of the delimitation area are superior to Bahrain's there. This is quite important. Thus, if one takes the single maritime boundary as a whole, there is some balance in the result of the delimitation.

547. The result in the Parties' southern sector is consequential on the method followed by the Court when defining the "Bahrain's relevant coasts" and the alleged "equidistance line" as well as on the "special circumstances" identified and applied with a view to adjusting that "equidistance line". It is true that in a number of cases the "equidistance line" was adjusted in favour of Qatar, but such adjustments were not sufficient to achieve an equitable result in the southern sector because the point of departure, the "equidistance line of the Judgment", is not a true equidistance or median line between the mainland *coasts* of the two States Parties.

548. However, bearing in mind that an "equitable result" is a criterion which moves between parameters, in other words, there could be more than one line which could be characterized as an "equitable line", we consider that the course of the single maritime boundary, generally speaking, as *from about the Quita'a el Erge area to the last point of the single maritime boundary in the Parties' northern sector of the delimitation area* may be regarded as relatively equitable, although Qit'at Jaradah and Fasht Ben Thur are on the western side of the boundary line and not, as they should be, on its eastern side. It is with this reservation in mind that we nevertheless accept that part of the single maritime boundary defined by the Judgment.

549. However, *in the Hawar Islands maritime area,* the delimitation effected by the Judgment is *not* an equitable delimitation, these islands being *foreign* coastal islands by virtue of the Judgment's finding on the sovereignty over the Hawar Islands. This explains our negative vote on the single maritime boundary defined by the Judgment once it was decided that the boundary line should be voted upon as a whole.

FINAL REMARKS OF THE OPINION

550. By the present Judgment, the Court finds that the State of Qatar has sovereignty over Zubarah and Janan Island, including Hadd Janan, and that the low-tide elevation of Fasht ad Dibal also falls under the sovereignty of the State of Qatar. Moreover, the adopted course of the single maritime boundary (i) likewise places the low-tide elevations of Qit'at ash Shajarah and Qita'a el Erge under the sovereignty of the State of Qatar and (ii) leaves to the State of Qatar most of the continental shelf and superjacent waters of the Parties' northern sector of the disputed maritime delimitation area with all its living and non-living resources. Lastly, the Court reminds us that the vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from other Bahraini islands the right of innocent passage accorded by customary international law, thus placing this reminder within the scope of the *res judicata* of the present Judgment.

551. On the other hand, the Court finds that the State of Bahrain has sovereignty over the Hawar Islands and Qit'at Jaradah. Moreover, the adopted course of the single maritime boundary leaves to the State of Bahrain (i) the low-tide elevations of Fasht Ben Thur and Fasht al Azm; and (ii) most of the territorial sea waters in dispute in the Parties' southern sector of the maritime delimitation area as Bahraini territorial sea. As stated, I consider that Qit'at Jaradah is not an island but a low-tide elevation and that as such it is not a maritime feature, sovereignty over which the State of Bahrain could have acquired by occupation. The single maritime boundary should have left that low-tide elevation on the Qatari side of the line. But this is not the reason for my dissent from the present Judgment.

552. The reason for my dissent relates to the finding of the majority on the Hawar Islands dispute, the legal basis of that finding and its consequences for the maritime delimitation. In effect, this finding fails to acknowledge (1) the *original title* and corresponding sovereignty of the State of Qatar over the Hawar Islands, a title established through a process of historical consolidation and general recognition; and (2) the absence of any better or prevailing *derivative title* of the State of Bahrain over the Hawar Islands. To this it should be added that the resulting *superveniens* maritime "special circumstance" is not treated as such in the definition of the course of the single maritime boundary in the Hawar Islands maritime area. These conclusions of the majority are, in my opinion, wholly unjustified in the light of the applicable general international law, the circumstances of the case and the evidence submitted by the Parties with respect to the Hawar Islands dispute.

