

SEPARATE OPINION OF JUDGE FORTIER

Challenge of eighty-two (82) Qatari documents by Bahrain — Decision by Qatar to disregard “non-authentic documents” — History of eighty-two (82) documents including impact on Qatari claim to Hawar Islands — Qatar’s new argument — Potential damage to administration of international justice.

Sovereignty over Zubarah — Review of 1868 to 1916 documents — Burden of proof — Naim presence in Zubarah — Allegiance of nomadic tribes as basis of title — Events of 1937 — Acts of conquest and change of title in 1937 — Protest of forcible taking in pre-United Nations Charter days — Effect of principle of stability — Competency of Court.

Janan Island and 1939 British decision — Janan Island as part of the Hawars Context and interpretation letters of 23 December 1947.

Maritime delimitation — Reservations.

PRELIMINARY ISSUE

1. Before I write my separate opinion in respect of Zubarah and Janan Island, I wish to address one important issue which has arisen in the course of the present proceedings and which, I believe, should have been commented upon in the Judgment. Since the Court chose not to address this issue, I have decided that it was my duty to do so. I refer to the 82 Qatari documents whose authenticity was successfully challenged by Bahrain.

2. The only reference to the 82 documents in the Judgment is found in paragraphs 15 to 23 of the section setting out the history of the proceedings before the Court. It consists of a mere narrative. I am of the view that this extraordinary incident merits the following comments.

3. When Qatar made its Application to the Court in July 1991, it based its principal contentions in support of its claim to the Hawar Islands on these 82 documents. When Qatar filed its Memorial in September 1996, its Annexes included these 82 documents. These documents played an essential role in Qatar’s Memorial, serving as almost the only basis for Qatar’s claim to the Hawar Islands as well as, to a lesser degree, the Zubarah region. Once the authenticity of these essential documents was challenged by Bahrain, Qatar did not abandon its claim to the Hawar Islands. It adduced a new argument, which was not even developed in its original Memorial as an alternative argument.

4. I believe that the Court should not simply disregard and fail to take into consideration this unprecedented incident. In my opinion, these documents have “polluted” and “infected” the whole of Qatar’s case (CR 2000/11, pp. 12 and 14).

5. Some of them resurface, directly or indirectly, at various stages of Qatar’s written and oral pleadings. They remain in the record and some of them linger and are invoked occasionally in support of Qatar’s alternative argument.

6. While I must accept, as I do, Qatar’s disclaimer and apologies, in my opinion I cannot consider Qatar’s case without having in mind the damage that would have been done to the administration of international justice, indeed to the very position of this Court, if the challenge by Bahrain of the authenticity of these documents had not led Qatar, eventually, to inform the Court that it had “decided [to] disregard all the 82 challenged documents for the purposes of the present case”.

7. In my consideration of Qatar’s case, I cannot ignore the history of these documents. Qatar’s case today is not the same case as it was when it was first set out in the Claimant’s Memorial in September 1996. The manner in which the Qatari claim to the Hawar Islands has been developed before the Court has changed fundamentally since the Qatar Memorial and Counter-Memorial. What has happened has a direct bearing on the substance of various important aspects of the case.

8. I note that the introduction to Qatar’s Counter-Memorial contained a summary of what it called “the central elements” of its case and asserted that Qatar’s evidence had achieved the following:

- one, it had “demonstrated” the territorial integrity of Qatar as comprising the whole peninsula and the Hawar Islands;
- two, it “showed” that this alleged territorial integrity was recognized “at least” since the mid-nineteenth century by Britain, the Ottoman Empire, local rulers, and indeed Bahrain;
- three, it had “shown” the worthlessness of Bahrain’s evidence in support of its successful defence of the Hawar Islands in the arbitration that resulted in the British Award of 1939; and
- four, it had “provided evidence” of Qatar’s own “acts of sovereignty” on the Hawar Islands (Counter-Memorial of Qatar, paras. 1.2-1.8).

