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Wednesday 14 June 2000

008 The PRESIDENT : Please be seated. The sitting is open, et je donne la parole à M. Reisman au nom de l'Etat de Bahreïn.

M. REISMAN :

LES QUESTIONS MARITIMES

PREMIÈRE PARTIE

38. Merci beaucoup, Monsieur le président, Madame et Messieurs de la Cour. La Cour se souvient qu'avant la suspension de l'audience hier soir, j'étais en train de m'acquitter de ma tâche qui consistait à décrire la géographie physique et la qualification juridique de cette géographie aux fins d'une délimitation maritime. J'avais examiné rapidement le fait que Bahreïn est un Etat pluri-insulaire ou un archipel *de facto*, par opposition à Qatar qui est un Etat continental. Et j'ai indiqué que la ligne de côte d'un Etat pluri-insulaire ou d'un Etat archipel est le périmètre externe établi d'après la laisse de basse mer, ce qui avait imposé de dénombrer les îles et les autres formations maritimes dont il faut tenir compte parce que ce sont les points de base à utiliser pour la délimitation entre Bahreïn et Qatar. La Cour se souviendra que j'ai tout d'abord examiné Fasht al Azm et que j'ai démontré, en me fondant sur les preuves scientifiques qui ont été présentées et qui n'ont pas été contestées, que Fasht al Azm fait partie de l'île de Sitrah. J'ai attiré ensuite l'attention de la Cour sur Qit'at Jaradah et j'ai montré, en me fondant encore sur des preuves scientifiques, que Qit'at Jaradah remplissait les conditions énoncées à l'article 121, paragraphe 1, de la convention de 1982 et est également une île. En raison de son statut d'île, nous avons commencé à examiner le haut-fond découvrant de Fasht ad Dibal qui, vous vous en souvenez, se trouve à 2,08 milles de l'île de Qit'at Jaradah.

A la fin de l'audience, je vous ai donné lecture d'une lettre que l'agent politique adressait en 1946 aux deux souverains en leur demandant de dire si, à leur avis, ils possédaient Fasht ad Dibal et, dans l'affirmative, sur quoi ils se fondaient. La réponse des deux souverains, sur le plan de l'argumentation juridique, a été conforme à la position adoptée par ces Etats depuis plusieurs dizaines d'années. Ce qui était particulièrement important à mon sens, ai-je dit, c'est que les deux souverains, tout comme l'agent politique, raisonnaient en se fondant sur l'hypothèse que le haut-fond découvrant se prêtait à l'exercice de la souveraineté et que les conditions de

l'établissement de cette souveraineté seraient les fondements habituels de la souveraineté territoriale. Il s'agissait en quelque sorte d'une hypothèse commune et partagée, en somme une
009 espèce d'hypothèse régionale. Sur la foi de ces réponses, l'agent politique a conclu que Bahreïn avait en fait droit à Fasht ad Dibal. Ce document important figure également dans votre dossier[1].

39. Hormis les activités relevant de l'exercice de la souveraineté menées sur certaines formations maritimes et indiquant que la souveraineté y est exercée, activités qui commencent en 1938, (lorsque la BAPCO a cherché à obtenir de Bahreïn l'extension de la superficie de ses concessions pétrolières), toute la zone maritime située entre la plus grande île de Bahreïn et Qatar a fait l'objet de relevés et de nombreuses formations maritimes ont été marquées sous une forme ou une autre aux fins de la sécurité de la navigation et de l'établissement de cartes. En 1950 — j'insiste sur cette date de 1950 — la BAPCO a signalé au souverain de Bahreïn qu'elle avait effectué des relevés jusqu'à la laisse de basse mer au large de la côte de Qatar. Les activités de la BAPCO avaient été autorisées par Bahreïn. Elles avaient été effectuées au grand jour et Qatar devait en avoir connaissance. Pourtant, aucune protestation n'a été enregistrée. D'ailleurs, lorsque PCL, la société pétrolière dont l'action était soumise au contrôle de Qatar, a décidé en 1940 de placer des repères de navigation sur, par exemple, Tighaylib, Mashtan et Janan, elle a demandé l'autorisation de Bahreïn.

40. Qatar, encore une fois pour éviter d'avoir à produire des preuves d'effectivités et bien que son souverain ait admis qu'il était possible, pour dire qui était propriétaire de hauts-fonds découvrants, de se fonder sur des principes territoriaux, soutient à présent que la souveraineté sur cette zone est régie non par des principes territoriaux mais par le droit de la mer, dans la version que Qatar propose et qui innove.

41. Tout comme ce fut le cas pour Qit'at Jaradah, Bahreïn exerce depuis fort longtemps son autorité sur Fasht ad Dibal. Ici aussi, je me bornerai à résumer les faits, ces effectivités étant exposées en détail dans les écritures. La souveraineté de Bahreïn s'est manifestée de la manière suivante:

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[1] Lettre du 18 janvier 1947 du résident politique britannique au secrétaire d'Etat pour les Indes, annexe 344, vol. 6, p. 1480.

— des opérations de relevé et l'octroi de concessions pétrolières[2];

— la construction de cairns[3];

— la construction d'un puits artésien[4];

— l'octroi de licences pour la mise en place de pièges à poissons permanents[5];

— la solution apportée à des problèmes de navigation dans le secteur[6];

010 — l'assistance fournie lors de situations d'urgence en mer[7]; et

— les patrouilles des garde-côtes de Bahreïn dans le secteur[8].

42. Qatar n'a, quant à lui, pas apporté la *moindre* preuve de ses propres effectivités sur Fasht ad Dibal. Sans le vouloir peut-être, il a toutefois fourni de multiples preuves des manifestations de la souveraineté de Bahreïn, tout en critiquant l'importance juridique de ces effectivités. Qatar conteste la pertinence juridique des balises et des puits construits par Bahreïn. Comme je l'ai expliqué au sujet de Qit'at Jaradah, il s'agit bien là de manifestations de souveraineté. A tout le moins, si le Royaume-Uni a désigné Bahreïn et non Qatar pour ériger et entretenir les balises, c'est qu'à ses yeux, l'Etat qui était appelé à le faire était Bahreïn, puisqu'il était le seul Etat actif dans la région. De même, Qatar conteste la pertinence du forage par la BAPCO d'un puits artésien sur Fasht ad Dibal en 1940, mais omet de dire que la BAPCO agissait en vertu de la concession accordée par Bahreïn un mois auparavant. Qatar nie par ailleurs que Fasht ad Dibal soit utilisé exclusivement par des bateaux bahreïnites ou que Bahreïn y assure seul les contrôles opérés par les garde-côtes, mais Qatar n'apporte aucune preuve à l'appui de ces affirmations.

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[2] Mémoire de Bahreïn., par. 576.

[3] *Ibid.*, par. 586.

[4] *Ibid.*, par. 584 et 586.

[5] *Ibid.*, par. 577.

[6] *Ibid.*, par. 577-579.

[7] *Ibid.*, par. 577 à 579.

[8] *Ibid.*, par. 598 et 599, rapport des garde-côtes de Bahreïn, annexe 24, vol. 2, p. 148 à 151.

C. Janan

43. Monsieur le président, Madame et Messieurs de la Cour, l'illustration qui apparaît maintenant à l'écran présente l'île de Janan. Qatar fonde sa revendication sur Janan sur cinq motifs. Le premier et le deuxième sont la proximité et la géomorphologie. La proximité n'est pas un fondement de titre de souveraineté en droit international, comme l'a démontré sir Elihu. En réalité, il y a proximité entre Janan et les îles Hawar, et la souveraineté sur les îles Hawar revient à Bahreïn. Quant à la revendication fondée sur la géomorphologie, comme l'a fait observer sir Elihu, la géomorphologie de toute cette région — y compris l'Arabie saoudite et l'Iran — est la même. En troisième lieu, Qatar a invoqué des documents qui visent à prouver une reconnaissance diplomatique de la souveraineté de Qatar sur Janan. Ces documents ont tous été dénoncés comme étant des faux et ont été retirés. En quatrième lieu, Qatar prétend pouvoir bénéficier de la doctrine Huber qui s'applique aux différentes composantes d'un archipel, de telle sorte que, si Qatar a la souveraineté sur les îles Hawar, il l'a aussi sur Janan. Bahreïn souscrit au principe exprimé dans la doctrine Huber mais fait observer que les revendications de souveraineté de Qatar sur les îles
011 Hawar qui seraient utiles pour l'application de la doctrine Huber sont fondées *entièrement* sur des faux qui sont désormais retirés de l'affaire. Enfin, dernier motif, Qatar soutient que la Grande-Bretagne a accordé Janan à Qatar dans la lettre de 1947. Bahreïn rejette cette thèse. Le dossier montre que la sentence de 1939 reconnaissait la souveraineté de Bahreïn sur Janan parce que celle-ci faisait partie intégrante des îles Hawar. Janan figurait sur la liste des îles que Bahreïn a soumise au gouvernement britannique. Janan a été considérée comme faisant partie des îles Hawar lors des négociations relatives aux concessions pétrolières des années trente. Bahreïn a installé des balises sur Janan en 1939, suite à la décision de 1939[9], etc. Dans les années quarante, un certain nombre de communications britanniques peu cohérentes ont traité de Janan de manière contradictoire. Dans son contre-mémoire, Bahreïn a passé ces communications en revue pour démontrer que l'on peut facilement replacer dans leur contexte les divergences d'objectifs et les confusions souvent compréhensibles concernant les îles du groupe de Hawar[10]. En tout état de cause, même les fonctionnaires britanniques ont accepté le caractère définitif de l'arbitrage

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[9] Voir réplique de Bahreïn, p. 6 et 7.

[10] Contre-mémoire de Bahreïn, p. 130 à 151.

de 1939. Bahreïn défend devant la Cour l'idée que cet arbitrage, qui a établi la souveraineté de Bahreïn sur les îles Hawar, s'étendait à Janan. Bahreïn se permet de faire observer qu'il serait extraordinairement dommageable de démembrer l'archipel des îles Hawar et d'attribuer à Qatar une de ses composantes qui fait partie intégrante de l'archipel, à savoir Janan, essentiellement, comme l'a dit M. Volterra, comme un prix de consolation au terme de la présente procédure.

D. Les effectivités

44. La Cour voit ici les nombreuses autres îles qui font partie de Bahreïn. Bahreïn a un droit sur ces îles, non seulement en raison des effectivités qu'il a démontrées mais aussi parce qu'elles font partie du système pluri-insulaire, c'est-à-dire de l'archipel qui constitue son territoire : ce sont ses «formations naturelles». Les nombreuses îles qui composent l'archipel ou les archipels constituent, comme le veut la nature même de l'archipel, un ensemble ou, pour utiliser l'expression du juge Huber, «un groupe». Par conséquent, outre les effectivités que Bahreïn a établies en ce qui concerne les îles et les autres formations maritimes, le statut d'archipel de Bahreïn ne le fait-il pas bénéficier d'une présomption ancienne, applicable aux archipels en général, exprimée au siècle précédent par le juge Huber dans l'affaire de l'*Ile de Palmas* ? «Pour ce qui est des groupes d'îles», a dit le juge Huber, «il est possible qu'un archipel puisse, dans certains cas, être regardé en droit comme une unité, et que le sort de la partie principale décide du reste»[11]. C'est la raison pour laquelle la Cour, dans l'affaire des *Minquiers et des Ecréhous,* a jugé superflu de rendre une décision formelle distincte concernant chacun des îlots et chacun des rochers mais a choisi de «dire d'une manière générale à laquelle des Parties appartient la souveraineté sur chaque groupe dans son ensemble»[12].

45. Le célèbre *dictum* de M. Huber nous amène maintenant au problème général des hauts-fonds découvrants. Bahreïn a montré, en apportant la preuve de multiples effectivités manifestes, qu'il possédait un titre sur les hauts-fonds découvrants. Si la souveraineté sur ces formations maritimes revient à Bahreïn, c'est qu'elles font partie des formations maritimes de l'archipel. Bahreïn ayant démontré, en apportant la preuve d'effectivités, qu'il jouissait d'une

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[11] Revue générale de droit international public, 1935, p. 183.

[12] *Minquiers et Ecréhous, arrêt, C.I.J. Recueil 1953*, p. 53.

souveraineté sur les principales formations maritimes, il est dispensé, en vertu de la jurisprudence établie par les précédents de l'*Ile de Palmas* et *des Minquiers et Ecréhous*, de démontrer qu'il exerce un contrôle de niveau comparable sur les îlots et rochers plus petits pour faire reconnaître son titre sur ces derniers. Le titre de Bahreïn est consolidé par le fait que le Royaume-Uni, en tant que puissance régionale, a constamment reconnu la souveraineté de Bahreïn sur ces mêmes formations maritimes. L'idée que ces formations puissent appartenir à Qatar n'a jamais été évoquée. Comme l'a affirmé le tribunal saisi de l'arbitrage *Erythrée/Yémen*, «la commune renommée est également un élément important pour la consolidation du titre»[13]. A cet argument, le conseil de Qatar oppose d'un ton plaintif que «en décidant en 1947 d'attribuer les droits souverains sur les hauts-fonds de Dibal et Qit'at Jaradah à Bahreïn, le Gouvernement britannique paraît avoir commis une erreur»[14]. Monsieur le président, Madame et Messieurs les Membres de la Cour, peut-être est-ce Qatar qui se trompe.

46. Dans tous les exemples d'effectivités on trouve premièrement «une manifestation délibérée de la souveraineté et de l'autorité sur le territoire par l'exercice de la juridiction et de fonctions étatiques»[15] et, deuxièmement, une prise en compte du contexte et des circonstances. Ces critères ont permis de faire régner, souplement mais systématiquement, l'état de droit, sous une forme générale, dans une très large gamme de situations géographiques et historiques.

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47. Bahreïn, dans son mémoire, a apporté la preuve de l'exercice historique de sa souveraineté sur les formations insulaires[16] en invoquant notamment le témoignage d'anciens marins et pêcheurs (de perles et de poissons) de Bahreïn et d'Arabie saoudite[17].

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[13] Sentence arbitrale de 1998 entre l'Erythrée et le Yémen, par. 516.

