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YEAR 2000

Public sitting

held on Thursday 8 June 2000, at 10 a.m., at the Peace Palace,

President Guillaume presiding

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

VERBATIM RECORD

ANNEE 2000

Audience publique

tenue le jeudi 8 juin 2000, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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Mr. Sami Abushaikha, Legal Expert,

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Dr. Ali bin Fetais Al-Meri, Director of Legal Department, Diwan Amiri,
Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I (Panthéon-Sorbonne),
Mr. Jean Salmon, Professor emeritus of International Law, Université libre de Bruxelles, Member of the Institut de droit international,
Mr. R. K. P. Shankardass, Senior Advocate, Supreme Court of India, Former President of the International Bar Association,
Sir Ian Sinclair, K.C.M.G., Q.C., Barrister at Law, Member of the Institute of International Law,
Sir Francis Vallat, G.B.E., K.C.M.G., Q.C., Professor emeritus of International Law, University of London, Member emeritus of the Institut de droit international,
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Ms Sonja Knijnsberg, Freshfields,
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M. Andrew Newcombe, cabinet Freshfields, Paris, membre du barreau de la Colombie britannique,
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M. John Wilkinson, ancien maître de conférence à l'Université d'Oxford, membre émérite du Collège Saint Hugh, Oxford,

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S. Exc. le cheikh Abdul-Aziz bin Mubarak Al Khalifa, ambassadeur de l'Etat de Bahreïn aux Pays-Bas,
S. Exc. M. Mohammed Jaber Al-Ansari, conseiller de Son Altesse l'émir de Bahreïn,
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Mme Sonja Knijnsberg, cabinet Freshfields,
M. Kevin Mottram, cabinet Freshfields,
M. Yasser Shaheen, second secrétaire, ministère des affaires étrangères de l'Etat de Bahreïn,

comme personnel administratif.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et nous commençons aujourd'hui la présentation de l'Etat de Bahreïn. Je vous prie d'abord d'excuser le retard avec lequel la Cour ouvre cette séance, qui a été dû à des consultations que j'ai eues avec les Parties. Je vais maintenant donner la parole à S. Exc. M. Jawad Salim Al-Arayed, agent de l'Etat de Bahreïn.

Mr. AL-ARAYED: Thank you Mr. President.

1. Mr. President and honourable Members of the Court:

2. I am honoured and pleased to stand before you and express the State of Bahrain's respect for the International Court of Justice, and to make my voice an echo of our people's deepest hope that your decision will enable us to look to the future with serenity and with confidence.

3. The members of our legal team are in the list before you, and in the interest of time, I shall not make individual introductions.

4. Mr. President, ours is a very small country. With 914 people per square kilometre — 914 people — Bahrain is the fifth most densely populated country in the world. Although there are more than twice as many Bahrainis as there are Qataris, Qatar's landmass is 16 times greater than ours.

5. You will understand our depth of feeling when a neighbour, so richly blessed in land territory, seeks to take away from us one third of the precious space in which we have to live, and where we must nurture future generations.

6. Indeed, if Qatar were to take the Hawar Islands from us, and if its views on the maritime boundaries prevailed, our air force would need permission to use Qatar's airspace simply to land in Bahrain. The same would be true of the larger, commercial airplanes that serve our small land.

7. In other words, not only would our country be amputated — but even the sovereignty remaining to us would be intolerably diminished.

8. Qatar has relentlessly pursued its expansionism into our territory. In 1937 it expelled our people from the Zubarah region by force. To this day, the area remains under Qatar's *de facto* control. If we had not erected defensive fortifications on the Hawar Islands, Qatar would undoubtedly have invaded them also.

9. In 1986, Qatar mounted an armed attack on Fasht ad Dibal, one of our principal maritime features. Fortunately Arab and international pressure drove them out. Once again, if we had not shown our determination to defend the Hawar Islands, we believe that Qatar would have attacked them too.

10. Until today, our state of readiness on the Hawar Islands remains high. Qatar's *de facto* occupation of the Zubarah region is unacceptable as a matter of principle. Force does not create title. Might is not right.

11. No less regrettably, Qatari expansionism has also involved an abuse of the legal process. As you have seen in our Memorials, Qatar first sought to raise a claim over the Hawar Islands more than 60 years ago. In 1939, Great Britain rejected this claim because Qatar had failed to show any evidence that it had ever had a presence on the islands. Its only argument then, as now, was based on proximity.

12. In more recent years, recognizing that proximity by itself creates no sovereign rights, Qatar somehow collected a thick file of 82 supposedly historical documents, which no historian had ever seen before. These documents purported to show a history of Qatari control over the Hawar Islands. Then Qatar made a unilateral application to this Court, and based the principal contentions in support of its claim on those documents. As Bahrain was able to prove, every one of those documents is a forgery. Imagine the damage that would have been done to the administration of international justice — indeed to the very position of this Court — if *Bahrain had not* exposed those forgeries.

13. As for the Hawar Islands, how many times must Bahrain litigate this issue? There is a long-established legal principle that uninterrupted possession and administration creates a title which cannot be dissolved by the greed of a neighbour, who has nothing more to rely on than mere proximity. There is no rule in national law that says "it's close" — "I want it" — "therefore it is mine"? And certainly there is no such rule in international law.

14. How can the finality of the 1939 decision, which confirmed Bahrain's effective control over the Hawar Islands, now be overruled?

15. But beyond those principles, I do not wish to leave you under any misapprehension as to the intensity of the feelings of the people of Bahrain. The Hawar Islands are part of their

homeland. Any thought of separating those islands from Bahrain would be intolerable to them. Many thousands of Bahrainis are members of families, who have had homes on those islands for generations. Their ancestors and relatives are buried there. Those islands are an integral part of the fabric of our little country.

16. You will therefore understand, Mr. President, that this case touches the heart of Bahrain's existence. For Qatar, on the other hand, this case is an adventure without risk. This explains why Qatar has acted as though it has nothing to lose in making its unilateral Application.

17. Recently, there has been an improvement in the atmosphere between our two countries. Qatar has said that it will not rely on the 82 forged documents by letter to the Court dated in December 1998. Its distinguished Agent — very properly — expressed regrets. The Amir of Qatar has taken the initiative of seeking bilateral negotiations with Bahrain over a wide range of issues. This resulted in his very welcome visits to our country.

18. The people of Bahrain welcome these signs of a willingness to accommodate and co-operate. We do not wish our relations to be poisoned by the ghosts, and the rancour, of past misunderstandings.

19. The future is where we and our children will live, and that is why we hope that we can pursue our bilateral relations in a constructive and friendly, forward-looking manner.

20. With your permission, Mr. President, as we go forward in the coming sessions, counsel will not read out citations during the oral proceedings. The citations will be provided to the Registry and I would request that they be included in the written records.

21. And so, Mr. President and distinguished Members of the Court, I thank you for listening with such care to my presentation to you, of the concerns and anxieties of my small nation. Bahrain considers that Qatar's forcible and illegal annexation of Zubarah cannot be upheld. As for the Hawar Islands, they are a vital part of our land. They have been ours for generations and we ask you to confirm our title.

22. Mr. President, I would ask you directly to call on Sir Elihu Lauterpacht to give an overview of our substantive territorial contentions.

23. And so, the Bahrain people will await your judgment with confidence that justice will prevail. My people are rooted in their land and the Hawar Islands are part of the soil of Bahrain. Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Minister. May I now give the floor to Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT:

I. INTRODUCTION

1. Mr. President and Members of the Court,

2. Once again, I have the privilege and pleasure of appearing before you. The party that I have the honour now to represent is the State of Bahrain.

3. Despite the 16 changes of scene that the Court has had during the presentation of the Claimant's opening, this was never, and is not now, a complex case. But it is not the same case now as it was when it was first set out in the Claimant's Memorial in September 1996.

4. It is true that the main questions in the case remain the same. The questions of title to the Hawar Islands and Zubarah are still the principal territorial issues. And on the resolution of those questions depends much of the other principal part of the case — the maritime delimitation.

5. But the manner in which the Qatari claim to the Hawars has been developed before the Court has changed fundamentally since the Qatar Memorial and Counter-Memorial. In considering the implications of that fact, Bahrain is bound to point to the reasons for it.

6. The reason is the withdrawal by Qatar of reliance upon what have euphemistically been called "the 82 documents" or the "non-authentic" documents. But no words can conceal the fact that those documents are forgeries. Dead men write no letters! Official correspondence is not signed by 10-year-old boys! It is not important who produced the documents and Bahrain fully accepts Qatar's disclaimer and apologies. But despite the assertion by Qatar's distinguished Agent that that matter is closed (CR 2000/5, p. 16), closed it cannot be. What has happened has a direct bearing on the substance of various important aspects of the case, especially the question of the Hawars.

7. If the Court were to have an opportunity of looking again at the highlighted version of the Qatar Memorial that was delivered by Bahrain to the President at the meeting held in November 1997 and which contains yellow marked passages representing the use of the forged documents, the Court would observe that the removal from Chapter V of that pleading, entitled "The Territorial Integrity of Qatar and Qatar's Sovereignty over the Hawar Islands", would not simply decimate that chapter; it would effectively destroy it. Gone entirely would be all the subsection of "Specific Instances Demonstrating Recognition" in the main section entitled "Recognition of Territory". Gone would be the so-called Ottoman Survey Map of 1873 so liberally splattered with seals which investigation has subsequently shown were bought across the counter in a novelty shop here in The Hague — a map which so helpfully to Qatar names the Hawars as the "Hawar of Qatar" and drew a boundary in the sea well to the west of those islands. Gone would be the references set out in footnote 58 to the additional exercise of Qatari sovereignty over the Hawar Islands — all totally false. Parenthetically, however, one may observe that many of these references do serve to indicate very clearly Qatar's belief as to the sort of actions that are sufficient for a claimant State to demonstrate in relation to territory over which it asserts title by possession and control. As perusal of the forged documents will show, they appear to suggest that Qatar was content with a very low standard of requirement as to the degree of specific conduct required of a State to establish its title to territory. Very few acts of possession were asserted by Qatar. Rather, it preferred to invoke what is, really, no more than hearsay evidence on a large scale, principally in the form of statements attributed to the Ottomans and to the Sheikhs of Abu Dhabi and Dubai. It is hardly open to those who parade such undemanding standards of proof of conduct and *effectivités* as a basis for a claim to title now to turn round and call upon Bahrain to satisfy a higher standard. Nevertheless, Bahrain has met a higher standard — as is evidenced from its written pleadings and from their defence by Bahrain's counsel in these hearings. The sort of actions that have in fact marked Bahrain's presence in these islands now stand totally unopposed by any contradictory Qatari conduct. Gone, too, are the items which pretended to evidence Bahraini recognition of Qatar's sovereignty over the Hawar Islands.