553. These conclusions are in fact quite erroneous in international law and I must state, to my great regret, that as a result of these conclusions the State of Qatar — which came to the Court in order, *inter alia*, to

remedy a breach of its territorial integrity concerning the Hawar Islands through the peaceful means of judicial settlement — in that respect did not obtain from the Court the judicial answer which the merits of its case on the Hawar Islands dispute deserved. This example makes me wonder whether judicial settlement is in fact a means of redressing notorious territorial usurpations by effecting the peaceful change that the re-establishment of international law may require in a given situation. If the majority has been unable to find flaws in the consent such as induced error, fraudulent conduct and coercion in the evidence submitted to the Court in the present case, I am afraid that they do not lend themselves to proof in future cases. In any case, *quieta non movere* does not provide an explanation in the current case because the Judgment *non movere* in the Hawar Islands dispute does not apply to the definition of the single maritime boundary. In the maritime delimitation aspect of the case, the Judgment is *movere*; it opts for change. But, the *non movere,* like the *movere* of the majority, seems to be in one direction always, in a manner which in my view does not coincide with the normative requirements of applicable general international law and/or the relative weight of the arguments and evidence submitted by the Parties. Last but not least, the considerations in the Judgment's reasoning concerning the finding on the Hawar Islands dispute could not be more fragile. In effect, the reasoning is unable, in my opinion, to duly motivate the finding of the majority.

554. How is it possible to explain this finding on the basis of consent to a 1938-1939 British procedure whose outcome — the 1939 British "decision" — was clearly and obviously an invalid decision in international law, both formally and inherently, at the time of its adoption? The resurrection in the year 2001 of an invalid colonially minded decision linked to oil interests to resolve a disputed territorial question between two States is more than amazing and for me a quite unacceptable legal proposition. The Judgment's line of reasoning on consent is to all practical purposes exclusively focused on Qatar. But the 1938-1939 British procedure was a procedure with three participants. Where in the reasoning is the analysis of consent with respect to the other two participants? It seems also to have been forgotten that the British representatives in the Gulf who negotiated with Qatar and Bahrain, that is, Fowle, Weightman and others, and the British officials concerned in London, such as those of the India Office, were agents of the British Government acting in that capacity. Thus, their acts, to the extent that they are proven to be vitiated, are vitiated acts of the British Government or imputable to the British Government in international law, namely to the very Government which made the "1939 decision". Moreover, the reasoning of the Judgment does not even explicitly consider the question whether the

1939 British "decision" was valid at the time from the standpoint of the essential requirements of the law as regards validity.