9. I observe that all these “central elements” of Qatar’s case depended on the use of the 82 documents. These documents were later abandoned by Qatar.

10. As I noted earlier, Qatar then adopted a new argument to support the maintenance of its claim to the Hawar Islands. Conduct and *effectivité* having been abandoned, Qatar’s title to the Hawar Islands now rests on original title and proximity. Why was this new argument, if it has the merit that Qatar now claims for it, not developed in Qatar’s original Memorial at the very least as an alternative line of approach? Qatar never answered that question.

11. With these observations, I end my comments on the 82 challenged documents and close that chapter. I believe that the Court, in considering the Parties' conflicting versions of the facts in this case, had a duty to do more than merely narrate the Parties' respective exchange of letters following Bahrain's challenge of the authenticity of 82 documents which loomed as central to Qatar's case. I regret that it elected not to do so.

ZUBARAH

12. While I voted in favour of the Court's Judgment that the State of Qatar has sovereignty over Zubarah, I reach my conclusion for reasons different from those set out in the Judgment.

In my view, the documents originating between 1869 and 1916 on which Qatar relies in support of its claim to Zubarah and which the Court found dispositive do no such thing. By 1916, Bahrain had not lost its title to Zubarah on the Qatar peninsula.

13. In paragraph 5 of its Application to the Court in July 1991, Qatar represented that: "until 1868, the Qatar peninsula was considered by the British as a dependency of Bahrain". This admission by Qatar permits me to observe at the outset of my separate opinion that, at least until 1868, the entirety of the Qatar peninsula was subject to Bahrain's sovereignty; this obviously included Zubarah.

14. The question which I set out to resolve is: how, where, when and in what degree did Bahrain lose its title to the peninsula, including, more particularly, Zubarah? Qatar has the burden of proof in respect of this question. Having reviewed the evidence I have reached the conclusion that it has not discharged its burden.

15. Qatar, in support of its claim to Zubarah, has relied on a series of documents originating between 1868 and 1916. I will refer to these documents, in turn.

16. Having reviewed the 1868 Agreements, I find no basis whatsoever on which I could conclude that, by virtue of these Agreements, Bahrain's authority in the Qatar peninsula ended in 1868.

17. The history of the period from 1868 to 1916 consists of a complex web of relations between the Turks, the British, the Sheikhs of Bahrain, the leaders of the Al-Thani family and many tribes in the east and north of the Qatar peninsula. Having reviewed the record before the Court, I find nothing in it to suggest that, during this period, the Sheikhs of Bahrain abandoned their claims to Zubarah. I note, in particular, that in its Memorial and Counter-Memorial, Qatar relied on a number of documents originating during this period as supportive of its claim to Zubarah. Many of these documents have been acknowledged as "non-authentic".

18. Before the departure of the Ottomans in 1915, Great Britain and

Turkey concluded the unratified 1913 Anglo-Turkish Convention and the 1914 Treaty. Counsel for Qatar has referred the Court to Article 11 of the unratified 1913 Anglo-Turkish Convention (CR 2000/22, p. 18, para. 40). That Article includes the provision that “the said peninsula shall be governed, as heretofore, by Sheikh Jasim-bin-Sani and his successors”. I see nothing in that clause or, indeed, anywhere in the document that amounts to recognition of an independent State of Qatar existing throughout the peninsula. The crucial words are that the peninsula shall be governed “as heretofore” by the Al-Thani. The evidence before the Court is overwhelming: the prior governance of the peninsula (prior to 1913) by the Al-Thani did not extend to large parts of the peninsula, including Zubarah. I fail to see how Qatar can rely on the text of the 1913 Agreement as evidence of its title to Zubarah. In any event, the unratified 1913 Treaty cannot create a title.

19. Did the 1914 Treaty amount to recognition of a State of Qatar as of that date? Having reviewed the Treaty carefully, I find nothing in it to suggest recognition of the political status of the territory of El-Katr or the area of authority of those who governed part of it.

