

CR 2000/13

International Court  
of Justice

THE HAGUE

Cour internationale  
de Justice

LA HAYE

YEAR 2000

*Public sitting*

*held on Tuesday 13 June 2000, at 10 a.m., at the Peace Palace,*

*President Guillaume presiding*

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

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VERBATIM RECORD

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ANNEE 2000

*Audience publique*

*tenue le mardi 13 juin 2000, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Guillaume, président*

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

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COMPTE RENDU

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

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

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S. Exc. M. Mohammed Jaber Al-Ansari, conseiller de Son Altesse l'émir de Bahreïn,  
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M. Hafedh Al-Qassab, ministère d'Etat de l'Etat de Bahreïn,  
Mme Aneesa Hanna, ambassade de Bahreïn, Londres,  
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Mme Vanessa Harris, cabinet Freshfields,  
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*comme personnel administratif.*

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et nous allons ce matin entendre la continuation de la présentation par l'Etat de Bahreïn et je donne d'ores et déjà la parole à M. Robert Volterra.

Mr. VOLTERRA:

1. Mr. President, Members of the Court, it is an honour for me to appear before this tribunal.

**THE UNINTERRUPTED CONTINUUM OF BAHRAIN'S SOVEREIGNTY OVER THE HAWAR ISLANDS  
AS EVIDENCED BY ITS *EFFECTIVITÉS* AND THE CONDUCT OF THE RESIDENTS OF HAWAR**

**Introduction**

2. Bahrain has asked me to present its arguments in relation to Bahrain's uninterrupted continuum of sovereignty over the Hawar Islands as evidenced by its *effectivités* and the conduct of the islands' inhabitants. Professor Sir Elihu Lauterpacht spoke on Friday about the legal principles involved in determining questions of title to territory and my comments provide the factual context for the principles that he elucidated.

3. This morning, I shall discuss evidence of Bahrain's *effectivités*, conduct on the Hawar Islands that qualifies as *à titre de souverain*, the understanding of third parties that the islands belonged to Bahrain, and the general social, political and economic context of Bahrain's centuries-old ownership of the islands. I will conclude my remarks by considering Qatar's analysis of this evidence.

**Qatar versus Bahrain: physical geography versus human history**

4. The issue before the Court of title to the Hawar Islands is one of physical geography versus human history. The islands do lie off the coast of the Qatar peninsula. But Bahrain has historical evidence that the islands have belonged to it for many generations. Qatar cannot deny that the historical record shows Bahraini activities in the Hawar Islands and shows *no* Qatari activities there.

5. It will not have escaped the attention of the Court that Qatar spent much of its first round describing how the Hawar Islands are situated just off the Qatar peninsula. Qatar would have you believe that the Hawar Islands were untouched by Bahrainis or other human beings, with the



possible exception of passing fishermen, until 1936. The satellite photographs shown by Qatar's distinguished Agent, for example, to depict the recent military and civil construction on the islands by Bahrain, very conspicuously omitted to label the buildings and ruins that still exist on the islands and pre-date the 1938-1939 arbitration by decades.

6. Qatar has recounted at some length to the Court the geomorphology of the islands, which incidentally, is the same as Bahrain and the Hasa Coast of Saudi Arabia. But Qatar is silent about the presence of no less than six cemeteries on the islands. Qatar claims there were no settlements on the islands. But Qatar has no answer to the existence of two permanent villages on the islands, recorded repeatedly from as early as 1820. Qatar calls the islands waterless, but — again — has declined to note the existence of water cisterns there. Qatar claims that its sovereignty over the Hawar Islands, by virtue of the purported control of the Qatar peninsula, was recognized until 1936. But Qatar can only point to inferences drawn from speculation based on documents that are in truth silent on the subject.

7. This slide shows the evidence presented by both Parties supporting their claims to have authority over the Hawar Islands. At least this is how the evidence might have been. But Qatar has had to withdraw its 82 forged documents. And Qatar agrees that maps do not establish legal title. And so you see the case of Qatar. As a result, Qatar has not been able to provide one single example of the exercise of its authority on the islands. Nor has Qatar been able to point to the conduct of any Qataris on the islands, let alone Qataris acting under the authority of the Rulers of Qatar.

8. In contrast, Bahrain's written pleadings contain more than 80 documented examples of Bahraini activities on the Hawar Islands.

9. Indeed, the public record establishes that the Hawar Islands have been an integral part of the social and political economy of Bahrain for more than 200 years. The British archives confirm that Britain, British officials, and British records recognized the Hawar Islands to be Bahraini consistently from 1820 onward. Qatar has chosen merely to ignore all but a dozen or so of these documents.

10. Qatar's claim to the Hawar Islands, made initially in 1938 and raised again subsequently after a decades-long silence, is at best a calculation that Qatar had nothing to lose by doing so, and might somehow counterbalance Bahrain's very real claim to the Zubarah region.

11. If Qatar obtains nothing from this present case, then Qatar will have lost nothing. If Qatar somehow acquires even Janan Island, let alone Dibal, Jaradah, Fasht al Azm or other territories, that will reward its speculation and its course of conduct.

12. Bahrain has submitted as I said, more than 80 examples of its activities in the Hawar Islands in its written pleadings. A list of 70 of them can be found at paragraphs 28 to 30 of Bahrain's Reply, with a further ten contained in the Supplementary Documents. I do not intend to recite these to you. Instead, I will describe selected examples placed in their social and historical context.

13. The most effective way to do this is to break down my presentation into time periods. Thus, I will first review Bahrain's *effectivités* over the Hawar Islands during the eighteenth and nineteenth centuries. Then I shall move on to the first two decades of the twentieth century. Next the 1920s. Then the 1930s. Finally, I will remind the Court of Bahrain's *effectivités* during the decades following the 1938-1939 arbitration. These last, of course, show the continuing exercise of sovereignty over the islands by Bahrain since the arbitration. Reviewing Bahrain's *effectivités* and activities in this way shows that, starting from 1783 until the present day, there is a substantial body of publicly accessible, genuine and — perhaps most importantly — *uncontradicted* evidence of Bahrain's authority over the islands.

14. There is evidence of Bahraini activity from every period of the Hawar Islands' history, including well before the Ruler of Qatar first made a claim to the islands in 1938. Indeed, of the 80 Bahrain activities mentioned in the written pleadings, some 60 took place before the British arbitration of 1938-1939. And of those 46 took place before 1936.

**The evidence of Bahrain's *effectivités* over the Hawar Islands during  
the eighteenth and nineteenth centuries**

15. In 1783, the Al-Khalifa defeated the Persian garrison on the main island of Bahrain and extended their dominion beyond the Qatar peninsula to include the islands in the Gulf of Bahrain. Shortly thereafter, a nearby branch of the Dowasir tribe petitioned the Ruler of Bahrain to permit

them to settle on the Hawar Islands. The Qadi of Zubarah, the highest-ranking legal and religious official of the Al-Khalifa Government, appointed by the Ruler of Bahrain, granted their request and the Dowasir settled into the islands<sup>1</sup>.

16. The Al-Khalifa grant of permission was referred to in a despatch sent on 4 April 1909 from Captain Prideaux, the British Political Agent, to the Political Resident. In that correspondence, Captain Prideaux repeated the fact of the existence of the grant and noted the written permission from the Qadi still existed<sup>2</sup>.

17. But I anticipate events. It was specifically recognized that the Hawar Islands belonged to Bahrain from as early as the 1820s. Captain George Brucks, a British Indian Navy officer, was commissioned to conduct a detailed and careful study of the Arabian Gulf coast from 1821 to 1829<sup>3</sup>. The report of his findings is entitled the *Arabian Coast Survey* and it is considered the authority on the political configuration of the Gulf during the first half of the nineteenth century. Mr. Paulsson brought this document to the attention of the Court on Friday. It bears emphasizing that this was a vast and comprehensive undertaking: you will find the relevant extract of this report at tab 27 of your judges' folders; if you turn to page 93, which is designated on the bottom right-hand corner of the pages, and turn to the last full paragraph you will see the meticulous care with which Captain Brucks conducted his survey over a period of nine years. This is how Captain Brucks described his methodology:

"My information has been obtained in the following manner: I have proposed to the chiefs certain questions relative to the tribes, and their localities, of the revenues, trade, etc., which I have noted, with their replies."<sup>4</sup>

18. The next paragraph of Captain Brucks' introductory remarks describes how he cross-checked and verified his information.

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<sup>1</sup>Letter from Capt. Prideaux to British Political Resident, 4 April 1909. Memorial of Bahrain, Ann. 236, Vol. 5, p. 1039 at p. 1041.

<sup>2</sup>Letter from Capt. Prideaux to British Political Resident, 4 April 1909. Memorial of Bahrain, Ann. 236, Vol. 5, p. 1039 at p. 1041.

<sup>3</sup>Captain G. Brucks of the British Indian Navy "Memorial Descriptive of the Navigation of the Gulf of Persia 1821-1829", Memorial of Bahrain, Ann. 7, Vol. 2, pp. 92-109.

<sup>4</sup>Memorial of Bahrain, Ann. 7, Vol. 2, p. 93.

19. In relation to the Hawar Islands, referred to then by Europeans as Warden's Islands, Captain Brucks observed — and this quotation can be found, again, at tab 27, page 101, third paragraph:

"Warden's Islands is a group of eight or nine islands and rocks . . . The principal is called Al Howahk, and is about four miles long. It has two fishing villages on it, and belongs to Bahrein."<sup>5</sup>

20. Very simple: the Hawar Islands have two fishing villages on them and the Hawar Islands belong to Bahrain. These were the facts recorded by this British naval officer in 1820.

21. Thus some 120 years before the British arbitration of 1938-1939, detailed, reliable and neutral observation recorded two important facts about the Hawar Islands that entirely contradict Qatar's latest theory: first, the islands were inhabited. Captain Brucks noted the existence of no less than two villages there; and second, the islands belonged to Bahrain.

22. It is difficult to reconcile the findings of Captain Brucks with Qatar's vision of an empty group of islands that was consistently recognized by Britain as belonging to Qatar until a sudden reversal of policy in 1936. It is not without significance that Qatar's pleadings do not attempt to address this.

23. Qatar has submitted no evidence to suggest that anything occurred between the time of Captain Brucks' 1820s report and the British arbitration of 1938-1939 that changed the status quo of the islands.

24. Lorimer's *Gazeteer*, published in 1908 and referred to by both Parties — 1908 being decades before the first Qatari claim to the islands — recalls that the Ruler of Bahrain had invited the nearby branch of the Dowasir to settle also on the main island of Bahrain in 1845. The Dowasir did so<sup>6</sup>. That act affirmed and reinforced the political relationship between the Bahraini branch of the Dowasir and the Rulers of Bahrain. The Bahraini Dowasir continued to inhabit the Hawar Islands even after they moved to Budaiya and Zellaq on the main island of Bahrain, as this extract from Lorimer confirms. He wrote:

"[The main Island of Hawar is about] 10 miles long, north and south, and roughly parallel to the Qatar coast. There are no wells but there is a cistern to hold

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<sup>5</sup>Memorial of Bahrain, Ann. 7, Vol. 2, p. 101.

<sup>6</sup>Lorimer, *Gazeteer of the Persian Gulf, Oman and Central Arabia*, Vol. II (1908). Memorial of Bahrain, Ann. 74, Vol. 3, p. 378.

rainwater built by the Dowasir of Zellaq in Bahrain who have houses at two places on the island and use them in winter as shooting boxes."<sup>7</sup>

25. Almost 100 years after Captain Brucks, Lorimer was reporting essentially the same thing.

26. Following the 1845 invitation to establish themselves on the main island of Bahrain, the Hawar islanders were engaged in a settled pattern of life. They followed the seasons and the resources of the Gulf: spending five months of the year on the main island of Bahrain during the pearling season and the remainder of the year in regular habitation in their villages on the Hawar Islands.

27. The Court will have noted that Qatar, in its oral arguments in the first round, recognized the importance of oral testimony in the "Arab oral culture", to use counsel for Qatar's own expression<sup>8</sup>. This will undoubtedly have put the Court in mind of the affidavits submitted by Bahrain in its written pleadings that contain the testimony of Bahrainis who grew up in the Hawar Islands during the 1920s and 1930s. One of these former Hawar islanders who was born in 1920, Hamoud bin Muhanna al Dosari, and who grew up in the north village of Hawar in the reign of Sheikh Isa bin Ali, who died in 1932, has described their pattern of life over generations. This can be found at tab 28 of the judges' folders, page 1363, at paragraph 5:

"Everyone lived with their families and cattle and property on the Islands. They would come every year with their families, their servants and their belongings from Zellaq after the summer pearling season."

He continued:

"I do not know exactly how long the Dowasir had been in the Hawar Islands. When I was a child, I served coffee in the Majlis [the village meeting place] to people who were 80 and 90 years old. They used to tell stories of living in the Hawar Islands when they were young."<sup>9</sup>

Hamoud bin Muhanna al Dosari, whose testimony I just read — at least his English translation thereof — is 80 years old now. The fact that he was relating events from the 1920s and early 1930s means that the elders were passing down oral histories of their lives in the Hawar Islands from the mid-1800s.

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<sup>7</sup>Memorial of Bahrain, Ann. 74, Vol. 3, p. 399.

<sup>8</sup>CR 2000/5, p. 48, para. 10.

<sup>9</sup>Statement of Hamoud bin Muhanna bin Hamad al Dosari, 7 Sep. 1996. Memorial of Bahrain, Ann. 313 (a), Vol. 6, pp. 1363-1364.

28. The testimony of the Hawar islanders uniformly tells of their regular, seasonal migration to and from the main island of Bahrain. Another former Hawar Island resident now living on the main island of Bahrain, is Abdallah bin Ali bin Thamir Al Dosari. He was born on the Hawar Islands in 1924 and recounts the pattern of their lives:

"We would stay in Hawar in the winter and in the summer we would go to Zallaq, because there was no water in Hawar. Our relations were divers. During the diving season we would go to Zallaq, and afterwards we would return to Hawar."<sup>10</sup>

29. The testimony of the former Hawar islanders also shows that the Al-Thani and the population centres in Doha were far away from the Hawar Islands. An understanding of the human geography of the Qatar peninsula confirms this. Travelling west from Doha, one would have to cross the entire barren interior of the Qatar peninsula before arriving at the western coast across from the Hawar Islands. One would not have encountered a single permanent settlement along the way. As counsel for Qatar noted, the first recorded visit of a Ruler of Qatar anywhere close to the Hawar Islands occurred in 1938 when the then Ruler of Qatar visited Zekrit, on the west of the Qatar peninsula, to inspect the new oil works there<sup>11</sup>. There is no record of any contact between the islanders and the people of Doha. Hawar residents deny that there ever was any<sup>12</sup>.

30. In contrast, the populous and comparatively wealthy market centres of Manama, Riffa, Budaya, Zellaq and the other towns on Muharraq and the main island of Bahrain were close by. The main island of Bahrain is only 11 nautical miles away. The short trip over the shallow waters of the Gulf of Bahrain was easily covered in one of the dhows that plied the waters, carrying gypsum and fish from the Hawar Islands and returning with goods and supplies.

31. The life of the islanders appears to have remained much the same from 1845 until the 1940s when the oil era changed Bahrain society. The islanders fished — under permit from the Ruler of Bahrain<sup>13</sup> — they dived for pearls — under licences from the Government of Bahrain<sup>14</sup> —

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<sup>10</sup>Statement of Abdallah bin Al Bin Thamir Al Dosari, 5 May 1999. Reply of Bahrain, Ann. 23 (a), p. 145.

<sup>11</sup>CR 2000/5, p. 61, para. 82.

<sup>12</sup>Statements of former Hawar residents. Memorial of Bahrain, p. 188, para. 420; Memorial of Bahrain, Anns. 313-316, Vol. 6, pp. 1363-1413.

<sup>13</sup>Letter from Belgrave to Packer, Manager of PCL, 31 Jan. 1938. Memorial of Bahrain, Ann. 250, Vol. 5, p. 1078.

<sup>14</sup>Letter from C. Belgrave to H. Weightman, 22 Dec. 1938 (Bahrain Counter-Claim). Memorial of Bahrain, Ann. 274, Vol. 5, pp. 1132-3; Statements of former Hawar residents. Memorial of Bahrain, Ann. 313 (a) and 316 (a), Vol. 6, p. 1367, paras. 20-1 and pp. 1405-1406, para. 23.

they built cisterns, tended their livestock, mined gypsum — under licences from the Government of Bahrain — and traded with other parts of Bahrain<sup>15</sup>.

32. The antiquity, stability and permanence of the settlement is illustrated by physical evidence on the Hawar Islands<sup>16</sup>. Professor Paolo Costa of the University of Bologna produced a report in 1995 of his field work on the Hawar Islands. Bahrain has submitted a copy of this report in its Memorial<sup>17</sup> and I shall not go through it here. Professor Costa noted the three ancient villages and houses — these images can be found at tab 30. He also noted the six cemeteries, including the children's cemetery. He noted the many dams and water cisterns, the animal-powered millstones, the pottery shards, games carved into the rocks; he also noted the gypsum quarries and the ancient mosques and prayer walls, the grazing pastures used by the Hawar islanders and finally Professor Costa concluded: "(I) cannot refrain from expressing the belief that what results is definitely the picture of settled people and not of wandering fishermen or occasional visitors."<sup>18</sup>

33. Although the Bahraini Dowasir were proud and independent-minded, they lived under the authority of the Rulers of Bahrain. Britain recognized that the Bahraini Dowasir were subject to the laws of Bahrain. In a letter from the British Political Resident addressed to "the Chief and members of the Dowasir tribe at Budaiya and Zellaq" dated 21 November 1869, the British Political Resident insisted that the Bahrain Dowasir conform to an interdiction on smuggling that applied to all Bahrainis<sup>19</sup>.