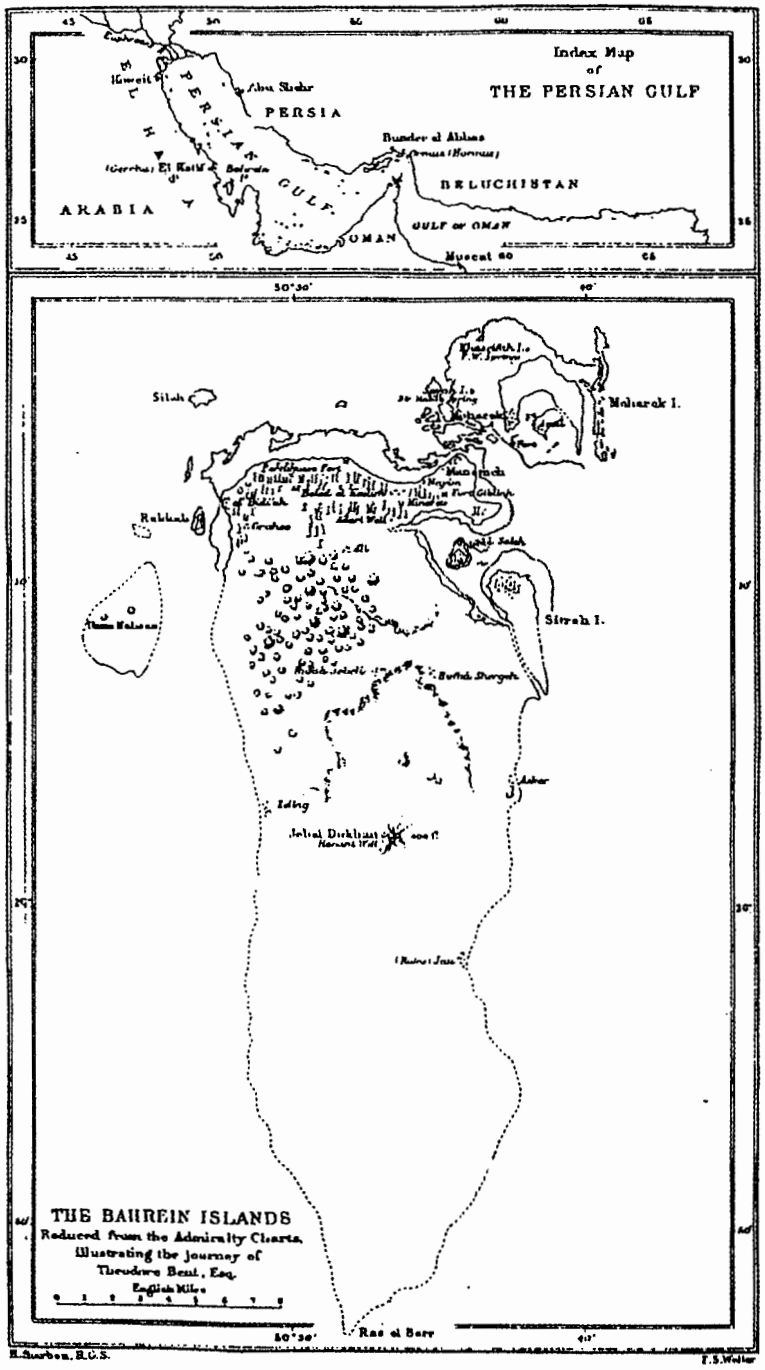
555. Furthermore, inter-temporal validity is quite alien to the reasoning of the Judgment. How may it be affirmed that, on the basis of the consent determined by the Judgment, the 1939 British "decision" has legally binding effects today between the Parties without analysing whether the "consent" to the 1938-1939 British procedure that has been determined may be considered valid consent under the international law in force at the time of the adoption of the present Judgment? To conclude that this is so would have necessitated asking oneself questions about, for example, the possible existence of *jus cogens superveniens* rules or *erga omnes* imperative obligations, as well as the possible compatibility of the consent concerned with fundamental principles of the Charter of the United Nations and of the present international legal order.

556. It follows that I am unable to accept the conclusion that the State of Bahrain is the holder of a derivative title to the Hawar Islands on the basis of consent as determined by the Judgment. The reality and validity of that consent — as well as the permanency of its legally binding effects for the Parties is *not* adequately and convincingly explained in the reasoning of the Judgment. At the same time, having found no other relevant derivative title or titles of Bahrain, the original title of Qatar to the Hawar Islands cannot for me but prevail as between the Parties in the dispute on the Hawar Islands in the present case.

(Signed) Santiago TORRES BERNÁRDEZ.

Map No. 1 (1890)
(No. 12 in Qatari Atlas)