8. The Qatari Counter-Memorial was no less infected by these noxious documents. In paragraphs 2.39 and 2.40 of that pleading, 22 documents were cited in summarizing Qatar's

allegations that it had exercised authority over the Hawar Islands. Each of these 22 documents was among the 82 which are now to be, as Qatar says, "disregarded". When Qatar presented these documents it announced, not without dramatic flourish, that they were proof of the unreliability of the official documents on which Bahrain relies. As Qatar said: "the appearance is reflected in the official documents in the British Archives" while "the unpleasant reality" — Qatar's words — "is reflected" in Qatar's own documents. What documents, one may ask, and how ever did they get into the case?

9. The introduction to Qatar's Counter-Memorial contained a summary of what it called the central elements of the case, and asserted that Qatar's evidence had achieved the following:

— one, it had "demonstrated" the territorial integrity of Qatar as comprising the whole peninsula and the Hawar Islands;

— two, it "showed" that this alleged territorial integrity was recognized "at least" since the mid-nineteenth century by Britain, the Ottoman Empire, local rulers, and indeed Bahrain;

— three, it had "shown" the worthlessness of Bahrain's evidence in support of its successful defence of the Hawar Islands in the arbitration that resulted in the British Award of 1939; and

— four, it had "provided evidence" of Qatar's own "acts of sovereignty" on the Hawar Islands.

10. As shown by Qatar's own citation, all these "central elements" of Qatar's case depended on the use of the 82 documents. They are now all gone. There is nothing left of the "central elements" of Qatar's case.

11. So what was Bahrain entitled to expect once Qatar indicated that it would no longer rely upon these 82 documents? It would have been reasonable to have foreseen that Qatar would correspondingly abandon the claim, the proof of which rested upon these documents. Bahrain was entitled to expect that Qatar, in the same spirit of regret that marked its abandonment of the false documents, would adhere to the logic of the position it had adopted and would abandon pursuit of its claim to the Hawars. After all, if you start a case entirely in reliance upon certain materials, one would expect that when the materials are proved false, the affected parts of the case would be withdrawn. Nor would it have been any answer to say that the argument of proximity could remain a viable alternative to that part of Qatar's case based on the forged documents. As will presently be

seen, the argument of proximity as a support for Qatar's claim of title to the Hawars in its turn collapses entirely when confronted by proof of Bahrain's possession of those islands.

12. So Bahrain came to assume that Qatar would instead focus only on Zubarah and on the maritime delimitation. But, quite surprisingly, Qatar has invented a replacement argument to support the maintenance of its claim to the Hawars. This now purports to dismiss the relevance of conduct and of all *effectivités*. It appears to go something like this. Qatar was an acknowledged and effective State from 1868 and in complete control of, and with full title to, the whole peninsula. That title extended, by reason of proximity, to the Hawar Islands. Therefore, any subsequent Bahraini conduct there was illegal and unopposable to Qatar. In any event, the critical date in respect of the Hawars falls in 1936, thus depriving all of Bahrain's *effectivités* —which in Qatar's selective view all occurred after 1936 — of their legal value. Therefore the Hawar Islands are legally empty or uninhabited. In consequence, they belong to the closest State. This happens to be Qatar.

13. Bahrain asks the Court to consider why this new argument, if it has the merit that Qatar now claims for it, was not developed in Qatar's original Memorial. It could quite properly have been presented there as an alternative line of approach. However, presumably for good reasons, Qatar did not do that. And as Bahrain responds to each of these new arguments in turn it will invite the Court to share its doubts about the role that they now can play in this case.

14. This said, Mr. President and Members of the Court, not out of rancour nor out of any desire gratuitously to reopen old wounds, but only because it is important to restore to the case its proper focus. I can now leave the subject of the forgeries and their effect, subject only to one additional point: although Qatar has undertaken not to rely on the forged documents, the fact is that once such material has polluted the case it continues to exercise an insidious influence from which it is not easy to escape. Even now, for example, such material has ensnared Professor Salmon. On 5 June he referred to the recognition of the authority of the Al-Thani over the whole of the Qatar peninsula from the middle of the nineteenth century. His footnote reference was to paragraph 2.25 of the Qatar Counter-Memorial. In its turn this paragraph is dependent on three supportive footnotes. One is, in this respect, innocent, namely a reference to Palgraves's narrative of his journey of 1862-1863. The other two are tainted, being references to Annexes II.17

and II.18 of the Qatar Memorial. Both of these are among the forged documents brought to the notice of the Court and of Qatar. No suggestion is made that this reference in Professor Salmon's pleadings is other than entirely accidental. But it does go to show how careful the Court must be in its consideration of Qatar's version of the facts, especially on so important a contention as one pretending to greater authority in the Al-Thani family than it actually possessed. With this behind me, I can now turn to deal in a more positive manner with substantive matters.

15. The Court will, of course, understand that in this reply Bahrain will not follow either the order or the exact content of Qatar's current submissions. Instead, Bahrain's arguments — at any rate on the principal questions of sovereignty over the Hawars and Zubarah — will seek generally to match and elaborate the series of 14 rather condensed propositions that I will presently offer the Court, in the hope that they will enable the Court more rapidly and easily to appreciate the overall thrust of Bahrain's case. Such condensation necessarily leads to a generality of expression that may well attract criticism in some quarters. I hope that this will not be the case, but should it be, I ask to be forgiven.

16. Some measure of generalization is called for at the present stage of a case that has seen the introduction of so much documentary material. Qatar, in particular, has produced four times more pages of annexes than has Bahrain (even though Qatar has only used about 50 per cent of the documents submitted). For despite the seeming profusion of facts presented to the Court, notably regarding events in the nineteenth century, this remains, as I suggested at the beginning, a simple case. It is one in which Bahrain seeks two things: one, the restoration of its position in its ancient possession, Zubarah; and, two, the rejection of Qatar's claim to sovereignty over areas that have long been in Bahrain's possession and under its authority, namely, the Hawar Islands, including Janan and Hadd Janan, as well as over all the insular and other features, including Fasht ad Dibal and Qit'at Jaradah, that constitute the Bahrain archipelago.

17. In pursuit of these objectives, I shall now present the propositions reflecting the essentials of Bahrain's territorial case. The case relating to the maritime boundary will be presented separately.

18. The 14 propositions are as follows:

19. The first three relate principally to Zubarah, though the second is also relevant to the Hawars.

(1) *First proposition*: In the mid- to late eighteenth century the Al-Khalifa family (that is the family of Bahrain) ruled in Zubarah. Their authority was maintained there throughout the nineteenth century both directly and by their adherents, the people of the Naim tribe. Even Qatar concedes, in paragraph 5 of its own Application in this case filed in July 1991 — and I read — "Until 1868, the Qatar peninsula was considered by the British as a dependency of Bahrain" — the Qatar peninsula a dependency of Bahrain. This is an admission of the highest significance. Qatar does not dispute the correctness of the British view that until 1868 at least, the Qatar peninsula was a dependency of Bahrain. Qatar takes the view that the peninsula includes the nearby islands, notably the Hawars, and Qatar is bound by that view. We may conclude, therefore, that Qatar is here admitting that Bahrain had title not only to Zubarah but also to the Hawars.

(2) *Second proposition*: Even after 1868, for the rest of the nineteenth century and until 1916, there was no State of Qatar possessing attributes of sovereignty over the whole of the geographical area of the peninsula of Qatar. The town of Doha on the east coast came under the sway of the Al-Thani family (that is the Qatari family) in the mid-nineteenth century, but their authority did not extend to the north or north-west of the peninsula as far as Zubarah. The suggestion now made by Qatar that it is a State of the same age as Bahrain is entirely unsupported by the words or effect of the text on which it relies, namely, the 1868 Agreement. The earliest glimmer of recognition of a State of Qatar that one may be able to identify is in the unratified 1913 Treaty. Even then the territorial extent of that entity remains quite imprecise. Starting from Qatar's admission which I have recalled in Proposition One, that until 1868 the Qatar peninsula was considered by the British as a dependency of Bahrain, one of the central questions in this case with which Qatar must grapple — and which hitherto seems to have escaped its attention — is this: how will Qatar discharge the burden of proof that undoubtedly rests upon it by reason of that admission, of showing how, when and in what degree Bahrain lost its title to the peninsula including, more particularly, Zubarah and the Hawars?

(3) *Third proposition*: In 1937 the Al-Thani and their adherents forcibly evicted from Zubarah the Naim tribesmen loyal to Bahrain who represented the continuing authority in Zubarah of the Rulers of Bahrain. This attack upon Zubarah was an unlawful use of force from which no legal rights could arise. The Court ought not to treat as valid an illegal act of this kind. The continuing sovereign rights of Bahrain and the other rights of the Al-Khalifa family in Zubarah should be recognized by the Court.

The remaining ten propositions relate principally to the Hawars — perhaps the most important territorial issue in the case.

(4) *Fourth proposition*: The requirements of international law for the acquisition and retention of title over the Hawar Islands, including Janan, are the continuous peaceful possession of the territory and the public display of governmental authority therein. As has been shown, and will be shown again in plentiful detail, Bahrain has met and continues to meet these requirements.

(5) *Fifth proposition*: The non-penetration of the interior of the Qatar peninsula by the Al-Thani family based in Doha and its adherents in the nineteenth century, and even into the twentieth, meant not only that the Al-Thani influence did not reach Zubarah. It also meant a total absence of any actual Al-Thani authority on or in relation to, the Hawar Islands, including Janan, or indeed on the peninsula coast opposite them. Even in 1934 — I emphasize "1934" — the British Political Resident had occasion to observe that the "Shaikh of Qatar is more a large merchant than a Ruler and has practically no authority over the interior of his State where oil operations will presumably be carried on and, where the strongest Bedouin elements are migratory tribes from Saudi Arabia" (Supplemental Documents of Bahrain, 1 March 2000, Ann. 5, Telegram, 10 January 1934). Moreover, the area between the west coast and east coast of the peninsula was and is desert, and could then be crossed only with difficulty. This is in total contrast with the ease of maritime communication in the shallow waters between the main island of Bahrain and the Hawars. In this sense, natural unity is between the Hawars and Manama, not between the Hawars and Doha, as illustrated on the map now behind me. Indeed, even when the oil company began operations on the west coast of Qatar, at Dukhan, not quite opposite to, but a little bit south of, the Hawars, its base was in

Bahrain and all its supplies were brought by boat from Bahrain. Incidentally, there is no reason to believe that the geological unity suggested by Qatar between the peninsula and the Hawars does not also extend to the Bahrain main island as well as to Saudi Arabia and even Iran. How far, one may ask, should the political effects of geological unity stretch?