20. I come now to consider the 1916 Agreement. Does it demonstrate the loss by Bahrain of its title to Zubarah, in favour of Qatar? The Court has been referred by Qatar to Articles X and XI of that Agreement. By virtue of Article X, the British Government undertook to protect the Ruler, his subjects and his territory from aggression. By virtue of Article XI, Britain also undertook to grant the Ruler its good offices should he or his subjects be assailed by land within the territory of Qatar. In neither of these articles or, indeed, anywhere in the Treaty, was any definition given of this “Territory”. Nowhere in the 1916 Agreement can I find an acknowledgment of Qatar’s status or of title to the Qatar peninsula, in particular, Zubarah.

21. I conclude that Qatar has not discharged its burden of proof and that the evidence is clear: by 1916, Bahrain had not lost its title to Zubarah on the Qatar peninsula.

22. Before I come to certain events in 1937 which are crucial to my conclusion on which Party has sovereignty over Zubarah today, I will review briefly two important facets of the present case:

- (i) May a Ruler establish or maintain his title in territories having certain characteristics through tribes swearing allegiance to him?
- (ii) May the ties between the Ruler of Bahrain and the Naim Tribe be characterized as ties of allegiance capable of serving as the basis of a claim by Bahrain to sovereignty over Zubarah?

I will deal with these two questions together.

23. I believe that the evidence before the Court is sufficient to establish a regular and consistent Naim presence in the Zubarah region, at the very least from 1868 to 1937. That the Naim and the Al-Khalifah had a relationship is uncontroverted (see Reply of Bahrain, pp. 124-126). Does the allegiance of the Naim tribes that inhabited the northwest of the Qatar peninsula and who remained loyal to Bahrain and the Al-Khalifah throughout the relevant period confirm Bahrain's title over the Zubarah region? Qatar has argued forcefully that there was no such allegiance and that, in any event, allegiance of nomadic tribes such as the Naim in the Gulf region cannot create title.

24. In areas such as the Zubarah region, where the pattern of habitation was nomadic and boundaries were not drawn formally, are the ties of allegiance referred to above capable of serving as the basis of a claim by Bahrain to sovereignty over Zubarah? I believe so.

25. International law recognizes that in certain territories that are possessed of exceptional circumstances such as low habitability, of which the Zubarah region is undoubtedly one, a Ruler might establish and maintain title to his territory by manifestations of dominion or control through tribes who gave him their allegiance and looked to him for assistance.

26. In the *Dubai/Sharjah* Arbitration, which involved a border dispute between neighbours of the Parties to the present case, this basis of title received legal approbation. The Tribunal observed as follows:

“until the mid-twentieth century this region was largely desert and sparsely populated. Except for the coastal fringe, the population was nomadic or semi-nomadic and for such people the modern concept of ‘boundary’ or ‘frontier’ had no meaning. They were concerned only with areas or localities within which they moved from place to place.

.....
 The tribes owed allegiance to a Ruler. The form of allegiance varied, but might, for instance, involve the payment of the religious tax known as ‘zakat’. The link between a tribe and a Ruler might be close or tenuous, dependent on the degree of independence manifested by the people concerned. It was, however, by way of this allegiance that a Ruler was able to exercise a form of sovereignty over a region where nomadic tribesmen were regularly moving from place to place. There was no direct control by a Ruler over a given territory but a control exercised through the tribal system, which might indeed, if a particular tribe displayed a high degree of independence, become more or less theoretical. Mr. Morsy Abdullah has very well summarised the position in these words:

‘Political boundaries were dependent on tribal loyalties to particular shaikhs and consequently were subject to frequent change. Therefore, the frontier between the Trucial States and the Sultanate of Muscat and the inter-state boundaries changed frequently

during the nineteenth and twentieth centuries as it was based on the *dirah* of the tribes. *Dirah* in Arabia at this time was a flexibly defined area, changing in size according to the strength of the tribe which wandered within it. In addition, a tribe's loyalty was determined by its own interests and could, and at this time often did, alter.'