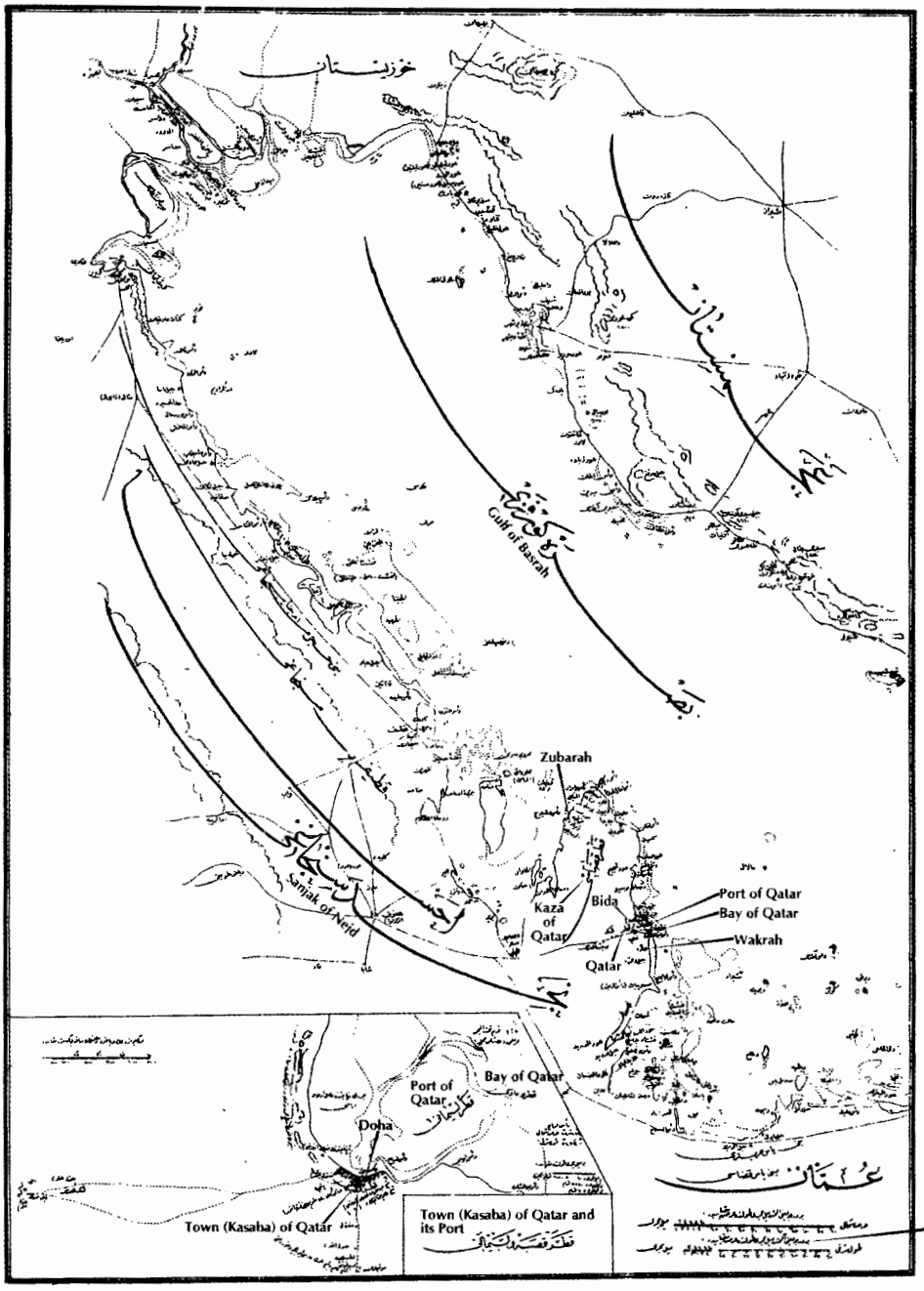
Carte n° 1 (1890)
(n° 12 dans l'atlas de Qatar)



Publ. for the Proceedings of the Royal Geographical Society, 1890.

Map No. 2 (1890)
(No. 15 in Qatari Atlas/translation)

Carte n° 2 (1890)
(n° 15 dans l'atlas de Qatar/traduction)