(6) *Sixth proposition*: In about 1800 the Qadi of Zubarah, the highest-ranking religious and legal official of the Al-Khalifa family, gave permission to a branch of the Dowasir tribe to settle in the Hawar Islands. In 1845 the Ruler of Bahrain invited them also to settle on the main island of Bahrain. Thenceforth this branch of the Dowasir ceased to be nomadic. Thereafter, there was movement by these Dowasir between Bahrain and the Hawars and their alternative homes in Budaiya and Zallaq on the Bahrain main island. The seasonal movement from one settled home in the Hawars in the winter to another settled home in the towns of Zallaq and Budaiya on the main island of Bahrain in the summer was regular and continuous in the nineteenth century, right through into the mid-twentieth century. The Bahrain Dowasir in the Hawars accepted the authority of the Rulers of Bahrain almost without interruption throughout the nineteenth and twentieth centuries. The presence of the Bahraini Dowasir in the Hawars has also been accompanied by that of many non-Dowasir Bahrainis. Regular habitation in the Hawars by an established population is evidenced by the fundamental indications of residence: houses, mosques, cemeteries, water cisterns, fish traps and so on, dating back to the earliest days.

(7) *Seventh proposition*: The Bahrain Government has for many years exercised sovereign authority in the Hawars. Such authority has been evidenced, *inter alia*, by continuing Bahraini governmental legislative, judicial and executive conduct in, or in relation to, the Hawars, including the grant of licenses for fishing, pearling and gypsum extraction, as well as by the building of infrastructure and the provision of public services. These actions are what we call "*effectivités*". Much of Bahrain's evidence in this respect pre-dates the 1930s.

(8) *Eighth proposition*: At no time, and this must be emphasized, at no time has Qatar ever exercised any authority over the Hawar Islands or taken possession of them in whole or in part in any way. I have already referred to the abandonment by Qatar of such evidence to the contrary — all forged — as was produced in its Memorial and Counter-Memorial. It is a

prominent and inescapable feature of the speeches on behalf of Qatar in the opening phase of these oral proceedings that not once was any suggestion made of the existence of any Qatari *effectivités* or the presence of any Qatari residents on the Hawar Islands.

(9) *Proposition nine*: Bahraini presence, and the corresponding absence of any Qatari activity, in or in relation to the islands was reviewed and brought into prominence in the period 1936-1939 when Britain, under whose protection both Bahrain and Qatar were at the time, carefully examined the situation in the Hawars for that purpose. Britain invited Qatar more than once to provide evidence of the extent of any authority claimed by it in the islands. Qatar produced no evidence at all of possession or occupation of the islands — not even of the map attached to the oil concession issued by its Ruler on 17 May 1935 and said to extend to the islands, as Mr. Paulsson will presently mention. On the basis of the evidence available to them about Bahraini presence in the islands, and correspondingly about Qatari absence, the British accordingly determined that the Hawar Islands belonged to Bahrain.

(10) *Tenth proposition*: The principal remaining argument advanced by Qatar in support of its claim to the Hawars has been that of their geographical proximity to the coast of Qatar and of the fact that part of the islands lie inside the Qatar 3-mile territorial sea. An attempt has also been made by Qatar to bolster this with references to maps and evidence of so-called "repute".

(11) *Eleventh proposition*: International law does not accept the use of proximity alone as a basis of title, though it might do so as an element in support of measures of possession or the exercise of authority. This is equally true whether the islands in question lie outside or within the territorial waters of the adjacent State. In the *Eritrea/Yemen* case the Tribunal observed that

> "there is some presumption that any islands off the coasts may be thought to belong by appurtenance to that coast unless the state on the opposite coast has been able to demonstrate a clearly better title" (*Award*, para. 458).

Following the abandonment by Qatar of its alleged evidence of possession of the Hawar Islands and of the exercise of any governmental authority there, its claims to the islands have been left to rest on proximity alone. By itself, this cannot serve to confer title on Qatar — especially not so in the face of undisputed Bahraini possession. Recourse to

proximity should, therefore, also have been abandoned when the false documents were dropped.

(12) *Twelfth proposition*: The maps invoked by Qatar and the evidence of so-called "repute" do not help it. Indeed, counsel for Qatar has accepted that maps alone cannot establish title.

(13) *Thirteenth proposition*: What is true of the Hawar Islands themselves is equally true of Janan which is no more than an appendage of the Hawars.

(14) *Fourteenth and last proposition*: In addition to serving as a record of the facts relating to Bahrain's presence in, and Qatar's absence from, the Hawar Islands, the British decision of 1939 determined the question of title to the islands as between Bahrain and Qatar. It can be viewed — that is the decision — primarily as an arbitration. As such, it renders the issue of title *res judicata,* a decided matter that cannot now be reopened in this Court. Alternatively, the British decision can be viewed as a political decision made within the scope of the authority of Britain as the power protecting both States. Either way, the duty of this Court, it is submitted, is to uphold the validity and effect of the British decision — the more so because on the *Grisbadarna* doctrine a "settled state of affairs" should not be disturbed.

20. These, then, Mr. President and Members of the Court, are the 14 propositions relative to the territorial issues relating to Zubarah and the Hawars. The maritime delimitation and the associated questions of the status of the maritime features, Dibal and Jaradah, are distinct matters which are best left to separate treatment by my colleagues skilled in these matters.

21. The propositions just formulated and the case on the delimitation and maritime features will be developed by counsel in the following manner:

(i) I shall proceed presently to develop a number of legal submissions mainly relating to the acquisition of territory and to the very limited operation of the doctrine of proximity in international law. I shall also make certain legal observations upon the legal invalidity of the forcible seizure of Zubarah by Qatar in 1937 and the irrelevance of the critical date concept.

(ii) I shall then be followed by my colleague, Mr. Jan Paulsson, who will present the Court with the factual elements relating to Bahrain's position in both Zubarah and the Hawars. He will also recall in some detail the circumstances and validity of the 1939 decision.

(iii) He will be followed by Professor Reisman who will analyse the legal nature and consequences of the British decision of 1939.

(iv) In view of the importance of Bahrain's display of sovereign authority in the Hawars to the total exclusion of any comparable activity by Qatar, this matter will then be developed in further detail by Mr. Robert Volterra.

(v) After him, Maitre Fathi Kemicha, recalling the emergence of the parties into full independence in 1971, will examine the relevance and effect in the present case of the doctrine of *uti possidetis*.

(vi) There will then remain two matters of detail in relation to the Hawar Islands which will require attention. The first is consideration of the role of maps as being supportive of Bahrain's position in relation to the Hawars and as being unsupportive of Qatar's position. That task will fall to me.

(vii) Finally, in relation to the second remaining but significant point of detail relative to Bahrain's authority in the Hawars, Mr. Paulsson will return to speak of the manner in which the negotiations for and grant of oil concessions in the area in the 1930s confirmed the authority and title of Bahrain in the Hawars and the corresponding denial of Qatar's title.

(viii) With the various aspects of the two main contested areas of sovereignty behind us, it will then be possible to turn to the question of maritime delimitation. It will be in this context that the question of the legal status of Dibal and Jaradah will be considered. I shall not attempt to summarize here Bahrain's main contentions in this connection. It makes more sense to leave that aspect of the case in the greatly experienced hands of my distinguished colleagues, Professor Weil and Professor Reisman, who will also revert in more detail to Bahrain's rights in Janan.

22. The programme of Bahrain's case having thus been presented, I shall, with the Court's permission, now turn to the several legal points that are my concern. Mr. President, perhaps you may find this a convenient point in which to break.

Le PRESIDENT : La Cour suspend pour dix minutes.

L'audience est suspendue de 11 h 25 à 11 h 40.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise. Sir Elihu, vous avez la parole.

Sir Elihu LAUTERPACHT: Mr. President, Members of the Court, just before the break I had indicated that I would now turn to the several legal points that are my concern. They are the following:

23. The establishment and maintenance of title to territory under three sub-headings: the basic law; the response to Professor Salmon's argument about *effectivités*; and the question of title to the islands. In addition, I shall refer briefly, to the question of the effect of the forcible seizure of Zubarah by Qatar in 1937 and, lastly, to the question of the critical date.

II. ESTABLISHMENT AND MAINTENANCE OF TITLE

A. The basic law

24. I come first to the law relating to the establishment and maintenance of title to the Hawars.

25. It would appear that so far as concerns the law applicable to the determination of title to the islands the differences between the Parties can be precisely defined.

26. For this purpose one must distinguish between, first, the basic law relating to the acquisition of title to the islands and, second, the scope of application in this connection of the concept of proximity and its limitations.

27. As regards the first, the basic law, I had originally thought that the Parties were not significantly divided, and that their main differences related to the second element, proximity. Things look a bit different now as a result of Professor Salmon's argument. In order, therefore, that there should be no doubt about Bahrain's position regarding the positive legal elements supporting its title to the Hawars, I shall restate them briefly knowing, as I well do, that the basic

considerations are already familiar to the Court. In so doing I shall, of course, respond to what Professor Salmon has said.

28. For present purposes it is not necessary for me to refer to a wide range of authorities.

29. The Court will, I am sure, see no disrespect to it if I pass immediately to the most recent arbitral consideration of questions of title in the *Eritrea/Yemen* case. As the question of title to islands was specifically involved in that case, the decision is particularly relevant to the present case. A few quotations from that Award will serve to present the relevant law:

> "The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any." (*Eritrea/Yemen, First Award, 9 October 1998*, para. 239.)

> "Evidence of intention to claim the islands *à titre de souverain* is an essential element of the process of consolidation of title. That intention can be evidenced by showing a public claim of right or assertion of sovereignty to the islands as well as legislative acts openly seeking to regulate activity on the islands." (*Ibid.*, para. 241.)

In referring to the evidence of the apparent long attachment of the population of each coast to fisheries in and around the islands, the Tribunal said:

> "However, it does not constitute evidence of *effectivités* for the simple reason that none of these functions are acts *à titre de souverain*. For State activity capable of establishing a claim for sovereignty, the Tribunal must look to the State licensing and enforcement activities concerning fishing described above." (*Ibid.*, para. 315.)

In extrapolating, as I do, from the limited scope of this observation, my understanding is that the Tribunal was saying that the mere presence of individuals on an island is not by itself sufficient to confer title on the claimant State to which they adhere. Something in the nature of related State activity or authority is required.

30. In this connection both Professor Salmon (CR 2000/5, translation, p. 36, para. 26) and Mr. Shankardass (CR 2000/8, p. 34, para. 49) referred to the decision of the Court last year in the *Kasikili/Sedudu Island* case (*I.C.J. Reports 1999*) as if supportive of their position. So it may be useful to identify briefly the manner in which the pertinent facts of that case are to be *clearly* distinguished from the facts in the present case. Mr. Shankardass presents the Court's decision as holding "that the Masubia did not occupy the island *à titre de souverain* when using it intermittently, according to the seasons and their needs, for exclusively agricultural purposes".