The term 'dirah' indicates a region within which a nomadic people moves. The term 'haram' means, however, an area in the vicinity of a town or settlement upon which such town or settlement has a claim of exclusive rights for the purpose of obtaining the necessities of its existence." (*Dubail/Sharjah Border (Award)*, *International Law Reports*, Vol. 91, pp. 587-588.)

27. The tribal *dirah* of Zubarah was the home of the Naim tribe during the relevant period and it remained so until the events of 1937 (Memorial of Bahrain, Sect. 2.1; Counter-Memorial of Bahrain, Sect. 2.2. See also Map 5 in Annex 7 of Memorial of Bahrain).

28. In the *Western Sahara* case, the Court considered different regional concepts of sovereignty as basis for territorial sovereignty in international law. The Court said:

"Morocco requests that, in appreciating the evidence, the Court should take account of the special structure of the Sherifian State. No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today. Morocco's request is therefore justified. At the same time, where sovereignty over territory is claimed, the particular structure of a State may be a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty.

That the Sherifian State at the time of the Spanish colonization of Western Sahara was a State of a special character is certain. Its special character consisted in the fact that it was founded on the common religious bond of Islam existing among the peoples and *on the allegiance of various tribes to the Sultan*, through their caids or sheikhs, rather than on the notion of territory . . . Political ties of allegiance to a ruler, on the other hand, have frequently formed a major element in the composition of a State. *Such an allegiance, however, if it is to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority.* Otherwise, there will be no genuine display or exercise of State authority. It follows that the special character of the Moroccan State and the special forms in which its exercise of sovereignty may, in consequence, have expressed itself, do not dispense the Court from appreciating whether at the relevant time Moroccan

sovereignty was effectively exercised or displayed in Western Sahara.” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 43-44, paras. 94-95; emphasis added.)

29. In my opinion, sovereignty over Zubarah appertained to Bahrain through the period from 1868 to 1937 as a result of the presence in the region of the Naim tribe, which clearly manifested its allegiance to the Ruler of Bahrain and accepted his political authority. The record provides numerous examples of this relationship (Reply of Bahrain, pp. 124-126).

30. I observe that Qatar, for its part, has been unable to provide any evidence of Al-Thani or Ottoman activities in the Zubarah region prior to 1937.

31. I find a letter written by the British Political Resident, Hickinbotham, in May 1937, pertinent both to events which unfolded later in that year as well as to the alleged sovereignty of Qatar at that time to the whole of the peninsula. He wrote:

“The Adviser [Belgrave] informed me that the Bahrain Government had a counter proposal ready if necessary, the basis of which was that they were prepared to concede all the area directly extraneous to Zubarah itself provided the Bahrain Government were permitted to retain Zubarah itself to do with exactly as they wished. We were agreed that provided any vestige of power remained with Shaikh Abdullah [or Qatar], there was no reason why a compromise should not be satisfactorily arrived at in this form — whilst the Na'im should be given the right to decide by plebiscite as to which ruler they desire to serve, and of course *should they move into any portion of Qatar belonging to the Shaikh of Qatar*, after having admitted, for example, Bahrain nationality, they would then *ipso facto* be liable for payment of all taxation that at the time had been imposed upon other adherents to Qatar.” (Memorial of Bahrain, Vol. 3, Ann. 128, p. 675; emphasis added.)

32. There was thus no doubt in the mind of the British Political Resident in that crucial year of 1937 that there were portions of Qatar which did not then belong to the Sheikh of Qatar. The Zubarah region was manifestly one of those “portions”.

33. In sum, the evidence provided by Bahrain, in my opinion, establishes a regular and consistent Naim presence in the Zubarah region until 1937. Sovereignty over Zubarah appertained to Bahrain prior to the events of 1937. I now come to those events.

34. As I wrote earlier, the Zubarah region was then inhabited by the Naim tribe. In July 1937, the Naim tribesmen who lived in Zubarah were attacked by the Al-Thani and their adherents and forcibly evicted from the region. First-hand recollections of this battle have been provided to the Court. (See Memorial of Bahrain, paras. 283-284.)