[14] Contre-mémoire de Qatar, par. 6.19.

[15] Sentence arbitrale de 1998 entre l'Erythrée et le Yémen, par. 239.

[16] Mémoire de Bahreïn, sections 6.1 A et 6.2 B.

[17] Voir les déclarations d'Ibrahim bin Irhama Al Binali, annexe 15, vol. 2, p. 125 ; Ahmad bin Mohamad Al Shayji, annexe 16, vol. 2, p. 127 ; Mohamad bin Abdallah Al Thawadi, annexe 17, vol. 2, p. 129 ; Saleh bin Abdalla bin Mohamad, annexe 18, vol. 2, p. 132 ; Mubarak Ahmad al Naaimi, annexe 18, vol. 2, p. 134 ; Mubarak bin Salman Al Ghatam, annexe 20, vol. 2, p. 136 ; Ali bin Ahmad Shaheen Al Dosari, annexe 21, vol. 2, p. 139 ; Majed bin Abdallabin Thamir Al Dosari, annexe 22, vol. 2, p. 142 ; Abdalla bin Ali bin Thamir Al Dosari, annexe 23, vol. 2, p. 144 ; Salim bin Mohammed Salim Al-Omairi, annexe 26, vol. 2, p. 176 ; Khalil bin Ibrahim Al-Khaldi, annexe 27, vol. 2, p. 179; Abdullah bin Thazaa Al-Majdal, annexe 28, vol. 2, p. 182 ; Sulaiman bin Sagr bin Salman Al-Majdal Al-Khaldi, annexe 29, vol. 2, p. 184 ; Bader bin Mohammed Al-Majdal Al-Khaldi, annexe 30, vol. 2, p. 186 ; et Mubarak bin Saad, annexe 31, vol. 2, p. 188 (toutes ces déclarations figurent dans la réplique de Bahreïn).

48. Dans son contre-mémoire, Qatar conteste six catégories d'actes de souveraineté bahreïnites : l'érection de balises ou de cairns, les activités des compagnies pétrolières, l'assistance aux pêcheurs, l'usage exclusif des *fashts*, la sécurité de la navigation et les opérations de police en mer et la pêche des perles et des poissons. Soyons clair : Qatar ne conteste pas la réalité des actes bahreïnites mais leur impact juridique. Dans son mémoire, Qatar examine dans le détail l'érection par Bahreïn de balises et de cairns sur les formations maritimes contestées[18]. Ces activités sont bien connues. Qatar a reconnu qu'elles sont le fait des Bahreïnites et qu'il n'a jamais lui-même jamais déployé d'activités analogues. Et sur le plan juridique, nos adversaires se contentent d'affirmer qu'«il n'a jamais été admis que de tels actes emportaient l'acquisition de territoires»[19].

49. Un Etat continental pourrait ne pas attacher d'importance particulière aux cairns et aux balises. Pour les populations maritimes et archipélagiques, ces structures sont en revanche très importantes : elles sont indispensables à la navigation et parfois même à la survie des marins. C'est pourquoi, à tout le moins, l'érection de balises et de cairns par Bahreïn (non imité par Qatar sur ce point) témoigne d'un vif intérêt pour les formations maritimes. Dans l'affaire des *Grisbadarna*, le tribunal a relevé que les efforts et les frais lié à ce type d'activités démontraient la perception d'un droit et d'un devoir[20]. Qatar ne s'est manifestement pas senti investi du droit ni du devoir d'établir ou d'entretenir des systèmes d'aide à la navigation dans cette région.

50. Dans la même veine, le tribunal saisi de l'affaire *Erythrée/Yémen* déclare, au sujet des phares yéménites, que leur construction a des «conséquences» :

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> «La construction et l'entretien de phares en dehors de tous arrangements conventionnels et pour une durée indéterminée entraînaient certaines conséquences. L'acceptation de l'offre du Yémen ne valait pas reconnaissance de la souveraineté de celui-ci sur des îles. Mais elle valait acceptation du fait que le Yémen était le mieux placé pour se charger de l'établissement et de l'entretien de feux dans ce secteur de la mer Rouge et était disposé à le faire et que, lorsque viendrait finalement le moment de déterminer le statut de ces îles, le Yémen serait certainement une «partie intéressée».[21]» *[Traduction du Greffe.]*

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[18] Mémoire de Qatar, par 6. 41-6.45.

[19] Contre-mémoire de Qatar, par. 6.21.

[20] Travaux de la CPA 1921, p. 135.

[21] Sentence arbitrale de 1998 entre l'Erythrée et le Yémen, par. 237.

51. Pour Bahreïn, le fait d'avoir, depuis des dizaines d'années, établi et entretenu des balises et des cairns démontre qu'il accepte et assume les responsabilités maritimes d'un Etat archipel, qu'il manifeste un intérêt constant pour les formations maritimes en question, son sens des responsabilités et du devoir et qu'il exerce sa juridiction en apportant son aide aux marins. Cette action a d'autant plus d'importance que Qatar, pour sa part, n'a jamais établi ni entretenu la moindre de ces installations. Bahreïn conclut par conséquent que, de ce point de vue, ces activités constituent des effectivités déterminantes.

52. S'agissant des activités exercées par les compagnies pétrolières, là encore, les faits ne prêtent pas à controverse. Ce qui n'empêche pas Qatar, dans son contre-mémoire, de soutenir que lesdites activités ne constituent pas «des preuves d'actes de souveraineté»[22]. Mais les activités exercées sur un territoire par des agents privés en vertu de permis délivrés par un Etat revendiquant ce territoire, permis sans lesquels ces activités ne pourraient pas être menées légalement dans l'Etat concerné, constituent bel et bien des manifestations de souveraineté. Une fois de plus, Bahreïn a produit des preuves de l'exercice de telles activités, alors que Qatar n'en a présenté aucune.

53. Dans les manifestations bahreïnites de souveraineté figurent également certains moyens fournis aux pêcheurs (abstraction faite des balises et cairns dont j'ai déjà parlé), ainsi que les puits forés par une compagnie pétrolière en vertu d'une autorisation de Bahreïn ou par des ressortissants bahreïnites utilisant les îles en cause. Je tiens à faire remarquer de nouveau l'absence d'activités analogues de la part de Qatar.

54. Quant à l'utilisation des *fashts* [hauts-fonds] par des bateaux bahreïnites, la question n'est pas de savoir si les ressortissants d'autres Etats les utilisaient aussi, mais quel Etat exerçait sa compétence sur eux. Une fois de plus, Bahreïn a produit une masse d'éléments de preuve de l'exercice de sa juridiction en matière législative, réglementaire et administrative. A nouveau, Qatar, lui, n'a rien présenté.

E. Les bancs d'huîtres perlières

55. Monsieur le président, Madame et Messieurs les Membres de la Cour, pour faire le point juridique et géographique des revendications territoriales de Bahreïn, il faut également s'intéresser

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[22] Contre-mémoire de Qatar, par. 6.29.

015 aux bancs d'huîtres perlières et voir l'effet qu'ils auront sur la délimitation maritime entre Bahreïn et Qatar. Les bancs sont mis en évidence sur la carte. Cette question a été traitée avec une certaine dérision et non pas examinée au fond lors des plaidoiries de la semaine dernière. Elle mérite mieux. Pour les Etats du Golfe, la pêche des perles représentait au XIX[e] siècle l'équivalent du pétrole aujourd'hui. Différents bancs relevaient de Bahreïn, d'Abou Dhabi et de Qatar en vertu d'un usage traditionnel et étaient exploités principalement par leurs flottes respectives, rejointes occasionnellement par les bateaux d'autres tribus amies. En 1905, les jurisconsultes de la Couronne britannique ont publié un avis autorisant à faire valoir des droits coutumiers exclusifs sur les zones traditionnelles de pêche des perles[23] et ces droits furent reconnus par un accord de 1911 mais soumis au contrôle de la résidence qui vérifiait si des concessions étaient accordées à des étrangers[24]. Je pense que personne ne peut contester matériellement que les bancs particuliers montrés sur la carte étaient bahreïnites et non qatariens : Qatar possédait d'autres bancs vers l'est, ce qui explique probablement l'emplacement de Doha.

56. Bahreïn soutient qu'en ce qui concerne l'acquisition de la souveraineté sur les bancs, le point essentiel est de savoir si le Gouvernement de Bahreïn exerçait une autorité étatique exclusive sur les Bahreïnites et les ressortissants étrangers qui travaillaient sur ces bancs. Qatar n'a fourni aucune preuve indiquant qu'il exerçait une juridiction étatique quelconque sur ces bancs d'huîtres perlières.

57. M. Paulsson a déjà fait l'historique de cette pêche des perles et évoqué la manière dont cette activité commença à décliner dans les années vingt pour ne plus être aujourd'hui que tout à fait insignifiante. Ce déclin met-il fin pour autant à la souveraineté que Bahreïn a acquise jusqu'alors ? Qatar n'a produit aucune preuve attestant de l'abandon de ces droits par Bahreïn. Au contraire, Qatar sait que Bahreïn n'a cessé de les revendiquer pendant toutes les négociations. Lorsqu'un gisement de pétrole ou de gaz est épuisé à Qatar et que la terre alentour n'est plus exploitée et redevient désertique, Qatar perd-il pour autant la souveraineté sur ce territoire ? Si tel

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[23] Rapport des jurisconsultes Finlay et Carson, 11 février 1905, mémoire de Bahreïn, annexe 321, vol. 6, p. 1431.

[24] Lettre du lieutenant-colonel Cox, résident politique britannique, à l'agent politique britannique, 11 juillet 1911, mémoire de Bahreïn, annexe 322, vol. 6, p. 1434-1435.

n'est pas le cas, il n'y a aucune raison pour que la souveraineté bahreïnite ne soit pas reconnue sur ces vieux bancs de pêche perlière.

58. Monsieur le président, Madame et Messieurs les Membres de la Cour, Bahreïn soutient que la délimitation entre Bahreïn et Qatar correspond à une délimitation entre un Etat continental et un Etat pluri-insulaire ou un archipel. Pour Bahreïn, les îles et les hauts-fonds découvrants à l'intérieur de l'archipel de fait bahreïnite sont bahreïnites, parce que Bahreïn y manifeste depuis
016 très longtemps sa souveraineté dans la mesure où le milieu, sur les formations maritimes en question, se prête à l'habitat humain, parce que ces formations font partie intégrante de l'archipel, enfin parce qu'elles font aussi l'objet d'une commune renommée à l'échelle internationale.

Je vous remercie de votre attention. Monsieur le président, je vous serais très obligé de bien vouloir appeler maintenant à la barre mon collègue, Prosper Weil, qui décrira en détail les principes juridiques régissant cette délimitation. Merci.

Le PRESIDENT : Merci beaucoup, professeur Reisman. I now give the floor to Professor Prosper Weil.

Mr. WEIL:

THE MARITIME DELIMITATION PROCESS

Mr. President, Members of the Court,

By way of introduction, permit me to tell the Court how honoured I am to take the floor here on the maritime aspects of this case — a case in which the Court will make one more contribution to that edifice of the law of maritime delimitation which, judgment by judgment, it has been constructing for more than 30 years.

Permit me also to thank the Government of the State of Bahrain for the confidence it has shown me by instructing me to defend interests which are vital for its future.

Finally, permit me to address my respectful congratulations to the new Members of the Court, its new President and its new Vice-President.

1. Mr. President, Members of the Court, this is the first time in recent history that the Court finds itself faced directly with a problem of delimitation of the territorial sea. The previous

cases — from the *North Sea Continental Shelf* cases in 1969 to the *Jan Mayen* case in 1993 — basically involved a delimitation of the continental shelf, of fishery zones or of exclusive economic zones. This time, it is a delimitation of the territorial sea which the Court is invited to undertake, in the whole of the southern sector and in part of the northern sector[1]; only in the remainder of the northern sector will the boundary to be drawn separate the continental shelf and the fishery zones of the two States.

2. This is indeed a "new legal situation", to quote Qatar's words in its pleadings[2], a situation which only arose in the course of the proceedings. [Illustration.] When Qatar filed its Application in 1991, neither Bahrain nor Qatar claimed more than three nautical miles of territorial sea. Between the outer limits of the two territorial seas, there extended in 1991 a continental shelf and high seas zone, and this is the zone in which the single maritime boundary then envisaged was to run. In this zone, too, beyond the territorial seas of the two countries, ran the line dividing the subsoil resources which was envisaged by the British in 1947. Finally, in this same zone beyond the territorial seas of the two countries were located the two features which are now so strongly contested: Fasht ad Dibal and Qit'at Jaradah. [Illustration.] Since the extension of the territorial sea to 12 nautical miles decided on by Qatar in 1992 and by Bahrain in 1993, the geographical context of the delimitation has changed profoundly. For a large part of its course, the single maritime boundary will now run within the territorial seas of the two States, that is to say, through the area where the two territorial seas overlap. Qit'at Jaradah, which at the time the Application was filed lay outside the territorial seas of the two States, is now situated within both Bahrain's 12 miles of territorial sea and Qatar's 12 miles of territorial sea. With regard to Fasht ad Dibal, which was also outside the territorial seas of the two States when the Application was filed, a small part of this feature now lies within Qatar's territorial sea, the remainder being less than 12 nautical miles from both the Bahraini island of Sitrah and the Bahraini island of Qit'at Jaradah, that is to say, within the territorial sea of Bahrain.

3. The fact that the delimitation to be undertaken is essentially a territorial sea delimitation is one of the principal characteristics of our case. The distances which it involves have nothing in

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[1]Counter-Memorial of Bahrain, paras. 457-461.

[2]Memorial of Qatar, paras. 11.3, 11.5-11.12.

common with those which were involved in previous cases. They amount to only a few nautical miles — in the present case a distance of 10 nautical miles seems a considerable one; on a map, for example, the Hawar Islands appear to be far from the main island of Bahrain, whereas in reality they are only 11 nautical miles away from it. As we shall see, this aspect is not without legal consequences.