However, counsel for Qatar must have failed to recall that the Court has identified two factors which led to its conclusion that the Masubia had not occupied Kasikili *à titre de souverain*. Those were enunciated a few lines after the passage I have just quoted and were two in number. The first was that the Masubia use of the island began prior to the establishment of any colonial administration in the Caprivi Strip. There was thus no *souverain* in support of whose *titre* they could have been acting. Secondly, the Masubia use of the island seemed to have continued subsequent to the establishment of the colonial administration without being linked to territorial claims on the part of the authority administering the Caprivi. That was the situation as identified by the Court.

31. The situation is totally different here and I need do no more than summarily recall, because the matter will be referred to in the arguments of Mr. Paulsson and Mr. Volterra, here there was a *souverain* that existed prior to the arrival of the Dowasir in the Hawars, namely the Al-Khalifa Rulers of Bahrain. It was that *souverain* from whom the Dowasir obtained by grant the right to reside in the Hawars. This was recognized by Captain Prideaux, the British Political Resident in 1909. Moreover, the presence of the Dowasir in the Hawars is closely linked to the territorial claims of the Rulers of Bahrain — as is shown by the various *effectivités* carried out by Bahrain in the Hawars during the nineteenth and twentieth centuries. None is more striking perhaps than when some of the Dowasir left the Hawars for a period of years in 1923 and then sought the permission of Bahrain to return to the Hawars in about 1928. If, on the facts just mentioned, the relationship between the Dowasir and Bahrain is not held to be *à titre de souverain*, it is difficult to see what relationship could meet that requirement.

32. I return now to the quotations from the Award in the *Eritrea/Yemen* case. It is also to be noted that in the Tribunal's examination of life on the islands, which on the facts of that case it found to be seasonal and temporary, in contrast with the factual position that will be demonstrated in respect of the Hawars, the Tribunal nonetheless found that even that limited activity — in the words of this Court — in the Anglo-Norwegian *Fisheries* case of 1951 — represents a "consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage" (*I.C.J. Reports 1951*, p. 133).

33. Now, to these observations may be added two more short ones: the first is from Judge Huber in the *Isle of Palmas* case — and I may mention to you that the relevant extracts from the *Isle of Palmas* Award appear as tab 1 in your folders that have been placed before you. Judge Huber said in that case: "It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control." (2 *R.I.A.A.* 829 at 867.) This was cited with approval in the *Eritrea/Yemen* case (*Eritrea/Yemen Award*, para. 104).

34. The second quotation is again from the *Eritrea/Yemen* case where, it must be recalled, there were governmental acts on both sides, not simply on one side as in this case. It is as follows:

35.

> "It may be said at once that one result of the analysis of the constantly changing situation of all these different aspects of governmental activities is that, as indeed was so in the *Minquiers and Ecrehos* case where there had also been arguments about claims to very ancient titles, it is the [and this is a passage I wish to stress], *relatively recent history of use and possession that ultimately proves to be a main basis of the Tribunal's decisions.*" (*First Award, 1998*, para. 450. Emphasis added.)

B. Response to Professor Salmon's argument about *effectivités*

36. If I may say so, the quotations that I have just read the Court are really not controversial. As the Court will already have seen in Bahrain's written pleadings and of which the Court will be reminded yet again in the course of our arguments to come, these quotations lay down requirements that have been amply satisfied by Bahrain's conduct — not since 1936, as Qatar maintains, but since the earliest days of Bahrain's presence in the Hawars.

37. But when one comes, as I do now, to the observations of my friend and confrère, Professor Salmon, it cannot for a moment be suggested that he was not controversial. I leave aside for later consideration by my colleagues Professor Salmon's opening points on *quieta non movere,* on *uti possidetis,* on the statehood of Bahrain and on the emergence of Qatar. The matter with which I must concern myself now is his fifth question "the effectivity of acts of occupation" (CR 2000/5, p. 31, translation). Here the Court has been presented with an argument, I say it with respect, as circular as it is unexpected.

38. Professor Salmon starts with the passage in which the Chamber in the *Burkina Faso* case classifies the acts of administrative authorities into four categories (CR 2000/5, translation, p. 31,

para. 17). Our first such category is "where the act corresponds exactly to law". For some reason the quotation — otherwise presented in full — then omits the following eight words which appear in the original: "where effective administration is additional to *uti possidetis*". Here, in this first category, the role of the *effectivité* is to confirm the exercise of the right derived from a legal title.

39. The second category is "where the act does not correspond to law", i.e., "where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title". In this case the "preference should be given to the holder of the title".

40. The third category is where "the *effectivité* does not co-exist with any legal title". In that case "it must invariably be taken into consideration".

41. And the fourth case is "where the legal title is not capable of showing exactly the territorial expanse to which it relates".

42. Why Professor Salmon invokes this classification is quite baffling because it does not help to solve the problem now before the Court. Everything turns on the category within the analysis in which one places the present problem. Bahrain would say that the situation, if it falls into any of these categories which are all "colonial" related, would probably fall into the first category, namely: "When the act corresponds exactly to the law" (and I complete the quotation with the words omitted by Professor Salmon) "where effective administration is additional to *uti possedetis*", i.e., additional to existing legal title. In other words Bahrain has legal title and its *effectivités* are in support of that. In this case, as the quotation says "the only role of *effectivités* is to confirm the exercise of the right derived from the legal title". In Bahrain's view, Bahrain has always had title to the Hawars because they fell within the area of Al-Khalifa rule at the time of the original grant to the Dowasir. Nothing has happened to deprive Bahrain of that title; and its *effectivités* confirm its possession of that title.

43. Professor Salmon, on the other hand, would appear to place the case in a different category. Which one, is not quite clear, but probably it is the second: "where the act does not correspond to law... preference should be given to the holder of the title". Presumably he considers that Qatar is the holder of the title and therefore its title should be given preference over the *effectivités* of Bahrain.

44. But this approach does nothing to prove Qatar's title. Nor does Professor Salmon's elaboration of the matter do so. The very first sentence of his paragraph 19 reveals the deficiency of his argument:

> "These elementary principles show the reason why an occupation of territory *belonging to another State* does not involve a conflict between two *effectivités* whose respective merits will have to be evaluated, a conflict which would have to be resolved by granting the territory to the party with the best *effectivité*". (Emphasis added.)

Professor Salmon assumes precisely what he has to prove. He starts from the assumption that the Hawars "belong" to Qatar. Yet that "belonging" is the very point in issue. In consequence, his conclusion is entirely without value. He says: "In this regard the whole of Bahrain's argument as to the predominance of the *effectivité* of its occupation of the Hawar Islands is irrelevant. Only acquiescence by Qatar, the territorial sovereign, could have created a title." Perhaps Professor Salmon would have been right in his conclusion if Qatar were the territorial sovereign. But as this is what he must prove, his whole attempt to exclude the relevance of Bahrain's *effectivités* fails. Indeed to bring to an end this part of my argument, Professor Salmon could have provided no clearer indication of Qatar's concern over the reality and significance of Bahrain's *effectivités* in the Hawars than this attempt to deny their relevance.

TITLE TO ISLANDS AS SUCH

45. So now we must turn to consider the basis, other than mere assertion, on which Qatar claims title to the Hawars. On 30 May Sir Ian Sinclair summarized Qatar's positive case for sovereignty over the Hawars in the following terms:

> "Qatar claims an original title to the Hawar Islands on the ground that the great majority of them lie within a three-mile limit drawn from the low-water mark on Qatar's mainland coast, and the remainder on the basis of the principle of proximity as properly understood." (CR 2000/6, p. 53 para. 39.)

46. Sir Ian also referred to two further grounds "which support and sustain", as he put it, Qatar's claim, namely, the historical evidence and the map evidence. These will be considered later. For the moment I will confine myself to Sir Ian's principal argument developed by him and in Qatar's written pleadings.

47. But before investigating Sir Ian's contention, it is necessary to allude to one matter of fact on which his argument rests. As stated in Qatar's Reply (at para. 4.6):

> "Qatar relies not only upon the fact that the majority of the islands and islets constituting the Hawar Islands lie wholly or partially within a three-mile territorial sea limit from the mainland coast of Qatar (that limit being the one recognized by Qatar and Great Britain in the 1930s), but also that *all* of them now lie within a twelve-mile territorial sea limit from the mainland coast (that limit being the one currently applied by Qatar)."

And that fact was again recalled by Sir Ian (CR 2000/6, p. 47, para. 27).

48. The position as regards the effect of the 3-mile territorial sea limit is indicated in Map No. 9 of the Memorial of Qatar (opposite p. 145), which has been put up on the screen. Bahrain has no reason to question the general representation on this Qatari map of the 3-mile limit, though Bahrain must reserve its position as regards some of the details of the map and the location of the baselines in respects which do not significantly affect the present point. I should also point out that the permanently dry land area of the islands is the lighter yellow and that the outer penumbra represents only the areas exposed at low tides.

49. As can be seen, the 3-mile limit does not embrace the Hawar Islands to the degree that is implied in Qatar's reference to the islands lying "wholly or partially" within the 3-mile limit. In truth, the islands lie only very partially within the 3-mile limit. To be precise, moving from south to north, only half of Janan, about one-third of Hawar itself together with Sawad Janubiyah and Sawad Shamaliyah lie within the 3-mile limit. Outside the 3-mile limit lies half of Janan, the northern and greater part of Hawar as well as, in their entirety, the islands of Umm Hazwarah, Umm Jini, Juzur Alajiyat, Jazirat Ajirah, Rabad Sharqiyah and Rabad Gharbiyah.

50. So, even if Qatar's reliance upon the role of the 3-mile territorial sea were valid (which, as will be seen, it is not), it still could only apply to a limited extent. It would be a matter for debate, into which Qatar has not entered, as to whether the areas inside the 3-mile limit brought all the islands into the régime of the territorial sea or whether the larger area outside the 3-mile limit had the reverse effect of removing the whole of the islands from the influence of the 3-mile régime. Bahrain, it need hardly be said, contends that the fact that the larger part of the Hawar Island, being the principal island, lies outside the 3-mile limit would make Qatar's argument based on that limit ineffective — even if, *quod non*, it were valid in principle.

51. As regards the effect of the extension of Qatar's territorial sea limit from 3 to 12 miles, Bahrain submits that that can make no difference to the legal position. Qatar only extended its claim to 12 miles on 16 April 1992, some nine months after it filed its application in this case on

8 July 1991. Such an action must, therefore, be excluded from consideration. In any event, even if the extension had taken place earlier, it would make no difference to the role of the territorial sea which, if it operated at all, must have done so many decades previously. It may also be mentioned in passing that the extension by Qatar of the width of its territorial sea from 3 to 12 miles was a clear breach of the status quo principle laid down in 1983 as part of the mediation process to be conducted by His Highness the King of Saudi Arabia to whom Bahrain remains ever grateful for his efforts. It was obviously done with a view to improving Qatar's legal position in this case. Qatar cannot really turn round now and accuse Bahrain of breaches of the status quo. In any event, it was for the Mediator to have intervened in relation to any alleged breaches of the status quo. He did not do so in this or in any other episode of alleged breach. Bahrain considers that the question of the status quo requires no further discussion in this case.