35. Having examined the record before the Court, I believe that the events of July 1937 can only be characterized as acts of conquest by Qatar. Bahrain has never acquiesced in the seizure by Qatar of Zubarah (see Reply of Bahrain, Sect. 4.6, at pp. 140 *et seq.* See also Memorial of Bahrain, Vol. 5, Ann. 301, pp. 1216-1217).

36. If the seizure of Zubarah, in 1937, by an act of force, were to occur today, there would be no doubt that it would be unlawful and ineffective to deprive Bahrain of its title. The position now prevailing and fully accepted in international law is that the use of force is unlawful and, by itself, ineffective to bring about a change of title.

37. In 1937, however, the law was in a process of evolution and the situation was not so clear.

38. During the oral pleadings, the Court was referred to the Fifth Edition of Oppenheim's *International Law*, published in 1937, and the Ninth Edition, published in 1992 (CR 2000/11, pp. 39-41). In this last edition, the authors, Sir Robert Jennings and Sir Robert Watts, opined that it should not be assumed that forcible takings of territories in the pre-United Nations Charter days can be protested today.

39. The authors of the Ninth Edition conclude their comments with the following observation: "This conclusion is fortified by the principle of stability which must be at least a significant factor in questions concerning territorial sovereignty" (at p. 705). I agree.

40. I have thus come to the conclusion that the Court is not competent to judge and declare today, more than 60 years after the *forcible taking*, that Bahrain is and at all material times has remained sovereign over Zubarah.

41. For these reasons, I conclude that Qatar has sovereignty over Zubarah.

JANAN ISLAND

42. The Court has found that the State of Qatar has sovereignty over Janan Island, including Hadd Janan. In this separate opinion, I set out the reasons why, in my view, the State of Bahrain has sovereignty over Janan Island, including Hadd Janan.

43. The Court has ruled that the 1939 British decision was dispositive of the question of title to the Hawar Islands in favour of Bahrain. The critical issue in relation to Janan is whether, by the normal canons of interpretation, that decision is to be understood as having, at the time, included Janan. The Court's sole task is to interpret the 1939 decision.

44. The letter containing the 1939 decision states:

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

sideration of the evidence adduced . . . they have decided that *these Islands* belong to the State of Bahrain and not to the State of Qatar” (Counter-Memorial of Bahrain, Vol. 1, p. 150, para. 362; emphasis added).

45. Was the generalized reference in the 1939 British decision to the “Hawar Islands” to be understood as including or excluding Janan? In my opinion, it can only be understood as including Janan.

46. There is ample evidence in the record before the Court that the terms “Hawar Islands Group”, “Hawar Group of Islands”, “Hawar Group” and “Hawar Islands” were used synonymously by all interested parties in the 1930s.

47. In the 1930s and before, the general tendency was to perceive Janan as being part of the Hawars. This was not based on any geological studies, nor on measurements of sea depth between Jazirat Hawar and Janan. Each side has sought to proffer maps suggesting that the Hawars, including Janan, belonged to them. There is no map evidence to suggest that the British, the Turks, or others, differentiated Janan from the Hawars. It is clear that in the 1930s the British would have thought that the attribution of sovereignty for “the Hawars” covered Janan, too.

48. Nor was there anything in the conduct of Bahrain and Qatar, in the period prior to the 1939 decision, which would have led Great Britain to think that it was facing anything more than a single problem in deciding sovereignty in the islands off the west coast of Qatar.

49. In 1936, against the background of negotiations for an oil concession over Bahrain’s unallotted area, the Ruler of Bahrain provided a list of islands that formalized his claim to the Hawars. The list included Janan island. There was no indication, either internally or in correspondence with the Ruler of Bahrain, that Britain regarded Janan as outside the Hawars, and thus as having been included in PCL’s 1935 Qatar concession.