4. The question thus arises whether, and in what way, the principles and rules governing that part of the course of the maritime boundary which separates the territorial seas of the two States differ from those governing the delimitation of the other maritime spaces. Without going into the details of its turbulent history, I would simply observe that from the 1969 Judgments in the *North Sea Continental Shelf* cases onwards, the delimitation of maritime spaces other than the territorial sea has been characterized by a prolonged descent into the horrors of the equidistance method — faulted in every possible way, the victim of a veritable witch-hunt which has echoed around this hall again and again. The delimitation of the territorial sea, however, a delimitation by proximity, aroused little passion, and no one considered questioning the rule of customary law which found expression in Article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, a provision which was repeated word for word, more than 20 years later, in Article 15 of the 1982 Convention on the Law of the Sea — namely a boundary "every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured". The sole exception is "where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith".

5. Thanks to the efforts of the Court from *Libya/Malta* in 1985 to *Jan Mayen* in 1993, little by little the law on maritime delimitation recovered some unity. Whatever the maritime space to be delimited, whatever the applicable law is — customary law or treaty law —, whether or not a single maritime boundary is to be drawn, in every case the delimitation process now takes place in two stages, namely a provisional equidistance line, followed by an adjustment of that line if the circumstances require and justify such an adjustment[3]. Accordingly, throughout the single

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[3]Memorial of Bahrain, paras. 609-614; Memorial of Qatar, para. 11.37. See Counter-Memorial of Bahrain, para. 467; Counter-Memorial of Qatar, paras. 6.3, 7.21, 7.28.

maritime boundary which the Court is requested to determine, from south to north, it is, as the two Parties agree, "proper to begin the process of delimitation by a median line provisionally drawn" and, in the second stage, if such appears necessary, to take account of "circumstances which might modify the result produced" — the Court will recognize the expressions it used in the *Jan Mayen* case[4]. It should be added that between the "special circumstances" of territorial sea delimitations and continental shelf delimitations governed by Article 6 of the 1958 Convention, on the one hand, and the "relevant circumstances" of other delimitations the only difference is now terminological: in both cases, as the Court explained in that case, these are facts "necessary to be taken into account in the delimitation process"[5]. The two-stage process was confirmed in the recent *Eritrea/Yemen* Arbitral Award, in which the Tribunal stated that it had taken as its fundamental point of departure that, as between opposite coasts, a median line obtains[6]. The Court has undoubtedly stated that this unification of the rules governing the delimitation process applies "at any rate in regard to a delimitation between opposite coasts"[7]. This precautionary language — which does not preclude the extension of the two-stage process to delimitations between adjacent coasts — does not in any case apply to territorial sea delimitations, since the customary rule in Article 15 of the 1982 Convention expressly states, in black and white, that it applies "where the coasts of two States are opposite or adjacent to each other".

6. Does this mean, Mr. President, that the delimitation of the territorial sea has lost every shred of independence, that all its originality by comparison with the delimitation of other maritime spaces is a thing of the past, and that consequently there is nothing to distinguish the present case from the earlier cases decided by the Court, which concerned the delimitation of the continental shelf, of fishery zones and of exclusive economic zones? Certainly not. The Court observed in 1969 that the distorting effect produced by a slight irregularity in a coastline or a small island off the coast is negligible at a short distance from the coastline but becomes more marked the further

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[4]*Maritime Delimitation in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993,* p. 62, paras. 53 and 55.

[5]*Maritime Delimitation in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993,* p. 62, para. 55.

[6]Second Stage, para. 83.

[7]*Maritime Delimitation in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993*, p. 58, para. 46; cf. p. 62, para. 56.

020 one goes from the coast[8]; this observation remains correct and fully valid. As a result of it, corrections — for example the half-effect or no effect — are confined to long-distance delimitations, such as those of the continental shelf or the exclusive economic zone, whereas equidistance remains firmly the rule for short-distance delimitations, which by their very nature is what territorial sea delimitations are. Nor should it be forgotten that, although today the customary rule regarding the delimitation of the territorial sea laid down in Article 15 of the 1982 Convention is based on what might be called the ordinary law of maritime delimitation, it nonetheless has particular force because of its explicit and strongly asserted character. One territorial sea delimitation is inevitably and necessarily more equidistant than another, I have to say. Likewise, the distinction between opposite coasts and adjacent coasts, which has already been reduced to virtual insignificance in delimitations of the continental shelf and of fishery zones and exclusive economic zones, becomes totally irrelevant in a territorial sea delimitation once the customary rule in Article 15 is declared applicable in all geographical situations.

7. It is this customary rule in Article 15 which, in the present case, governs the delimitation over the major part of its course — the two Parties agree on this point — and this is the first time the Court has been called upon to apply this rule in so specific a manner. I would add that neither Bahrain nor Qatar are parties to any of the four 1958 Geneva Conventions, and although Bahrain is a party to the 1982 United Nations Convention on the Law of the Sea, Qatar, which has signed but not ratified it, is not a party to it, and consequently the customary law is applicable.

8. The Parties equally concur, and I feel this point is extremely important, in believing that the principles of contemporary law should govern the delimitation[9]. Accordingly, we must rid this case of considerations and concepts whereby this or that factor would acquire what the Court has called, in regard to geological and geophysical factors, "a place which now belongs to the past"[10].

021 9. I would observe in passing that what is true of the delimitation of maritime spaces is, of course, also true of the title of a State to the spaces adjacent to its coasts. I find it difficult, for example, to understand Sir Ian Sinclair's reasoning, the pretext for which is the theory of

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[8] *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 18, para. 8; p. 37, para. 59; p. 49, para. 89.

[9] Memorial of Qatar, para. 11.2; Counter-Memorial of Bahrain, paras. 464 *et seq.*

[10] *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 36, para. 40.

inter-temporal law, that today sovereignty over the Hawar Islands should be determined in the light of the rule in force between 1936 and 1939, whereby the maximum breadth of the territorial sea was three nautical miles. Every island, he said, which is wholly or partly within three nautical miles of a State's mainland coast, is under the sovereignty of that State. With regard to the islands situated beyond the three nautical miles of the territorial sea as it existed in the years 1936-1939, but within 12 nautical miles, Sir Ian continued, they are under the sovereignty of the coastal State by virtue of the so-called proximity principle *«compris correctement»* ["as properly understood"] and the "portico doctrine"[11]. This reasoning, Mr. President, relies on concepts and rules which are totally a thing of the past. It is in the application and context of contemporary law and contemporary terminology that the maritime aspects of the present case must be judged, and not in the light and application or context of the law and terminology of three quarters of a century ago. Why, therefore, would the Court make a finding in the year 2000 from the standpoint of the context of the territorial sea of the 1930s? And conversely, what is the relevance here, may I ask, in the context of the 1930s, of the 12-mile limit of the territorial sea which dates from a much later time?

10. This is not, I hasten to say, the only example of our opponents' misunderstanding of the principle which they themselves rightly proclaim: that the maritime delimitation should be undertaken by the Court within the framework of present-day law. I am thinking more especially of the role they wish to see attributed to the 1947 British line, which goes back to the time when the law of the sea bore but a distant relationship to what it is now. I shall have occasion to revert to this.

11. Mr. President, it is when the two-stage operation — on which, I repeat, the Parties are at one — has to become a reality that a gulf opens between them.

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12. In the view of Qatar, the delimitation process must begin with a provisional equidistance line drawn according to what our opponents call *«la méthode de calcul de masse terrestre à masse terrestre»* ["the mainland-to-mainland method"][12]. This method, they explain, consists in taking no account of land which is above water other than the main island of Bahrain, on the one side, and the peninsula of Qatar on the other; in other words, in reasoning as though the islands and low-tide

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[11]CR 2000/6, pp. 45-48, paras. 23-28.

[12]Counter-Memorial of Qatar, p. 231; Reply of Qatar, p. 332.

elevations between the two did not exist: *«la méthode de calcul de masse terrestre à masse terrestre»*, ["the mainland-to-mainland method"], we read in Qatar's Reply, *«ne prend pas en compte les îles, îlots, rochers, récifs et haut-fonds découvrants»* ["disregards islands, islets, rocks, reefs and low-tide elevations"][13]. In their undoubted awareness of the fragility of this method, our opponents, the Court will have noted, did not repeat the description *«la méthode de calcul de masse terrestre à masse terrestre»* ["the mainland-to-mainland method"] in their oral presentation; even if the term has vanished, though, the argument has not altered one jot. The provisional equidistance line is drawn first from mainland to mainland; Qatar then departs from it in the second stage of the operation in order to make the maritime boundary coincide with the 1947 British line. It is only in the extreme south and the extreme north that the coincidence ceases: in the south, because the British line awards the Hawar Islands to Bahrain, which is obviously vexing to our opponents; in the north because the British line stops at point BLV and therefore requires to be completed. Yet these two segments, except for the maritime boundary requested by Qatar, coincide precisely with the 1947 British line. [Illustration.] The description of a two-stage delimitation process is purely an illusion. Contrary to what our opponents would have us believe, the boundary claimed by Qatar is not the result of an adjustment of the initial equidistance line made for reasons of equity; in actual fact, it has no connection with the initial equidistance line. The line claimed by Qatar would have been exactly the same without going through the provisional stage of an equidistance line, and this pointless detour is, no doubt, attributable to Qatar's wish to present to the Court an operation which has the guise of legal rectitude. To this point too I shall have occasion to revert.

13. With the maritime boundary along the 1947 British line thus fixed, Qatar then requests the Court to award the above-water features situated between the western coast of Qatar and the eastern coast of the main island of Bahrain — of which no account had been taken previously — according to whether they lie to the east or the west of that boundary. In paragraph 7.41 of its Reply, Qatar writes as follows:

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> *«[Qatar] revendique la souveraineté sur toutes les îles, îlots, récifs et hauts-fonds découvrants . . . qui sont situés à l'est de la ligne délimitant les mers territoriales respectives des deux Etats. S'ils relèvent de la souveraineté de Qatar, ce n'est pas parce qu'ils fournissent une* justification *aux fins de la délimitation maritime,*

[13]Reply of Qatar, p. 333.

> *mais parce qu'ils* relèvent *de Qatar* par suite *de la délimitation maritime effectuée sur d'autres bases.»*

If I may, I will read out this all-important text in its original version:

> ["It [Qatar] claims sovereignty over all the islands, islets, reefs and low-tide elevations . . . which are situated to the east of the line delimiting the respective territorial seas between the two States. If they fall under the sovereignty of Qatar it is not because they provide *a justification* for the maritime delimitation, but because they *appertain* to Qatar as a *consequence* of the maritime delimitation effected on other grounds."]

Accordingly, Al Hul, Halat Nun, Qassar Nun, Jazirat Mashtan, Thighaylib and Umm Jalid are awarded by our opponents to Bahrain not on the basis of a title or of the effective exercise of sovereignty, but for the one and only reason that they lie to the west of the maritime boundary sought by Qatar. Fasht ad Dibal, Qit'at Jaradah, Fasht Bu Thur and the Hawar Islands are claimed by Qatar, not on the basis of a title or of the effective exercise of sovereignty, but for the one and only reason that they lie east of the maritime boundary sought by Qatar. When it comes to Fasht al Azm, our opponents simply cut it in two.

14. In a word, Qatar's argument comes down to two propositions:

— First: that the maritime boundary between Bahrain and Qatar must be the 1947 British line adjusted in the south and extended in the north.

— Second: that the insular and quasi-insular features lying to the east of that line must be placed by the Court under Qatar's sovereignty; those lying to the west of that line must be placed by the Court under Bahrain's sovereignty.

15. [Illustration] In the face of this thesis — which consists in delimiting the sea by regarding areas of land as non-existent which nevertheless definitely do exist, and in determining sovereignty over them as a consequence of maritime delimitation — Bahrain's position is totally different. Bahrain starts from the territorial sovereignty and the coastal geography of the two States and requests the Court to draw the maritime boundary consistently with those two factors. As my

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friend Michael Reisman has shown, Bahrain is an insular ensemble. Such is nature, such is the geography. Such too is the history, and such is the political, economic and human reality. Over this ensemble Bahrain — and Bahrain alone — has performed acts of sovereignty. Over this ensemble Bahrain — and Bahrain alone — has effectively exercised State powers. Compared with the total, complete and absolute absence of *effectivités* on the part of Qatar, the *effectivités* of

Bahrain in the component parts of this ensemble more than suffice, far more, given the nature of these territories, to establish its sovereignty. It is the territory of the State of Bahrain as a whole, as it exists, that generates maritime projections, and not only the main island, formerly called Al Awal. It is the whole of the coasts of the State of Bahrain, and not those of the main island alone, which constitutes Bahrain's "coastal front" and "coastal opening". It is from this "coastal front" and this "coastal opening" — the words are the Court's — that the process of delimitation must proceed and the provisional equidistance line be drawn. After which, once it has been drawn, in the second stage of the delimitation process the question will arise whether equity requires that the line be adjusted. In the southern sector, no adjustment is necessary. In the northern sector on the other hand, as we shall see later, Bahrain considers that two adjustments are needed: one in favour of Bahrain, to take account of the location of the pearling banks; the other in favour of Qatar, to take account of the maritime delimitations with third States. This, Mr. President, is Bahrain's position.

16. It can be seen from this brief résumé of the positions of the two Parties that they disagree basically on two issues of principle. And it is this dual disagreement which is at the heart of the dispute which the Court is invited to decide.

17. The first area in which the Parties have opposite views goes to the very basis of the law of maritime delimitation and, to a wider extent, of the law of the sea. For this is where the dividing line falls between, on the one hand, the Qatari thesis that a maritime delimitation precedes and conditions the territorial distribution and, on the other, the Bahraini thesis which advocates that a maritime delimitation should be based on territorial sovereignties. Does the land dominate the sea,

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as international law has long proclaimed? Or will the Court now overthrow that principle and decide that henceforth the sea will dominate the land? This is what is at stake in our case.

18. Once this issue, of the greatest significance, is settled, it will be for the Court to consider a question which is specific to the present dispute: that of the relevance, for the purposes of the maritime delimitation between Bahrain and Qatar, of the British line of 1947. This line is the be-all and end-all of Qatar's claim, even though Qatar tries to dissimulate the fact by invoking the so-called provisional equidistance line, which in reality — as I have already pointed out — is nothing but a fiction and a sham.