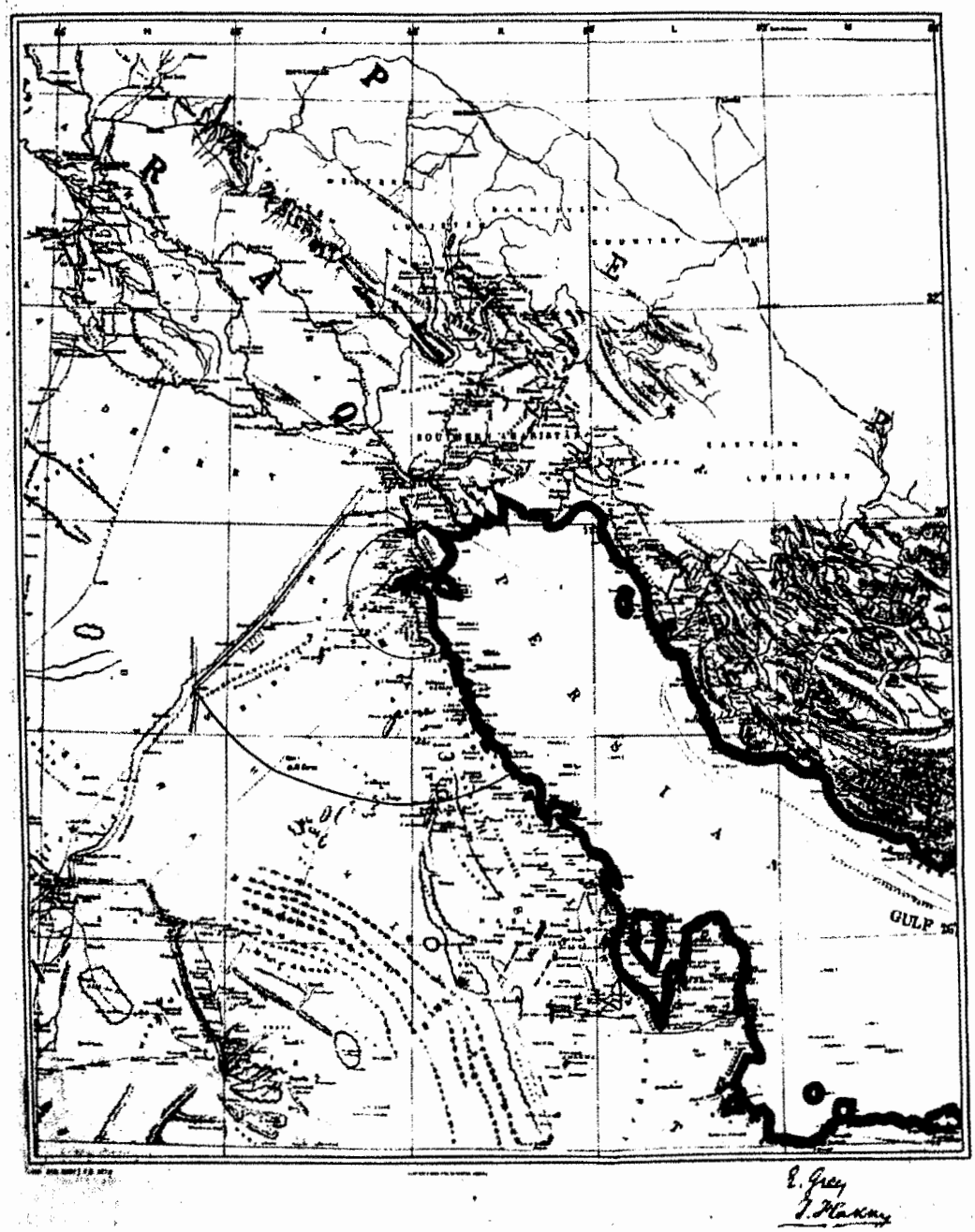


Map No. 3 (1913)
(No. 46 in Qatari Atlas)

Carte n° 3 (1913)
(n° 46 dans l'atlas de Qatar)

Annexe V.

MAP TO SHOW THE LIMITS OF KOWEIT AND ADJACENT COUNTRY.