34. The Rulers of Bahrain are recorded to have made annual visits to the Hawar residents, as far back as the nineteenth century<sup>20</sup>. In 1873, Sheikh Isa bin Ali, the Ruler of Bahrain, was visiting his relatives on the islands when a group of Ottoman soldiers was shipwrecked on the coast. The

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<sup>15</sup>Statements of former Hawar residents. Memorial of Bahrain, Ann. 313-316, Vol. 6, pp. 1363-1406.

<sup>16</sup>Expenditure Summary for Government of Bahrain for 1358 Hejra (1939). Memorial of Bahrain, Ann. 293, Vol. 5, pp. 1200-1; Statement of Hamoud bin Muhanna bin Hamad al Dosari. Memorial of Bahrain, Ann. 313 (a), Vol. 6, p. 1364, para. 9.

<sup>17</sup>Report by Dr. P. Costa on the Archaeological Investigation on the Hawar Islands, 17 Jan. 1995. Memorial of Bahrain, Ann. 310, Vol. 6, pp. 1332-1351.

<sup>18</sup>Memorial of Bahrain, Ann. 310, Vol. 6, p. 1351.

<sup>19</sup>Letter from the British Political Resident to the Chief and Members of the Dowasir tribe at Budaiya and Zellaq, 21 Nov. 1869. Counter-Memorial of Bahrain, Ann. 7, Vol. 2, pp. 14-15.

<sup>20</sup>Letter from Belgrave to Weightman, 22 Dec. 1938. Memorial of Bahrain, Ann. 247, Vol. 5, p. 1134.

Ruler assisted in their rescue and arranged for the transfer to the main island of Bahrain — of those soldiers — and thence onward to their intended destination.<sup>21</sup>

35. The Ottoman Empire clearly understood that the islands belonged to Bahrain and that the Al-Thani and Doha were separate and far to the east. The Court will no doubt recall the 1878 Ottoman survey map prepared by Captain Izzet of the Ottoman Navy. Suffice to note that Captain Izzet's map was consistent with this map shown on the screen and found at tab 31 of the judges' folders. This map was prepared by Captain E. L. Durand to accompany his report on Bahrain in 1879 — one year after Captain Izzet. You can see from Captain Durand's map, Doha is shown far off on the south-east coast of the Qatar peninsula. The peninsula itself, Mr. President, Members of the Court, is labelled "El-Bahrain", leaving no room for Qatar's instant coast-to-coast sovereignty claim to the Hawar Islands.

**The evidence of Bahrain's *effectivités* over the Hawar Islands  
during the early twentieth century**

36. Bahrain's continued administration of the Hawar Islands as well as the continued occupation of the islands by the Bahraini Dowasir acting under the authority of the Rulers of Bahrain continue to be recorded in the public documents dating from the beginning of the twentieth century. These include records of court cases, police activities, and government directives<sup>22</sup>.

37. There are Bahraini court decisions dating from 1909 and 1910 that relate to land and fishing rights on the Hawar Islands<sup>23</sup>. The judgment in the 1909 case was made by the Qadi of the Sharia Court of Bahrain. The judge was an official of the Ruler of Bahrain, acting under his authority. It can be found at tab 32 of the judges' folders. The judgment in that case reads, in part:

"Be it known that Ahmad bin Shahin Dosari and Bati bin Salman and Jabr bin Muhanna and Hamad bin Saeed have appeared before me and disputed the ownership of land and sea properties in Hawar. Ahmad bin Shahin claimed those to be his property inherited from fathers and forefathers; Jabr and Bati claimed them to be their properties and that they held documents . . ."<sup>24</sup>

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<sup>21</sup> Memorial of Bahrain, Ann. 274, Vol. 5, p. 1134.

<sup>22</sup> Counter-Memorial of Bahrain, para. 159.

<sup>23</sup> Judgment made by Sharaf bin Ahmad, Qadi of the Bahrain Sharia Court, 1327 Hejrah (1909), Memorial of Bahrain, Ann. 235, Vol. 5, p. 1049. Memorial of Bahrain para. 434; Judgment written by Sharaf bin Ahmad, Qadi of the Bahrain Sharia Court 1328 Hejrah (1910), Memorial of Bahrain, Ann. 238 A, Vol. 5, p. 1049 (a).

<sup>24</sup> Memorial of Bahrain, Ann. 235, Vol. 5, p. 1049. Memorial of Bahrain para. 434.



38. And so it continues.

39. In 1910, the Bahrain Court described the subpoena power exercised by the Bahrain Government over the Hawar islanders — this can be found at tab 33 of the judges' folders. The judgment of the Court in that year begins:

"By the order of Shaikh Abdullah bin Isa Al-Khalifa, Ahmad bin Shahin Dosari and Isa bin Ahmed Dosari appeared before me in a dispute about land and sea properties in Hawar . . ." <sup>25</sup>

40. The judgment is signed and sealed by the Ruler of Bahrain.

41. To contest the evidence of Bahrain's exercise of judicial authority over the Hawar Islands, Qatar drew the attention of the Court to abstract theories of the general jurisdiction of Qadis under Islamic law. Qatar thus hoped to show the irrelevance of the fact that disputes over property in the Hawar Islands were brought to Bahrain courts<sup>26</sup>. Mr. President, Members of the Court, the Ruler of Qatar tried that same argument back in 1939. The response of British officials at that time still holds true today — and you can find this in tab 34 on page 1170, starting at the last sentence:

"This statement is of course true up to a point in 'personal' cases, but the Shaikh of Qatar would be the first to deny that a Nejdi (Saudi) Qadhi, for instance, could settle a dispute between two Qatar subjects in respect of *landed properties* in Doha." <sup>27</sup> (Emphasis added.)

42. In the course of its arguments on this point, Qatar conceded:

"For what they are worth, Bahrain's own Dowasir witness statements point out that if the Dowasir had disputes . . . they went to the tribal elder . . . [and] . . . only if they could not solve a dispute, they went to the Ruler of Bahrain or his descendants to solve it, presumably as arbitrators." <sup>28</sup>

43. Bahrain is unable to discern in Qatar's argument anything other than evidence of the exercise of judicial authority by Bahrain over the Hawar Islands.

44. British records dating from 1911 tell of the Ruler of Bahrain's ability to exercise his authority over the Hawar Islands and the people living there<sup>29</sup>. The request for the Ruler to bring

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<sup>25</sup>Memorial of Bahrain, Ann. 238 A, Vol. 5, p. 1049 (a).

<sup>26</sup>CR 2000/8, p. 29, paras. 34-36.

<sup>27</sup>Report of H. Weightman, 22 April 1939, Memorial of Bahrain, Ann. 281, Vol. 5, pp. 1170-1171.

<sup>28</sup>CR 2000/8, p. 28, para. 28.

<sup>29</sup>Letter from Ruler of Bahrain to Major Cox, 15 Jan. 1911. Memorial of Bahrain, Ann. 239 (a), Vol. 5, p. 1050.

an individual from the Hawar Islands to the main island of Bahrain was made by the British Political Agent "regarding the matter of Rajab bin Abbas and Isa bin Ahmad al-Dosari". This is not only an example of the authority of the Rulers of Bahrain over the Hawar Islands and the people who lived there. It is further evidence of Britain's continued recognition that the islands were under the jurisdiction and control of Bahrain.

45. Both the Ottomans and Britain continued to recognize that the Hawar Islands were under the jurisdiction of Bahrain during this period, as confirmed by their responses during the Zakhnuniyah incident of 1909.

46. In spring 1909, the Ottomans sent troops to occupy Zakhnuniyah Island, just off the coast of what is now Saudi Arabia in the Gulf of Bahrain. The Dowasir who were on the island, and who were part of the Bahraini branch of the Dowasir tribe, immediately complained to the Ruler of Bahrain about the Ottoman acts. They refused to co-operate with the Ottomans on the grounds that they — and the islands — were Bahraini.

47. Bahrain and Britain took up the matter with the Ottomans.

48. A number of significant documents which were produced during the course of the affair are examined in Bahrain's pleadings at length<sup>30</sup> and references to those are contained in the footnote to my speech. I will only now, note six highlights from these documents:

- (1) Bahrain and Britain invoked, as the basis for protesting against the Ottoman activities, the Ruler of Bahrain's sovereignty over Zakhnuniya Island. That sovereignty was understood by Bahrain and Britain to exist by virtue of the regular seasonal use of the island by the Bahraini Dowasir, who were subject to the authority of Bahrain<sup>31</sup>.
- (2) The Ottomans eventually backed down. The fact that the Ottomans backed down was tantamount to recognition by them that the Bahrain Dowasir were subject to the authority of Bahrain<sup>32</sup>.

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<sup>30</sup>Memorial of Bahrain, Ann. 236, Vol. 4, p. 1041-2; Memorial of Bahrain, Ann. 235, Vol. 4, pp. 1034, 1037-1038; Administration Report for Bahrain for the year 1909, Memorial of Bahrain, Ann. 237, Vol. 4, p. 1044.

<sup>31</sup>Two letters from Captain Prideaux to the British Political Resident dated 20 March 1909 and 4 April 1909. Memorial of Bahrain, Anns. 235 and 236, Vol. 5, pp. 1034 and 1039.

<sup>32</sup>*Ibid.*

- (3) Britain investigated the situation "on the ground" vis-à-vis the Bahraini Dowasir, including the relationship of the Bahraini Dowasir to the Ruler of Bahrain and to the Hawar Islands. The British Political Agent — Captain Prideaux — visited the islands in 1909. In a letter, that can be found at tab 35 of the judges' folder, dated 20 March 1909, he wrote to the Political Resident:

"The facts are that Dowasir of Budaiya and Zellaq on the north-west coast of Bahrain are in the habit of every winter partially migrating to Zakhnuniya and Hawar Islands for fishing . . . and hawking."<sup>33</sup>

Captain Prideaux also reported that the Bahraini Dowasir had two villages on the islands. His report noted that in one of the two villages he had found: "a collection of 40 large huts under the authority of a cousin of the tribal principal Shaikh. This individual is . . . related by marriage to [the Ruler of Bahrain]."<sup>34</sup>

It is not without significance that the Dowasir Chief was related by marriage to the Ruler of Bahrain. In the Gulf at this time, if not even now, marriage was an important way of demonstrating political ties.

- (4) Not only did Captain Prideaux's report reflect the historical reality, it provided the factual basis for Britain's political response to the Ottomans in 1909. Britain thus confirmed its recognition that the Hawar Islands belonged to Bahrain.
- (5) In evaluating how to respond to the Ottomans, British officials noted that if Bahrain did not assert its uncontested sovereignty over the Hawar Islands, there would be difficulties in promoting Bahrain's claim to Zakhnuniya because both were based on the Bahraini Dowasir connection. The British Political Agent noted: "if Shaikh Esa (the Ruler of Bahrain) doesn't want or dare assert his sovereignty over Hawar we shall be in rather a quandary"<sup>35</sup>.

The Court will note, that the debate was not about whether the Ruler's sovereignty existed, but whether he would assert it. There is no record of the Ruler's response on the issue, it is true. The only record is of the Ruler of Bahrain's response to the Ottoman claim to Zakhnuniya (he refutes that claim by stating his sovereignty over those islands). The Ottomans did not make a

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<sup>33</sup>Memorial of Bahrain, Ann. 235, Vol. 5, p. 1035.

<sup>34</sup>Memorial of Bahrain, Ann. 236, Vol. 5, pp. 1041-1042.

<sup>35</sup>Memorial of Bahrain, Ann. 235, Vol. 5, p. 1038.

similar claim to the Hawars and so there was no response from Bahrain to a non-existent claim. As I noted the Ottomans withdrew from Zakhnuniya after being presented with the evidence of Bahrain's authority there by virtue of the Ruler's authority over the Bahraini Dowasir. The only inference that can be drawn is that the Ottomans recognized that the Bahrain Dowasir were subject to the authority of the Ruler of Bahrain. The same would have been logically extended to any claim to the Hawar Islands.

- (6) Finally, this episode affirms that the Bahrain Dowasir recognized the authority of the Ruler of Bahrain.

49. In 1911, British officials again investigated the situation of the Bahraini Dowasir and Zakhnuniya Island. Their report, published in the *British Administrative Reports for the Persian Gulf of 1911*, confirmed that the situation remained unchanged and that the Bahraini Dowasir continued to demonstrate their allegiance to the Ruler of Bahrain, *inter alia*, by flying his flag<sup>36</sup>.

50. The Court will no doubt have observed that none of the documents available in the historical record to this point have noted any connection between the Hawar Islands and the Al-Thani or the people living on the Qatar peninsula. No such connection will in fact ever be reflected in any record.

#### **The evidence of Bahrain's *effectivités* over the Hawar Islands during the 1920s**

51. The 1920s saw the first sustained interest in oil development in the Gulf. Mr. Paulsson will discuss the history of the oil concession negotiations this afternoon. I will not dwell on them now, therefore, other than to note that they show that all the relevant parties understood the Hawar Islands to belong to Bahrain.

52. In the mid-1920s, some, but far from all, of the Bahrain Dowasir left Bahrain because of a dispute over taxes and privileges with the Government of Bahrain. Most of those who left Bahrain stayed away for about three and a half years. Some stayed away for a few years longer.

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<sup>36</sup>Administrative Report for Bahrain Political Agency for the year 1911. Memorial of Bahrain, Ann. 240, Vol. 5, p. 1054.

53. Qatar has attempted to show that this episode demonstrates that the Bahraini Dowasir were not subject to the authority of the Rulers of Bahrain<sup>37</sup>. The history of the affair shows the opposite to be true.

54. Soon after their departure, the Dowasir who had left Bahrain began supplicating the Ruler of Bahrain to permit them to return. An India Office file, entitled "Desire of Dowasir tribe to return to Bahrain" dated 7 July 1927<sup>38</sup> describes this. A sufficient description of this is contained in Bahrain's Counter-Memorial, starting at paragraph 190, and I will not review it here.

55. When the Dowasir who had left returned to Bahrain, most of them in the spring of 1927, conditions were imposed on them by the Government of Bahrain that cannot be characterized as anything other than a humble affirmation by them of the authority of the Ruler of Bahrain. It was a full acknowledgement. The conditions included that they continue to recognize the authority of the Bahrain police and courts, that they pay taxes, that the Ruler of Bahrain could nominate and remove their official headmen, that they relinquish any claim to privileged status within Bahrain<sup>39</sup>. These unequivocal terms are even acknowledged in Qatar's Memorial<sup>40</sup>.

56. The Dowasir who had left Bahrain were required to agree expressly and in a public manner to these conditions before they were allowed to return to Bahrain. On 27 March 1927, the British Political Resident, Lieutenant-Colonel Haworth, described the meeting he had with Dowasir representatives to the Foreign Secretary of India in the following despatch — this can be found at tab 37, on the third page, page 387, in the second full paragraph. I quote from the second sentence of that document. Lieutenant-Colonel Haworth said:

"I informed them categorically that the whole matter (of their being permitted to return) rested with their acceptance of the laws of the country, that as long as they realised that they were as subject to law as any other person in Bahrain and had no privileged position Shaikh Hamad would naturally be glad to see them back in Bahrain. They accepted the condition without reserve and the interview ended amicably."<sup>41</sup>

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<sup>37</sup>Reply of Qatar, paras. 4.160-4.164.

<sup>38</sup>IOR, 371/12; one document from that file at Counter-Memorial of Qatar, Ann. III.31.

<sup>39</sup>Counter-Memorial of Bahrain, para. 193.

<sup>40</sup>Memorial of Qatar, para. 6.54.

<sup>41</sup>Despatch from British Political Resident to Foreign Secretary of India, 27 March 1927. Memorial of Qatar, Ann. III.73, Vol. 6, p. 383.

The Bahraini returning Dowasir thus agreed to return under the terms imposed by the Ruler. Again I would remind you that at tab 37 on the third page, page 387, second full paragraph, second sentence.

57. Qatar's submissions to the Court in response to this incident were expressed for the first time after it had to drop its arguments based on the forged documents, in its Reply at paragraphs 4.160 to 4.164. Qatar argued there:

"In the *Western Sahara* case, the Court considered that tribal allegiances, to support any claim for sovereignty, must be real and evidenced by acts manifesting acceptance of political authority. No such evidence is offered by Bahrain for the period before 1936 in regard to the Dowasir who seasonally frequented the Hawar islands."<sup>42</sup>

58. Bahrain cannot understand how Qatar can attempt to reconcile that statement with the evidence of the relationship between the Bahraini Dowasir and the Ruler of Bahrain submitted by Bahrain. The evidence of Lt.-Colonel Haworth that I just recounted, describing the explicit reaffirmation in 1927 by the Dowasir who had departed from Bahrain of the authority of the Ruler of Bahrain, is surely evidence of an act manifesting their acceptance of the political authority of the Ruler of Bahrain. It is difficult to imagine a more real or explicit acceptance than that. Qatar's assertion cannot stand in the face of the evidence.