19. It is around these two central issues, Mr. President, Members of the Court, that I wish to build my presentation: the issue of what Qatar calls the *«masse terrestre à masse terrestre»* ["mainland-to-mainland"] method of delimitation and the relationship between land and sea, first of all; and then the issue of the place to be attributed to the British line of 1947.

20. I now come to the first part of my statement, which deals with the issue of principle posed by the mainland-to-mainland *[masse terrestre à masse terrestre]* method of delimitation.

I. THE ISSUE OF PRINCIPLE: THE SO-CALLED MAINLAND -TO-MAINLAND *[MASSE TERRESTRE A MASSE TERRESTRE]* METHOD OF DELIMITATION AND THE RELATIONSHIP BETWEEN LAND AND SEA

21. Mr. President, Members of the Court, the law of maritime delimitation has developed continually since the Court laid the foundations of such law in its Judgments in the cases concerning the *North Sea Continental Shelf* in 1969. Yet if there is a field in which the basic principles have not varied in the slightest, that field is indeed the basis of the right of States over maritime areas. The basis of such rights has always lain, today as yesterday, in a relationship between land — or more precisely State sovereignty over land, i.e., territorial sovereignty — and sea: a one-way relationship, with no way back, flowing from land to sea and never the reverse. Yet what Qatar is asking the Court to do is to reverse this relationship. This is the first point I shall review.

22. Having stated the obvious, facts which to date appeared to be unassailable, that it is land which dominates the sea and not the reverse, that maritime rights derive from territorial sovereignty and not the reverse, that it is the coastal opening which determines maritime projections and not the
026 reverse, the question arises as to what exactly is understood by the term "land". What is land? Qatar refuses to grant this status to low-tide elevations: for Qatar, low-tide elevations are not land; they belong to the sea, they belong to the water. For this reason, in a second strand of argument, I shall consider which of Bahrain's above-water features have the status of "land", i.e., "territories" under Bahrain's "territorial sovereignty" and as such have coasts which give rise to maritime projections.

23. After that there will be a third and last issue: are all of Bahrain's coasts which give rise to maritime projections to be taken into consideration in the delimitation process, for drawing the

maritime boundary and constructing the equidistance line? Or should only some of them be selected for such a purpose? As the Court knows, for Qatar just because a point on the coast of Bahrain is used as a basis for calculating its territorial sea, it should not automatically be used as a basis for constructing the maritime boundary between Bahrain and Qatar. For us, on the contrary, each coast of Bahrain gives rise to a territorial sea and each coast of Bahrain can therefore be used as a baseline and base point for constructing the equidistance line as a first stage. This raises, as the Court cannot fail to notice, a further, extremely important issue of principle.

24. At this point I would like to make two preliminary remarks on the way in which the case is presented before the Court.

25. First, as the Court has no doubt noted, there is the exclusively defensive — I would almost say negative — nature of our opponents' line of argument. What do we read throughout our opponents' three written pleadings? What have we heard throughout their oral arguments? That the islands and low-tide elevations located between Qatar's western coast and the eastern coast of Bahrain's main island should *not* be taken into account in the process of delimitation; that Bahrain's acts of sovereignty over these territories are *not* relevant in establishing *effectivités* in Bahrain's favour; that Bahrain's low-tide elevations are *not* Bahraini territory and therefore may *not* serve as base points for establishing a maritime boundary. This, Mr. President, is what we have read and heard. Yet never, not once, not one single time, have we read or heard Qatar's proof in the

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form of a single document, or a single action *positively* establishing Qatar's sovereignty over a particular island or a particular low-tide elevation. The only considerations on which Qatar bases its claim to certain islands and low-tide elevations are their location to the east of the maritime boundary claimed by Qatar, i.e., their closer proximity to the Qatar peninsula than to the main island of Bahrain. Proximity, proximity, proximity! Our opponents' arguments lead back to this, again and again, here as elsewhere.

26. This brings me to my second remark. In making such efforts to show that a particular island or a particular low-tide elevation cannot give rise to maritime rights in Bahrain's favour, or that a particular point on the coast of Bahrain must not be used as a base point for the construction of the equidistance line, even if the breadth of Bahrain's territorial sea is calculated from that point,

Qatar implicitly but necessarily acknowledges that that particular island, that particular low-tide elevation, or that particular point on the coast is the territory of the State of Bahrain.

27. Mr. President, my statement on this issue of principle will therefore be divided into three parts:

— First, I shall recall the obvious truth that maritime delimitation must be effected between the actual coasts of the two States. In requesting the Court to draw the maritime boundary by taking account solely of the coasts of the main island of Bahrain and the coast of the Qatar peninsula, as if nothing lay between them, as if these same pieces of land located between these coasts did not exist, and in requesting the Court to award sovereignty over the land lying east of that boundary to Qatar, and west of that boundary to Bahrain, our opponents' disregard the fundamental principles of the law of the sea.

— After that, I shall review which territories of Bahrain give rise to maritime rights, and then consider the maritime rights of low-tide elevations.

— Lastly, moving on from the question of title to that of delimitation, I shall consider whether all the land and all the coasts of Bahrain which give rise to a maritime title in Bahrain's favour may be used as base points for the construction of the delimitation line.

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A. Land first, then sea

28. Mr. President, if there is one principle of the law of the sea, as I have already said, which has assumed an almost axiomatic value both politically and legally, it is indeed the principle that the rights of States over the sea derive from territorial sovereignty, being the prolongation of such sovereignty, and that such rights are exercised through the intermediary of the coastal front. The principle has been accepted for centuries for the territorial sea; it is accepted today, unquestionably, for the continental shelf and the exclusive economic zone. This philosophy of maritime rights does not spring from the imagination of legal writers concerned with intellectual consistency, but from the will of States. It is in this manner that the rule of law was framed and that it is applied by States and by international tribunals. And, had these principles not been challenged by Qatar in this case, I would never have dreamt of recalling them here, so obvious are they.

Maritime rights, rights derived from territorial sovereignty

29. Maritime rights are not autonomous rights, they do not exist by themselves: their origin and their justification are found in the sovereignty of the State over its land territory. This is what the Court has steadfastly asserted and reasserted. As far back as 1951 — half a century ago — the Court emphasized, in the case concerning *Fisheries*, "the close dependence of the territorial sea upon the land domain," setting forth the fundamental principle that "[i]t is the land which confers upon the coastal State a right to the waters off its coasts"[14]. In 1969, in the cases concerning the *North Sea Continental Shelf*, as we are all aware, the Court confirmed this approach in wording which is well-recognized and now classic: "the land", so the Court said, "is the legal source of the power which a State may exercise over territorial extensions to seaward", giving rise to "the principle . . . that the land dominates the sea" *[«le principe que la terre domine la mer»]*[15]. Ten years later, in 1978, in the case concerning the *Aegean Sea Continental Shelf*, the Court stated with remarkable precision: "it is solely by virtue of the . . . State's sovereignty over the land" that international law grants it rights over the sea. Such rights, it said, are "legally both an emanation
0 2 9 from and an automatic adjunct of the territorial sovereignty of the . . . State"[16]. Maritime rights derive from the sovereignty of the State over a territory; they are an "emanation" from it, they are an "adjunct" of it. They are like the shadow which follows man. They do not exist by themselves, they are derived rights. The commonplace expression "maritime projection" is literally true: land projects seawards. These are truths which we believed were simply not open to question.

The role of the coastal front

30. Several fundamental aspects of the law of the sea, enshrined in judgments of the Court, derive from the above. First, there is the decisive role of the coasts, since the "coastal front" or "coastal frontage" — these are the Court's expressions, I reiterate — constitutes the mandatory intermediary used in any maritime projection. The forms of wording used by the Court are too well known, and too legion, for it to be necessary, or even permissible, to quote them again here. Nor is there any need to clarify that when we talk of coasts in this context we are talking, in a legal

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[14] *Fisheries, I.C.J. Reports 1951*, p. 133.

[15] *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 51, para. 96.

[16] *Aegean Sea Continental Shelf (Greece* v. *Turkey), I.C.J. Reports 1978*, p. 36, para. 86.

context, about coasts represented by baselines and base points. In one of his works, my friend Michael Reisman used the term "legal coastline": the baseline, he wrote, is the "legal coastline" *[«côte juridique»]*[17]. However, as the Court has often emphasized, such stylization must not lead us to reshape nature and refashion geography. Coasts are what they are. Maritime delimitation is a legal operation, i.e., an operation of will, one which is based on the recording of geographical-historical facts; it takes geography and history as its starting-points in order to pronounce the law. Maritime delimitation should lead us neither to reshape nature in order to render it more harmonious or more simple, as our opponents would wish, nor to rewrite history in order to refashion territorial sovereignties in what might be considered a more rational manner.

31. That this principle of the pre-eminence of land over sea, a principle which the Court has asserted, reiterated and reasserted on many occasions, still prevails today is borne out, *inter alia*, by the fact that the recent *Eritrea/Yemen* arbitration was split into two stages, the first devoted to territorial sovereignty, and the second to the maritime boundary. As the Tribunal declared in its second Award, in delimiting the maritime boundaries, it was required to take into account the
0 3 0 opinion that it formed on the question of territorial sovereignty[18]: it did not appear to have occurred to the Tribunal that it might have proceeded in reverse order.

Qatar's distortion of Bahrain's coast

32. Mr. President, admittedly our opponents do not challenge any of the principles I have just recalled. Their tactic lies elsewhere. It consists in attempting to apply these principles to a version of Bahrain's coast that has first been mutilated and distorted. If we are to believe them, the coast of Bahrain which the Court must take into account is solely that of the main island of Bahrain, to which they generously add the coasts of Muharraq and Sitrah, excluding the coasts of all the other features which make up the State of Bahrain.

33. With the Court's permission, I would like to digress into the byways of terminology here in answer to a complaint that in our pleadings we have referred to insular and quasi-insular features *[formations insulaires ou quasi-insulaires]*. Neither the term features *[formations]* nor the

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[17]W. M. Reisman & G. E. Westerman, *Straight Baselines in International Maritime Delimitation,* New York, 1992, p. 1, note 1.

[18]Second stage, para. 82.

adjectives insular or quasi-insular *[insulaires ou quasi-insulaires]* find favour with our opponents. The concept of feature, they state, is "alien to international law" and "meaningless", and if Bahrain has used it so often in its pleadings, this is done, they add, "to obscure the legal situation"[19]. A term "fully open to . . . criticism" so Professor Quéneudec reiterated in this very courtroom a few days ago[20].

34. Well, well! "A concept alien to international law?" The authors of the 1969 Judgments in the cases concerning the *North Sea Continental Shelf*, were they still with us, would have been shocked to hear this complaint, they who so often referred, even in the operative part of the Judgment, to a natural geographical feature *[accident géographique naturel]*, an incidental special feature *[particularité non-essentielle]*, or a special or unusual feature *[caractéristique spéciale ou inhabituelle]*[21]. The authors of the 1977 Arbitral Award in the case concerning the *Maritime Delimitation between France and the United Kingdom* would be no less shocked, they who also referred, on almost every page, to geographical features, incidental special features, special or unusual features, particular features, physical features, or distinct features *[situation géographique, caractéristique géographique, données géographiques, élément géographique]*[22]. And, Mr. President, what of Article 46 of the 1982 Convention on the Law of the Sea, which defines an archipelago as a group of islands and "other natural features" *[«autres élements naturels»]*? Our opponents would have done better to take a closer look at the subject before launching themselves into this line of reasoning.

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35. So much for English terminology. In the French version of the 1969 Judgments and of the 1977 Franco-British Arbitral Award, the term "feature" has been translated in various ways: *«caractéristique»*, *«accident»*, *«particularité»*. In the French text of Article 46 of the 1982 Convention on the Law of the Sea, the term "other natural features" has been translated by *«autres éléments naturels»*. It would seem, I regret to note, that there is no French word which corresponds exactly to "feature" in the meaning in which this term is used in the context of the law

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[19]Reply of Qatar, para. 7.11.

[20]CR 2000/10, p. 9, para. 59.

[21]See, for example, *North Sea Continental Shelf, I.C.J. Reports 1969,* p. 49, para. 89; p. 50, para. 91; p. 54, para. 101.

[22]*UNRIAA*, Vol. XVIII, p. 45, para. 70; p. 58, para. 101; p. 60, paras. 107-108, etc.

of the sea. It is interesting in this respect to note that in a single paragraph of the Franco-British Award, in the same, single paragraph, the word "feature" has been translated, a few lines apart, in three different ways[23]. The Registry of the Court has also translated "features" in various ways as: *«éléments naturels»*, *«caractéristiques géographiques»*, *«reliefs maritimes»*, *«formations naturelles»*[24]. The Court will forgive me, I think, if I use any one of these terms here, without distinction, or if sometimes I also speak of *formations* or, simpler still, if I use the English term "features".

36. As for the adjective "insular or quasi-insular" which we have used to describe these features, I am well aware that it is not a commonplace expression, but it seemed to us convenient to group under this term elements which are islands, true islands, within the meaning of Article 121 of the United Nations Convention on the Law of the Sea as well as elements which are not islands, such as low-tide elevations. It is a convenience of language, just as the term "maritime features" is a convenience of language, being the term commonly used in English, and one which my friend Michael Reisman used just now. Maritime features *[formations maritimes]* are in reality land features *[formations]* which protrude above the sea and which affect maritime delimitation to a greater or lesser extent.

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37. It is precisely all these features that Qatar wants the Court to disregard, in requesting it to establish the delimitation between the coast of the Qatar peninsula and the coast of the main island of Bahrain, as if there were nothing in between. Qatar finds two justifications for such mutilation of the State of Bahrain, which I shall review briefly. One is the alleged minor, insignificant nature of these features and I shall return to this later. The other is what our opponents have called in their pleadings the requirement of simplicity *[l'exigence de simplicité]*[25].

Mr. President, do you wish to take a break here or to continue for a few minutes?

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[23]*Op. cit.*, para. 107, p. 60 (English version) and p. 191 (French version).

[24]Reply of Qatar, p. 295, paras. 7.11, 8.13, 9.9.

[25]Counter-Memorial of Qatar, paras. 7.9, 7.24 and 7.51.