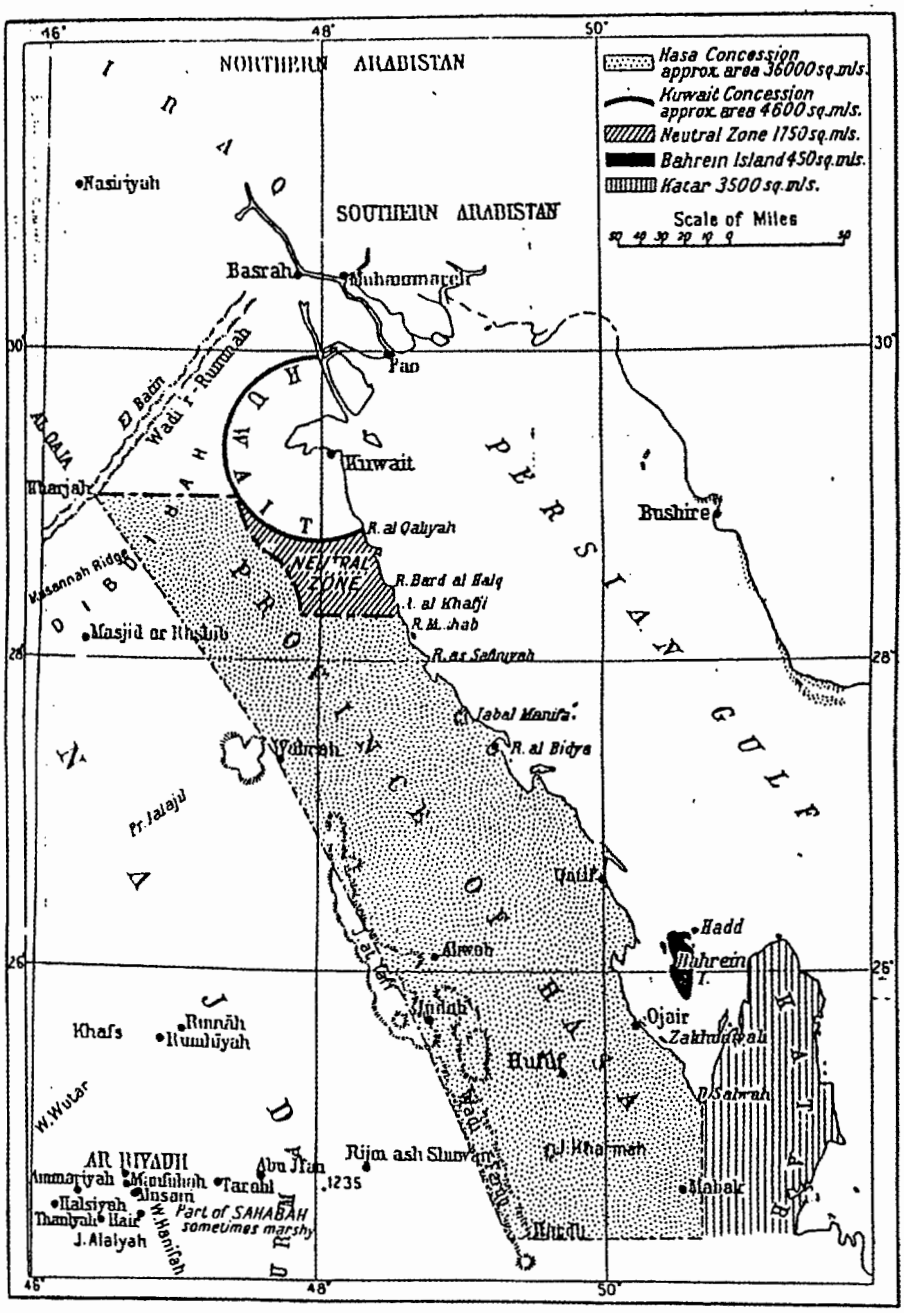


Map No. 4 (1920)
(No. 58 in Qatari Atlas)

Carte n° 4 (1920)
(n° 58 dans l'atlas de Qatar)

Map No. 5 (1923)
(No. 71 in Qatari Atlas)

Carte n° 5 (1923)
(n° 71 dans l'atlas de Qatar)



MAP PREPARED BY MAJOR HOLMES

Map No. 6 (1933)
(No. 77 in Qatari Atlas)

Carte n° 6 (1933)
(n° 77 dans l'atlas de Qatar)