59. As Bahrain noted in its Counter-Memorial, the principal documents relating to the short episode wherein some of the Bahraini Dowasir left Bahrain for a few years are contained in a special India Office file entitled *The Dowasir tribe and their removal from Bahrain; their return and retrieval of their property*<sup>43</sup>. The file contains documents which cover the period 1922-1928 and Bahrain has included relevant documents from the file in its written submissions<sup>44</sup>.

60. I do not propose to recount for the Court all the contents of the file. As Bahrain made clear in its written pleadings, the documents there entirely confirm Bahrain's description of events and entirely contradict Qatar's hypothesis.

61. Qatar's thesis accords to the Dowasir a degree of independence that would take them outside the authority of Bahrain or any other political entity. Does Qatar wish to assert to the Court

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<sup>42</sup>Reply of Qatar, para. 4.160.

<sup>43</sup>PRO R/15/2/87.

<sup>44</sup>Memorial of Bahrain, Ann. 49, Vol. 2, pp. 155-158; Memorial of Bahrain, Ann. 50, Vol. 2, pp. 159-161; Memorial of Bahrain, Ann. 53, Vol. 2, pp. 170-172.

that there was an independent State of the Dowasir? Were the Dowasir who lived in Zellaq and the Hawar Islands independent of Bahrain but somehow subject to the Chief of Doha on the other side of the desert? Or would Qatar have the Court believe that they were part-time Bahraini citizens?

62. The definitive word on the subject was contained in the report of Major Daly, the British Political Agent, to the British Political Resident dated 13 July 1922, over a year before the temporary departure of the Dowasir and 16 years before Qatar first made a claim to the Hawar Islands in 1938. Major Daly stated: "The Dowasir have been settled so long in Bahrain that they are recognized as Bahrain subjects".<sup>45</sup> Fairly simple, Mr. President.

63. Qatar has tried, in the oral pleadings, to pretend that Bahrain has somehow been forced to alter its description of the inhabitation of the Hawar Islands. Counsel for Qatar stated last week:

"In fact Bahrain now itself also admits that the Dowasir lived in Buddaiya or Zellaq on the main island of Bahrain, and only seasonally visited the Hawar Islands for fishing and hunting."<sup>46</sup>

64. However, if one turns to the text of Bahrain's Memorial purportedly cited by Qatar for this proposition, one finds written there what Bahrain has always maintained. What Bahrain wrote about there was not about *visiting* the Hawars. It was about *living* there. Allow me to read to you the paragraph cited by Qatar. I warn you, and I apologize, that it will sound familiar:

"Many of the Dowasir who lived on the main island of Bahrain spent five months of the year there during the pearling season and the remainder of the year on the Hawar Islands. Although the presence of some Hawar Islanders was seasonal, the settlement was nevertheless permanent (see paragraphs 458 to 465). The ruins of old mosques and the six cemeteries on the Hawar Islands, one a children's cemetery, demonstrate the stability of the community there (see paragraphs 463 to 464)."<sup>47</sup>

Bahrain sees no change in its position, no inconsistency with any of the documents.

65. The inescapable fact, recorded in the public archives since 1820, is that there was a stable community of Bahrain Dowasir who lived there, and from 1845, they also lived in Zellaq and the Budaiya for five months of the year (that is to say the summer) and in the Hawars for seven months of the year (in the winter). This inhabitation was not nomadic, it was not transient, it was not haphazard. It was seasonal, annual, stable. The documents show that it included families and

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<sup>45</sup>Note from British Political Agent to British Political Resident entitled "Bahrain Affairs", 13 July 1922 at p. 3. Memorial of Bahrain, Ann. 49, Vol. 2, pp. 155-158.

<sup>46</sup>CR 2000/8, p. 19, para. 9.

<sup>47</sup>Memorial of Bahrain, para. 419.

children and livestock and chattels. The links between the Hawar islanders and the rest of Bahrain did not cease or were not suspended during the winter months when they were in the Hawars. The islanders had not gone to the moon or to Doha. They had taken a short boat ride. And all done under the authority of the Rulers of Bahrain.

66. The evidence of former Hawar residents, submitted in affidavit form in Bahrain's pleadings, confirms Major Daly's 1922 conclusion that they were Bahraini and describes the exercise of authority of the Ruler of Bahrain over the islands during this period. One such former resident's testimony is contained at tab 39, Nasr bin Makki al Dosari. He was born on the Hawar Islands in about 1922, and he recalls that as a child on the Hawar Islands, he used to help the guards — who were appointed by the Ruler of Bahrain — who policed the Hawar Islands. He stated:

"When I was young, I used to help the guards of the islands before the police fort was built. We were acting under the authority of Sheikh Hamad, the Ruler of Bahrain. We used a small straw hut on the shore just north of the North Village. We would check that the gypsum cutters who used to come from the main island of Bahrain had a valid permit issued by the government of Bahrain. The other guards were Rahma bin Rashid, Muhanna bin Hazeem, Abdullah bin Hazeem, Hazeem bin Muhanna, Hamad bin Mohammed, Mohammed bin Irhama, Afoor and his father, Faris and my father Makki. Rahma had a boat which was armed with a gun, which he would use to guard the islands. When I recently returned to the main Hawar Island I was able to recognise the spot where the guard hut used to be. I could tell where the kitchen had been next to the hut. We used to cook fish there which we caught near Rabad Island (one of the other Hawar Islands north of the main island) and from our fish traps."<sup>48</sup>

67. Another former Hawar islander, Hamound bin Muhanna al Dosari, (whom I quoted earlier) came to live in the islands in 1938 when he was eight years old. His testimony is found at tab 38 and I am going to quote from paragraph 10, found at page 1364. He testified:

"The Ruler of Bahrain appointed local guards to keep watch over the coast. They kept a guard post on the coast until the Bahrain Government built the police fort just outside the North Village . . . I remember one policeman who spent over 40 years on Hawar. His name was Juma. He was a Baluchi. He also used to tend to fishing traps on Braiber Head with the villagers from the North Village."<sup>49</sup>

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<sup>48</sup>Statement of Nasr bin Makki bin Ali al Dosari, 16 Sep. 1996. Memorial of Bahrain, Ann. 314 (a), Vol. 6, pp. 1383-1384. Hamoud bin Muhanna bin Hamad al Dosari recalls the guard post prior to the construction of the Police Fort — see para. 10 of his statement, Memorial of Bahrain, Ann. 313 (a), Vol. 6, pp. 1364-1365.

<sup>49</sup>Memorial of Bahrain, Ann. 313 (a), Vol. 6, para. 10, pp. 1364-65.



68. Former Hawar islanders have also testified that the islanders continued to refer disputes to the Ruler of Bahrain and I made reference to this earlier, as did counsel for Qatar last week. Hamoud bin Muhanna al Dosari has recalled:

"If two Dowasir men in the Hawar Islands had a dispute, they went to the tribal elder to solve it. If he did not solve it, they went to our Ruler, Shaikh Isa bin Ali or his descendants and asked him to solve it. The disputes were usually about fishing rights and fish traps."<sup>50</sup>

69. Yet another former Hawar Island resident, Salman bin Isa bin Ahmad bin Saad al-Dosari, who was born in 1916, also provided a witness statement. Bahrain has included this at tab 40 and I am going to quote from paragraph 9 of tab 40, at page 1394. Salman bin Isa, who was born in 1916, also testified about his life on the islands when he was young and he stated:

"If there was a quarrel on the Hawar Islands, for example about fish traps or fishing rights, the people would go to the village elders for adjudication. My father was an elder and people would go to him with their arguments . . . The Dowasir liked to settle their disputes between themselves. However, if the quarrel was serious and was not solved we would refer it to the Ruler of Bahrain, Sheikh Hamad and before that Shaikh Isa, his father."<sup>51</sup>

70. The Court will recall that Sheikh Isa died in 1932 — the Sheikh Isa referred to by the last witness, so the period in question is well before the 1938-1939 arbitration.

71. If I may invoke yet another witness, Ibrahim bin Salman bin Ahmed Al-Ghattam, whose testimony is found at tab 41, and I shall refer to paragraph 15, found at page 1403. I should note that Mr. Al-Ghattam was a non-Dowasir Bahraini who started going to the Hawar Islands with his family before the 1920s. He testified:

"If a quarrel took place amongst the Hawar islanders, they would go first to the village elders and, if this did not resolve matters, to the Courts of Bahrain for adjudication. The quarrels could be about trivial things or sometimes about fishing rights. If a crime had been suspected, a policeman would be sent to the islands to bring the wrongdoer to the Chief of Police, Shaikh Khalifa, at the Fort in Manama. No one ever went to Doha for adjudication. Our life had no connection with Doha. Most of us would not have even known where Doha was."<sup>52</sup>

72. The testimony of former Hawar Island residents is consistent with the evidence from the public record that, well before the 1938-1939 British arbitration, the Government of Bahrain was

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<sup>50</sup>Memorial of Bahrain, Ann. 313 (a), Vol. 6, pp. 1368, para. 24.

<sup>51</sup>Statement of Salman bin Isa bin Ahmad bin Saad al Dosari, 15 Sep. 1996. Memorial of Bahrain, Ann. 315 (a), Vol. 6, p. 1394, para. 9.

<sup>52</sup>Statement of Ibrahim bin Salam bin Ahmed Al Ghattam, 15 Sep. 1996. Memorial of Bahrain, Ann. 316 (a), Vol. 6, pp. 1403-1404, para. 15.

administering justice on the islands, was licensing gypsum cutters there and was policing the islands both by appointing local residents as guards and by patrols of the national police.

73. In addition, former Hawar islanders have testified that the Bahrain flag was traditionally displayed by the islanders on special occasions such as during the Eidd festival<sup>53</sup>. This is again entirely consistent with the evidence from the British report dated 1911, that I recounted to you earlier, of the Bahraini Dowasir in Zakhnuniya Island flying Bahrain flags<sup>54</sup>. Ibrahim bin Salman, who was born in 1914, recalled the Eidd festivities in the Hawar Islands when he was a boy. His testimony is found at tab 41, paragraph 11:

"I also enjoyed many Eidd festivals in Hawar. During the Eidd, we would fly the flag of Bahrain from the dhow and the roofs of the houses and the young children would wear daggers and someone would beat the drum for them."<sup>55</sup>

74. Fishing rights were originally granted to the people of Hawar by the Ruler of Bahrain<sup>56</sup>. At this point I must interject an observation about Qatar's claim that the Hawar Islands were frequented by all sorts of fishermen, and not just Bahrainis<sup>57</sup>.

75. Qatar has no genuine evidence for this assertion. Its claim in this respect was formerly based on the forged documents but it now appears to be based on the submissions of the Ruler of Qatar in the 1938-1939 arbitration<sup>58</sup>.

76. Those particular submissions were, of course, rhetorical and cited no evidence or facts. Qatar now does refer now to a document submitted by Qatar to Britain in 1939 that purported to be a statement made by Qatari fishermen<sup>59</sup>. Qatar omits to relate that *that* document was, in fact, rejected by Britain during the arbitration<sup>60</sup>. In 1939, Hugh Weightman, being the British Political Agent at the time, wrote that the document was not to be relied upon because of:

"the fact that the signatures . . . are in one handwriting . . . Nor is any description of the alleged signatories given, their place of residence or reason for having special knowledge of the Hawar Islands . . ."

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<sup>53</sup>Memorial of Bahrain, para. 475.

<sup>54</sup>Memorial of Bahrain, para. 429.

<sup>55</sup>Memorial of Bahrain, Ann. 316 (a), Vol. 6, para. 11, p. 1403.

<sup>56</sup>Memorial of Bahrain, Ann. 250, Vol. 5, p. 1078.

<sup>57</sup>For example, CR 2000/8, p. 37, para. 5 and p. 33, para. 46. Reply of Qatar, para. 4.173 (d), p. 152.

<sup>58</sup>Memorial of Qatar, Ann. III.157, Vol. 7, p. 285 and Memorial of Qatar, Ann. III.192, Vol. 7, p. 453.

<sup>59</sup>Reply of Qatar, para. 4.173 (d), p. 152.

<sup>60</sup>Report of H. Weightman, 22 April 1939, Memorial of Bahrain, Ann. 281, Vol. 5, pp. 1166-1167.

Weightman concluded that the supposed statement of Qatar's fishermen: "is to my mind entirely valueless"<sup>61</sup>. Qatar provides no basis in fact for its self-serving conjectures about fishermen from outside Bahrain using the Hawar Islands.

77. The affidavits of former Hawar residents attest to the fact that in exercising their fishing rights Janan Island was treated as one of the Hawar group. Hamound bin Muhanna — whose testimony appears at tab 28; I shall quote from paragraph 26, found at page 1368 — testified:

"Apart from the main Hawar Island, there were many fish traps on the other islands. Just north of the island of Janan, there were many reefs which were dangerous for the fishing dhows. A pipe was therefore built there by the Bahrain Government to lead the dhows away from the reefs. I remember that a fisherman from Muharraq once accidentally hit the pipe and broke his dhow. He was compensated by the Bahrain Government, by Sheikh Salman."<sup>62</sup>

78. Nasr bin Makki, who you will recall was born on the Hawar Islands in 1922, was able to identify the names and locations of many of the Hawar islanders' fishtraps around the main Hawar Island. He added in his statement: "There were many fish traps on the other islands which belonged to the Hawar islanders including Janan, Sawad, Ajirah and Rabad Islands."<sup>63</sup>

79. Salman bin Isa Saad al Dosari — whose testimony is found at tab 40 — was born in 1916 and lived on the islands when he was growing up. He also testified about the fishing patterns of the residents of the main Hawar Islands when he was young:

"Many of the Hawar islanders also had fish traps on the other islands. They would sail there to check the traps and put up makeshift shades. Janan Island and Hadd Island were particularly rich in fish and many Hawar islanders had fish traps there, including my father and Muhanna bin Hazeem from the South Village."<sup>64</sup>

80. The testimony of the former Hawar Island residents, all now living on the main island of Bahrain, confirms that the Government of Bahrain also regulated their pearling activities, including the registration of boats and the provision of diving books and log books to divers and boat captains respectively<sup>65</sup>.

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<sup>61</sup>Memorial of Bahrain, Ann. 281, Vol. 5, p. 1165 at pp. 1166-1167.

<sup>62</sup>Memorial of Bahrain, Ann. 313 (a), Vol. 6, para. 26, pp. 1368-69.

<sup>63</sup>Memorial of Bahrain, Ann. 314 (a), Vol. 6, para. 16, pp. 1382-83.

<sup>64</sup>Statement of Salman bin Isa bin Ahmad bin Saad al Dosari, para. 7, Memorial of Bahrain, Ann. 315 (a), Vol. 6, p. 1393.

<sup>65</sup>Statements of former residents on the Hawar Islands. Memorial of Bahrain, Anns. 313 (a), 314 (a), 316 (a) in Vol. 6, pp. 1367, 1384, 1405-1406.

81. Mr. President, in support of its arguments about the Hawar Islands, Qatar has attempted to characterize them as empty and uninhabited.

82. The reality is different. The Hawar Islands were not empty. And the islands are not as close to the Qatar peninsula as Qatar would have you believe. In order to assist Bahrain to describe this in as time-efficient manner as possible, Bahrain has prepared a short presentation for the Court. It contains images submitted by Bahrain in its written pleadings. May I now direct your attention to the screen.

#### **VIDEO PRESENTATION — THE HAWAR ISLANDS**

I. The Al-Thani never challenged Bahrain's control of the territory within the waters known on countless maps as the Gulf of Bahrain<sup>66</sup>. This was particularly true for the islands of Hawar.

II. At about the time of the Al-Khalifa conquest of Bahrain, the Dowasir tribe from Al Hasa on the Arabian mainland obtained permission from the Al-Khalifa to settle in the Hawar Islands.

III. In the middle of the nineteenth century, the allegiance of the Hawar Dowasir to Bahrain strengthened. In 1845 they were invited by the Ruler of Bahrain to settle on the main island of Bahrain. There they established the towns of Budaiya and Zellaq on the west coast.

IV. Most members of the Dowasir tribe have the family name Al Dosari, which is simply the Arabic singular form of "the Dowasir".

V. They moved back and forth freely from Hawar to Budaiya and Zellaq on the main island. In the climate of the Gulf, water is an easy medium for transportation<sup>67</sup>, sand a very difficult one.

VI. Qatar's interior<sup>68</sup> — shown here — is not a pleasant place. In the times when one had to use camels to find one's way through empty spaces where paths were obliterated by sandstorms, it was also dangerous. This explains why the Hawar islanders had practically no exchanges with the people of Qatar, and why the people of Qatar gave little thought to these islands that are so remote and isolated from them. And you see a shot of the Hawar Islands from Qatar peninsula.

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<sup>66</sup>Fasht Bu Thur, see Bahrain Supplemental Documents, p. 151 (e).

<sup>67</sup>Fishing dhow, see Bahrain Supplemental Documents, p. 135.