The PRESIDENT: I think that we may stop now. Thank you, Professor. The Court will adjourn for a quarter of an hour. Thank you.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and I give the floor to Professor Prosper Weil.

Mr. WEIL:

The false argument of "simplicity"

38. Qatar contends that when a maritime area is dotted, as is the southern sector in the present case, with a great number of islands, islets, reefs, rocks and low-tide elevations it becomes extremely difficult, if not impossible, to rely on these countless maritime features *[impossible de se baser sur ces innombrables formations maritimes]* for the purpose of drawing the maritime boundary[26] and that they must therefore be "disregarded". All the more so, adds Qatar, when the legal status of numerous features is debatable and uncertain[27]. Faced with this practical and legal impossibility, so the opposing Party maintains, a delimitation which took account of such features would be quite simply impossible, and only a mainland-to-mainland delimitation is possible ("any delimitation other than a mainland-to-mainland delimitation would be extremely difficult to determine if not to practically impossible" ... "only a mainland-to-mainland delimitation is practically possible") *[«toute délimitation autre qu'une délimitation opérée entre les deux masses continentales serait extrêmement difficile, sinon impossible en pratique» ... «seule une délimitation entre les deux territoires principaux apparaît possible dans la pratique»]*[28].

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39. Mr. President, admittedly the existence of features does complicate the situation, and matters would be simpler if the State of Bahrain were no more than its main island, Al Awal. However the State of Bahrain is something other than and more than its main island, even complemented by Muharraq and Sitrah. Bahrain's other islands and low-tide elevations equally

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[26]Counter-Memorial of Qatar, para. 7.24; see para. 9.39.

[27]Counter-Memorial of Qatar, para. 7.24.

[28]Counter-Memorial of Qatar, paras. 7.9 and 7.23.

exist, and cannot be wiped off the map in the name of simplicity. How many legal problems would be brought to an easy, instant solution if, in the name of a so-called principle of the requirement of simplicity *[exigence de simplicité]*, we took no account of everything which is precisely the problem. It is one thing, in the name of simplicity, to avoid drawing a maritime boundary which has too many changes of direction; the simplified equidistance line has long been accepted in the practice of States as well as in jurisprudence. However, wiping out a large part of the territory of a State or the coastal front of a State in the name of simplicity is refashioning nature, reshaping geography and rewriting history, something which the Court has always firmly opposed.

40. Between the main island of Bahrain and the peninsula of Qatar there is not the legal vacuum which our opponents imagine. In giving the name of "Bahrain" only to the main island of this State, Qatar twists words and asks the Court to take the part for the whole.

41. A glance at the map moreover shows that these features, and Qatar would spare the Court the task of determining the legal nature of such features on the grounds that such a task would be too difficult for it, these features number no more than two in the final analysis — yes, Mr. President, two: Fasht al Azm and Qit'at Jaradah. The legal nature of all the others is not in doubt. There is no doubt even in respect of Fasht al Dibal, there is no divergence between the parties: Fasht al Dibal is a low-tide elevation. There remain, I reiterate, only two issues, that of the legal status of Fasht al Azm and that of the legal status of Qit'at Jaradah. Yet even there, as my friend and colleague Michael Reisman has shown, doubt crumbles after the most cursory examination of the situation.

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The lack of relevance, in this case, of the argument of security and of the principle of non-encroachment

42. Nor will the Court be impressed by the spectre of security brandished by Qatar[29], or by the principle of non-encroachment. Map 10 of the Reply of Qatar[30] [illustration] is typical in this regard, and the Court knows this map well. This map gives the Court a nod and a wink: "See how reasonable we are in Qatar! See how Bahrain is unreasonable, requesting a maritime boundary so close to our coast!" — A very heavy nod and wink, truth to tell, since our opponents produced this

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[29]Counter-Memorial of Qatar, para. 7.25; CR 2000/9, p. 37, para. 9.

[30]Facing p. 314 in the Reply of Qatar.

map twice during their oral presentation, as the first and last map framing their arguments in their entirety. Mr. President, I am well aware, having emphasized it myself in this courtroom in a previous case, that the concern to avoid drawing a maritime boundary so close to the coastline of one of the parties that there is a possible threat to its security is a factor which the Court cannot disregard. For this reason, where the territories of two States lie some way away from each other, the Court avoids drawing the maritime boundary along the beaches, so to speak, of one of the parties and far from the coast of the other party. As the Court said in 1993 in the case concerning *Jan Mayen*:

> "while courts have been unwilling to allow such considerations of security to intrude upon the major task of establishing a primary boundary in accordance with the geographical criteria, they are concerned to avoid creating conditions of imbalance".

Security considerations, the Court added in the same case, "are of course not unrelated to the delimitation of maritime spaces"[31].

43. However, Mr. President, this is not at all the situation here. This is not at all the issue. In the present case, the proximity of the maritime boundary to the coasts of Qatar is not, or would not be, the consequence of the maritime delimitation process. It is the consequence of a geographical and political fact, I mean that it is the consequence of the presence, a short distance from the coast of Qatar, of islands and other natural features under the sovereignty of Bahrain. It is due to the
035 proximity of the land territories of the two Parties; it is due to geography and history. Moving the maritime boundary away from one of the coasts in the present case, a case which concerns coasts lying close together naturally, would be tantamount to failing to take account of the existence of the land territories of the other Party, i.e., it would be tantamount to disregarding geography. This is precisely what Qatar requests the Court to do: to disregard *[ne pas tenir compte]* certain of Bahrain's territories. In relying on a panoply of maps which are at times somewhat biased, our opponents resort to somewhat of a psychological operation, one which they hope will lead the Court to draw the course of the maritime boundary as if the Bahraini territories which lie closest to the coast of Qatar did not exist. This inevitably brings to mind the way in which the Franco-British Tribunal reacted to the suggestion that it draw the continental shelf boundary in the Channel using

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[31] Case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993*, pp. 74-75, para. 81.

the mainland-to-mainland method, ignoring (in the English meaning of that word) the Channel Islands. The Tribunal's reaction was curt and firm: "The Channel Islands, however, *do* exist" *[«Mais les îles Anglo-Normandes existent»]*[32]. And in this case, Mr. President, do not Fasht ad Dibal, Qit'at Jaradah, Qita'a el Erge, Fasht al Azm, an integral part of Sitrah, Al Mu'tarid, etc., also exist? All these territories "*do* exist" *[«existent»]*. And if they exist, why should they be ignored in the delimitation process? And why therefore should delimitation be carried out on the basis of imaginary, reconstituted coasts, and not on the basis of real coasts?

44. Territorial sovereignties are what they are, the heirs to history, and often therefore capricious. When, as a result of history, two State territories lie relatively far away from each other, it is clear that the maritime boundary should not be drawn in such a way that it passes excessively close to one of them. Yet when, as a result of history, two State territories are separated only by a narrow, constricted maritime area, the maritime boundary will inevitably and unavoidably run close to the territory of both parties. My friend Sir Elihu Lauterpacht has given the Court many examples of situations of this kind scattered about the world[33]. The situation is exactly the same in the present case. Bearing in mind the short distance separating the easternmost Bahraini territories from the western coast of Qatar, the maritime boundary cannot do otherwise

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than run close to both the western coast of Qatar and the coasts of the easternmost parts of the State of Bahrain. Recalling the weight the Court attaches to the principle of the stability of frontiers, it is difficult to imagine that it might permit the determination of maritime boundaries to open the door to revisionism on a vast scale of the course of land boundaries.

45. Mr. President, this shows the importance of the decision the Court is asked to take. It is the very substance of one of the Parties — the State of Bahrain — that is at stake. Considerations of security or non-encroachment do not come into it. Because the maritime boundary between the territories of Bahrain and the territory of Qatar would run close to the coast of Qatar we must not conclude that these territories should be ignored or disregarded *[«ignorés»]* in the maritime delimitation process, nor must we conclude that the maritime delimitation should be effected between the State of Qatar as it stands and a State of Bahrain amputated of a large part of its

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[32] *UNRIAA*, Vol.. XVIII, pp. 88 and 223, para. 183.

[33] CR 2000/11, p. 34, para. 75.

substance, i.e., an imaginary State of Bahrain. The description by a member of the Tribunal, in the case concerning the *Maritime Delimitation between Guinea-Bissau and Senegal*, of Guinea-Bissau's "broad bulwark of islands" applies, *mutatis mutandis*, to the carpet of Bahraini islands and other features which stretches to the gates of the Qatar peninsula. "Guinea-Bissau," the arbitrator wrote, "would not be what it is without the Bijagos."[34] And Bahrain, Mr. President, would not be what it is without the features [*formations*] which Qatar seeks to wipe off the map. As for the somewhat scornful accusation levelled against Bahrain by our opponents — a principality with an "imperialist" image of itself as a State "ruling the waves" *[«dominant les flots»]*[35] — it is too ridiculous and extravagant even to warrant rebuttal.

A "carpet", a "group", a "chain", a "system" of islands and low-tide elevations — in a single word an archipelago

46. It is not without interest in this connection to note what the Arbitral Tribunal in the *Eritrea/Yemen* case referred to as the "undoubted rule" *[«règle incontestée»]* that the outer limit of the territorial sea may legitimately be drawn from a baseline which includes an entire chain, or group of islands with no gap between them of more than 12 nautical miles[36]. In the present case, we are dealing with what the *Eritrea/Yemen* Tribunal called, in the case of the Dahlaks, a "tightly knit group of islands and islets" *[«groupe étroitement tissé d'îles et d'îlots»]*, together with low-tide elevations, which form part of the coastal configuration. Still on the subject of the Dahlaks, the Tribunal also refers — and I cannot resist the temptation to quote its images — to "an island system" *[«système insulaire»]* whose external fringe should serve as the baseline of the territorial sea[37]. Referring to another group of islands, the *Eritrea/Yemen* Award states: "here again there is, if not a carpet, at least a considerable scattering of islands and islets . . . which . . . ultimately form part of a large island cluster or system . . ." *[«là encore, il y a, sinon un tapis, du moins un extraordinaire éparpillement ou un système d'îles et d'îlots qui . . . en définitive, font partie d'un vaste groupe ou système insulaire»] [traduction du greffe]*[38]. The Tribunal refers to "an intricate

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[34] *UNRIAA*, Vol. XXI, p. 204, para. 134.

[35] Memorial of Qatar, para. 10.33; Reply of Qatar, para. 7.30; CR 2000/10, p. 8, para. 57.

[36] First Stage, para. 473.

[37] Second Stage, para. 139.

[38] Second Stage, para. 149.

system of islands, islets and reefs" *[«système complexe d'îles, d'îlots et de récifs»]*[39], in short to an archipelago — an actual archipelago, a geographical archipelago, independently of and apart from the question as to whether it is an archipelago in law within the meaning of the 1982 Convention. This, the Court will note, is something our opponents do not challenge since they themselves refer to the "group" or the "archipelago" of Bahrain[40]. What our opponents do challenge, what they question, is the composition of this archipelago, which they would limit to a "compact" group — the word recurs very frequently, compact, i.e., restricted — of only a few islands, excluding the other islands and low-tide elevations located between the main island of Bahrain and the coast of Qatar and, excluding of course, the Hawar Islands. Must we recall that in 1939 and 1947 the British authorities held that not only the Hawar Islands, but also Dibal and Jaradah, were part of this so-called "compact" entity? Similarly, our opponents do not raise any obstacles to acknowledging in international law the existence of a concept of the unity of island groups[41].

47. "Carpet of islands", "cluster of islands", "chain of islands", "island system", "complex system", "group of islands", "archipelago", the idea behind these manifold colourful descriptions is
038 always the same: in the presence of a geographical reality of this type, the territorial sea must necessarily be measured from the external fringe *[frange extérieure]* of the carpet, the cluster, the system or the group, so said the *Eritrea/Yemen* Tribunal. Fifty years on, we recall the famous description of the Norwegian coast given by the Court in the *Fisheries* case: "the large and small islands, . . . the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the Norwegian mainland"[42]. Admittedly — and please do not make me say the opposite — the main island of Bahrain does not have a *"skjaergaard"*, and Bahrain is not using the argument of a *"skjaergaard"*, admittedly the geography is not at all the same. Yet it could well be said of Bahrain's features *[formations]* what the Court said of the *"skjaergaard"* in 1951, namely that it "constitutes a whole with the mainland" (in the English version of the Judgment the term *mainland [terre ferme]* is used) and that consequently it is "the outer line . . .

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[39]Second Stage, para. 151.

[40]For example, CR 2000/5, p. 32, para. 11; CR 2000/6, p. 13, paras. 2-3; p. 15, para. 11; p. 16, para. 13, etc.

[41]For example, CR 2000/6, p. 47, paras. 25 and 28.

[42]*I.C.J. Reports 1951*, p. 127.

which must be taken into account into delimiting . . . territorial waters". In this case as in that one — I am still quoting from the 1951 Judgment — "this solution is dictated by geographic realities"[43]: Geographical realities, but also political, economic, sociological and historical realities. Qatar endeavours to paint a picture of Bahrain — and this is the core of its reasoning — as a continental State off which lie scattered tiny, insignificant pieces of confetti, off-lying features *[formations au large]*. No, Mr. President, this is not what the situation is. Bahrain is an insular and quasi-insular system, an archipelago all of whose component parts together *[toutes ensemble],* as Lorimer said, make up the State of Bahrain. Mr, President, Qatar acknowledges and even emphasizes that the maritime area lying between the coast of the main island of Bahrain and the coast of the Qatar peninsula is "dotted" with "countless" *[«innombrables»]* islands, islets, rocks and low-tide elevations[44]. However, acknowledging this, and it does acknowledge this, why does it then refuse to take account of this reality in the process of maritime delimitation? Paradoxically, would it be because they are so numerous as to be "countless"*[«innombrables»]* that we must proceed as if they did not exist? In seeking, under the

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virtuous pretext of simplicity, to take account of only a single component of this indissoluble whole, the other Party does not simplify the situation, it distorts it.