52. To return to the operation of Sir Ian's argument based on the territorial sea. If it is valid at all, which Bahrain submits that it is not, it is of significantly limited geographical scope and, arguably, because of its limited effect, is of no relevance at all.

53. I now turn now to the substance of Sir Ian's argument derived from a State's sovereignty over the territorial sea. Now, there are at least three possible responses to it.

54. The first is that those who have specifically discussed the question of title to islands within the territorial sea have always qualified their observations about the coastal States' rights by acknowledging the possibility that another State may have acquired title to the island by ordinary means. There is no absolute rule that islands within the territorial sea belong to the coastal State. Thus in the *Eritrea/Yemen* case, the Tribunal observed, in relation to the Mohabbakahs, which lie within 12 miles of the Eritrean coast: "Whatever the history, in the absence of any clear title to them being shown by Yemen, the Mohabbakahs must for that reason today be regarded as Eritrean". (*Award, 1998*, p. 125, para. 472). I emphasize the words: "in the absence of any clear title to them being shown by Yemen . . .". It is, of course, Bahrain's contention — and it will be supported later — that it possesses a clear title to the Hawars by virtue of its ancient authority coupled with continuous occupation and demonstration of governmental authority.

55. The Eritrea/Yemen Tribunal cited Professor Bowetts's book on the *Legal Régime of Islands in International Law* (p. 48 (1978)), where he has the following to say about islands lying

within the territorial sea of a State: "Here the presumption is that the island is under the same sovereignty as the mainland nearby." And he continues:

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

56. In developing his argument, Sir Ian quoted a passage from Judge Huber's award in the *Isle of Palmas* case — a passage which Sir Ian described as "the key passage" in the Award. (CR 2000/6, p. 46). However, he put an interpretation on that passage which I respectfully cannot share; and because the disagreement is rather basic, I am sorry to have to impose on the Court yet a further reading of the same passage: The Court will find the Award in the judges' folders, at tab 1. and I am reading from p. 854 and the quotation is as follows:

57.

> "Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size)."

58. From this passage, Sir Ian sought to spell out what he called a negative proposition. As he put it — and I quote him again:

59.

> "Now, the Court would surely note that his [that is Judge Huber's] negative proposition applies only to islands situated outside territorial waters; it does not apply to islands situated within territorial waters." (CR 2000/6, p. 46, para. 24.)

60. With respect to Sir Ian, I do not read a negative proposition into those words. I read only a positive proposition in the sentence taken as a whole, namely, that it is impossible to show the existence of a rule of positive international law to the effect that islands situate in the high seas should belong to the nearest State.

61. So what did Judge Huber intend to convey when he included the words "islands situated outside territorial waters" in his statement that it is impossible to show the existence of a positive rule of international law to the effect that islands outside territorial waters should belong to a State

from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size)"?

62. The first thing to recall is that the island of Palmas is, as stated in the *compromis* of that case, some 50 miles south of Cap San Augustin, a cape in the southern part of the Philippine island of Mindanao — which is the more northerly of the two arrows now showing on the map before you. Palmas lies about halfway between that cape and the nearest island of the Nanusa group of what was then the Netherlands East Indies and is now Indonesia — that is the most southerly arrow on the map before you. The island was therefore in the high seas, nowhere near the territorial sea of either party.

63. Judge Huber was clearly conscious of this fact because he alluded to the locations of islands earlier in his Award. Speaking of the delimitation of territory, he said:

> "If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as e.g. *in the case of an island situated in the high seas*, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterion of territorial sovereignty." (*UNRIAA*, Vol. II, p. 840. Emphasis added.)

64. Again, a little later in the Award, he said that "it must be remembered that it is a somewhat isolated island and therefore a territory clearly delimited and individualized" (*UNRIAA*, Vol. II, p. 855).

65. Certainly Judge Huber was not responding to any argument advanced by either party suggesting a special position for islands in territorial waters. I have examined the pleadings in the *Palmas* case and cannot find any passage in which either side suggested that a distinction should be drawn between islands in territorial waters and islands in the high seas.

66. I would respectfully suggest to the Court that when Judge Huber inserted in his remarks about islands the phrase "islands outside territorial waters" he was doing nothing more than exercising proper judicial caution and restraint in a manner with which I venture to suggest that this Court is familiar. The case before him related to an island in the high seas. It was not necessary for him to lay down a rule for islands in territorial waters and thereby create the possibility of subsequently being exposed to criticism for saying something that would be purely *obiter*. Though he spoke only of "islands situated outside territorial waters", nothing that he said excluded the

applicability of his reasoning to islands within the territorial sea. He did not, for example, suggest that such islands were subject to different rules from those applicable to islands in the high seas. The important point is that the logic of his approach, and the generality of his language, was such that his approach is as much applicable to islands within the territorial sea as it is to islands outside.

67. Thus, when he said that it is impossible to show the existence of a rule of positive international law to the effect that islands belong to a State from the mere fact that its territory forms the nearest *terra firma,* that statement was as applicable to territorial sea islands as to high seas islands. Just as he said that there are no precedents sufficiently frequent and precise in their bearing to establish a rule of proximity in international law in relation to high seas islands, so there are none that establish such a rule for islands within the territorial sea. Just as he said that the application of the concept of contiguity to islands in the high seas would be in conflict with what has been said as to the acquisition of territorial sovereignty, so the same would be true of the application of the concept to islands within the territorial sea.

68. Doctrine and practice subsequent to the *Palmas* case support the analysis that I have just presented. There is a statement by Sir Humphrey Waldock that is highly pertinent here. In an article in 1948 when he was speaking of the Judgment of the Permanent Court in the *Eastern Greenland* case, he said:

> "[it, that is, the Judgment] does not, it is submitted, conflict at all with the views of Judge Huber *as to the non-legal character of the proximity doctrines* . . . Arbitral decisions of the present century have established beyond all doubt that 'effective occupation' does not mean physical settlement of the territory but effective display of state activity. If this vital point is remembered, the *Eastern Greenland* case presents no difficulty and no conflict with the principles of effective occupation. The Court did not hold Denmark to have sovereignty over Eastern Greenland merely by reason of it being a continuation of other territory possessed by Denmark; nor did it do so merely because Greenland, being an island, is a geographical unity. The Court held Denmark to have actually displayed state authority in regard to the whole of Greenland, slight though the impact of that authority might have been in the contested part of the island . . . The geographical unity of Greenland was an important fact in assessing the limits of Denmark's state activity, but it is plain from the judgment that geographical continuity would not have availed Denmark in the least if she had not established some *state activity displayed in regard to the whole island*".

Sir Humphrey continued:

> "In short, any significance that has been attributed by international tribunals to proximity has been not as a legal principle independent of effective occupation but as a fact indicating the extent of an effective occupation." ("Disputed Sovereignty in the

Falkland Island Dependencies", *BY* XXV (1948), pp. 343-344. Emphasis in the original.)

69. And Sir Humphrey had more to say:

> "International law therefore appears to take account of continuity or contiguity of territory only within the principle of effective occupation. Within that principle proximity may, in certain circumstances, operate to raise a presumption of fact that a particular state is exercising or displaying sovereignty over outlying territory in which there is no noticeable impact of its state activity . . ." *(Ibid.)*

But, if I may venture to add a few words of my own, that is *all* that the concept of proximity does.

70. The fact that Sir Humphrey made these remarks in relation to a question of sovereignty over a single continuous piece of territory, namely, Greenland, indicates that his repetition without qualification a few pages earlier (at p. 341) of Judge Huber's exclusion of islands within a State's territorial waters was probably not a considered one. It cannot stand together with Sir Humphrey's acknowledgement that the presumption following from proximity is limited even in relation to a continuous portion of land territory. *A fortiori*, it would not apply to an island within territorial waters.

71. And that, in all likelihood, is why Sir Gerald Fitzmaurice deliberately omitted the questionable words "situated outside territorial waters" (as indicated by dots within his quotation) from his own citation of Judge Huber's proposition, in one of his learned articles in the *British Year Book* on the Law and Procedure of this Court. (See *BY* XXXII (1955-56), p. 74; "The Law and Procedure of the International Court of Justice (1986)", Vol. 1, p. 312, No. 2). Qatar suggests that "Sir Gerald may have been in error" (Reply of Qatar, para. 4.21). I would prefer to think that Sir Gerald — a most distinguished judge of this Court, not given to making mistakes — was not in error, but was applying to the question the strict legal logic that was the hallmark of his important contribution to the law.

72. The second reason why islands within the territorial sea should not be seen as an exception to the exclusion of the concept of proximity as a basis of title is this: the justification advanced for treating islands within the territorial sea in this way has been expressed in terms of security. Sir Ian said:

> "the Court will undoubtedly recall that the raison d'être of the notion of the territorial sea was the perceived need to protect the fundamental security interests of the coastal State; and that is a consideration which still applies today" (CR 2000/6, p. 46, para. 25).

73. Well, if that consideration still applies today, the security of the coastal State is unlikely to be protected only by the automatic extension, as Sir Ian would suggest, of a State's sovereignty over its territorial waters to all islands situated within those waters, regardless of the fact that the islands might be in the possession of another State. The idea that the security of the coastal State might be so protected is really the application of the canon-shot rule in reverse. Because in olden times a canon had a range of 3 miles, the State might in theory have been protected if islands within 3 miles of its shores were subject to its sovereignty. But that is manifestly untrue today when the range of missiles is so enormously increased that a State can be imperilled from a launching pad scores or even thousands of miles away. The security approach, if valid, would justify claims to islands many miles distant from the coast; and obviously that cannot be the case. By reference to security considerations, therefore, there is no reason for treating islands within the territorial sea differently from more distant islands.

74. The third reason for rejecting the proximity concept, and in particular, its application to islands within the territorial sea of a State, is that, as a matter of practice, States have found it possible to accept the presence of foreign islands close to their coasts, and even within their territorial seas. The Hawars are no exception.

75. In considering the extent to which the presence of an island claimed by State A in whole or in part within the territorial waters of State B and thus, as Qatar would contend, almost automatically part of the territory of State B on the basis of proximity, it is appropriate to recall that there are at least 11 instances in which islands of State A lie whole or partly within the territorial waters of State B, or very close to them and yet are accepted as belonging to State A. Evidently in these situations arguments about proximity, the need for the defence of State B and so on have not prevailed. I will now give the Court these 11 examples:

— First, the *Kamaran Island*

Until the union in 1990 of the Democratic Republic of Yemen and the Yemen Arab Republic, the Democratic Republic of Yemen claimed the island of Kamaran, notwithstanding the fact that it lies within the territorial waters of what was then the Yemen Arab Republic (as can be seen from the map on the screen) and was claimed by the Yemen Arab Republic on the basis of

proximity. In this connection the British Government in 1956 expressed the view that propinquity in itself does not give title to territory.