<sup>68</sup>See Bahrain Supplemental Documents, p. 141.

VII. By contrast, there has always been an easy and regularly used sea link between the main island of Bahrain and the Hawar Islands, less than 20 km across the water — a short boat ride away<sup>69</sup>.

VIII. Throughout the times since they were first granted permission by the Rulers of Bahrain to occupy the Hawar Islands around the year 1800, many of the Dowasir from Hawar have become leading figures in the history of Bahrain<sup>70</sup>. For example, in the South Village of Hawar lie the remains of the home of the father of Yusuf bin Rahma, a prominent and highly respected figure in Bahrain public life. For 30 years, he was the head of the Amiri Court and as such directed the entire staff of Sheikh Isa bin Salman, the late Amir. Yusuf bin Rahma, who died in October 1995, lived on Hawar as a child<sup>71</sup>. Some of his childhood friends, now old men, are still alive<sup>72</sup>.

IX. Village life on the Hawars continued into the 1970s. But by then most of the original Hawar population returned to the main island of Bahrain where they find jobs and schools. The towns of Zellaq and Budaiya remain Dowasir towns, as may be seen by the frequent Dowasir names on shops and businesses there<sup>73</sup>.

X. Many Dowasir breathed their last on Hawar<sup>74</sup>.

XI. The island has many cemeteries, such as the one pictured here. There was the North Cemetery<sup>75</sup> — this one — the Circular Cemetery<sup>76</sup> in the south of the island, but perhaps none of the cemeteries is as poignant as the Children's Cemetery<sup>77</sup> near the south.

XII. The cemeteries bear testament to the harsh existence of the islands. Life revolved around the difficult trades of pearling, fishing and the extraction of gypsum<sup>78</sup>.

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<sup>69</sup>*Hawar Islands Express*, see Bahrain Supplemental Documents, pp. 118-120.

<sup>70</sup>Fish trap, see Bahrain Supplemental Documents, p. 132.

<sup>71</sup>Cemeteries, see Bahrain Supplemental Documents, pp. 130-131.

<sup>72</sup>See statement of Hamoud bin Muhanna al Dosari, paras. 11 and 12, Memorial of Bahrain, Ann. 313 (a), Vol. 6, p. 1365, and statement of Nasr bin Makki al Dosari, paras. 1 and 25, Ann. 314 (a), Vol. 6, pp. 1379 and 1385.

<sup>73</sup>See Bahrain Supplemental Documents, p. 137.

<sup>74</sup>See Bahrain Supplemental Documents, pp. 129-132.

<sup>75</sup>See Bahrain Supplemental Documents, p. 126.

<sup>76</sup>See Bahrain Supplemental Documents, p. 130.

<sup>77</sup>See Bahrain Supplemental Documents, p. 133.

<sup>78</sup>See Bahrain Supplemental Documents, p. 135.

XIII. To obtain the most basic necessity of human existence, water, large cisterns<sup>79</sup> were designed throughout Hawar to catch and store the water from the rainy season or from an unexpected storm. The ingenuity of the Hawar islanders in collecting this precious liquid is reflected in the design of this covered cistern<sup>80</sup>, which filters water collected in another cistern and covers the resulting drinking water to prevent evaporation. Wherever depressions in the land caused water channels to form, a cistern would be found at the end. The Hawar islanders even built a dam<sup>81</sup> to control the flow of water in this depression in the southernmost part of the main Hawar Island.

XIV. The people of the Hawar Islands did not just look to the sea for their livelihood<sup>82</sup>. The gypsum rock found on the islands was highly prized for its quality. It was sold at a premium in the bazaars and markets of the main island of Bahrain.

XV. This is His Highness Sheikh Hamad bin Isa Al Khalifa, the Amir of Bahrain. He is pictured at his palace on the main Hawar Island. That palace, as many traditional buildings in Bahrain, has detailing made with Hawar gypsum. Here you can see a piece. The Bahrain Government issued licences for gypsum extraction in the Hawar Islands beginning in the early part of the twentieth century.

XVI. Gypsum from Hawar was brought to the main island of Bahrain and used in traditional houses and palaces. The fine gypsum detailing can still be seen in Sheikh Isa bin Ali's palace in Muharraq, which was built in the mid-nineteenth century<sup>83</sup>, as well as in the beautiful Beit Seyadi house nearby.

XVII. The remains of gypsum detailing may also be found in the palace of Abdullah bin Jabr Al Dosari, the famous Dowasir secretary to Sheikh Hamad, the Amir's great-grandfather. This is not surprising given the links which Abdullah bin Jabr Al Dosari had with the islands. His father had a fish trap near the South Village of Hawar.

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<sup>79</sup>See Bahrain Supplemental Documents, pp. 125, 131 and 134.

<sup>80</sup>See Bahrain Supplemental Documents, p. 125.

<sup>81</sup>See Bahrain Supplemental Documents, p. 132.

<sup>82</sup>Pearling, see Bahrain Supplemental Documents, p. 135.

<sup>83</sup>See Bahrain Supplemental Documents, p. 138.

XVIII. Other remains in the island bear witness to the daily life and rituals of its inhabitants. In the South Village the remains of a prayer wall<sup>84</sup> can be seen as well as a sizeable millstone<sup>85</sup> and the foundations of an oven<sup>86</sup>.

XIX. The people of the Qatar peninsula had shown no interest in the islands far to the west of where they lived — these islands were the territory of the Bahraini Dowasir.

XX. But after the attack on Zubarah in 1937, Bahrain was naturally concerned that the Al-Thani of Qatar in Doha might seek to take Hawar by force. A fort<sup>87</sup> was accordingly established on the island in 1838<sup>88</sup>. Ever since, Bahrain has unfortunately been forced to respond to Qatari threats by reinforcing the defences on Hawar. Bahrain's fortifications had in particular been strengthened since Qatar's armed attack on Fasht ad Dibal 14 years ago, in 1986.

XXI. Sheikh Salman, grandfather of the present Amir, who reigned from 1942, built a residence on Hawar<sup>89</sup> and even a simple garage for the first automobile that ever came to the Islands.

XXII. The Hawar Islands are not so close to the Qatar peninsula as Qatar would like it to be believed.

XXIII. The maps submitted by Qatar to the International Court of Justice invariably show the southern tip of Hawar as a very long tail that practically touches the Qatari coast. All of these maps seem to be derived from map No. 5 submitted with Qatar's Memorial. This map is entitled "Proximity of the Hawar Islands to Qatar". It purports to show the extent of Hawar's land mass at both low tide and high tide, the low-tide contours being given by Qatar in the darker yellow colours. According to this Qatar map No. 5, EVEN AT HIGH TIDE — when water obviously tends to cover land — the tail of the main island of Hawar allegedly extends a bit more than 7 km from the headland to within 250 m of the Qatari coast.

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<sup>84</sup>See Bahrain Supplemental Documents, p. 133.

<sup>85</sup>See Bahrain Supplemental Documents, p. 128.

<sup>86</sup>See Bahrain Supplemental Documents, p. 128.

<sup>87</sup>See Bahrain Supplemental Documents, p. 122.

<sup>88</sup>Note: The date should be 1938, not 1838.

<sup>89</sup>See Bahrain Supplemental Documents, p. 102.

XXIV. One can only wonder how this map could possibly have been prepared, or if the mapmaker had ever been near the area. Because this is the reality.

XXV. As one descends along Hawar's eastern coast, the Tail first appears as a wide crescent. Arriving at its base, one sees that it extends seaward in a very straight line. This image was taken from a helicopter between high and low tides late in the afternoon of 13 February 2000, a particularly clear day for the season. The Tail<sup>90</sup> in fact extends about 2 km out from the headlands, that is to say less than one third of what Qatar's maps show. As one can clearly see, the Qatar shoreline is distant, more than 4 km off.

XXVI. To take stock of the situation at low tide, these images were taken at ground level early in the morning of 13 February 2000. The Tail now extends a further 1.5 km in the direction of the Qatari coast. A few observations are obvious. The part of the Tail which emerges when the sea recedes at low tide is narrow and broken by natural pools and channels. It is a rough calcified reef<sup>91</sup>, and provides no convenient passage. Last but not least, its end remains a significant distance from the Qatari shore.

XXVII. How does the Tail of Hawar appear when one looks at it from Qatar? The following images are taken from three different points on the Qatari coast. First, from the northern tip of what might be called, for purposes of identification, the Dukhan peninsula. This is the angle of vision as shown on map No. 8 of Bahrain's Memorial. The low-lying Tail of Hawar is simply invisible although the more distant cliffs of Hawar are clearly to be seen<sup>92</sup>. Second, from the westernmost point of what might be called, again for purposes of identification, the Zekreet peninsula. And this is what one sees<sup>93</sup>. Third, from the point Qatar's map shows as being within 250 m of the Tail of Hawar. This is what map 5 of Qatar's Memorial shows. And from this point here is what one sees in reality<sup>94</sup>.

XXVIII. Qatar's map is clearly wrong. It states that it is compiled from Bahrain chart scale 1:50,000 sheet 3. But Qatar's mapmakers used an outdated version of the map, produced before

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<sup>90</sup>See Supplemental Documents of Bahrain, pp. 143-144.

<sup>91</sup>See Supplemental Documents of Bahrain, pp. 143-144.

<sup>92</sup>See Supplemental Documents of Bahrain, p. 146.

<sup>93</sup>See Supplemental Documents of Bahrain, pp. 147-148.

<sup>94</sup>See Supplemental Documents of Bahrain, p. 148.



there had been a field survey of the Tail of Hawar. Since 1988, successive surveyed versions of this map<sup>95</sup> consistently show the true length of the Tail of Hawar.

XXIX. Another misleading feature of the Qatari map is that it depicts areas submerged under water as though they were land, creating the impression that the region is practically a solid mass traversed by a few channels. But, as the Bahraini maps show, wide stretches of water separate the Hawar Islands from Qatar.

XXX. What the eye actually sees confirms the Bahraini chart. For example, consider Suwad al Janubiyah, the second largest of the Hawar Islands and the Hawar Island which lies the closest to Qatar. The angle of vision is this, looking at Suwad al Janubiyah from the nearest spot on the coast of Qatar. And here is what the eye actually sees<sup>96</sup>.

XXXI. Significant development has occurred on the Hawar Islands. They continue to be a regular and integral feature of Bahraini life today<sup>97</sup>.

XXXII. On weekends, hundreds of Bahraini fishing enthusiasts enjoy the Hawar Islands waters in their own boats. Events take place on the Hawar Islands for the entertainment of the Bahraini population. Daily public transportation is provided by the popular *Hawar Express*<sup>98</sup>, which makes the crossing in a little more than 30 minutes. On the weekends, it makes several round trips.

XXXIII. Housing and other infrastructure around the Hawar Resort Hotel<sup>99</sup> — images of which you have just seen — and even more around the North Village — which you see here — have transformed the Island.

XXXIV. Major projects are under way on the Hawar Islands. A comprehensive plan divides the main island into two zones<sup>100</sup>. The western half has fine beaches. There is where all the infrastructure is being concentrated. All buildings must comply with strict guidelines. On the eastern side, which features pristine cliffs and bays of surpassing beauty, as well as remarkable bird

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<sup>95</sup>Hawar Islands, 1:50,000, sheet 3, 1997, Supplemental Documents of Bahrain, p. 175.

<sup>96</sup>See Supplemental Documents of Bahrain, p. 151 (a).

<sup>97</sup>See Supplemental Documents of Bahrain, pp. 101-120.

<sup>98</sup>See Supplemental Documents of Bahrain, pp. 118-120.

<sup>99</sup>See Supplemental Documents of Bahrain, pp. 101-117.

<sup>100</sup>Reply of Bahrain, Sect. 2.11.

life, building will not be permitted — nor any motor vehicles. Once relations with Qatar are normalized, Bahrain hopes to dismantle the heavy defensive fortifications it was compelled to install after the 1986 armed attack by Qatar.

**This brings to an end the visual presentation.**

83. Counsel for Qatar commented on the photographs Bahrain submitted with its Supplemental Documents (pages 143 to 151 (a)) by saying: "All these photographs were clearly taken at high tide . . . so that the distances . . . are always exaggerated."<sup>101</sup> No explanation was given for this assertion. Perhaps counsel for Qatar have become so used to repeating that the Hawars are 150 m or 250 m from Qatar that when they see proof to the contrary they assume this "clearly" must mean that there is some trick. Now, this is the photograph taken from the tip of the Tail of Hawar, provided in the Supplemental Documents, which Qatar's maps show as being 250 m from Qatar even at low tide.

84. As you can see, even at low tide, Qatar is far off in the distance. For the record, this picture was taken at low tide on 13 February this year. Counsel for Qatar may have overlooked the fact that Bahrain filed the relevant Tide Tables at page 153 of the Supplemental Documents, which confirm that this was low tide. You can see, *even at low tide* the distance to the nearest spot in Qatar is faintly visible in the background almost 3 km away.

85. Mr. President, I wonder whether now might be a convenient time to take the morning break?

Le PRESIDENT : Je vous remercie. La Cour suspend pour un quart d'heure.

*L'audience est suspendue de 11 h 20 à 11 h 40.*

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne à nouveau la parole à M. Robert Volterra.

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<sup>101</sup>CR 2000/6, p. 33, para. 1.

Mr. VOLTERRA:

86. Mr. President, I hope that Bahrain's visual presentation before the break has enabled the Court to get an idea of the reality of the Hawar Islands. If the Court had visited the Hawar Islands to see the reality for itself, what would have been the fastest way to get there? The fastest way to get to the Hawar Islands is by helicopter from Bahrain. From the time one leaves the shore of the main island of Bahrain until one reaches the main Hawar Island it takes less than six minutes. It would take much longer to make the trip from Doha. And where would you sleep, if you chose not to stay on the islands, or in the lovely Hawar Island resort hotel? The fact is that the closest hotels to the Hawar Islands are in Manama, in Bahrain.

87. In terms of human geography, Manama, Muharraq, Zellaq, Budaiya, have always been closer to the Hawar Islands than Doha. This helps to understand the close connection of the islanders with the rest of Bahrain.

**The evidence of Bahrain's *effectivités* over the Hawar Islands during the 1930s prior to the 1938-1939 British arbitration**

88. It is important to note that only now in my presentation do we reach the 1930s. The pace of Bahrain's economic development increased with the discovery and then brief production of oil from 1932. Not surprisingly, the activities of the Government of Bahrain in general also increased from the middle of the 1930s. Just as did the governments of its neighbours when they began receiving oil revenues. In the case of Bahrain, this included, but was not unique to, the Government's activities in Hawar. In 1932 the Amir, Shaikh Isa, died and Shaikh Hamad became Amir. The regular visits to the Hawars of the Rulers of Bahrain continued as before.

89. Throughout the 1930s, Bahrain continued its regulation of the gypsum cutting industry on the islands, including by issuing licences<sup>102</sup>. Also during the 1930s, the Government continued to supervise fishing activities by the Hawar Island residents and to adjudicate fishing disputes,

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<sup>102</sup>Bahrain Supplemental Documents, Ann. 6, pp. 79-81, 83-84, 86-87; Memorial of Bahrain, Ann. 261, Vol. 5, p. 1107; Memorial of Bahrain, Ann. 313 (a), Vol. 6, pp. 1367-1368.

including in relation to Janan Island<sup>103</sup>. The courts of Bahrain continued to deal with disputes related to the Hawar Islands and the islanders.

90. For example, there are the records of two cases involving Hawar Island residents before the Bahrain courts from 1932.

91. One involved a resident of the Hawar Islands who was subpoenaed to appear before the courts of Bahrain. The Court ordered the defendant, who was living in the Hawar Islands, to appear. When he failed to do so, the court turned to the Ruler of Bahrain "informing him of the case and asking him to order his servant to produce [the] defendant from Hawar". An order was issued and finally the Bahrain police were directed to produce the defendant from the Hawar Islands<sup>104</sup>. The other case from 1932 involved a fishing dispute between Hawar Island residents<sup>105</sup>.

92. In relation to yet another dispute, there is a record of the Bahrain Police Directorate bringing to the Bahrain courts a violent dispute over fishing traps in the Hawar Islands in April 1936<sup>106</sup>. Bahrain's analysis of this document is contained in its written pleadings: I will discuss it further when I deal with Qatar's attack on the historical evidence, towards the end of my remarks.

93. You may recall that I noted a few statistics about the evidence of Bahrain's sovereignty over the Hawar Islands at the outset of my remarks today. Of the 80 *effectivités* listed in Bahrain's written pleadings, some 60 of the activities took place before the British arbitration that started in 1938; and no less than 46 of the activities took place prior to the date in 1936 that Qatar has chosen as its preferred critical date.

94. I have so far not mentioned a single one of the post-1936, pre-1939 *effectivités*. Counsel for Qatar did not deny the existence of these post-1936 activities and only proposed their exclusion on the basis of Qatar's critical date theory<sup>107</sup>.

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<sup>103</sup>Memorial of Bahrain, Ann. 274, Vol. 5, p. 1129; Memorial of Bahrain, Ann. 281, Vol. 5, p. 1165; Memorial of Bahrain, Anns. 313 (a)-316 (a), Vol. 6, pp. 1363, 1392, 1379, 1400.