Qatar applies its so-called mainland-to-mainland method *[méthode de calcul de masse terrestre à masse terrestre]* selectively

48. Better still! Qatar applies its so-called mainland-to-mainland method *[méthode de calcul de masse terrestre à masse terrestre]* in a highly selective manner. In paragraph 7.31 of the Counter-Memorial we read that "In the present case, Qatar submits that the provisional median line must be drawn from relevant points on the two mainland coasts . . ." *[«En la présente instance, Qatar soutient que la ligne médiane provisoire doit être construite à partir des points pertinents des côtes des deux territoires principaux.»]* This is the essence of the method: drawing the provisional equidistance line on the basis of points on the two mainland coasts *[territoires principaux]*. Yet, Mr. President, Qatar does not proceed in this manner, not at all. I would respectfully draw the Court's attention to map 14 in the Memorial of Qatar, to map 5 in the

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[43] *Loc. cit.,* p. 128.

[44] Counter-Memorial of Qatar, para. 7.24.

Counter-Memorial of Qatar, and to map 14 in the Reply of Qatar [show maps] where it will see that Qatar indeed constructs its so-called mainland-to-mainland *[masse terrestre à masse terrestre]* provisional median line from the mainland *[territoire principal]* of Bahrain but not at all, not at all, not at all from the mainland *[territoire principal]* of Qatar. Qatar constructs its provisional median line from the western coast of Jazirat Hawar, i.e., from the western coast of the westernmost island of the Hawar group. To explain this flagrant breach of the principles they proclaim, our opponents write that the Qatar peninsula, the peninsula, should be understood as embracing the main Hawar Island, the natural extension of the land mass of Qatar[45]. Here we have islands that have been naturalized to become part of the mainland land mass. In fact, since Jazirat Hawar is the westernmost of the Hawar Islands, not only does Qatar remove that island — Jazirat Hawar — from the scope of its so-called method, but the totality of the Hawar Islands, including, in particular, Suwad ash Shamaliyah and Suwad al Janubiyah. To show itself in a good light, the other Party then proposes, in an alleged desire that both Parties should be treated equally *[afin de traiter les deux Parties de manière égale],* to base the median line on Bahrain's side also on some islands, the islands of Sitrah and Muharraq[46]. The inconsistency becomes even more glaring when we note that on the three maps in its written pleadings, Memorial, Counter-Memorial and Reply [show maps] Qatar exempted from its so-called mainland-to-mainland *[masse terrestre à masse terrestre]* method not only Jazirat Hawar and the intervening islands, but also two further islands, Rabad al Sharbiyah and Rabad ash Sharkijah, even further away from the mainland *[territoire principal]* of Qatar than is Jazirat Hawar. On the map found under No. 41 in the judges' folders submitted to the Court a few days ago [show map], Qatar's base points were prudently moved back on to Jazirat Hawar. The only lesson which I can draw from this is that our opponents are not very consistent in the application of the famous mainland-to-mainland method *[méthode de calcul de masse terrestre à masse terrestre].*

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49. By the by, Sitrah and Muharraq as a counterpart to the Hawar Islands? What generosity! What concern for equality! Mr. President, how dare Qatar put Sitrah and Muharraq on the same footing as the Hawar Islands? Sitrah and Muharraq are districts of the town of Manama, from all

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[45]Reply of Qatar, para. 9.37.

[46]*Ibid.*

points of view they are an integral part of the main island. Sitrah and Muharraq are not subject to any dispute, whereas the Hawar Islands lie at the heart of this dispute. In short, for all the intermediate features apart from the Hawar Islands Qatar proposes to begin by delimiting the sea before determining territorial sovereignty. When it comes to the Hawar Islands, this method is forgotten and swept aside. In respect of the Hawar Islands, Qatar requests the Court to start with sovereignty, its own sovereignty of course, and to deduce from that sovereignty the course of the maritime boundary. In other words, Qatar would like the Court to apply its fundamental theory of the mainland-to-mainland method *[méthode de calcul de masse terrestre à masse terrestre]* to Bahrain but not to Qatar. Our opponents have clearly forgotten the English proverb "What is sauce for the goose is sauce for the gander" *[«Ce qui est bon pour l'un est bon pour l'autre»] [traduction du greffe]*.

The so-called mainland-to-mainland method *[méthode de calcul de masse terrestre à masse terrestre]* is self-destructive: the ambiguity of Qatar's argument

50. Yet this is not all, Mr. President. The so-called "method" which Qatar proposes to the Court is, in some respects, self-destructive and suicidal. By protesting so stridently against the alleged defects of a maritime boundary taking account of the intermediate features, our opponents, as I have already said, implicitly acknowledge that such features are part of the State of Bahrain, for were they not the territory of Bahrain, the maritime consequences which Qatar fears, the consequences it objects to, would not exist and the entire edifice of Qatar's reasoning would have neither purpose nor raison d'être.

51. We put our finger here on one of the inconsistencies, one among several, of Qatar's reasoning. What, precisely, is the basis of Qatar's request that the Court take no account, in its maritime delimitation, of the natural features lying between the western coast of the Qatar peninsula and the eastern coast of the island of Bahrain? What exactly is the argument? Does Qatar challenge Bahrain's sovereignty over these features, or is its argument that these features, although under Bahrain's sovereignty, are too insignificant to be taken into account in the process of maritime delimitation? Quite obviously, the two approaches are fundamentally different but, as the Court has noted, the other Party has not made a clear choice between them and is hedging its bets.

The so-called mainland-to-mainland method *[méthode de calcul de masse terrestre à masse terrestre]* is legally unacceptable

52. Mr. President, the method advocated by Qatar is legally unacceptable. Qatar's reasoning consists in relying on the fact that a maritime boundary which took account of Bahrain's sovereignty over the intermediate features would run close to the coast of Qatar, which is true, and concluding from that that it needs to deny this sovereignty. Qatar also takes Bahrain's sovereignty over the intermediate features as a starting-point for denying this sovereignty in the name of its maritime consequences. The reversal of the basic land-sea sequence, established by the practice of States and by international jurisprudence, is radical, complete and total. Territorial sovereignty does not derive from the maritime boundary; it is the maritime boundary which derives from territorial sovereignty. Following Qatar's reasoning, it would no longer be "the coast of the territory of the State [which] is the decisive factor for title . . ."[47] over maritime areas. It would be the opposite. It would no longer be the land which is "the legal source of the power which a State may exercise over territorial extensions seawards"[48]. It would be the opposite. It would not be "by virtue of the coastal State's sovereignty over the land"[49] that the maritime rights of the parties would be established. It would be the opposite.

53. Second, Qatar's claim limits the capacity to engender maritime jurisdictions to what Qatar calls mainlands *[territoires principaux]*, excluding any other land territory. The territory of a State would thus be made up of a mainland *[territoire principal]* and of territories which would not have that status. Under Qatar's approach, even some islands are deprived of this power, in flagrant contradiction with the principle of customary law, expressed in Article 121 of the Convention on the Law of the Sea, that islands give rise to the same maritime jurisdictions as "other land territory".

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54. To sum up, following Qatar's line of reasoning, the principle that the land dominates the sea would be replaced, for land territories other than mainlands *[territoires principaux]*, by the opposite principle that the sea dominates the land. For such territories, land would no longer be the source of maritime rights, but the consequence of them; the sea would engender territorial

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[47] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 61, para. 73.

[48] *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 51, para. 96.

[49] *Aegean Sea Continental Shelf (Greece* v. *Turkey), I.C.J. Reports 1978*, p. 36, para. 86.

sovereignty. And, if we believe Qatar, I repeat — I reiterate — that this would be true not only of low-tide elevations, but also of true islands, of islands which are most undeniably islands, of islands which are the most island-like, dare I say. Qatar would like these islands too to be Qatari or Bahraini depending on whether they lie east or west of the maritime boundary. Instead of giving rise to maritime rights, in accordance with the rule set forth in Article 121 of the Convention on the Law of the Sea, territorial sovereignty over islands would become a mere by-product of maritime delimitation.

55. Mr. President, the Court will note that so far I have used the word mainland *[territoire principal]*, used by our opponents in their written pleadings, without translating it into French, as in the case of the word features *[formations]*. Our opponents do not hide the fact that this concept lies at the heart of their theory, there can be no doubt on this matter. "At the very heart of this method of delimiting maritime areas, lies, by definition, the concept of a mainland." *[«Au coeur de cette méthode de délimitation des espaces maritimes se trouve, par définition même, le concept de "masse terrestre".]* The question then arises what is a mainland *[masse terrestre; territoire principal]*? Qatar states immediately thereafter that mainland means "a large piece of land, a continental mass" *[«un grand morceau de terre, une masse continentale»]*[50], and it refers to the definition given in *Webster's Dictionary*: "a continuous body of land constituting the chief part of a country or continent" *[«une masse terrestre d'un seul tenant constituant la partie principale d'un pays ou d'un continent»] [traduction du greffe]*. The chief part *[partie principale]*: this definition, as we see, is essentially empirical. It is not a definition, it is a description. The difference between an island and a continent is quantitative and not qualitative. It is one of degree rather than one of nature. A very large island is a continent; everything is a matter of proportion and scale. In relation to the European-Asiatic "continent", Britain is an island, or a group of islands: do we not commonly speak of the British Isles? With regard to the maritime delimitation between France and
043 the United Kingdom, on the contrary, Britain is a mainland off whose shores lie other islands — the Isle of Wight, for example. The main island of Bahrain appears an island in relation to the continental land masses of Saudi Arabia and of Qatar; in relation to Tighaylib or Umm Jalid, it

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[50]Reply of Qatar, para. 9.37.

appears a mainland *[territoire principal]*. Sometimes the word mainland is translated by *«continent»*, but this term does not convey the connotation of relativity as much as the English word does. The Registry of the Court appears to share these hesitations. I looked, I sought to know how it translated mainland-to-mainland *[masse terrestre à masse terrestre]*. And I found that it was sometimes translated by *«méthode de continent à continent»*[51], sometimes by *«méthode de masse terrestre à masse terrestre»*[52]. Elsewhere, the Registry has translated "mainland coast" by *«la côte du territoire principal»*[53]. Article 13 of the 1982 Convention on the Law of the Sea determines the régime of low-tide elevations depending on their distance *«du continent ou d'une île»* in the French version of the Convention, or "from the mainland or an island" in the English version. We may well ask whether Max Huber, in his *Island of Palmas* Award, was not in the right to employ the term *terra firma* in preference to mainland, adding immediately in brackets, because he too had doubts, that he understood this to mean "the nearest continent or island of considerable size" *[«le plus proche continent ou île d'étendue considérable»]*[54], which admirably highlights the relative, purely comparative nature of this concept.

56. It is this relativity, I believe, which explains why the concept of mainland, or *«continent»*, or *«masse terrestre»*, which lies at the heart of our opponents' theory, has no legal specificity. Whether "continent" or island, in both cases it is what Article 121 of the Convention of the Law of the Sea calls a "land territory" *[«territoire terrestre»]*; and, as I shall recall, the 1982 Convention grants low-tide elevations exactly the same legal régime whether they be located off a mainland *[territoire principal]*, off a continent, or off an island. This leads me to a remark which is also glaringly obvious.

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57. There is no hierarchy between the land territories and the coasts. In Qatar's view, the principal island of Bahrain warrants being taken into consideration because of its large size, because it is a mainland *[territoire principal]*, but Bahrain's islands and other smaller territories do not warrant consideration because of their small size — pieces of confetti, I said earlier, scattered

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[51]For example, Reply of Qatar, para. 9.11.

[52]For example, Reply of Qatar, p. 332.

[53]Reply of Qatar, para. 438.

[54]*UNRIAA*, Vol. II, p. 829.

over the sea as it were. It is this image of two substantial mainlands separated by a maritime area dotted with insignificant, negligible, minuscule features that our opponents seek to impress upon the Court through their reasoning and maps. I need hardly recall, Mr. President, that according to the jurisprudence of the Court, "the capacity to engender" maritime rights "derives not from the land mass but from sovereignty over the land mass"[55]. Not from a physical feature, but from a legal and political element. Once it has been established that it is part of the State territory of Bahrain, the smallest of small islets engenders maritime projections. In international law, land territories are not divided into mainlands *[territoires principaux]*, the only ones to be taken into account in maritime delimitation, and non-mainland territories, i.e., secondary ones, which can be "disregarded" *[«ignorés»]* or forgotten about in maritime delimitation! Professor Quéneudec's statement that the "mainland coasts . . . are . . . the only true coasts of the two States"[56] evokes a distinction which the Court strictly condemns.

58. Qatar's maritime theory, and our opponents do not deny it, is in some respects a further application of the so-called "principle of proximity" which they dreamt up to suit the needs of the present case, with regard as much to the Hawar Islands as to the other natural features lying between the mainland of Bahrain and the peninsula of Qatar. My friend Sir Elihu Lauterpacht has addressed the Court on the inexistence of this principle in international law, and I shall not return to this question. I shall merely emphasize that, as far back as 1969, in the cases concerning the *North Sea Continental Shelf*, the Court rejected this principle in the strongest possible terms. This is a dictum not often quoted from the 1969 Judgment, but a dictum which deserves a few seconds of our attention:

> "Submarine areas do not really appertain to the coastal State because — or not only because — they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law . . . mere proximity confers *per se* title to land territory."[57]

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59. There would appear to be nothing more to add. Territorial sovereignty, sovereignty over features *[formations]* as over mainlands *[territoires principaux]*, is determined by a subtle

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[55] *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 41, para. 49.

[56] CR 2000/10, p. 43, para. 9.

[57] *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 31, para. 43.

interplay of titles and *effectivités* and, as Sir Elihu recalled, it is only if such criteria are insufficient to determine sovereignty that international law resorts to the subsidiary criterion of proximity, of contiguity, of appurtenance *[rattachement]*, or of the situation in relation to a maritime boundary. The authorities quoted by our opponents — Fitzmaurice, Waldock, Bowett — are unanimous on this head.