— We turn to the Greek islands of *Lesvos, Khios, Samos, Kos, Simi, Rhodes and Megisti*, all these lie within a distance of the Turkish coast less than the width of the latter's territorial sea and we have put up just a couple of examples for you.

— Third, the Malawi islands of *Chisamule and Likomal* in Lake Nyasa which is a boundary lake between the two States, respectively lie within 10 and 3 miles off the coast of Mozambique, which is the eastern side of the map for you.

— Next, the French island of *St Pierre and Miquelon* lie 10 to 12 nautical miles off the southern coast of Newfoundland.

— The *Shortland Islands Group* which belongs to the Solomon Islands lie 3 to 5 nautical miles off the coast of Papua New Guinea.

— Until recently ceded to Namibia, the 13 *Penguin Islands*, lying within 6 miles off the coast of Namibia, belonged to South Africa. We have put up two examples, but the rest are not dissimilar.

— The *Corisco and Elobey Islands* of Equatorial Guinea lie approximately 16 nautical miles off the coast of Gabon.

— The Australian islands of *Dauan, Boigu and Saibai* lie between 5 and 1.7 nautical miles off the coast of Papua New Guinea.

— The Spanish islands, *Islas Chaferinas*, lie 2 nautical miles off the coast of Morocco.

— At its closest, the Greek island of *Corfu* is about 1.1 nautical miles from the Albanian coast.

— And the Bangladeshi island of *St. Martins* lies about 4.7 miles due west of the nearest point on Myanmar, or Burma's coast.

All these maps are printed again in the judges' folders, so that you may look at them.

76. As the Court can thus see, the closeness of the Hawars to the Qatar peninsula does not pose an unusual problem.

77. There is another way — and an important way — of looking at the question of proximity.

78. Let it be assumed, contrary to fact, that as Qatar contends, it was already in existence as a State in the latter half of the nineteenth century and in an area coextensive with the limits of what is

called the Qatar peninsula. It would follow that, at the commencement of that State's life 140 years or so ago, if the doctrine of proximity were operative at all, it would have operated from the outset to extend Qatar's title to the Hawars.

79. For that, of course, is how the doctrine of proximity operates. Being a legal concept, it must be operative at the moment that the State invoking it acquired title to the generative or dominant area. If, therefore, Qatar acquired sovereignty over the adjacent peninsula in the nineteenth century, it must have been at that time that it acquired title to the Hawars by operation of the doctrine of proximity or contiguity. As the Ruler of Qatar claimed in 1939, "the Hawar islands belonged to the Qatar State from the very day when God created them" (Memorial of Bahrain, Ann. 289, Vol. 5, p. 1184).

80. The question must then be asked how, if at all, has Qatar supported or maintained that title over the intervening years in the total absence of any activity on its part in the islands, and in the face of evident opposing activity by Bahrain?

81. The question is implicit in one sentence of the award of Judge Huber in the *Island of Palmas* case. There, in his discussion of intertemporal law, he observes that "a distinction must be made between the creation of rights and the existence of rights".

> "The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law". (*UNRIAA*, Vol. II, at p. 845).

In other words, the merely theoretical extension of Qatari sovereignty from the peninsula itself to the adjacent islands that might have been sufficient *without more* in the mid-nineteenth century to accord title to Qatar cannot survive the fact that in the ensuing 150 years Qatar has failed in any respect to demonstrate its claimed sovereignty over the Hawars or, indeed, even over the adjacent peninsula coast, but that does not matter. With the exception of the relatively recent oil development at Zikrit and Dukhan on the coast of the peninsula, not quite facing the Hawars — and the map you see is the famous concession map — this region of the Qatar peninsula is an empty quarter — empty of inhabitants and empty of means of communication. As the Court will see, there is a broad yellow band drawn from the coast opposite the Hawars towards Doha, and that is an empty area; empty of inhabitants, empty of communication. While there is no need to question

Qatar's present title to the peninsula itself (with the exception of Zubarah), it certainly should be pointed out that in terms of compliance with the historical development of the law relating to the acquisition and, more to the point, the retention of title to territory, Qatar has done absolutely nothing in relation to the Hawars.

82. One comes thus to another highly relevant consideration twice expressed by Judge Huber in the *Palmas* case. The first is this:

> "if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has *continued to exist* and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign." (*UNRIAA*, Vol. II, p. 839.)

83. The second relevant observation comes later in the Award:

> "The admission of the existence of territorial sovereignty early in the 18th century and the display of such sovereignty in the nineteenth century . . . would not lead . . . to the conclusion that, unless the contrary is proved, there is a presumption for the existence of sovereignty in the meantime . . . [N]o presumptions of this kind are to be applied in international arbitrations, except under express stipulation. It remains for the Tribunal to decide whether or not it is satisfied of the continuous existence of sovereignty, on the ground of evidence as to its display at more or less long intervals." (*UNRIAA*, Vol. II, at p. 864.)

84. In short, if the presumption of title by proximity operates at all, it must have operated from the inception of Qatar's statehood. Qatar asserts that that statehood came about in the nineteenth century. But in all the intervening years Qatar has done nothing at all to display or assert its sovereignty over the Hawars, even at the time, so Qatar alleges, before Bahrain laid claim to the Hawars. And since then — said by Qatar to be from 1936 onwards — Qatar has done nothing to assert its title except for a short while to make a few and limited protests.

85. To conclude, if there ever was a presumptive Qatari title to the Hawars it has lapsed by reason of the passage of time and of governmental inactivity. In making this submission I do no more than echo the views expressed by Judge Huber as restated and approved by Sir Humphrey Waldock in the following passage, and I quote from Sir Humphrey:

> "Judge Huber insisted that the presumption only operates in the initial stages and that, when title is claimed by a continuous and prolonged display of sovereignty, there must be some manifestation of sovereignty throughout the territory claimed. In other words, proximity only constitutes presumptive evidence of an assumption of sovereignty which is rebutted by a failure to provide any positive evidence that

> sovereignty is asserted during a period of time in which some display of sovereignty would obviously be called for." (Waldock, *op. cit.*, p. 345.)

86. This virtually equates the basis of Bahrain's title to the Hawars with the notion of an historic title in international law spoken of in the *Eritrea/Yemen* case in the following terms:

> "But an historic title has also another and different meaning in international law as a title that has been created, or consolidated, by a process of possession, or acquiescence, or by possession so long continued as to have become accepted by law as a title. These titles too are historic in the sense that continuity and the lapse of a period of time is of the essence." (*First Award, 1998*, para. 106.)

87. Thus, the longer that Qatar maintains that it has been a State, the longer is the period in which the total absence of Qatari *effectivités* in the Hawar Islands evidences the disappearance of such claimed title as it may ever have had there.

88. So, Mr. President, that brings me to the end of the section on legal title. I now turn quite briefly to the question of the use of force by Qatar in seizing Zubarah in 1937.

ZUBARAH: THE USE OF FORCE BY QATAR IN SEIZING ZUBARAH IN 1937 WAS INEFFECTIVE TO DEPRIVE BAHRAIN OF ITS TITLE

89. Professor David gave this subject remarkably short shrift in his argument on 5 June (CR 2000/9, p. 15, para. 26): «*Je ne m'attarderai pas non plus sur les mérites d'une telle qualification qui, en dépit de ce que suggère Bahreïn, n'a même jamais retenu l'attention de la Société des Nations.*»

90. I venture to suggest — and you will forgive me for my French — I venture to suggest that whether or not the seizure of Zubarah engaged the attention of the League of Nations is of no relevance. The considerations denying legal effect to forcible seizures of territory are substantive ones that operate even though League procedures may not have been involved.

91. If the seizure of Zubarah in 1937 by an act of force were to occur today there would be no doubt that it would be unlawful and ineffective to deprive Bahrain of its title. In 1937 the position was not so clear because the law was then in the process of evolution from, first, the situation in which war and the use of force had been accepted as lawful to, second, the position now prevailing, and fully accepted, that the use of force is unlawful and by itself is ineffective to bring about a change of title. But although the thirties were a period of transition Bahrain submits that the Court should not accord validity to the forcible seizure of Zubarah by the Al-Thani in 1937.

92. At that time the major instruments affecting the forcible seizure of territory were the Covenant of the League of Nations and the Kellog-Briand Pact of 1928. By the latter especially, States undertook to refrain from the use of force as an instrument of national policy.

93. I should also recall, but need not repeat in detail here, the references made in the Memorial of Bahrain to such significant developments as the Declaration made in 1932 by 19 American Republics to the effect that they would not recognize the validity of any territorial acquisitions which might be obtained through force of arms; the note addressed to Japan in that same year, 1932, by the Members of the Council of the League of Nations drawing attention to the fact that it appeared to follow from Article 10 of the Covenant that no infringement of the territorial integrity of any Member of the League brought about by disregard of that Article ought to be recognized as valid; the similar declaration made soon afterwards by the League Assembly; and the Montevideo Convention of 1933 on the Rights and Duties of States in which the Parties agreed not to recognize territorial acquisitions obtained by force (Memorial of Bahrain, pp. 227-228).

94. Those instruments were not without effect in shaping the law. It is appropriate to note the manner in which the problem was approached in the fifth edition of Oppenheim's *International Law* which appeared in the very year of the seizure of Zubarah, 1937. The learned editor then said:

95.

> "The recognition of title by conquest was, prior to the Covenant of the League and the General Treaty for the Renunciation of War, the necessary result of the admissibility of the right of war as an instrument both for enforcing the law and for changing existing rights. The right to terminate the existence of another member of the community is a legal anomaly which can be understood only by reference to other anomalies of the legal system in question. Under general International Law conquest is not the result of an illegal act; on the contrary, it is the consequence of use of force permitted by International Law. The position has, it is submitted, undergone change as the result of the Covenant of the League and, in particular, of the General Treaty for the Renunciation of War [i.e., the Kellog-Briand Pact]. In so far as these instruments prohibit war, they probably render invalid conquest on the part of the State which has resorted to war contrary to its obligations. An unlawful act cannot normally produce results beneficial to the law-breaker. As has been pointed out above, the so-called doctrine of non-recognition does not render such conquest illegal; it is an announcement of the intention or the assumption of an obligation not to validate by an act of recognition claims to territorial title which originate in an illegal act and which is, accordingly, itself invalid." (Oppenheim's *International Law*, 5th ed. (1937), by H. Lauterpacht, at pp. 453-454.)

96. Despite the caution on this subject of the editor of 1937 edition of Oppenheim, it is instructive to observe how it has been dealt with in the latest edition of Oppenheim prepared by Sir Robert Jennings and Sir Arthur Watts. They said:

97.