<sup>104</sup>Particulars of cases to the Bahrain Court between Bahrain subjects living in Hawar — Case No. 246/1351 (1932). Memorial of Bahrain, Ann. 242, Vol. 5, p. 1065.

<sup>105</sup>Bahrain Court Record for Case 6/1351. Memorial of Bahrain, Ann. 243, Vol. 5, p. 1066.

<sup>106</sup>Letter from Police Directorate to the Bahrain Court, 14 April 1936. Memorial of Bahrain, Ann. 245, Vol. 5, p. 1070.

<sup>107</sup>CR 2000/8, pp. 38-42, paras. 7-18.

95. As there is no factual controversy about them, I shall only list them briefly.

- Oil concession negotiations, starting in 1936<sup>108</sup>.
- Surveying activities<sup>109</sup>.
- Erecting and maintaining maritime markers in and around the islands, although it must be noted that Qatar contests the relevance of these activities<sup>110</sup>.
- Maintaining and improving the islands' cisterns.
- Drilling for water<sup>111</sup>.
- Instituting regular visits by the Bahrain Chief of Police<sup>112</sup>.
- Replacing the old police station with the new Police Fort, following Qatar's armed attack on Zubarah in 1937<sup>113</sup>.
- Regulating immigration, issuing Bahraini passports to islanders<sup>114</sup>.
- Constructing a pier in 1937<sup>115</sup>.
- Building a new mosque at the request of the islanders to replace the old one that had fallen down<sup>116</sup>.
- Replacing damaged houses in the villages on the island.
- Promulgating and enforcing Bahraini laws<sup>117</sup>.
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<sup>108</sup>Letter from T. C. Fowle to M. J. Clauson, India Office, 4 Jan. 1936. Memorial of Bahrain, Ann. 71, Vol. 2, p. 232.

<sup>109</sup>Letter from Fripp (BAPCO) to Belgrave, 10 Aug. 1941, Memorial of Bahrain, Ann. 295, Vol. 5, p. 1204; Letter from PCL to Under Secretary of State for India, 30 June 1939, Memorial of Bahrain, Ann. 285, Vol. 5, p. 1179; Letter from Black (BAPCO) to Belgrave, 8 Oct. 1939, Memorial of Bahrain, Ann. 290, Vol. 5, p. 1187.

<sup>110</sup>Memorial of Bahrain, para. 487.

<sup>111</sup>Letter from Weightman to Fowle, 15 May 1938, Memorial of Bahrain, Ann. 257, Vol. 5, p. 1096; Note by Belgrave entitled "The Hawar Islands", 29 May 1938, Memorial of Bahrain, Ann. 261, Vol. 4, p. 1107; Memorial of Bahrain, Ann. 295, Vol. 5, p. 1204.

<sup>112</sup>Memorial of Bahrain, Ann. 316 (a), Vol. 6, pp. 1404-1405.

<sup>113</sup>Letter from Belgrave to Capt. Hickinbotham, 19 Aug. 1937, Memorial of Bahrain, Ann. 158, Vol. 3, pp. 729-730; *Annual Report of the Government of Bahrain* for year 1356 (March 1937-February 1938), Memorial of Bahrain, Ann. 253, Vol. 5, p. 1086; Police orders of Government of Bahrain, 24 May 1938, Memorial of Bahrain, Ann. 259, Vol. 5, p. 1101.

<sup>114</sup>Letter from Adviser to Government of Bahrain to Head Natur (Police Officer) on Hawar Island, 10 Nov. 1937. Memorial of Bahrain, Ann. 249, Vol. 5, p. 1077.

<sup>115</sup>Memorial of Bahrain, Ann. 253, Vol. 5, pp. 1086-1087.

<sup>116</sup>Expenditure summary of Government of Bahrain for 1358 Hejrah (1939). Memorial of Bahrain, Ann. 293, Vol. 5, p. 1201.

<sup>117</sup>Memorial of Bahrain, Ann. 274, Vol. 5, p. 1133; Memorial of Bahrain, Ann. 261, Vol. 5, p. 1108; Letter from Belgrave to Loch, 28 April 1936. Memorial of Bahrain, Ann. 246, Vol. 5, pp. 1072-1073.

- Arranging for the public display of official proclamations<sup>118</sup>.
- And representing the interests of the Hawar islanders in a dispute over damage to their fishing interests and traps with Qatar's oil concessionaire in January 1938<sup>119</sup>.

96. Recall that Qatar does not contest that these activities took place. Qatar's only ground for arguing that these activities should be discounted is that they occurred after the date that Qatar now suggests should be the critical date in the dispute. Bahrain rebutted this argument last week and I am not going to deal with it here.

97. In 1938, Qatar first made a claim to the Hawar Islands. That claim gave rise to the 1938-1939 British arbitration. It might be appropriate, therefore, to take stock of the evidence of Bahrain's activities in the Hawar Islands to this date.

**Prior to the 1939 Award all the relevant actors recognized that the Hawar Islands were part of Bahrain**

98. One way to take stock of these Bahraini *effectivités* is to examine the views of relevant actors about the sovereignty of the Hawar Islands up to the 1938-1939 arbitration. The historical record shows that, prior to the 1939 Award, all the relevant actors recognized that the Hawar Islands were part of Bahrain. I shall describe but a few highlights.

**The Rulers of Bahrain**

99. The Rulers of Bahrain always considered that the Hawar Islands belonged to Bahrain. This can be seen from the facts that:

- They originally granted permission to the Dowasir to inhabit the Hawar Islands through one of their officials<sup>120</sup>.
- They invited the Hawar Island residents to settle also on the main island of Bahrain in 1845.
- They exercised authority over the Bahraini branch of the Dowasir and enjoyed their loyalty and allegiance.
- They regularly visited the Islands.
- They paid for housing and a new mosque.

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<sup>118</sup>*Ibid.*

<sup>119</sup>Letter from Belgrave to Packer (PCL), 31 Jan. 1938, Memorial of Bahrain, Ann. 250, Vol. 5, p. 1078.

<sup>120</sup>Where citation given already above, not repeated here.

- They settled disputes.

### **The Government of Bahrain**

100. As it became distinct from the person of the Rulers during the development of Bahrain, the Government of Bahrain also demonstrated that it considered that the Hawar Islands belonged to Bahrain:

- The Government regulated economic activities on the islands, including fishing, gypsum cutting, and pearling.
- It provided police and civil administration to the islands.
- It exercised legislative, executive and judicial functions.
- It built infrastructure there, drilled for water, negotiated for oil concessions.
- It regulated immigration and issued passports.

### **The Dowasir of Bahrain**

101. The Dowasir of Bahrain considered that the Hawar Islands belonged to Bahrain, as is evidenced by the fact that:

- They requested the original grant of permission to reside in the Hawar Islands from the Al-Khalifa officials.
- They also settled on the main island of Bahrain in 1845 and moved seasonally between there and the Hawar Islands for a century before the British arbitration. British officials recorded that the islanders even sent their livestock to the main island of Bahrain during water shortages<sup>121</sup>.
- They turned to the Rulers of Bahrain for assistance when facing external threats, for example during the 1909 Zakhnuniya incident and the 1938 fishtrap dispute with the PCL oil company.
- They repeatedly declared themselves to be under the authority of the Ruler of Bahrain. This included the Bahrain Dowasir who left Bahrain for several years during the mid-1920s.
- They repeatedly expressed their continuing allegiance to the Rulers of Bahrain.
- They flew the Bahrain flag on the islands.

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<sup>121</sup>Weightman Report. Memorial of Bahrain, Ann. 281, Vol. 5, p. 1169.

- They turned to the Rulers of Bahrain for help in rebuilding homes and mosques and in controlling gypsum miners on the islands.

### **Other Bahrainis**

102. Other Bahrainis, they also considered that the Hawar Islands belonged to Bahrain:

- Non-Dowasir Bahrainis resided in the Hawar Islands as well as the Dowasir<sup>122</sup>.
- The witness statements confirm that merchants from the other islands of Bahrain regularly traded with the islanders.
- Other Bahraini gypsum cutters working in the Hawars had to operate under licence from the Government of Bahrain.

### **Britain**

103. Britain considered that the Bahraini Dowasir who resided in the Hawar Islands were subjects of the Ruler of Bahrain. The evidence supporting this includes:

- The anti-smuggling order of 1869.
- The reports of Captain Prideaux during the 1909 Zakhnuniya incident.
- The reports of British officials in the 1911 *Administrative Reports*.
- Admiralty reports of 1915 and 1916<sup>123</sup>.
- Major Daly's report of 1922.
- The positions taken by British officials in relation to those of the Bahraini Dowasir who left between 1923 to 1927.
- Not to mention, of course, the investigations of British officials reported during the 1938-1939 arbitration.

104. Britain also consistently recognized and expressed the view internally between senior officials, in public reports and in representations to third parties, that the Hawar Islands belonged to Bahrain. The evidence for this includes:

- The Brucks' report of the 1820s.

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<sup>122</sup>Memorial of Bahrain, Ann. 316 (a), Vol. 6, p. 1406, para. 25.

<sup>123</sup>A Collection of First World War Military Handbooks of Arabia 1913-1917, Vol. IV, A Handbook of Arabia, Vol. I, General, 1916, Archive Editions (1988), p. 326. Memorial of Qatar, Ann. III.296, Vol. 8, p. 485.



- The map of Captain Durrand produced in 1879.
- Britain's conduct and evidence gathering during the Zakhnuniya incident of 1909.
- In the request of British officials to the Ruler of Bahrain to subpoena a Hawar Island resident in 1911.
- The history of the oil negotiations in the 1920s and 1930s.
- And, of course, the 1938-1939 arbitration.

### **The Ottomans**

105. The Ottomans recognized that the Hawar Islands belonged to Bahrain. This evidence includes:

- The Captain Izzet map from 1878.
- And the response of the Ottomans to the evidence of Bahraini sovereignty of Zakhnuniya Island based on Bahraini Dowasir during the Zakhnuniya incident of 1909.

### **The Rulers of Qatar**

106. The Rulers of Qatar also recognized that the Hawar Islands belonged to Bahrain. Reasoning for this includes:

- The fact that the Rulers of Qatar never claimed the Hawar Islands until 1938, even in the context of the oil negotiations, as Mr. Paulsson will show.
- Nor, until 1938, did Qatar ever protest against any of the Bahraini activities taking place there<sup>124</sup>.
- At the time of the arbitration, the Ruler was unaware of the regular inhabitation of the islands or the two villages there or any of the things that you have just seen, before the break, in the video and in the photographs.
- Indeed, the Ruler of Qatar recognized Bahrain's sovereignty and jurisdiction over the Hawar Islands on a number of occasions, even after Qatar had made its first claim to the islands. This is illustrated in a document sent by the Ruler of Qatar to British officials in

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<sup>124</sup>Letter from Lt. Col. Gordon Loch, British Political Agent, to the British Political Resident, 6 May 1936. Memorial of Bahrain, Ann. 247, Vol. 5, p. 1074. Letter from Ruler of Qatar to Hugh Weightman, British Political Agent, 8 July 1938. Memorial of Bahrain, Ann. 265, Vol. 5, p. 1118. Letter from Ruler of Qatar to Hugh Weightman, British Political Agent, 12 July 1938, Memorial of Bahrain, Ann. 266, Vol. 5, p. 1119.

1938 — found at tab 45. It was in relation to two incidents from 1938, where Qatari citizens, landed on the Hawar Islands, were arrested and sent to the main island of Bahrain. The Ruler of Qatar complained to the British Political Agent protesting the *manner* in which Bahrain had exercised its jurisdiction over the islands. The Ruler made no objection to the jurisdiction itself. The Ruler of Qatar's letter raised the theoretical question as to what would happen if Bahraini ships seeking shelter on the Qatari coast were treated in a similar manner. By comparing the incident with what might happen if it had occurred within Qatar's jurisdiction, the Ruler accepted and acknowledged that the Hawar Islands were within Bahrain's jurisdiction<sup>125</sup>. I repeat, this was in 1938.

107. Mr. Paulsson will later today describe how the parties to the oil negotiations all recognized that the Hawar Islands belonged to Bahrain.

**Qatar's attempts to refute the evidence of Bahrain's *effectivités*  
on the Hawar Islands**

108. Qatar has not been able to locate one example of its having exercised authority on the Hawar Islands. Bahrain submits that Qatar has not been able successfully to challenge the evidence of Bahrain's *effectivités*. In its Reply, Qatar allocates only 21 pages out of the 360-page total in attempting to address the evidence of Bahrain's *effectivités* and activities on the Hawar Islands. Qatar's oral arguments were no more effective.

109. Qatar relied on two overriding propositions for its attack on Bahrain's connection with the Hawar Islands. The first was that the Bahrain branch of the Dowasir were nomads, not subject to the authority of Bahrain, whose fishermen occasionally dropped by the Hawar Islands.

110. The records clearly show the opposite. This was not the case of isolated and unverifiable instances of shipwrecks or fishermen seeking shelter from a storm before leaving without a trace — as was the case with all the islands in the *Eritrea/Yemen* dispute, as the Award in the first phase of that case describes it. The Bahraini Dowasir engaged in annual seasonal migration patterns — transhumance, if you will — between the main island of Bahrain and the Hawar Islands for 100 years before the 1939 Award. They were not nomads. They lived on the

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<sup>125</sup>Letter from Ruler of Qatar to Hugh Weightman, British Political Agent, 12 July 1938. Memorial of Bahrain, Ann. 266, Vol. 5, p. 1119.

islands with their families, as the remains of their villages you saw attest. So too the cemeteries, including the children's cemetery. The Bahraini Dowasir did not travel from Zellaq to Hawar with their dead children in order to bury them in the children's cemetery on the Hawars. They were buried near their homes — on Hawar.

111. The second proposition put forward by Qatar is that Bahrain exercised no authority over the Hawar Islands and that the Hawar islanders became in some way autonomous from Bahrain when they left the main island and travelled to the Hawars. The activities that I have brought to the attention of the Court, based on the historical record, massively contradict Qatar's unsupported assertions on this point.

112. In its first round of oral pleadings, counsel for Qatar referred to the bullet-point list of examples of Bahrain's exercise of authority over the Hawar Islands that is contained in Bahrain's Reply. He stated:

"In my respectful submission, a great majority of the bullet points are simply bold assertions, without any supporting evidence and therefore hardly deserving of serious consideration."<sup>126</sup>

113. But the Court will be able to satisfy itself that *this* statement, *by Qatar*, is itself a "bold assertion". It is unsupported by any citation. Nor did Qatar develop or sustain that argument. It cannot. As the Court is aware, the bullet point list in Bahrain's Reply summarized for the reader the evidence submitted by Bahrain in its Memorial and Counter-Memorial. Every summary point on the list provides a citation that refers to the location of the detailed argument elsewhere in the written pleadings that in turn cite the underlying evidence supporting the proposition. Mr. President, the pleadings speak for themselves. Bahrain's examples — all 80 of them — are supported by evidence and are therefore "deserving of serious consideration". Qatar has *chosen* to ignore them.

114. Next, Qatar argued: "None of them [the examples of Bahrain's activities on the Hawar Islands] constitutes an act performed by or on behalf of Bahrain *à titre de souverain*."<sup>127</sup>

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<sup>126</sup>CR 2000/8, p. 17, para. 4.

<sup>127</sup>CR 2000/8, p. 17, para. 4.

115. Quite a sweeping statement, but it is very telling. It tells us that Qatar understands the very high threshold that it faces. Qatar understands that it must destroy every single example of Bahrain's activities on the Hawar Islands.

116. Qatar nevertheless failed to address all but three items from the list of 80.

117. Or, rather, in fact, what Qatar chose to call "three" *effectivités* because in fact they turned out to relate to a far greater number of documents that together describe Bahraini control of the Hawars ranging from the eighteenth century through to 1936.

118. The first in this series of "three" *effectivités* referred to by counsel for Qatar is the Al-Khalifa grant of permission to the Dowasir tribe to settle in the Hawar Islands in the eighteenth century<sup>128</sup>. In support of this historic event, Bahrain has submitted a number of documents from the public record, dating well before any dispute over the Hawars. Qatar's principal response to this is that the Dowasir who lived in Zellaq and the Hawars might not really have been Bahraini<sup>129</sup>. This speculation is directly refuted by the evidence that I have reviewed this morning.

119. Qatar also tries to attack the British records that refer to the grant of permission to the Dowasir to reside in the Hawars given by the Qadi of Zubarah. Counsel for Qatar argued that this evidence should be dismissed. On what basis did they do this? Because it had been marshalled by Britain in reaction to a threat to Bahrain from the Ottoman Empire during the 1909 Zakhnuniya incident. Bahrain cannot see how this makes the evidence any less probative.

120. In the course of his arguments on this point, counsel for Qatar questioned what Captain Prideaux meant in 1909 when he wrote to the Political Resident as follows:

"as the Kazi of Zubarah was in those days an official of the Al Khalifa, the island [the Hawar Islands] would seem to be a dependency of the mainland State, which the Chief of Bahrain still claims as morally and theoretically his"<sup>130</sup>.

121. To Bahrain, Prideaux's meaning is clear. Did Prideaux mean to say that the Hawar Islands were the dependencies of the Al-Khalifa or the dependencies of the Al-Thani? No mention is made of the Al-Thani. The context is unmistakable: he was questioning whether the Dowasir

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<sup>128</sup>CR 2000/8, p. 17, para. 5.