50. Janan had been specifically mentioned in the 1936 Bahrain list which appeared to be the first formal written statement by Bahrain of its sovereignty over the Hawar Islands. The 1937 Bahrain list mentioned neither Janan or Hawar Island nor other specific islands. It simply refers to the “Howar peninsula”. There is every reason to read that phrase by reference to the more specific listings of the previous year, and thus as including Janan.

51. The 1938 list was proffered in immediate connection with the decision to be made on the Hawar Islands. In that context, one might have expected a total listing of all claimed islands and islands off the west coast of Qatar. However, I find it entirely persuasive that in the light of the two earlier lists submitted within the previous two years, Bahrain saw

no need to repeat but in fact chose to do something different — to attempt to substantiate a claim already made through now identifying rocks and islands with beacons. This list was passed by Belgrave, who within a few days also passed a concession map clearly showing Janan as part of the Hawar Islands concession area.

52. Finally, I note that in the claim presented by Qatar in respect of the 1939 British decision, it is never suggested that, whatever the outcome of the Hawars might be, Janan was a separate issue, in which Qatar's claim was as strong, or stronger.

53. In coming to its conclusion in respect of Janan Island, the Court has attached a great deal of importance to the letters sent on 23 December 1947 by the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain. The Court has found that the British Government, in thus proceeding in 1947, "provided an authoritative interpretation of the 1939 decision and of the situation resulting from it" (Judgment, para. 164).

54. In my opinion, the 1947 letters do not purport to determine ownership of any island, large or small. The letters, by any normal rule of interpretation, do not purport to interpret the 1939 decision. The critical issue for the Court is not whether the 1947 sea-bed delimitation, in its references to Janan, was or was not right. If the 1939 British decision did indeed include Janan as part of the Hawars (as I believe it does), the statement in the letter of 1947 that "Janan Island is not regarded as being included in the islands of the Hawar Group", cannot lawfully revise the 1939 decision. Finally, in my opinion, it carries little conviction even as an interpretation by an official, in 1947, of a governmental decision in 1939, because it does not address the documentation that would be relevant to such an interpretation.

55. Finally, the context of the 1947 letters is also important. The purpose of the letters was not to notify the Rulers of a decision which they would be entitled to respect, but merely to *inform them that the British authorities would henceforth consider the sea-bed as being divided by the line described therein, particularly in the course of their dealings with PLC and BAPCO, the two competing oil companies concerned.* In sum, it appears clear to me that the 1947 letters purported only to express the policy of the United Kingdom and had no legal significance whatsoever regarding ownership of Janan Island.

56. In closing, I observe that the fact that Janan Island has always been considered to be one of the Hawar group of islands appears to be acknowledged by Qatar when it cites Lorimer's 1908 description of the Hawar Islands. Lorimer wrote that "the island (Jaruzar Hawar) is adjoined on the north by Jazirats Rubadh and on the south by Jazirat Janan" (see Memorial of Qatar, para. 5.38).

57. For the foregoing reasons, I find that Janan, including Hadd Janan, must be considered to be part of the Hawars over which Bahrain has sovereignty. In the circumstances, I have thus voted against paragraph 3 of the operative part of the Judgment.

MARITIME DELIMITATION

58. Although I have some serious reservations with the Court's reasoning in respect of certain aspects of the maritime delimitation, particularly its treatment of Fasht al Azm, Qit'at Jaradah and Fasht ad Dibal, I have decided to vote for paragraph 6 of the operative part of the Judgment.

59. However, I wish to stress that I do not agree with that part of the single maritime boundary that runs westward between Jazirat Hawar and Janan. Since in my view Janan is part of the Hawars and thus belongs to Bahrain, I agree with my colleague Judge Kooijmans that the boundary should run south-westward between Janan and the coast of the peninsula. Since the Court, however, has ruled that Janan belongs to Qatar and has drawn the maritime boundary on that basis, I have elected not to express my disagreement by casting a negative vote.

(Signed) L. Yves FORTIER.