> "There is, however, a further dimension of this problem to be considered. There is impressive authority for the view that the prohibition of force expressed in Article 2, paragraph 4, of the Charter of the United Nations is not only a principle of customary international law but also a fundamental or cardinal principle of such law; and indeed that it has the character of *ius cogens*. If the rule against the use of force is of this peremptory character, the question then must arise whether it is now still permissible to plead even an ancient and historic title by subjugation; and this notwithstanding the principle of the inter-temporal law which, though in a sense axiomatic, is nevertheless not one which has attracted the notion of a *ius cogens*." (Oppenheim's *International Law*, 9th ed. 1992, Vol. I, p. 704.)

Even though, as one would expect from authorities of the eminence of Sir Robert Jennings and Sir Arthur Watts, the implications of this very perceptive question are immediately qualified by the statement of possible competing considerations, I have felt it right to draw to the attention of the Court their suggestion that it should not be assumed that forcible takings of territory in the pre-charter days are necessarily protested now.

98. The situation in Zubarah is, Bahrain submits, precisely the kind of situation that the editors of Oppenheim could have had in mind in questioning "whether it is now still permissible to plead even an ancient and historic title by subjugation". As the editors pointed out, "recognition, acquiescence and general historical consolidation" may lend legitimacy to a continuous and peaceful display of territorial sovereignty, even if the original claim now appears vitiated in the light of this peremptory norm prohibiting its acquisition by force or threat of force" *(id.)*. But these conditions are not satisfied in the case of Zubarah. Bahrain has never recognized, acquiesced or participated in a general historical consolidation which could lend legitimacy to the seizure by Qatar of Zubarah. To the contrary, Bahrain has consistently expressed opposition to the seizure and maintained its claim to the area. Between 1937 and 1961 Bahrain protested against Qatar's action in Zubarah no less than 24 times (see Memorial of Bahrain, Sect. 2.14, and Counter-Memorial of Bahrain, para. 4.15). Bahrain has maintained its position throughout the mediation process. And, of course, the maintenance of this position underlay Bahrain's insistence

that the question of Zubarah had to be included in the case that Qatar brought before the Court in the present proceedings. (Reply of Bahrain, Sect. 4.5, pp.140-143.)

99. It is noteworthy that Qatar itself accepts the view of the state of the law in 1938 just described as denying validity to seizure of territory consequent upon an aggressive act. Admittedly, the context was somewhat different in that Qatar was alleging that Bahrain had unlawfully seized the Hawars in 1938. But as the facts do not support the Qatari allegation, in contrast with what undoubtedly happened in Zubarah in the previous year, Bahrain has no hesitation in reminding Qatar of the position that the latter has taken on the law and from which it cannot now resile. (See Memorial of Qatar, paras.5.58-5.59.)

CRITICAL DATE

100. I come last, Mr. President, and happily briefly, to the subject of the critical date. I do so only because both Professor Salmon and Sir Ian Sinclair have brought it up.

101. In introducing the subject, Professor Salmon said: "It would be surprising if the old chestnut of the 'critical date' were not raised or did not put in an appearance." (CR 2000/5, translation, p. 37, para. 28.) Actually, it is surprising that the subject has been raised in these words, for the fact is that in its Counter-Memorial Qatar "deliberately refrained from positing the notion of a specific 'critical date'" (Counter-Memorial of Qatar, para. 3.98).

102. Now the concept returns, at this last stage of the case, evidently because Qatar remains aware that it possesses no evidence of conduct on its own part in the Hawars and is desperately anxious to exclude the ample evidence of Bahraini activity in those islands that has accumulated, especially in the period since 1936. It returns with escalating degrees of emphasis.

103. In its Counter-Memorial, Qatar did

> "not ask the Court to reject any evidence put forward by Bahrain as being inadmissible *in limine* only by reason of the fact that it relates to activities carried out by or on behalf of Bahrain after April 1936".

It did, however, ask the Court to reject as totally inadmissible any evidence which the Court is satisfied is "manufactured by Bahrain to strengthen its case" or relates to "activities undertaken with a view to improving Bahrain's legal position" (Counter-Memorial of Qatar, para. 3.99). Professor Salmon is now saying that "none of Bahrain's acts subsequent to . . . 28 April 1936 is

opposable to Qatar", apparently without reference to whether or not the acts were "manufactured to strengthen Bahrain's case or were undertaken with a view to improving its legal position" (see CR 2000/5, translation, p. 37, para. 29). In his argument, Sir Ian Sinclair took the matter a step further. He said that post-1936 evidence is wholly inadmissible. Only, he said, if this absolute position is rejected does it become inopposable (CR 2000/8, pp. 41-42, paras. 16-18).

104. However, in the end the difference between the various ways in which Qatar has expressed itself in its pleadings may not matter. Qatar itself cites the *Taba* Award for the following proposition: "Events subsequent to the critical period can in principle also be relevant, not in terms of a change of the situation, but only to the extent that they may reveal or illustrate the understanding of the situation as it was during the critical period" (Counter-Memorial of Qatar, para. 3.100).

105. In Bahrain's submission the Court may, and should, in this case weigh all the evidence subsequent to 1936 just as it should all the evidence relating to events before 1936.

106. For whatever earlier critical date or critical period, if any, that might be chosen would not serve to exclude the attachment by the Court of weight to acts performed in the steady continuation of prior governmental administration. This has been the situation in the present case. Bahrain's conduct throughout — and that means from the nineteenth century — has been consistent with the development of a naturally and normally evolving community in the Hawars — something which began many years before 1936 and continues unbroken to the present day. If the pace and scale of development has increased, this cannot be ascribed to improper motivation. It is a reflection of the greater interest and needs of the population and of more ample means to meet their wishes. Also, as pointed out elsewhere, the sudden Qatari attack on Fasht Dibal in 1986 has made the Government of Bahrain more sensitive to the need for defensive measures in the Hawars.

107. One may introduce here some words from the argument of Sir Gerald Fitzmaurice in the case of *Minquiers and Ecrehos,* as quoted by Sir Robert Jennings in his masterly study, *The Acquisition of Territory in International Law.* Sir Gerald said:

> "To put the critical date too early would be to place a premium on the making of paper claims which the country concerned need not then follow up or insist upon, because it would be secure in the knowledge that the mere making of the claim would operate to freeze the legal position and to shut out or nullify the value of all the subsequent acts of the other party." (*Op. cit,* p. 38.)

"Paper claims" is an exact description of the unsubstantiated claims made by the Ruler of Qatar in 1938-1939. They cannot serve to deny legal significance to the continuation of Bahrain's real presence and activity in the Hawars over the ensuing 60 years.

108. Mr. President and Members of the Court, that brings me to the end of my argument for the day. For the patience and attention with which you have heard me, I am most grateful. May I ask you therefore, Mr. President, now to call upon Mr. Paulsson.

Le PRESIDENT : Je vous remercie, Sir Elihu. Et j'appelle maintenant à la barre M. Jan Paulsson.

Mr. PAULSSON:

THE EVENTS OF THE 1930S IN THEIR CONTEXT

Introduction

1. Thank you, Mr. President. It is a privilege for me to address the distinguished judges of this Court.

2. Bahrain has entrusted me with the task of dealing with matters of history. But, apart from some necessary overview, my primary focus will be on a very short period: the decade of the 1930s.

3. I would like to propose five series of simple questions:

— first, as the 1930s began: what was Bahrain, and what was Qatar? Qatar now says that it enjoyed sovereignty over all of the peninsula. Was that true? Or is Bahrain right in saying that the Al-Thani rule was consolidated, if at all, only in parts of the peninsula — mostly on the east coast?

— secondly, as the 1930s began: what were Bahrain's connections with Zubarah — and what were Qatar's connections? Is there any evidence that Zubarah was ever under Al-Thani domination before the invasion of 1937?

— thirdly, Qatar's armed attack on Zubarah. What actually happened? Did Qatar subjugate or liberate the inhabitants of the Zubarah Region? And did Bahrain ever, from 1937 until today, abandon its position that Qatar's conquest was illegal and therefore not entitled to recognition?

— fourthly: the Hawar Islands. As the 1930s began, what were Bahrain and Qatar's respective connections with the islands?

— and the fifth and final set of questions: the British decision in 1939 to the effect that Bahrain owns the Hawar Islands. How did this British determination come about? And what was the aftermath of this decision, from 1939 until today?

4. Five simple series of questions may not sound like very much, Mr. President, but I fear I will not even reach the second series of questions until tomorrow morning for the simple reason that the first is the longest. I have found the moment, I think, about 18 minutes from now where it would be convenient for me to stop, but if I am wrong in my estimations, I am at your disposal.

Le PRESIDENT: Vous pouvez aller jusqu'à 13 h 10.

Mr. PAULSSON: Je vous remercie.

I. THE TWO STATES

What was Bahrain at the outset of the 1930s?

5. The main island of Bahrain has had a permanent population for many thousands of years. It was the centre of the Dilmun Empire. According to the Sumerian epic Gilgamesh, this is where the sole survivor of the Great Flood, Ziusudra, had found refuge, and where the hero Gilgamesh came to find the secret of perpetual youth.

6. Given its strategic location on the route from the Middle East to the Indian subcontinent, Bahrain has always been and remains a centre for trade in the region.

7. By comparison, the coastal lands near the archipelago of Bahrain are arid and sparsely populated. There is no mystery here. Bahrain is blessed with a gift of nature: this is where the immense freshwater aquifers under the Arabian peninsula rise toward the surface as artesian springs. Hence the name Bahrain, or "two seas" in Arabic — the salt sea around, the sweet sea below. Some freshwater springs actually emerge on the seabed itself, creating the unique phenomenon of places in the Gulf of Bahrain where the water, at a few metres' depth, is actually drinkable. The secrets of finding these places are still known to the fishermen of Bahrain.

8. Fishing for pearls was Bahrain's great traditional industry. But this industry declined rapidly in the 1920s. The pearl banks were depleted. And perhaps more importantly, the Japanese house of Mikimoto developed the cultured pearl, which quickly overwhelmed the international markets.

9. Politically, Bahrain had been ruled without interruption by the Al-Khalifa since the eighteenth century. Britain had dealt with Bahrain as a State at least as long ago as the General Treaty of 1820. As the 1930s began, the Ruler was Sheikh Isa bin Ali, who died in 1932 after a reign of 63 years.

10. 1932 also happened to be the year when oil was discovered on the main island of Bahrain. This was the first discovery of oil on the Arab side of the Gulf — before Saudi Arabia, before Kuwait, before Abu Dhabi, and before Qatar.

11. The oil business was the focus of feverish speculation, as I am sure you know, in the 1920s. As a way to quick wealth, it was the Internet of the day.