60. The recent *Eritrea/Yemen* case provides a striking example of this approach. The Tribunal stated that in the absence of any factor tipping the scales in favour of one or other of the States concerned, there is "some presumption" *[«certaine présomption»]*, and its caution must be noted, that an island belongs to the State off whose coast it lies. The Tribunal added that such a presumption would come into play only if the *effectivités* "speak with an uncertain voice" *[«parlent d'une voix incertaine»]*[58], the expression is an admirable one. Such a presumption gives way to any actual evidence tipping the scales in favour of one of the Parties. In other words, recourse to proximity, to contiguity, to appurtenance *[rattachement]* is limited to situations in which the Tribunal has no other available element allowing it to determine sovereignty on other grounds. The Tribunal stated that such a presumption, designed to avoid a situation of *non liquet*, would only come into play if neither State were able to show more than the other in respect of presence and the exercise of State functions[59]. This was so for the islands lying in the Beagle Channel: in the absence of any title or *effectivité* the Arbitral Tribunal awarded them to the parties, as we recalled, by location on one side or the other of the maritime boundary drawn in the Channel. This example, quoted by Professor Quéneudec[60], exactly echoes the spirit of *Eritrea/Yemen*. In that case, the Tribunal recalled that very few *effectivités* were sufficient to tip the scales in the case of difficult, inhospitable or isolated territories, and once the scales had been tipped, so to say, the presumption based on proximity, continuity or appurtenance *[rattachement]*[61] no longer had effect. The method advocated by our opponents, which consists in drawing a maritime boundary using the mainland-to-mainland *[masse terrestre à masse terrestre]* method, then sharing out the islands

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[58]First Stage, paras. 457-458; cf. para. 480.

[59]First Stage, paras. 507-508; cf. para. 458.

[60]CR 2000/10, p. 11, para. 63.

[61]First Stage, para. 452.

according to their location on one side or the other of this boundary — i.e., on the basis of proximity, of contiguity, of appurtenance *[rattachement]* — can only be used in the cases in which no other factor (particularly *effectivités*) allows the issue of territorial sovereignty to be determined. There can be no question, the *Eritrea/Yemen* Tribunal stated explicitly, of drawing a maritime boundary "without regard to the islands whose sovereignty has been determined"[62] — that is to say determined by the application of the principles and rules governing territorial sovereignty.

All the natural features situated between the coasts of the two so-called *"masses terrestres"* [mainlands] are Bahraini territory

61. Mr. President, if the match, if you will permit the expression, between Qatar and Bahrain ended in a draw as regards titles to or *effectivités* with regard to land features situated between the coast of Qatar and the coast of the main island of Bahrain, then, yes, the presumption based on proximity, contiguity, *appartenance* [appurtenance], the situation on one or other side of a maritime boundary drawn on the basis of other criteria, could make it possible to determine a score and decide between the Parties. But this is not so in the present case, for two reasons.

62. Firstly because, as you have been told, Bahrain has a title to all these features. An old title no doubt, but a historical one. The State of Qatar, as we know, was formed by separation from the State of Bahrain, which in the nineteenth century still included the peninsula of Qatar, and it is only the territories over which the Al-Thani dynasty exercised its authority which split from the State of Bahrain to form what in the twentieth century was to become the State of Qatar.

63. Subsequently, above all, because — independently of this consideration of legal history — there is the principle that in the absence of a clear legal title, it is the continuous and effective exercise of State functions which constitutes the criterion of territorial sovereignty, as Max Huber stated in the celebrated passage in his Award in the *Island of Palmas* case, to which reference was recently made by a Member of the Court in his opinion in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*[63], and has also been made here by my friend Elihu Lauterpacht. In addition, according to the principle laid down by the Permanent Court in the case concerning *Legal Status of Eastern Greenland*, recently evoked by another Member of the

[62]Second Stage, para. 83.

[63]Dissenting opinion of Judge Kooijmans, para. 14.

Court, again in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, in the jurisprudence the tribunal has been satisfied with "very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim"[64]. In our case, it is not a mere handful of *effectivités* which Bahrain can point to, but a large number, as my colleagues have shown. To borrow an expression from the *Eritrea/Yemen* Award, allow me to say that Bahrain *«pour ce qui est de manifester sa présence et son autorité, a mieux à présenter» [traduction du greffe]* "has more to show by way of presence and display of authority"[65] than Qatar.

64. The preponderance of *effectivités* is indeed overwhelming. It is not a matter for doubt, it is indisputable and, moreover, undisputed: it is in favour of Bahrain. Bahrain's activities, its presence, its *effectivités* speak as loudly as the nature of the place permits, whereas the activities, the presence, the *effectivités* of Qatar are totally inaudible. This is true of the Hawar Islands, of course, but it is equally true of the other features which are crucial for the course of the maritime boundary — Fasht ad Dibal and Qit'at Jaradah. Over these two features, as Michael Reisman has just demonstrated, and over all the others, Bahrain has exercised numerous acts of sovereignty, and has been the only one to do so. The position of the other Party — it has to be said and repeated yet again — is revealing: it contents itself with minimizing, denigrating, disqualifying Bahrain's acts of sovereignty by speaking disdainfully of *«les prétendues preuves d''actes de souveraineté' de Bahreïn»* ["so-called evidence of Bahrain's 'acts of sovereignty'"][66], but it has been unable to cite one single act of sovereignty by Qatar. And it is probably because Qatar does not have the slightest *effectivité* to rely on that our opponents have invented substitute theories intended to serve as some kind of a "spare wheel", such as the theory which awards to the coastal State, automatically and in principle, all insular or other features lying within its territorial sea.

65. I would not wish to take up the Court's time by referring yet again to Bahrain's acts of sovereignty over Dibal and Jaradah, as well as over the other features situated between the main
048 island of Bahrain and the peninsula of Qatar, or yet once more to the integration of these features

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[64]Dissenting opinion of Judge Rezek, para. 15.

[65] First Stage, para. 507.

[66] Counter-Memorial of Qatar, paras. 6.20 *et seq.*

into the Bahraini ensemble and the importance which some of them have for the economic and social development of the State of Bahrain. In regard to those of these features which lie to the west of the boundary claimed by Qatar, no evidence of the effective existence of Bahrain's sovereignty is really needed since, as we have heard[67], Qatar does not claim them. They are to the west of the boundary, and that is all, that suffices. It is therefore quite pointless to examine Bahrain's *effectivités* with respect to, let us say, Thaylib or Jazirat Mashtan. As regards Bahrain's *effectivités* with respect to such of these features as Qatar claims because they lie to the east of the maritime boundary which it claims, in particular Dibal and Jaradah, may I refer you on this point to our pleadings[68] and to what my friend Michael Reisman has just indicated to us.

66. In a word, in the case before us Bahrain is alone, to repeat the phraseology used in the *Eritrea/Yemen* arbitration, in showing evidence of *«une manifestation intentionnelle de son pouvoir et de son autorité sur le territoire en question par l'exercice de sa juridiction et des fonctions Etatiques» [traduction du greffe]* ["an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions"][69] — admirable phraseology destined to become as celebrated as the other repeatedly cited passage of Max Huber in his Award in the *Island of Palmas* case. It is therefore this sovereignty of Bahrain which is the starting-point and the basis on which the maritime boundary must be drawn. But how? This is a problem I wish to examine a little later.

The so-called *«méthode de calcul de masse terrestre à masse terrestre»* ["mainland-to-mainland method"] is politically unacceptable

67. As well as these considerations of a legal nature, there is a political aspect of the utmost importance. Should the *masse terrestre à masse terrestre* [mainland-to-mainland] delimitation theory carry the day and henceforth become law, the principle of the stability of frontiers, whose crucial role in the international legal system my friend Fathi Kemicha has pointed to, would be greatly endangered. Will the Court allow a State's sovereignty over an island or other feature resulting from the application of the principles and rules of international law governing territorial

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[67] CR 2000/10, p. 12, para. 64.

[68] Memorial of Bahrain, paras. 568-603; Reply of Bahrain, paras. 335-351.

[69] First Stage, para. 239.

sovereignty to be open to challenge because of, or on the pretext of, an alleged irrationality in its maritime consequences? In our present case, once Bahrain, pursuant to the principles and rules of international law governing territorial sovereignty, is sovereign in Fasht ad Dibal, Qit'at Jaradah, the Hawar Islands and the other islands and low-tide elevations lying between the main island of Bahrain and the peninsula of Qatar, will the Court allow this sovereignty to be called into question on the pretext or occasion of the maritime delimitation? Geography, Mr. President, is not a source of law, geography by itself is not a legal title. If the delimitation of maritime spaces were to be the occasion, or provide the pretext, for refashioning political boundaries inherited from history, it would woefully erode the stability of international relations. Will the Court allow maritime delimitation to serve as a starting-point for a process of large-scale territorial revisionism from one end of the planet to the other? This, quite apart from the specific dispute between Bahrain and Qatar, is something which is at stake in the present case.

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B. What are the territories of Bahrain which generate maritime rights?

68. Mr. President, Members of the Court, I now reach the second issue which I wish to examine in regard to the relationship between land and sea and the process of maritime delimitation. Once it is established that the theory of *«masse terrestre à masse terrestre»* [mainland to mainland] delimitation is contrary to the fundamental principles of the law of the sea and the law of territorial sovereignty, a more practical question arises, one closer to the circumstances of the present case: do all, or only some, of Bahrain's territories generate maritime rights? Does a distinction have to be drawn between territories of Bahrain and territories of Bahrain?

Islands, islets, rocks

69. As Qatar observes in its pleadings, the law of the sea "knows several concepts to characterize pieces of land emerging from the sea", namely islands, rocks, reefs and low-tide elevations[70]. Earlier, in its Memorial, Qatar also mentioned sand-banks[71], but as a legal category they are obviously non-existent. Also, the concept of rocks, mentioned in Article 121, paragraph 3,

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[70]Reply of Qatar, para. 7.12.

[71]Memorial of Qatar, para. 10.17.

of the Convention, is not unanimously regarded as forming part of customary international law, but this is a problem which does not arise here. That said, the other Party does not adhere to the classification it suggested with so much precision itself. As we pointed out in our Counter-Memorial[72], Qatar does two things. The first is simply to refrain from mentioning certain features or to minimize this or that feature in the hope of showing it to be less important than it really is. So, for example, Tighaylib, which Qatar describes as a reef — i.e., nothing at all — is in fact a low-tide elevation. The second — a method to which Qatar has recourse frequently and almost systematically — is to describe certain islands as islets, which do not correspond to any legal category whatsoever. Understand me fully, Mr. President: to describe an island of a small size as an islet is perfectly innocent and acceptable if done purely descriptively, so as to indicate that the island is small, and provided no normative effect is attached to the description, that is to say, if there is no attempt to distinguish between the legal status of an island and that of an islet. But the manifest purpose of our opponents in describing certain Bahraini islands — with an extraordinary richness of vocabulary — as "small islands", "islets", "small islets", "tiny islets", and even, to crown it all, "Lilliputian islets"[73] is a sort of legal *capitis deminutio*.

70. It must be observed once more that there is no such legal category as an islet in international law. Even these "tiny fragments of emerged land"[74], described and derided the other day by Mr. Quéneudec, these tiny fragments of emerged land, what do they amount to legally? Legally they are islands. Whatever their size, every island, that is to say, according to the definition in Article 121 of the Convention on the Law of the Sea, every "naturally formed area of land, surrounded by water, which is above water at high tide", generates the same maritime jurisdictions as other land territories. Nor, as we all know, is it relevant whether the island is inhabited or habitable, or whether it is neither inhabited nor habitable: an island is an island, and

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that is that. How can Qatar write that, in asserting that in matters of maritime delimitation "an island is an island", we have contradicted both international jurisprudence and State practice?[75]

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[72]Counter-Memorial of Bahrain, para. 484.

[73]Reply of Qatar, p. 283, paras. 7.22, 7.25, 7.29, 7.33, 7.35, 7.41, 8.8, 8.12, 9.39, 9.42, 9.50, 9.58, 9.60; CR 2000/10, p. 10, para. 61.

[74]CR 2000/10, p. 11, para. 61.

[75]Reply of Qatar, para. 9.9.

Have, then, the authors of Qatar's pleadings never read Article 121 of the 1982 Convention, which for that matter has been forcefully reaffirmed in the *Eritrea/Yemen* case? Every island, however small, says the Tribunal, and even rocks provided they are proud of the water at high tide, is capable of generating a territorial sea of 12 nautical miles[76] and creates a low-water baseline from which the territorial sea is to be measured[77].

Low-tide elevations: their character is territorial and that of land

71. Once the misunderstanding created by the other Party's systematic use of the word "islet" has been resolved, the issue which arises, and it is the only issue which arises from the legal point of view, is that of low-tide elevations. As we pointed out in our Counter-Memorial[78], the concept and the legal régime of low-tide elevations have long been uncertain, as evidenced even in 1951 by the Court's Judgment in the Norwegian *Fisheries* case[79]. It was not until Article 11 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, which Article 13 of the 1982 United Nations Convention repeats word for word — thus not until 1958 — that both the terminology and the legal régime were stabilized. As the Court knows, the Parties agree that these provisions have customary force. Since 1958, therefore, uncertainty and hesitation as to the status of low-tide elevations is a thing of the past — terminologically, conceptually and legally.

72. First, terminologically: the "drying rocks", "shoals" and "rocks awash" formerly spoken of have given way to "low-tide elevations", just as in French the *«sèches»*, *«fonds affleurants»* and *«fonds couvrants et découvrants»* have given way to *«hauts-fonds découvrants»*. The terminology

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is now settled. Consequently, we can only regret that from time to time our opponents continue to have recourse to out-of-date terms no longer recognized in international law.

73. Conceptually, today we know precisely what a low-tide elevation is. A low-tide elevation is defined in Article 13 of the 1982 Convention, to which the two Parties ascribe customary force, as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide". This definition, of exemplary precision, is a pendant to the

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[76]Second Stage, para. 155.

[77]Second Stage, para. 156.

[78]Counter-Memorial of Bahrain, para. 522.

[79]*I.C.J. Reports 1951*, p. 128.

definition of "island" given in Article 121: "a naturally formed area of land . . . which is above water at high tide"; low-tide elevations are above water at low tide and submerged at high tide.