<sup>129</sup>CR 2000/8, pp. 18-19, paras. 6-9.

<sup>130</sup>Memorial of Bahrain, Ann. 236, Vol. 5, p. 1039 at p. 1042.

were independent, or whether they were dependent on some authority elsewhere. The answer was yes: the island is a dependency. And Captain Prideaux noted that the Dowasir were, by virtue of the acts of an "official of the Al Khalifa" — his words — present in the Hawar Islands, and that they were a dependency of the mainland State, given the fact that the Al-Khalifa were still claiming it. The grant to the Dowasir was not made by an "Al Thani official" or some amorphous "Qatari" official.

122. In addition, Qatar outright misrepresents the words used by Prideaux in these 1909 documents. For example, one report by Prideaux notes the grant of the Qadi of Zubarah to the Dowasir and adds that the Qadi of Zubarah "of course was an official under the al-Khalifa"<sup>131</sup>. Counsel for Qatar, presumably recognizing the force of this evidence in reducing its thesis, claims that the report I just cited merely "mentions, *in effect*, that the Kazi, over 100 years earlier, was *likely* to be an official under the Al-Khalifa"<sup>132</sup>. This is more than just a trip of the tongue.

123. The second of the three series of documents that Qatar attacks is the records of the Bahrain court dating from the first decade of the twentieth century. As counsel for Qatar noted, there are two such records<sup>133</sup>. Qatar has chosen to question the authenticity of these documents in this stage of the oral proceedings in the following terms: "In all the circumstances therefore, Mr. President, the authenticity of the two judgments . . . must be open to serious doubt."<sup>134</sup>

124. "In all the circumstances". It is not acceptable to make such assertions simply because a document is unfavourable to one's case or simply because it is produced by one's adversary. When Bahrain read the Qatar Memorial and encountered the forged documents, Bahrain spent a year-and-a-half, in consultation with more than a dozen world-renowned experts — historians, scientists, forensic document examiners — in the most minute and exacting examination of the documents. Those experts prepared reports describing the many ways in which it could be established that the 82 documents submitted by Qatar were forgeries. Bahrain submitted to the Court those reports along with extensive analysis of its own.

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<sup>131</sup>Memorial of Bahrain, Ann. 235, Vol. 5, p. 1034 at p. 1037.

<sup>132</sup>CR 2000/8, p. 21, para. 15.

<sup>133</sup>CR 2000/8, p. 27, para. 28.

<sup>134</sup>CR 2000/8, p. 28, para. 28.

125. Qatar itself, when faced with the evidence of the forgeries, prepared four reports of its own on the forged documents before apologizing and effectively withdrawing them. The Court will no doubt recall that, of those four Qatari documents, two agreed with Bahrain's conclusion; one of Qatar's reports even pointed out further evidence of their forged nature that Bahrain had not bothered to submit. Of the remaining two Qatari reports one made irrelevant observations about Arabic handwriting, and *only one* disagreed with *some* of Bahrain's analysis. Even then, not one expert report produced by Qatar could say that the documents were authentic.

126. Now, let us consider what "all the circumstances" are that lead Qatar to question the evidence of Bahrain's exercise of judicial jurisdiction over the Hawar Islands, evidence, I remind the Court, that has been in the public domain for more than 60 years. What is the basis for this very serious charge?

127. Well, Qatar questions the evidence because Bahrain did not have a regular filing system in the first decade of the twentieth century<sup>135</sup>.

128. The relevant passage from the 1938 document relied upon by Qatar to challenge the authenticity of the evidence reads as follows, it can be found at tab 46, page 1133, paragraph 11. The Court will observe that it is in fact a letter from the Adviser to the Bahrain Government explaining to British officials, why even *more* judgments could not be provided by Bahrain during the 1938-1939 arbitration:

"Particulars of cases tried in the Bahrain Courts regarding disputes among the people of Hawar about moveable and immovable property are given in the note attached to this letter. It will be appreciated that until the present regime [i.e., until after Sir Charles Belgrave became Adviser to the Government of Bahrain] no regular filing system or preservation of records existed and a search for old cases regarding Hawar has been unproductive and has only produced two judgments dated 1327 and 1328 Hejrah [1909 and 1910]."<sup>136</sup>

129. This is "all the circumstances" upon which Qatar raises its allegations of inauthenticity: Bahrain explaining, in 1938, why a search of the government archives had only located two such judgments related to the Hawars. Qatar does not explain its reasoning further. Nor did Qatar

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<sup>135</sup>CR 2000/8, p. 28, para. 28.

<sup>136</sup>Bahrain Counter-Claim in 1938-1939 arbitration in the form of a Letter to the British Political Agent dated 22 Dec. 1938. Memorial of Bahrain, Ann. 274, Vol. 5, p. 1133.

provide any evidence upon which an allegation of inauthenticity could responsibly be made. In Bahrain's submission, Qatar must either provide evidence of its assertion or withdraw it.

130. The third and final series of *effectivités* referred to by Qatar relates, in fact, to the further exercise of Bahrain's judicial and quasi-judicial powers in relation to the Hawar Islands<sup>137</sup>. Qatar merely asserts that the documents do not show what Bahrain says they do: that is, that they show Bahraini authority over the Hawar Islands. The documents are before the Court. There seems little point in the parties arguing about what the texts actually say. I will only address Qatar's treatment of the first document under this category, as being exemplary of Qatar's approach to the remainder. The document is a police record dating from 14 April 1936. You may recall that I referred to it earlier in my remarks. So, what does Bahrain claim that this document says? In its Memorial, Bahrain wrote of this document: "In 1936, there is a record of the Bahrain Police Directorate seizing the Bahrain Courts of a violent dispute over fishing traps in the Hawar Islands."<sup>138</sup>

131. The 1936 document in question is addressed from the Police Directorate to the Bahrain Court. It describes the facts of the dispute, an altercation involving Hawar Island residents. The memo of the Police Directorate concludes: "Having informed you thus, we leave the matter to you. Hajj Abbas, Chief of Police."

132. Bahrain's original conclusion that this is a record of the Bahrain Police Directorate bringing to the attention of the Bahrain Courts a violent dispute over fishing traps in the Hawar Islands stands unchallenged. Indeed, a postscript at the bottom of the Bahrain Police Chief's memo reads:

"The two parties were present and we informed them that the fishing areas were not theirs this year. We said that if they caused a problem, the Court would lock them all up and that if any of them had a petition to make, he should present it and the Courts would look into it.

[signed by thumbprinted]

Sabah bin Saqr and Rahma bin Rashid al-Dosari."<sup>139</sup>

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<sup>137</sup>CR 2000/8, p. 30, para. 37.

<sup>138</sup>Letter from Police Directorate to the Bahrain Court, 14 April 1936, Memorial of Bahrain, Ann. 245, Vol. 5, p. 1070.

<sup>139</sup>Memorial of Bahrain, Ann. 245, Vol. 5, p. 1070.

133. This surely further confirms Bahrain's view of the document.

134. As for the remainder of Bahrain's evidence, Qatar apparently has no reply to make other than that Qatar does not consider that it deserves "any serious consideration"<sup>140</sup>. Qatar's statement that the evidence has "in reality . . . no credibility whatsoever" is merely self-serving<sup>141</sup>.

135. As the Court can observe, Qatar's response to the evidence of Bahraini activity on the Hawar Islands over generations amounts to little more than the bold and incorrect assertion that only three of the 80 examples of Bahrain's conduct, submitted by Bahrain, warrant further consideration<sup>142</sup>.

136. Counsel for Qatar, as I noted earlier, called them three examples of Bahrain's conduct, but in fact he referred to no less than 20 such examples in the course of his rebuttal of the evidence. Counsel for Qatar referred to: four cases before the Bahrain courts; three examples of the exercise of police or quasi-judicial activities there by Bahrain; the regular seasonal migrations to and from Hawar by the Bahraini Dowasir; the existence for centuries of two Bahraini villages on the islands; the ancient grant by the Qadi of Zubarah; the invitation from the Ruler of Bahrain to the Dowasir, in 1845, the activities of the Dowasir on the Hawar Islands; the loyalty of the Dowasir to Bahrain; the reports by British officials of, and I quote from one such British report as cited by Qatar, "his [the Ruler of Bahrain's] sovereignty over Hawar"<sup>143</sup>.

137. Mr. President, I could go on listing the Bahrain activities which counsel for Qatar *could not avoid mentioning*. Counsel for Qatar no doubt had his own reasons for calling them but three.

138. Qatar's rebuttal thus attempts to refute specific evidence with generalized theories based on extrapolations from documents that are not warranted by the texts of those documents. Counsel for Qatar's remarks were shot through with phrases such as, and I quote: "therefore seems to have

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<sup>140</sup>CR 2000/8, p. 33, para. 45.

<sup>141</sup>CR 2000/8, p. 34, para. 52.

<sup>142</sup>CR 2000/8, p. 17, para. 5.

<sup>143</sup>CR 2000/8, pp. 17-34.



been"<sup>144</sup>; "in other words"<sup>145</sup>; "seems to have assumed"<sup>146</sup>; "was not suggesting"<sup>147</sup>; and "it is inconceivable, Mr. President that"<sup>148</sup>.

139. Just as Qatar labels every British official who did not agree with Qatar's current view of history as biased or corrupt, just as Qatar attempts to refute every one of the historical documents that shows its theories to be incorrect by calling it mistaken, so too Qatar seems unable to *conceive* that it might be wrong and so it brushes aside all the evidence that contradicts its arguments as being *inconceivable*.

140. Qatar's attempt to challenge Bahrain's evidence stops with this.

#### **The evidence of Bahrain's *effectivités* since the British Award of 1939**

141. Mr. President, both Parties have reviewed Bahrain's *effectivités* on the Hawars since the British Award of 1939. These activities confirm Bahrain's title. They have been fully canvassed in Bahrain's written pleadings and I do not propose to do more now than to bring them to your attention. They fully confirm Bahrain's sovereignty and acts of authority over the Hawar Islands.

#### **CONCLUSION**

142. In concluding, Mr. President, may I remind the Court of the *Eastern Greenland* case, which Sir Elihu discussed last week.

143. In that case, as in this, the party in possession of the territory was faced with a speculative claim by an acquisitive neighbour that had no real evidence to support its claim. In truth, at least in *Eastern Greenland*, Norway had *some* evidence of its exercise of authority, if only recent. The Court in *Eastern Greenland* provided no consolation prize to Norway for attempting to take part of Denmark's territory by way of such a speculative case.

144. As I noted at the outset of my remarks, the issue of title to the Hawar Islands does not involve a weighing of competing evidence of the *effectivités* of two parties. Bahrain has presented massive evidence in the public domain that confirms the historical fact that for more than 200 years

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<sup>144</sup>CR 2000/8, p. 21, para. 15.

<sup>145</sup>CR 2000/8, p. 21, para. 17.

<sup>146</sup>CR 2000/8, p. 22, para. 18.

<sup>147</sup>CR 2000/8, p. 22, para. 18.

<sup>148</sup>CR 2000/8, p. 25, para. 25.

the Hawar Islands have been part of the fabric of Bahrain, *socially* and *politically*. Today, Qatar is left with nothing but a claim based on geographical proximity, just as it did in the previous arbitration of 1938-1939. Having effectively abandoned the 82 forgeries, Qatar no longer even claims that there ever were any Qatari *effectivités* over the islands. There is nothing for Bahrain to refute.

145. I end my remarks to the Court by recalling the analysis made by one of the Assistant Legal Advisers to the British Foreign Office, Mr. H. G. Darwin, found at tab 47. His remarks are at page 4 in handwritten observation. In 1964, anticipating Qatar's revival of its claims to the Hawars, Mr. Darwin asked the Foreign Office to investigate the issue of sovereignty over the Hawar Islands. On 13 May 1964, Mr. Darwin received the results of the enquiry and recorded his conclusions as follows:

"It appears from the inquiry that Bahrain can rely for their claim on tribal affiliations of the residents as well as acts of administration of the Bahrain Government whereas Qatar can rely on no argument except geographical contiguity which is on the whole not a very strong argument. [In 1964 the Assistant Legal Adviser concluded] Bahrain therefore wins easily."<sup>149</sup> [Citations omitted.]

146. Mr. President, may I ask you to call upon Maître Fathi Kemicha to continue the presentation of Bahrain's case.

The PRESIDENT: Thank you very much, Mr. Volterra. Je passe maintenant la parole au Dr. Fathi Kemicha.

M. KEMICHA :

1. Monsieur le président, Madame et Messieurs de la Cour, j'ai l'honneur et le privilège de comparaître aujourd'hui devant votre haute juridiction dans l'intérêt de l'Etat de Bahreïn.

#### UTI POSSIDETIS

2. Ma tâche consiste à vous exposer la position selon laquelle le principe d'intangibilité des frontières, dont l'*uti possidetis* est une expression, devrait s'appliquer au différend qui oppose l'Etat de Bahreïn à l'Etat de Qatar.

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<sup>149</sup>Foreign Office Minute dated 15 June 1964. Reply of Bahrain, Ann. 2, Vol. 2, p. 2.

3. L'*uti possidetis* est le principe selon lequel doivent être respectées et maintenues en l'état les frontières coloniales héritées au moment de l'indépendance par les nouveaux Etats.

4. La Chambre de la Cour, constituée pour connaître de l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*, a considéré, dans son arrêt du 22 décembre 1986, que l'*uti possidetis*,

«constitue un principe général, logiquement lié au phénomène de l'accession à l'indépendance, où qu'il se manifeste. Son but évident est d'éviter que l'indépendance et la stabilité des nouveaux Etats ne soient mises en danger par des luttes fratricides nées de la contestation des frontières à la suite du retrait de la puissance administrante.» (C.I.J. Recueil 1986, p. 565, par. 20.)

5. La seule limite à l'application du principe de l'*uti possidetis* dans le contexte d'une décolonisation est qu'il ne peut porter atteinte au droit d'autodétermination des peuples, qui est, comme l'a rappelé la Cour dans l'affaire du *Timor Oriental (Portugal/Australie)*, «l'un des principes essentiels du droit international contemporain» (C.I.J. Recueil 1995, p. 102, par. 29; les italiques sont de moi).

6. Une telle limitation à l'application de l'*uti possidetis* n'existe pas dans le cas des îles Hawar. Aucun groupe ou minorité ethnique ne revendique, à notre connaissance, ces îles.

7. Quoique, à entendre M. Shankardass citer, non sans malice, une lettre de l'agent politique Prideaux, on puisse avoir des doutes !

8. Le capitane Prideaux relève, dans cette lettre du 20 mars 1909, qui vous a été citée à plusieurs occasions, sur la foi ce que lui aurait dit un habitant de l'île, ce qui suit :

«les Dowasir considèrent Hawar comme leur propre territoire indépendant, la propriété de l'île ayant été octroyée à la tribu par le *casi* de Zubarah plus de cent ans auparavant, dans une déclaration écrite qu'ils possèdent encore» (CR 2000/8, p. 18, par. 18)

9. Il a été démontré par Bahreïn que les Dowasir se sont totalement intégrés dans la population bahreïnite et sont devenus, depuis plusieurs générations, des citoyens à part entière de l'émirat.

10. Il reste, cependant, que si ces îles devaient échapper à la souveraineté de Bahreïn, on serait inévitablement confronté à un problème d'autodétermination d'une population bahreïnite (cf. contre-mémoire de Bahreïn, sect. 3.7, trad. fr., p. 130, par. 438).

11. Contrairement à ce que prétend Qatar en affirmant que «*les parties n'[avaient] jamais invoqué le principe de l'uti possidetis juris dans la présente affaire*» (CR 2000/5, 29 mai 2000, p. 29, par. 5; les italiques sont de moi), Bahreïn invite respectueusement la Cour à se référer à son contre-mémoire qui lui a été soumis le 31 décembre 1997 et dans lequel il est dit ce qui suit :

«La position de Bahreïn est par ailleurs confortée par le principe de l'*uti possidetis* qui établit que les pays accédant à l'indépendance après avoir été soumis au colonialisme reconnaissent l'inviolabilité des frontières coloniales existantes. Dans le cas de Bahreïn et Qatar, l'analyse est simplifiée par leur qualité de protectorats de la Grande-Bretagne, ayant tous les deux accédé à l'indépendance pleine et entière en 1971. La position de la Grande-Bretagne à cette époque était claire et établie depuis longtemps : les îles de Hawar appartenaient à Bahreïn comme il avait été reconnu lors de l'arbitrage de 1938-1939 et comme l'indiquent les cartes établies depuis lors par le Gouvernement britannique.» (Contre-mémoire de Bahreïn, sect. 3.7, trad. fr., p. 130, par. 435.)

12. Qatar, pour sa part, s'est abstenu, tout au long de la procédure écrite, de faire connaître sa position quant à l'application de ce principe.

13. Il aura fallu attendre le 29 mai dernier pour entendre mon éminent contradicteur, le professeur Jean Salmon nous dire qu'il estimait que le principe *uti possidetis* «*ne trouve pas à s'appliquer ici*» pour utiliser ses propres termes (CR 2000/5, 29 mai 2000, p. 29, par. 5; les italiques sont de moi).