12. One man who was obsessed with the quest for oil on the Arab side of the Gulf was the legendary Major Frank Holmes, a New Zealander who had fought in World War I and now thought he knew something about geology. This is how he has been described by one historian:

> "He was convinced that the Arabian coast would be a fabulous source of petroleum, and he pursued his dream with unswerving stamina. A promoter par excellence, with a gift for making people believe in him, he travelled up and down the Arabian side of the Gulf, from one impoverished ruler to the next, spinning his vision, promising them wealth where they saw only poverty, seeking always to put another concession into his kit." (Daniel Yergin, *The Prize*, pp. 280-281 (1991).)

13. In 1925, the Amir of Bahrain granted an oil concession to Holmes's company, the Eastern and General Syndicate. But the company ran out of money, and was unable to raise any in London. "Holmes was the worst nuisance in London," it was said. "People ran when they saw him coming." (*Idem*, p. 282.)

14. So Holmes went to America. And eventually — by 1930 — Standard Oil of California had acquired an option to take over Holmes's rights, and established a subsidiary, called the Bahrain Petroleum Company — BAPCO — as holder of the concession in Bahrain.

15. The British Government immediately disapproved. Britain had made agreements with various Sheikhs in its protectorates ensuring that oil could be developed only by "British interests".

Very tough, high-level negotiations with the United States Government were required before Britain relented, and allowed the American BAPCO its concession.

16. BAPCO began drilling in October 1931. Six months later, Holmes's obsession had become a reality.

17. The great discoveries in Saudi Arabia and Kuwait did not come until 1938, and Qatar's first discovery in 1939. This explains Bahrain's head start, and how Bahrain came to have — for a time — the world's fourth largest oil refinery.

18. It is an irony of history that little Bahrain, which turned out to have far less oil reserves than the other oil-producing nations in the Gulf, thus enjoyed a brief period of singular prosperity. Sir Charles Belgrave, who after arriving in 1926 served 31 years as Advisor to the Amir in Bahrain, wrote as follows in his memoirs:

> "When oil was discovered Bahrain acquired the reputation in the gulf of being a place 'where all the streets are paved with gold', and Arabs from other parts of the Gulf entered the country seeking work, expecting to make their fortunes in a few months . . . many of them entered Bahrain illegally, paying large sums of money to boat owners who landed them at night on deserted stretches of the coast, or on sandbanks at low tide, telling them that they were on the Bahraini coast. When the tide rose and the sea covered the sandbank many of these unfortunate people were drowned . . ." (Charles Belgrave, *Personal Column*, pp. 103-104, (1959).)

19. Human nature being what it is, it is safe to say that toward the end of the 1930s, prosperous Bahrain was looked at by its poorer neighbours not only with admiration, but also with envy.

What was Qatar at the outset of the 1930s?

20. Qatar was, and is, a flat, gravelly desert country. It has virtually no natural vegetation. With 16 times as much land as Bahrain, Qatar is yet by population the smallest country in the Arab world. The historical record suggests that there was hardly any human habitation in this inhospitable land in the mid-nineteenth century, when fishermen and pearl divers gradually began to transform their temporary camps into a village on the east coast of the peninsula, where Doha is today.

21. Qatar's Memorials speculate about important communities which may have existed in the north of Qatar even before the arrival of the Al-Khalifa. In his oral presentation, Professor David

spoke of a town which *«aurait pu exister»* ["might have existed"] (CR 2000/8, p. 53, para. 7). These speculations may be true, but it cannot seriously be proposed that the modern State of Qatar somehow succeeded to a ghostly ancient principality whose existence is uncertain, whose time is entirely speculative, whose borders are unknown, and whose rulers cannot be identified.

22. Yet in these oral proceedings, Qatar has sought to convince the Court of two propositions: first, that by the 1930s Qatar had for a long time been a State, and secondly that the inherent territory belonging to that State of Qatar had for a very long time been the entire peninsula, and indeed the Hawar Islands as well. Each successive speaker seemed to push further back into the past the date when Qatar allegedly became a coast-to-coast political entity, from Professor Salmon — "beginnings of the twentieth century", (CR 2000/5, p. 28, para. 15 *(a)*) — to Mr. Bundy — "roughly 1870", (CR 2000/7, p. 9, para. 7) — to Professor David "as of the middle of the nineteenth century" (CR 2000/8, p. 55, para. 12).

23. But this was not Qatar's position when it made its Application in this case, nor indeed in its written pleadings before its abandonment of the 82 documents. At the time when Qatar was hoping to use those documents to try to convince the Court that it had evidence of acts of administration in Zubarah and on the Hawar Islands, it had no reluctance in admitting that it had not become a State in control of the entire peninsula until some time after 1945. Throughout the nineteenth century, Qatar wrote, "there were only tribal chiefs who endeavoured to consolidate their position by developing their relations with other tribes and controlling the trade networks" (Counter-Memorial of Qatar, para. 2.14)

24. Qatar stated that it then became a State in the modern sense of the word "after World War II" (Counter-Memorial of Qatar, 2.13) — i.e., sometime after 1945. So in 1930, Qatar, as a political entity, was still, at best, struggling to define itself — socially as well as geographically.

25. Qatar also stated that Bahrain too was such a traditional society — in *its* case until 1923. This is certainly inaccurate. Bahrain could spend a lot of time on this debate, but will spend none at all — it just does not matter for this case. Since Qatar has admitted that it was, prior to 1945, merely the domain of a "tribal chief" trying to "consolidate [his] position", surely a claim that any particular territory had belonged to such a tribal chief must be proven. Qatar has in effect conceded that the extent of Al-Thani authority depended on which tribes wished to accept Al-Thani rule at

any particular time. Surely the Al-Thani clan did not have some kind of manifest destiny, or mandate from heaven, to rule over a predetermined territory; it had no inherent geopolitical unity. New States do not have an *a priori* existence.

26. Let us consider the fact that Great Britain had colonies in North America which achieved collective sovereignty in 1776. They established a federal capital in Washington. Looking westward, if one were to follow Qatar's current theory as presented for the first time last week, the territory of California would be a part of that new American State, if only one could find a few convenient maps. After all, the *natural* limit was the shore of the Pacific Ocean. According to Qatar's thesis, any Spaniards or native Americans who might be found in California should be dismissed as "occupiers".

27. There are of course many islands and peninsulas with divided sovereignty: the Dominican Republic and Haiti — two former colonies which have to share the same island; or *idem*: Indonesia and East Timor; or yet again Indonesia and Papua New Guinea. How about Borneo, where three sovereign States are present: Indonesia, Malaysia and Brunei? The capitals of two of those three countries are not even on the island of Borneo — I am thinking of Jakarta and Kuala Lumpar — this changes nothing; and so similarly the fact that the Al-Khalifa moved their capital from Qatar is hardly decisive. Or Sweden and Norway — perhaps a particularly good example — because they were both once under the dominion of the same country, Denmark, and yet share a peninsula without, I believe, the slightest inclination to accept Professor Salmon's thesis of natural units which would condemn one of the Scandinavian kingdoms to be absorbed into the other.

28. It is just not possible to claim on behalf of the Al-Thani that as soon as they became masters of Doha they instantly became lords of a preordained territorial unit, including Zubarah — let alone the Hawar Islands. Nor is it acceptable, as various counsel for Qatar have put it, to say that this political entity "gradually came into existence" (CR 2000/5, p. 28, para. 15 *(a)*), "gradually emerged" (CR 2000/6, p. 2, para. 1), came to be "recognized" over a period of 70 years (CR 2000/7, p. 9, para. 1, see also CR 2000/8, p. 55, para. 12), as though the mere effluxion of time means that one is dispensed from having to point to any actual events constitutive of title. Political

authority over territory is not acquired by stealth, or by the accumulation of convenient indications, or mis-indications on favourite maps.

29. Professor Salmon argued that *effectivités* in western Sahara or in the Amazon jungle do not create title unless the sovereign consents or acquiesces. The analogy is inapposite for the simplest of reasons: first there must be a sovereign. In the case of western Sahara, as Professor Salmon must admit, all concerned — Spain, Morocco, and Mauretania — agreed that the *bled siba* in the relevant northern sector was already a part of the State of Morocco (CR 2000/5, p. 41, para. 25 *(a)*). As for Brazil, who can doubt, even in the Amazon, that it has long since established its sovereignty there? But that was not the case with the State of Qatar and the peninsula on which it came into being.

30. This is not a legal theory which fails because its last link is missing; the missing link is the very first one.

31. Qatar's theory of statehood and territory seems to be a matter of mysticism or emotion. As Sir Elihu just reminded the Court, Sheikh Abdullah Al-Thani of Qatar wrote this: "The Hawar Islands belonged to the Qatar State *(sic)* from the very day when God created them . . . they do not belong to Bahrain according to their natural and geographical position." (Memorial of Bahrain, Vol. 5, Ann. 289, p. 1184.) Surely Qatar must concede that the organization of human society on our planet occurred some time subsequent to the creation of the Hawar Islands. As for the particular part of human society which has become the contemporary nation of Qatar, it was not born full grown: Qatar is the product of expansion and consolidation. The expansion to Zubarah was *illegal*; the expansion to the Hawar Islands simply *never happened.*

32. In fact, the admission by Qatar in its Counter-Memorial that it did not become a State until after 1945 was as inevitable as it is fatal to the Qatari thesis today. The situation in the Qatar peninsula *well into the twentieth century* is inconsistent with any notion of statehood — or even indigenous tribal sovereignty — extending over the entire Qatar peninsula. One need only consider a few elements of the historical record (see, in addition, Counter-Memorial of Bahrain, Sect. 2.2):

— In 1871, that is to say after the year 1868 which now looms so large in Qatar's new conception of its emergence as a political unit, an internal Ottoman Empire report referred to

Mohammed bin Thani as residing in Doha and having "no rule over the other villages" (Memorial of Bahrain, paras. 133 and 158).

— In 1881, Mohammed's son Jasim wrote to the British Political Resident that:

> "I have no power over [the Katar coast]. You are aware of the treaty made in the time of my father [1868] between us and the British Govt. namely that we were only to be responsible for [Doha Town] and Al Wakra [a village just south of Doha]." (Memorial of Bahrain, para. 133.)

— In 1893, in a meeting with the British Political Resident: "Shaikh Jasim at once acknowledged the rights of Bahrain and expressed his willingness to pay tribute as before." (Memorial of Bahrain, paras. 66 and 164.)

— And finally, throughout their presence on the peninsula, 1871 to 1915, the Ottomans referred to the "Qatar province" as being the region of Doha, as opposed to the Zubarah and Odaid territories elsewhere on the peninsula (see Memorial of Bahrain, Sect. 2.7).

And here, Mr. President, I would like to ask your permission to stop.

Le PRESIDENT : Je vous remercie beaucoup. La séance est levée. Nous nous réunirons à nouveau demain à 10 heures.

L'audience est levée à 13 h 10.