74. Finally, and this is the most important, the legal régime: there exist between low-tide elevations and islands both points of similarity and differences. According to Article 121 of the United Nations Convention, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are governed by the same rules as are applicable to "other land territory", no difference being made between an island and other land territory. The low-water line of a low-tide elevation, on the other hand, may, according to Article 13 of the Convention, "be used as the baseline for measuring the breadth of the territorial sea" only if it is situated "wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island"; otherwise, Article 13 continues, the low-tide elevation has no "territorial sea of its own". Accordingly, and here is the difference, unlike islands, which always generate territorial sea whatever their location, a low-tide elevation generates or fails to generate territorial sea according to its location. One point must be added, which derives both from the wording of Article 13 itself and from the *travaux préparatoires*: a low-tide elevation, it is universally recognized, does not generate a territorial sea unless it is situated at a distance from a "mainland" or an "island" less than the breadth of the territorial sea. If it is situated less than 12 nautical miles from another low-tide elevation it does not generate territorial sea: leap-frogging, *le saute-mouton*, from one low-tide elevation to another *ad infinitum* is not possible. These rules are now firmly established.

053 75. It will be of interest to note that in the *Eritrea/Yemen* case the Tribunal, in stating that a reef that is not also a low-tide elevation cannot serve as a base point[80], confirms *a contrario* that a reef which has the nature of a low-tide elevation can serve effectively as a base point for measuring the territorial sea. The situation is crystal clear.

76. Another rule deserving mention in this respect points in the same direction: this is the rule in Article 7, paragraph 4, of the 1982 Convention, which provides that straight baselines "shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of

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[80]Second stage, para. 143.

baselines to and from such elevations has received general international recognition". That is to say, if either of these conditions is met, straight baselines can be drawn to and from a low-tide elevation. However, Mr. President, seeing that straight baselines can only be drawn to and from "appropriate points" — in the words of the Convention itself — on the coast and certainly cannot be drawn to and from points in the water, aquatic points, out at sea, the principle laid down in this provision necessarily implies that by their nature low-tide elevations are land and not sea, and if they are land they form part of State territory. A straight baseline cannot be drawn to and from a point in the water.

77. Even though certain low-tide elevations do not generate territorial sea, because they lie beyond the limits of the territorial sea, this is not at all because they are not State territory. If they were not State territory by their nature, they could never generate maritime jurisdiction. State territory is what low-tide elevations always are, regardless of their location. Even if situated beyond the outer limits of the territorial sea of a mainland or an island at a point further than 12 nautical miles, a low-tide elevation can nonetheless be subject to State sovereignty. If that were not so, there would be no justification for a State to be able to erect a lighthouse or similar permanent installation on it and make that lighthouse or installation the point supporting a straight
0 5 4 baseline from which, as the Convention permits, the breadth of its territorial sea will be measured. Nor would there be any justification for a low-tide elevation to be recognizable by other States as a point of support for a straight baseline. Whatever their location, low-tide elevations are always subject to the law which governs the acquisition and preservation of territorial sovereignty, with all its subtleties of title and *effectivités*. The old controversy, which was still current in 1953 at the time of *Minquiers and Ecrehos*, on the capability of low-tide elevations — as was said in the past and as Sir Gerald Fitzmaurice said — of appropriation in sovereignty, a pleasing expression, that controversy belongs to the past.

78. Mr. President, the other Party claims that Qatar has sovereignty over Dibal and Jaradah — it clearly claims sovereignty — although it considers both of them to be low-tide elevations; this Dibal is and, in our view, Jaradah is not. In doing so, it acknowledges that low-tide elevations can be the object of sovereignty. However, it maintains — and here appears the awkward point in its reasoning — that low-tide elevations situated in the territorial sea are under

State sovereignty, but as sea, as a body of a water, and not as land territory. As regards a low-tide elevation situated beyond the outer limit of the territorial sea but within the outer limit of the continental shelf (i.e., in practice, between 12 and 200 nautical miles), the low-tide elevation, Qatar maintains, is part of its continental shelf. At less than 12 miles the low-tide elevation is water, it is territorial sea. Beyond 12 miles but within 200 miles it forms part of its continental shelf and therefore is no longer subject to State sovereignty but to the sovereign rights which the coastal State possesses over its continental shelf. In short — and I believe this is no misrepresentation or parody of our opponents' argument — a low-tide elevation is water if it is situated less than 12 miles from the coast, but seabed if it is situated more than 12 miles from the coast; it will never, they say, be land territory.

79. Qatar draws two surprising conclusions from this theory that low-tide elevations are maritime — aquatic or seabed — in character. First, being sea, "it is the law of the sea that applies", and not the law of territorial sovereignty at all, in that — I quote Professor Salmon — "low-tide elevations are not subject to appropriation in the same way as *terra firma* may be appropriated"[81]; Qatar does not deny that they are capable of appropriation since Qatar claims them, or in any event claims Dibal and Jaradah. But they are not capable of appropriation in the same way as *terra firma* may be appropriated. Secondly, what is even more surprising, low-tide elevations have no coast; they cannot therefore represent the coast of a State and cannot form part of that coast; as Qatar writes, *«il n'y a pas à proprement parler de rivage sur un élément de la géographie marine auquel s'applique l'expression «haut-fond découvrant», et un tel haut-fond découvrant n'est donc pas un élément de la côte»* ["there is properly speaking no shore on a maritime feature which qualifies as a low-tide elevation, and a low-tide elevation therefore is not part of the coast"][82]. It is water, it is seabed, it is not a piece of land, it is not a coast. By this strange argument Qatar seeks to disqualify Fasht ad Dibal, Qit'at ash Shajarah, Qita'a el Erge and Fasht Bu Thur as Bahraini coastal points en bloc[83]: if we are to believe Qatar, legally all these features are aquatic in character. But if this is so, Mr. President, may I again put the following

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[81]CR 2000/5, p. 39, para. 21. Similarly, Memorial of Qatar, para. 10.59.

[82]Counter-Memorial of Qatar, para. 6.95. Similarly, CR 2000/9, p. 40, para. 18.

[83]Counter-Memorial of Qatar, paras. 6.82-6.83.

question: how do our opponents explain the customary rule expressed in Article 13 of the 1982 Convention, which by its very wording permits a State to calculate the outer limit of its territorial sea from the low-water line on certain low-tide elevations? Are there then base points in the territorial sea which are aquatic points detached from the coast? No, Mr. President. The sea, at least until the present day, does not generate any maritime projection; only land can do that. The sea does not dominate the sea any more than it dominates the land. It is true that low-tide elevations generate maritime projection, only in certain limited geographical situations, but this does not affect their inherent nature, which is and remains always the same — territorial and that of land.

80. It is interesting to note that in the *Eritrea/Yemen* case it was in the first stage of the arbitral procedure, relating to territorial sovereignty, that the Tribunal made a finding on the low-tide elevations; it would seem clear that it assimilated them to islands, islets and rocks in deciding that *«les îles, îlots, rochers et hauts-fonds découvrants»* ["the islands, islets, rocks and low-tide elevations"] of this or that group *«relèvent de la souveraineté territoriale»* ["are subject to the territorial sovereignty"] of one or other of the Parties[84]. As we can see, the Tribunal has treated
056 low-tide elevations as being subject to "territorial sovereignty", without distinguishing between those of them which are situated in the territorial sea and those which lie outside the territorial sea. The idea which Qatar would like the Court to accept in the present case, that a State cannot exercise territorial sovereignty over a low-tide elevation situated beyond the outer limit of its territorial sea[85], was evidently not in the minds of the *Eritrea/Yemen* Tribunal.

81. What is more, in the present case Qatar's argument would result in absurd — totally absurd — consequences in regard to Fasht ad Dibal. If we follow Qatar, Dibal — which, as we all agree, is a low-tide elevation — would have two different legal characters since the outer limit of 12 nautical miles from the peninsula of Qatar crosses Dibal. The part situated less than 12 nautical miles from the peninsula of Qatar, starting from Dibal, would therefore be Qatari territorial sea. As regards the part situated more than 12 nautical miles from the peninsula of Qatar, it would be continental shelf, so we are told; but since that part is situated less than 200 nautical miles from

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[84]First Stage, para. 527; *[French translations by the Registry]*.

[85]Counter-Memorial of Qatar, para. 6.15.

both Qatar and Bahrain and would therefore form part of the continental shelves of both Bahrain and Qatar, it would have to be delimited. The delimitation of the continental shelf too would precede and condition the determination of the territorial sovereignties. Not until the continental shelves of the two countries had been delimited would we know to whom sovereignty over part of Dibal belonged. Once again, Qatar would like the sea to determine the sea.

82. Looking at things from Qatar's standpoint, the situation of Qit'at Jaradah would be just as peculiar. In Qatar's view, as the Court knows, Jaradah is a low-tide elevation. In our view it is an island. Now Jaradah is less than 12 nautical miles from both Qatar and the main island of Bahrain, that is to say, it is within the territorial seas of the two countries. Qatar's approach would therefore place Jaradah under the sovereignty of both countries pending a maritime boundary being drawn across the area in which the two territorial seas overlap, the step which would make it possible to determine on which side of the maritime boundary Jaradah lay. Territorial sovereignty over Jaradah, as over Dibal, would be determined by the maritime delimitation.

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83. Because Qatar is doubtless aware of the remarkable absurdity of this situation, it proposes that the issue of Dibal and Jaradah should be tackled *«dans une autre perspective»*; that is its own expression: "from another perspective". In other words, by short-circuiting the reasoning which I have just suggested and explained. Dibal and Jaradah must be under Qatar's sovereignty, to use their very words, *«en raison de leur situation»* ["by their very location"], namely because they are closer to Qatar than to the main island of Bahrain[86]. In reality, as the Court knows, Dibal is closer to the Bahraini island of Qit'at Jaradah than to Qatar. But even if Dibal was closer to Qatar than any Bahraini island, one would be tempted to say *«Et alors»?* "So what?"

84. Qatar has no hesitation in maintaining that sovereignty over every feature, be it an island or a low-tide elevation, depends on whether it is situated to the east or to the west of the maritime boundary which the Court is to determine. "[T]he attribution of the islet of . . . Al Mu'tarid to one State or the other will depend on knowing on what side of the delimitation line the islet will be located", said counsel for Qatar. It is "the course of that line . . . that will have the effect of

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[86]Memorial of Qatar, para. 10.73; Counter-Memorial of Qatar, para. 6.85.

conferring title to these low-tide elevations in the light of their location in relation to the delimitation line."[87] What counsel for Qatar calls "the attribution of sovereignty"[88] to the maritime boundary is not only a reversal of the natural order of things, it makes proximity the criterion of sovereignty. Thus Dibal and Jaradah, as I have just observed, are claimed by Qatar because they are closer to the peninsula of Qatar than to the main island of Bahrain. The Hawar Islands are claimed by Qatar "by virtue", we are told "of their proximity to Qatar's coast"[89]. The eastern part of Fasht al Azm, Fasht Bu Thur, Qit'at ash Shajarah, Qita'a el Erge, Rabad ash Sharquiyah, Rabad al Ghabiyah, Jazirat Ajirah, all these are claimed by Qatar not because it has any title whereby to exercise *effectivités* in them; no, they are claimed by Qatar because they lie to the east of the maritime boundary which Qatar requests the Court to draw by ignoring these features. Proximity, the keystone of territorial sovereignty, the principal criterion of sovereignty, the decisive element in maritime delimitation —once more, this is the theory which Qatar requests the Court to endorse.

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85. Mr. President, if, instead of Qatar's imaginary theory, we apply the well-established principles and rules which govern territorial sovereignty, the islands and low-tide elevations lying to the east of the maritime boundary claimed by Qatar are subject to Bahrain's sovereignty by the same title, for the same reasons and with every ounce of certainty as the islands and low-tide elevations lying to the west of this boundary. Without exception, every one of these features which has the status of an island naturally generates a territorial sea: the principal island of Bahrain, Sitrah and Muharraq, but also all the other islands, those comprising the archipelago of the Hawar Islands, Rabad al Ghabiyah, Rabad ash Sharquiyah, Jazirat Ajirah, Al Mu'tarid, Jazirat Mashtan, Jabari and Qit'at Jaradah. Those of the low-tide elevations which are situated less than 12 nautical miles from a Bahraini territory, be it the main island or other Bahraini islands, also have their own territorial sea: Fasht ad Dibal, situated less than 12 miles from both Fasht al Azm (i.e., the island of Sitrah) and the island of Jaradah; Qit'at ash Shajarah, situated less than 12 miles from the island of Umm Jalid; Qita'a el Erge, situated less than 12 miles from the main island of Bahrain and the islands of Al Mu'tarid, Mashtan, Jazirat Hawar, Rabad ash Sharquiyah, Jazirat Ajirah and

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[87]CR 2000/10, p. 11, para. 62 and p. 13, para. 64.

[88]CR 2000/10, p. 11, para. 63.

[89]Reply of Qatar, para. 1.7.

Umm Jalid; Fasht Bu Thur, situated less than 12 miles from the main island and from the islands of Al Mu'tarid, Mashtan, Jazirat Hawar, Rabad al Ghabiyah, Rabad ash Sharquiyah and Jazirat Ajirah[90]. As far as Fasht al Azm is concerned, it forms part of the island of Sitrah, as my friend Reisman has shown; but even if we followed Qatar's reasoning that it is a low-tide elevation distinct from the island of Sitrah, even in that case Fasht al Azm would nevertheless have its own territorial sea, because it would then be a low-tide elevation situated less than 12 miles from the main island and from the islands of Sitrah and Umm Jalid.

86. Before going further and establishing whether all these Bahraini territories, which I have purposely enumerated in somewhat haphazard fashion, are capable of acting as base points in calculating the line, in determining the line of delimitation, I have to dispose of two precedents which Qatar relies on to support its peculiar theory of "first the sea, then the land": I shall talk about the Boggs-Kennedy line and about treaty practice in the Gulf. If we are to believe Qatar, these are decisive precedents which the Court could or should rely on in applying the *méthode de calcul de masse terrestre à masse terrestre* [mainland-to-mainland method]. Neither of these precedents, I hope to succeed in demonstrating tomorrow, has the slightest relevance for the purposes of the present case.

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I thank you for your patience, Mr. President.

The PRESIDENT: Thank you, Professor Weil. This brings this morning's sitting to an end. We shall resume tomorrow at 10 a.m.. The Court is adjourned.

The Court rose at 1.05 p.m.

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[90]See Memorial of Bahrain, paras. 619 and 626.