14. Cette position est bien compréhensible ! L'*uti possidetis* dessert Qatar.

15. Nous allons nous employer d'abord à réaffirmer la portée générale du principe d'*uti possidetis* et son applicabilité au différend entre Bahreïn et Qatar.

16. Pour ce faire, il nous appartiendra de démontrer que :

- l'*uti possidetis* est une règle de portée universelle et applicable, en l'occurrence, à Bahreïn et Qatar; et que
- ce principe n'a pas un caractère conventionnel, mais qu'il s'agit plutôt d'une règle coutumière applicable, en l'absence de dispositions conventionnelles contraires.

17. Nous nous attacherons, par la suite, à examiner les rapports entre titre et effectivités dans le contexte d'un *uti possidetis* applicable aux îles Hawar.

18. Bahreïn soutiendra alors, d'une part que :

- la décision de 1939 constitue un titre qui s'appuie sur les *effectivités* antérieures, et que d'autre part :

— les *effectivités*, postérieures à 1939, confirment le même titre constitué par cette décision britannique de 1939.

19. Mais avant de traiter ces deux questions, nous nous trouvons contraints, eu égard à la position de Qatar, d'avoir à démontrer l'évidence, à savoir, que Bahreïn et Qatar, sont d'anciens protectorats britanniques, et qu'à ce titre, l'*uti possidetis* leur est applicable à la date de leur indépendance.

**I. BAHREÏN ET QATAR SONT D'ANCIENS PROTECTORATS BRITANNIQUES; ET À CE TITRE, L'*UTI POSSIDETIS* LEUR EST APPLICABLE À LA DATE DE LEUR INDÉPENDANCE**

20. Bahreïn comme Qatar sont deux Etats issus de la décolonisation, ayant été d'anciens protectorats britanniques qui avaient proclamé leur indépendance en 1971 (le 15 août pour Bahreïn et le 3 septembre pour Qatar).

21. Cette vérité historique ne semble pas être acceptée par Qatar.

22. Le professeur Salmon nous a, en effet, indiqué lors de sa plaidoirie que : «les deux Emirats n'étaient ni dans une situation coloniale ni sous protectorat du Royaume-Uni» (CR 2000/5, p. 29, par. 6).

23. Si Bahreïn et Qatar n'étaient, *ni dans une situation coloniale ni sous protectorat*, pourquoi avaient-ils proclamé leur indépendance en 1971 ?

24. Nous allons démontrer que :

— les déclarations de l'indépendance de Bahreïn et Qatar établissent leur statut de protectorats britanniques; et que,

— la relative autonomie interne de Bahreïn et Qatar n'entamait en rien leur statut d'Etats protégés.

25. Pris, en effet, par le doute, j'ai pris soin d'aller consulter la proclamation de l'indépendance de Bahreïn en date du 15 août 1971, laquelle est constituée par un échange de lettres entre le résident politique britannique et l'émir de Bahreïn.

26. Cet accord relatif à l'abrogation du régime spécial de traité a été enregistré, le 10 février 1972, aux Nations Unies sur l'initiative du Royaume-Uni [ce document figure dans votre dossier d'audience — doc. n° 48].

27. La première lettre, constituant cet accord, est adressée par le résident politique à l'émir.

28. Permettez-moi, Monsieur le président, de vous en lire un extrait (dans une traduction en français réalisée par les services des Nations Unies). Je commence la lecture de cette lettre :

«J'ai l'honneur de me référer aux entretiens que j'ai eus avec vous au sujet de l'abrogation du régime spécial de traité entre le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et *l'Etat de Bahreïn et ses dépendances* et au désir qu'a manifesté votre gouvernement de voir l'Etat de Bahreïn assumer une entière responsabilité, sur le plan international en tant qu'Etat souverain et indépendant.»

On notera ici que le texte original anglais, qui figure à l'écran en même temps, est rédigé comme suit :

*"That the State of Bahrain should resume full international responsibility as a sovereign and independent State."*

29. Je reviens à présent au texte français :

«Au nom du Gouvernement du Royaume-Uni je propose maintenant ce qui suit :

- 1) Le régime spécial de traité entre le Royaume-Uni et l'Etat de Bahreïn, qui est incompatible avec l'exercice d'une entière responsabilité, sur le plan international, en tant qu'Etat souverain et indépendant, prendra fin à la date d'aujourd'hui.
- 2) *Les accords exclusifs du 22 décembre 1880 et du 13 mars 1892 et tous accords, engagements, dispositions et arrangements qui auraient été conclus entre le Royaume-Uni et l'Etat de Bahreïn dans le cadre du régime spécial de traité entre les deux Etats cesseront d'avoir effet à cette même date.»* (Nations Unies, *Recueil des traités*, 1972, n° 11586.)

30. A cette lettre est jointe la réponse de l'émir de Bahreïn qui confirme l'agrément de son gouvernement.

31. L'échange de lettres intervenu le 3 septembre de la même année 1971 entre cette fois l'émir de Qatar et la Grande-Bretagne est rédigé dans quasiment les mêmes termes [il figure dans le dossier d'audience — doc. n° 49.]

32. A l'instar de l'accord conclu avec Bahreïn, le résident politique britannique adresse une lettre à l'émir de Qatar. Permettez-moi, Monsieur le président, de vous en lire un bref extrait, au risque de me répéter :

«J'ai l'honneur de me référer aux entretiens que j'ai eus avec vous au sujet de l'abrogation du régime spécial de traité entre le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et l'Etat de Qatar [on ne parle pas de dépendances ici] et au désir qu'a manifesté votre gouvernement de voir l'Etat de Qatar reprendre les pleines responsabilités internationales en tant qu'Etat souverain et indépendant.»

Le texte original anglais est rédigé comme suit :

*"That the State of Qatar should resume full international responsibility as a sovereign and independent State."*

33. Je reviens à présent au texte français :

«Ces entretiens ont abouti aux conclusions ci-après :

- 1) Le régime spécial de traité entre le Royaume-Uni et l'Etat de Qatar qui est incompatible avec le plein exercice des responsabilités internationales d'un Etat souverain et indépendant, prendra fin à ce jour.
- 2) *Le traité général du 3 novembre 1916* et les traités et engagements que l'Etat de Qatar a acceptés au titre dudit traité général et tous autres accords, engagements, dispositions et arrangements conclus entre le Royaume-Uni et l'Etat de Qatar dans le cadre du régime spécial de traité entre les deux Etats cesseront d'avoir effet à ce jour.» (Nations Unies, *Recueil des traités*, 1972, n° 11811.)

34. A son tour, l'émir de Qatar confirme au résident politique que «les propositions énoncées dans [votre] note représentent correctement les conclusions auxquelles [nos] entretiens ont abouti».

35. Il apparaît, ainsi, et à la lecture de ces deux lettres, que Bahreïn et Qatar ont été, jusqu'à la proclamation de leur indépendance en 1971, des protectorats britanniques.

36. Si toutefois un doute subsistait, l'examen des seuls instruments juridiques, auxquels il est fait référence dans les échanges de lettres entre Bahreïn et Qatar d'une part et le Royaume-Uni d'autre part, établira la subordination de ces deux entités étatiques à l'Etat protecteur.

37. Des traités du 22 décembre 1880 et du 13 mars 1892 pour Bahreïn, ainsi que le traité du 3 novembre 1916 pour Qatar ont été joints au dossier d'audience [doc. n°s 50, 51, 52]. On y reviendra plus tard.

38. On peut certes discuter de la nature et de l'étendue des compétences de l'Etat protecteur. Les prérogatives de ce dernier sont-elles limitées à la représentation internationale ou couvrent-elles, au contraire, la gestion interne et l'exercice de compétences territoriales ?

39. Il sera démontré que la relative autonomie dont ont pu jouir Bahreïn et Qatar, au cours de la période antérieure à la proclamation de leur indépendance, n'entame en rien leur statut d'Etats protégés.

**A. La relative autonomie interne de Bahreïn et Qatar n'entame en rien leur statut d'Etats protégés**

40. La Cour permanente de Justice internationale a eu à examiner le régime du protectorat dans l'avis consultatif qu'elle avait donné le 7 février 1923 concernant les *Décrets de nationalité promulgués en Tunisie et au Maroc* (zone française).

41. La Cour relève :

«L'étendue des pouvoirs d'un Etat protecteur sur le territoire de l'Etat protégé dépend, d'une part, des traités de protectorat entre l'Etat protecteur et l'Etat protégé, et, d'autre part, des conditions dans lesquelles le protectorat a été reconnu par de tierces Puissances vis-à-vis desquelles on a l'intention de se prévaloir des dispositions de ces traités. Malgré les traits communs que présentent les protectorats de droit international, ils possèdent des caractères juridiques individuels résultant des conditions particulières de leur genèse et de leur degré de développement.» (*Avis consultatif, 1923, C.P.J.I. série B n° 4, p. 27.*)

42. Le professeur Salmon prend soin de souligner que :

«Le Royaume-Uni possédait sans doute le monopole de l'exercice des relations extérieures des deux Etats, mais il n'avait pas la compétence de disposer de leurs droits de souveraineté territoriale *sans leur consentement.*» (CR 2000/5, p. 29, par. 6; les italiques sont dans l'original.)

43. Cette affirmation tend à créer l'impression que les deux Etats bénéficiaient d'une large autonomie interne, laquelle les mettrait en dehors d'une situation coloniale.

44. Force est de constater que si autonomie il y avait, elle ne pouvait qu'être toute relative.

45. Dans l'affaire des *Phares en Crète et à Samos*, la Cour permanente a relevé, dans son arrêt du 8 novembre 1937 que :

«Malgré son autonomie, la Crète n'avait pas cessé de faire partie de l'Empire ottoman. S'il est vrai que le Sultan avait dû y admettre d'importantes restrictions à l'exercice de ses droits de souveraineté, cette souveraineté même, *quelle qu'en ait été la qualification doctrinale*, n'avait pas cessé de lui appartenir.» (*C.P.J.I. série A/B n° 71, p. 103.*)

46. Qatar nous a involontairement fourni une claire indication sur la nature des liens qu'entretenait la Grande-Bretagne avec les deux Emirats. Elle est contenue dans une pièce annexée à sa réplique, et que nous avons jointe au dossier d'audience (doc. n° 53).

47. Le document en question, dont l'intérêt pour Qatar est d'ordre cartographique, est une note, en date du 5 janvier 1933, rédigée par un agent du Foreign Office, Rendel; et dans laquelle ce dernier décrit le statut des Etats du Golfe couverts par le régime spécial de traité en ces termes :

«les autres Etats de la région jouissent d'un statut particulier dans la mesure où, bien qu'il s'agisse, techniquement, de principautés souveraines et indépendantes, ils



entretiennent avec le gouvernement de Sa Majesté des relations conventionnelles spéciales qui les transforment pratiquement en Etats protégés. Généralement, ces traités contiennent des clauses par lesquelles les Etats concernés s'engagent à ne pas céder une parcelle quelconque de leur territoire, à ne pas recevoir des représentants d'une puissance étrangère (en dehors de ceux du gouvernement de Sa Majesté) et à ne pas octroyer de concession pétrolière ou de pêche (de perles ou aux éponges) sans la permission du gouvernement de Sa Majesté. Ce dernier, en retour, s'engage à les protéger...» (Réplique de Qatar, annexe III.41, vol. 3, p. 247; trad. fr., p. 77.)

48. La meilleure illustration de ce qui vient d'être ainsi décrit nous est fournie par le professeur Salmon lui-même, lors de sa dernière plaidoirie sur la délimitation maritime.

49. Son propos était alors de démontrer le rôle du Royaume-Uni dans la répartition des concessions pétrolières :

«Les opérations des sociétés pétrolières étaient soumises à un double contrôle de la part du gouvernement de Sa Majesté. D'une part, *toute concession consentie par les deux Etats concernés devait recevoir l'accord de principe du gouvernement de Sa Majesté en vertu des accords passés avec chacun des Emirats et dont on vous a parlé précédemment (c'était l'article 3 de l'accord Bahreïn/Royaume-Uni du 13 mars 1892 et l'article IV du traité Qatar/Royaume-Uni du 3 novembre 1916).* D'autre part, et c'est ce qui était neuf, les parties concessionnaires devaient, elles-mêmes, passer un accord «politique» (*"political agreement"*) avec le gouvernement de Sa Majesté qui leur imposait des zones de sécurité où les opérations de forage ou d'exploitation ne pouvaient avoir lieu qu'avec l'aval dudit gouvernement.» (CR 2000/10, p. 29, par. 15; les italiques sont de moi.)

50. Que disent ces deux articles auxquels le professeur Salmon fait référence ?

51. L'article 3 du traité du 13 mars 1892, que vous trouverez dans le dossier d'audience (doc. n° 51), constitue un engagement de l'émir de Bahreïn, et est ainsi rédigé :

*"That I will on no account cede, sell, mortgage or otherwise give for occupation any part of my territory save to the British".*

52. Quant à l'article IV du traité du 3 novembre 1916 entre Qatar et la Grande-Bretagne (qui figure dans le dossier d'audience, doc. n° 52), il contient l'engagement suivant du cheikh Abdullah bin Jasim bin Thani :

*"neither will I, without such consent, cede to any other Power or its subjects, land either on lease, sale, transfer, gift, or in any other way whatsoever".*

53. Nous sommes ainsi dans la situation décrite par la doctrine, et dans laquelle :

«La compétence territoriale elle-même peut être reconnue à un Etat dans un espace qui n'est pas proprement le sien et sur lequel il n'a pas de «titre» territorial.» (J. Cambacau et S. Sur, *Droit international public*, 3<sup>e</sup> éd., Montchrestien, 1997, p. 395.)

54. La relation qui a existé jusqu'en 1971 entre Bahreïn et Qatar d'une part et la Grande-Bretagne d'autre part est indiscutablement une relation entre un Etat protecteur et un Etat protégé, comme il en avait existé en Afrique et en Asie au cours du siècle dernier.

55. Devant autant d'éléments prouvant l'existence d'une situation coloniale, nous ne pouvons que nous interroger sur le point de savoir si nos contradicteurs croyaient eux-mêmes à la fiction voulant que «*les deux Emirats n'étaient ni dans une situation coloniale ni sous protectorat du Royaume-Uni*».

56. Cela ne semble pas être le cas du professeur David qui, au détour d'une phrase, a fait référence à la position de «*la puissance protectrice elle-même, à savoir la Grande-Bretagne*» (CR 2000/9, p. 25, par. 55; les italiques sont de moi).

57. Quel que soit le qualificatif qu'on donne à la nature de ces «*liens spéciaux*», nul ne peut prétendre que Bahreïn et Qatar disposaient alors de la plénitude et de l'exclusivité des compétences internes et externes qui sont les attributs de la souveraineté.

58. Nier le fait colonial n'a d'autre dessein pour Qatar que de dresser des obstacles devant l'application de l'*uti possidetis*.

59. Ayant ainsi, j'espère, rétabli la vérité historique, revenons, si vous le permettez Monsieur le président, à l'essentiel, à savoir : l'application de l'*uti possidetis* au différend entre Bahreïn et Qatar.

## **II. PORTÉE GÉNÉRALE DU PRINCIPE DE L'*UTI POSSIDETIS* ET SON APPLICABILITÉ AU DIFFÉREND ENTRE BAHREÏN ET QATAR**

60. Monsieur le président,

61. Madame et Messieurs de la Cour,

62. On ne saurait contester aujourd'hui que l'*uti possidetis* soit une règle applicable aux Etats issus de la décolonisation où qu'elle se produise, qu'ils le soient d'une même ou de différentes puissances coloniales.

63. Je me dois de rappeler que la Chambre de la Cour a explicitement donné à ce principe une portée universelle en le qualifiant, dans son arrêt du 22 décembre 1986 dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*, de «principe de portée générale,

logiquement lié au phénomène de l'accession à l'indépendance où qu'il se manifeste» (C.I.J. Recueil 1986, p. 565, par. 20).

64. L'*uti possidetis* nous paraît devoir recevoir pleine application dans le litige opposant deux Etats issus de la décolonisation britannique.

65. Devant le silence qatarien, nous allons devoir examiner deux arguments que ne manqueront pas de soulever ceux qui ne préconisent pas une solution inspirée par l'*uti possidetis*.

66. D'abord, ce principe ne serait, à leurs yeux, qu'une règle coutumière de portée régionale. Nous allons démontrer qu'au contraire :

**A. L'*uti possidetis* est une règle de portée universelle, et applicable, en l'occurrence, à Bahreïn et à Qatar**

67. Quoique d'inspiration latino-américaine, l'*uti possidetis* fut repris en Afrique et a été notamment consacré par la résolution adoptée à la première session de la Conférence des chefs d'Etat africains réunie au Caire en 1964, qui a proclamé ce qui suit :

«Considérant, en outre, que les frontières des Etats africains, au jour de leur indépendance, constituent une réalité tangible, (la Conférence des chefs d'Etat africains) déclare solennellement que tous les Etats membres s'engagent à respecter les frontières existant au moment où ils ont accédé à l'indépendance.» (AGH Res 16 (1) du 21 juillet 1964.)

68. L'attachement du continent africain à l'intangibilité des frontières a été réaffirmé encore récemment à l'occasion du dernier sommet des chefs d'Etat africains tenu à Alger entre le 12 et 14 juillet 1999.

69. Le principe de l'*uti possidetis* a, par ailleurs, trouvé application dans les situations de dissolution d'un Etat fédéral.

70. La commission d'arbitrage de la conférence pour la paix en Yougoslavie avait ainsi estimé que :

«Le principe de l'*uti possidetis juris* ... bien qu'initialement reconnu dans le règlement des problèmes de décolonisation en Amérique et en Afrique, constitue aujourd'hui un principe présentant un caractère général.» (Avis n° 3, 11 janvier 1992, RGDIP 1992, p. 268.)

71. La commission présidée par M. Badinter a, par ailleurs, fermement considéré, s'agissant de la Yougoslavie, que :

«à défaut d'un accord contraire, les limites antérieures acquièrent le caractère de frontières protégées par le droit international conformément au principe d'*uti possidetis juris*» et qu'«aucune modification des frontières et des limites existantes établies par la force ne peut produire d'effets juridiques» (avis n° 3, 11 janvier 1992, *RGDIP* 1992, p. 268-269).

72. En dépit du recours à ce principe dans diverses régions du monde, comme nous venons de le souligner, certains continuent à chercher à circonscrire le champ d'application de l'*uti possidetis* à l'Amérique latine.

73. Leur argument principal consiste à s'attacher curieusement à l'origine latino-américaine du principe.

74. Et d'aucuns ont cru voir dans l'arrêt de la Cour du 11 septembre 1992 dans l'affaire du *Différend frontalier, terrestre, insulaire et maritime (El Salvador /Honduras)*, confirmation de leur propre vision.

75. Le passage auquel il est fait référence est ainsi rédigé :

76. «On ne peut douter de l'importance de l'*uti possidetis juris* qui, en général, a donné naissance à des frontières certaines et stables dans la plus grande partie de l'Amérique centrale et de l'Amérique du Sud.» (*C.I.J. Recueil* 1992, par. 41, p. 386.)

77. Nul ne conteste que le principe ait reçu le plus large écho dans cette région du monde qui, comme le dit justement la Cour dans ce même arrêt de 1992, a manifesté, je la cite, un «attachement ferme et constant ... au principe de l'*uti possidetis juris*» (*C.I.J. Recueil* 1992, par. 355, p. 569)

78. Est-il besoin de rappeler par ailleurs, que tout en évoquant «*les républiques hispano-américaines*», la Chambre de la Cour dans son arrêt de 1992 a fait fréquemment référence à sa devancière dans l'affaire *Burkina Faso/République du Mali* de 1986.

79. La Cour d'ailleurs n'avait pas besoin de réaffirmer l'universalité du principe, l'ayant déjà fait et d'une manière éloquente, précisément dans son arrêt du 22 décembre 1986 dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* où elle prononce son *dictum* devenu célèbre :

«Il faut voir, dans le respect par les nouveaux Etats africains des limites administratives et des frontières établies par les puissances coloniales, non pas une simple pratique qui aurait contribué à la formation graduelle d'un principe de droit international coutumier dont la valeur serait limitée au continent africain comme elle l'aurait été auparavant à l'Amérique hispanique, mais bien *l'application en Afrique*

*d'une règle de portée générale» (C.I.J. Recueil 1986, par. 21, p. 565; les italiques sont de moi.)*

80. Il n'y a donc à nos yeux aucun obstacle à l'application de l'*uti possidetis* à deux Etats arabes issus de la décolonisation.

81. Le principe demeure de portée générale. Le monde arabe ne fait pas exception.

82. L'autre argument qu'on se doit à présent de réfuter est celui qui consiste à attribuer à l'*uti possidetis* un caractère conventionnel.

83. Nous estimons tout au contraire que :

**B. L'*uti possidetis* est un principe de caractère coutumier applicable en l'absence de dispositions conventionnelles contraires**

84. Ceux qui attribuent à l'*uti possidetis* le caractère de règle purement conventionnelle considèrent que le principe ne serait applicable que dans la mesure où les parties l'acceptent pour la détermination de leurs frontières.

85. La meilleure illustration en serait, selon les tenants de cette thèse, l'existence même de traités qui s'éloignent de l'*uti possidetis* pour la fixation des frontières.

86. Nous ne pouvons admettre ce raisonnement, car comme l'a fort justement dit un auteur dans un ouvrage récent et bien documenté :

«L'existence de nombreux traités qui tracent les frontières concernées en appliquant des critères autres que l'*uti possidetis* témoigne de l'autonomie de la volonté des Parties et non forcément d'un rejet du principe. En somme, l'*uti possidetis* n'est qu'une règle dispositive, à laquelle les Etats peuvent en substituer d'autres.» (Marcelo G. Kohen, *Possession contestée et souveraineté territoriale*, PUF 1997 p. 453.)

87. L'*uti possidetis* constitue ainsi une norme coutumière de droit international à caractère dispositif qui s'applique en l'absence d'une volonté contraire des parties intéressées.

88. Si la délimitation des frontières a été établie par voie conventionnelle, il sera alors inutile de faire appel à l'*uti possidetis*.

89. Tel a été le cas dans l'affaire du *Différend territorial* entre le Tchad et la Libye, où la Cour avait estimé, dans son arrêt du 3 février 1994, qu'elle n'avait pas :

«à étudier plus avant des sujets qui ont été longuement traités devant elle comme le principe de l'*uti possidetis* et l'applicabilité de la déclaration adoptée par l'Organisation de l'unité africaine au Caire en 1964» (C.I.J. Recueil 1996, p. 38, par. 75).

dès lors que

«le traité de 1955 a déterminé de manière complète la frontière entre La Libye et le Tchad» (C.I.J. Recueil 1994, p. 40, par. 76).

90. Ainsi rien n'empêche les Etats intéressés de décider d'un commun accord de déroger à l'*uti possidetis*, et de déterminer les frontières respectives en utilisant des normes différentes; mais tant qu'ils ne l'auront pas fait, l'application de l'*uti possidetis* reste la règle.

91. Un accord explicite est donc requis pour toute modification d'une situation territoriale résultant de l'*uti possidetis*.

92. Un tel accord n'a jamais été convenu entre Bahreïn et Qatar.

93. Ayant ainsi exposé les raisons pour lesquelles il nous semble opportun d'écarter les deux arguments pouvant s'opposer à l'application de l'*uti possidetis* dans l'affaire qui est devant vous, je souhaite à présent,

94. Monsieur le président, Madame et Messieurs de la Cour, vous inviter à examiner, dans une troisième et dernière partie, les rapports entre le titre et les effectivités dans le contexte d'un *uti possidetis* applicable au différend opposant Bahreïn et Qatar.

### **III. LES RAPPORTS ENTRE LE TITRE ET LES EFFECTIVITÉS DANS LE CONTEXTE D'UN UTI POSSIDETIS APPLICABLE AUX ÎLES HAWAR**

95. Bahreïn invite respectueusement la Cour à examiner la relation juridique qui existe entre les effectivités et le titre servant de base à la mise en œuvre de l'*uti possidetis*.

96. La Chambre de la Cour, constituée pour connaître de l'affaire du *Différend frontalier* opposant le Burkina Faso à la République du Mali, a retenu l'approche consistant à distinguer plusieurs situations qu'elle a décrites dans son arrêt du 22 décembre 1986.

97. Le passage en question est reproduit, cette fois *dans son intégralité*, à l'écran devant vous; permettez-moi de vous le relire :

- «Dans le cas où le fait correspond exactement au droit, où une administration effective s'ajoute à l'*uti possidetis juris*, l'«effectivité» n'intervient en réalité que pour confirmer l'exercice du droit né d'un titre juridique.»
- «Dans le cas où le fait ne correspond pas au droit, où le territoire objet du différend est administré effectivement par un Etat autre que celui qui possède le titre juridique, il y a lieu de préférer le titulaire du titre.»

- «Dans l'éventualité où l'«effectivité» ne coexiste avec aucun titre juridique, elle doit inévitablement être prise en considération.»
- «Il est enfin des cas où le titre juridique n'est pas de nature à faire apparaître de façon précise l'étendue territoriale sur laquelle il porte; les «effectivités» peuvent alors jouer un rôle essentiel pour indiquer comment le titre est interprété dans la pratique.» (C.I.J. Recueil 1986, p. 586-587, par. 63.)

98. Si l'on devait appliquer, à titre de test, ces quatre hypothèses aux deux Etats revendiquant la souveraineté sur les îles Hawar, on se rendrait rapidement à l'évidence que l'Etat de Bahreïn est celui des deux qui détient à la fois un titre juridiquement valable et qui peut se prévaloir, en même temps, de l'exercice effectif de la souveraineté sur le territoire en question.

99. Des quatre situations envisagées, seule la première nous semble s'appliquer à notre affaire, je relis le paragraphe correspondant :

«une administration effective s'ajoute à l'*uti possidetis juris*, l'effectivité n'intervient en réalité que pour confirmer l'exercice du droit né d'un titre juridique» (C.I.J. Recueil 1986, p. 586, par. 63).

100. Il s'agit, d'une situation idéale d'exacte correspondance entre le fait et le droit; celle-là même qui caractérise la souveraineté de Bahreïn sur les îles Hawar où une administration effective confirme tout naturellement un titre juridique.

101. L'effectivité n'intervient ici que pour confirmer l'exercice du droit né d'un titre juridique.

102. Qu'il me soit à présent permis d'attirer respectueusement l'attention de la Cour sur le fait que *les effectivités* sur lesquelles Bahreïn s'appuie aujourd'hui, et dont l'inventaire vient de vous être exposé par mon confrère, Robert Volterra, se caractérisent par leur permanence.

103. Elles sont, dans une large mesure, antérieures à la décision de 1939 et ont même constitué le fondement sur lequel la souveraineté sur les îles Hawar a été attribuée à Bahreïn, en vertu de la décision britannique de 1939.

104. Je me propose d'établir que, d'une part :

- la décision de 1939 constitue un titre qui s'appuie sur les *effectivités* antérieures, et que d'autre part;
- les *effectivités*, postérieures à 1939, confirment le même titre constitué par la décision britannique de 1939.

**A. La décision de 1939 constitue un titre qui s'appuie sur les effectivités antérieures**

105. Mon collègue et ami, le professeur Michael Reisman, vous a exposé la position de Bahreïn, selon laquelle la décision du 11 juillet 1939 constitue bel et bien un titre sur lequel Bahreïn se fonde pour asseoir sa souveraineté sur les îles Hawar.

106. Que cette décision ait le caractère d'une sentence arbitrale ou d'une décision politique ou même administrative importe peu ! Nous sommes en présence d'un titre juridique.

107. Il convient de rappeler l'importance du titre dans le concept même de l'*uti possidetis*.

108. La Chambre de la Cour souligne dans son arrêt de 1986 que : «le premier [élément] mis en relief par le génitif latin *juris*, accorde au titre juridique la prééminence sur la possession effective comme base de la souveraineté»; avant d'ajouter plus loin :

«Mais le principe de l'*uti possidetis* ne s'épuise pas dans l'élément particulier que l'on vient de décrire. Il en est un autre, à savoir que, sous son aspect essentiel, ce principe vise, avant tout, à assurer le respect des limites territoriales au moment de l'accession à l'indépendance.» (*C.I.J. Recueil 1986*, p. 566, par. 23.)

109. Dans le cadre de l'*uti possidetis juris*, et donc d'une frontière héritée de la colonisation, le titre sur lequel on se fonde peut résulter d'un arbitrage antérieur comme dans l'affaire de la *Laguna del Desierto* entre l'Argentine et le Chili (*RGDIP* 1996 — 2, p 520-597); comme il peut aussi résulter des lois et règlements fixant les limites entre les différentes entités administratives appartenant au même empire colonial (affaire du *Différend frontalier*, *op. cit.*, p. 568).

110. Quelle que soit sa nature juridique, la décision de 1939 fait incontestablement partie intégrante du *legs colonial*.

111. Cette décision, faut-il le rappeler, a été rendue sur la base des *effectivités* dont Bahreïn a pu alors apporter la preuve à l'occasion d'une procédure arbitrale initiée par Qatar.

112. S'agissant maintenant des effectivités enregistrées par Bahreïn postérieurement à 1939, Qatar s'est évertué à leur contester toute valeur juridique. Nous pensons tout au contraire que les effectivités postérieures à 1939 confirment le titre juridique constitué par la décision britannique de 1939.



**B. Les effectivités postérieures à 1939 confirment le titre juridique constitué par la décision britannique de 1939**

113. Il a été en effet démontré par Bahreïn que les effectivités postérieures à la décision britannique n'ont fait qu'appuyer le titre confirmé par la décision de 1939.

114. L'indépendance acquise en 1971 a intégré cette décision dans un ensemble global qui est précisément l'*uti possidetis*.

115. Nous savons qu'il existe, s'agissant de l'*uti possidetis*, un débat sur le statut réservé aux *effectivités postcoloniales*.

116. La Chambre de la Cour, dans son arrêt du 11 septembre 1992 dans l'affaire *El Salvador/Honduras*, a tranché ce débat en reconnaissant à ces *effectivités postcoloniales* un effet *confirmatif*.

117. Elle a d'abord estimé que sa devancière de 1986 dans l'affaire *Burkina Faso/République du Mali* : «avait également à l'esprit les *effectivités postcoloniales*» (C.I.J. Recueil 1992, p. 398, par. 61; les italiques sont de moi).

118. Et la Chambre considère ensuite :

«[L]a possession effective par l'un des Etats du golfe d'une île du golfe [il s'agit bien évidemment du golfe de Fonseca] pouvait constituer une effectivité, certes postcoloniale, révélatrice de la manière dont la situation juridique était perçue à l'époque. La possession étayée par l'exercice de la souveraineté peut être considérée comme une preuve *confirmant le titre d'uti possidetis*.» (C.I.J. Recueil 1992, p. 566, par. 347; les italiques sont de moi.)

119. Telle est exactement la situation dans notre affaire : un Etat, Bahreïn, hérite au moment de la proclamation de son indépendance, d'un *uti possidetis*, dont fait partie intégrante une décision rendue par l'autorité coloniale, et reconnaissant explicitement la souveraineté de Bahreïn sur les îles Hawar sur la base d'effectivités prouvées et établies.

120. Les effectivités dont se prévaut Bahreïn couvrant aussi bien la période coloniale que la période postcoloniale, *La décision britannique de 1939 se trouve ainsi encadrée dans une séquence ininterrompue d'effectivités* et s'appuie sur plus de soixante ans *d'exercice continu, prolongé, paisible et effectif des fonctions étatiques par l'Etat de Bahreïn*.

121. Monsieur le président,

122. Madame et Messieurs de la Cour,

123. Je souhaite, en conclusion, souligner que le rejet de l'*uti possidetis* ne peut s'effectuer qu'au profit de celui de «*la table rase*»; ce qui ne peut que susciter la tentation en faveur d'une modification des frontières par la force.

124. Ce principe de *la table rase* a été, comme nous le savons tous, mis en oeuvre dans la région, lorsque l'Iraq décida le 8 août 1990 d'occuper le Koweït...

125. Nous sommes, pour notre part, convaincus que loin de souscrire au principe de «*la table rase*», les Etats arabes du Golfe sont, plus que jamais, attachés au principe de l'intangibilité et de la stabilité des frontières.

126. Dans ce contexte, je souhaite soumettre à votre réflexion ce *dictum* de la Chambre de la Cour dans son arrêt de 1986 :

«le maintien du *statu quo* territorial en Afrique apparaît souvent comme une *solution de sagesse* visant à préserver les acquis des peuples qui ont lutté pour leur indépendance et à éviter la rupture d'un équilibre qui ferait perdre au continent africain le bénéfice de tant de sacrifices. C'est le besoin vital de stabilité pour survivre, se développer et consolider progressivement leur indépendance dans tous les domaines qui a amené les Etats africains à consentir au respect des frontières coloniales.» (*C.I.J. Recueil 1986*, p. 567, par. 25; les italiques sont de moi.)

127. Nous n'avons aucune raison de penser que, «*ce besoin vital de stabilité pour survivre, se développer et consolider progressivement leur indépendance*», auquel la Cour fait référence, puisse ne pas être partagé par les tous Etats arabes du Golfe, y compris par l'Etat de Qatar.

128. Bahreïn, pour sa part, je peux vous en donner l'assurance, n'aspire à rien d'autre qu'à vivre en paix, à l'abri de toute menace, à l'intérieur de frontières fondées sur le droit international et auxquelles, nous en sommes confiants, la Cour apportera la sanction de sa haute autorité.

129. J'en arrive ainsi au terme de ma présentation. Il me reste à vous exprimer,

130. Monsieur le président, Madame et Messieurs de la Cour, ma vive et réelle reconnaissance pour votre patience et votre indulgence.

131. J'espère, enfin, qu'il plaira à la Cour de bien vouloir appeler, à sa convenance, Sir Elihu Lauterpacht.

Le PRESIDENT : Je vous remercie, Maître Kemicha. Ceci met un terme à notre séance de ce matin. La Cour se réunira à nouveau cet après-midi à 15 heures. La séance est levée.

*L'audience est levée à 13 heures.*

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