

AN ANALYSIS OF IRAN-IRAQ BILATERAL BORDER TREATIES

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I. INTRODUCTION

On September 22, 1980, Iraqi ground forces crossed the border into Iran, marking the official commencement of the Iran-Iraq war.[1] The war culminated a long history of tense relations between Iraq and Iran with the disputes traceable for thousands of years.[2] Never before had past tensions escalated into the level of fierce fighting that would characterize the next eight years of war. One of the primary reasons for such long standing and successful conflict minimization was the ability of the two countries to reach agreements in the form of treaties.[3] Although many of these treaties were short-lived, the overall treaty relations between the two countries provide an excellent opportunity to examine the strength and weaknesses of bilateral treaties along with the dynamics involved with a commitment to treaty formulation. The 1969 Vienna Convention on the Law of Treaties ("Law of Treaties"), the codified summation of the international law on treaties, merits particular attention. An examination of the historical relations between Iran and Iraq, focusing on the treaty development between the two States, is the basis for this analysis. In particular, claims as to which State consented, terminated, or violated the various treaties is analyzed, comparing each State's use of international legal principles as expressed in the Law of Treaties.

II. THE HISTORY OF IRAN-IRAQ TREATY LAW

A. The Early Years: The Ottoman Empire Versus Persia

Iraq did not gain independence until the Treaty of Lausanne of 1923,[4] although Iraq continued under the tutelage of Great Britain until the Anglo-Iraq Treaty of 1930.[5] In the years preceding its independence, Iraq was part of the Ottoman Empire. The Ottoman Turks had been unsuccessful in expanding their power westward and thus turned east starting in the 16th century, managing to seize Basra, but stopping short of Persia.[6]

The Persian[7] Empire was formed in the sixth century B.C. by King Cyrus.[8] Before the Ottoman Empire came into the Middle East region nearly 2000 years later, Persia had fought many battles trying to both expand its power and to defend itself. Regardless of the outcome of those battles, Persia always maintained a national identity with its own language, traditions, and culture of Indo-European descent.[9] The Persian religion of Zoroastrianism, however, did not survive. The defeat of Persia by Arab forces at Qadisiyah in 637 A.D.[10] resulted in a flourishing of Islam and the gradual banishment of Zoroastrianism throughout the Middle East, including Persia.[11]

When the Ottoman Empire established itself as the major power in the area, tensions between the two States immediately began to rise. The two Empires adopted opposing branches of the Islamic faith, while continually engaging in frequent but relatively mild skirmishes along an undefined border.[12]

Two main areas formed the basis of the territorial disputes between the States. The first area of dispute is the river known as the Shatt al-Arab.[13] This area has always been extremely valuable to Iraq, Iran, and their predecessors. For the Ottoman Empire and Persia, the Shatt al-Arab always represented the extent of their territorial reach.[14] Today, both Iraq and Iran have very strategic and important ports along the Shatt al-Arab.[15] For Iraq, the Shatt al-Arab represents its only true outlet to the Persian Gulf. The Shatt al-Arab has been referred to as "a vital artery of communications for Iraq." [16] Iraq's very limited direct access to the Gulf through its short coast line, along with the fact that virtually all of its major ports are on the Shatt al-Arab,[17] account for Iraq's extreme sensitivity concerning the use of the Shatt al-Arab.[18] Iran, on the other hand, has a very long coast line along the Persian Gulf. Nonetheless, it too has its most significant oil refinery on the Shatt al-Arab and has long depended on the Shatt al-Arab to help foster its trade.[19]

The second area of contention has been the lands north of the Shatt al-Arab which separates the two countries.[20] This area is largely inhabited by Kurds, who have long been opposed to Iraqi control.[21] Over the first two hundred years of the Ottoman-Persian existence, this area was never given a definitive border. Thus, desire for control over this northern area was the main impetus behind the early conflicts between the Ottoman Empire and Persia. In response to these conflicts the two countries, since 1639, began a long series of treaty formations, violations and abrogations.[22]

Before the Ottoman Empire and Persia could even begin to establish their common border, a cessation of hostilities was first needed. Therefore, the first series of treaties between the two were basically armistices.[23]

Although the first formal treaty, the Treaty of Zohab of 1639,[24] laid down a very general border which simply "made a broad division between the Persian plateau and the Mesopotamian plain," [25] the Treaty was nonetheless referred to as a sulh.[26] This type of treaty was written under Islamic principles, and was not to have a binding affect of more than ten years.[27] However, the two States did not sign another agreement until the Treaty of Kurda in 1746,[28] which reaffirmed the borders laid out in the Treaty of Zohab.[29] Once again, this Treaty was not one that was meant to last, and it soon became necessary to draw up yet another treaty.

The next treaty in this succession was the Treaty of Erzerum in 1823.[30] This Treaty reaffirmed the basic ideas set forth in two previous treaties while also ending the war of 1821-23 between the Ottomans and the Persians.[31] In addition, the Treaty added two new aspects to the border relationship. First, the Treaty established border zones instead of the past frontier lines.[32] Second, the Treaty referred back to the Treaty of Kurda's principles of reconciliation and normalization of relationships between the Ottoman Empire and Persia. At the same time, the Treaty of Erzerum, laid down the foundations for the Second Treaty of Erzerum of 1847.[33]

The main reason for a second treaty was that the first had essentially disintegrated. One year after the first treaty was signed, Persia backed a Kurdish rebellion in northeastern Iraq.[34] Fourteen years after the first Treaty of Erzerum had been signed, the forces of the two States again engaged in light fighting.[35] This time, the Ottoman troops attacked the Persian port city of Muhammara, located on the Shatt al-Arab.[36] Both of these acts constituted open and direct violations of the Treaty of Erzerum, which had been a peace treaty and not a simple truce.[37] These breaches of the Treaty made it clear that yet another treaty, one which better defined the Persian-Ottoman border, was needed.

The need for a new treaty was so great that the Russian and British governments, both of which had great stakes in the Middle East, became actively involved in the formation of the second treaty.[38] The second Treaty of Erzerum[39] began by reaffirming the earlier agreements that had been signed as to the intentions for peace and normalization of relations. The Treaty then went on to detail precisely what was meant by those words and to further define the border between the two States. The Treaty declared that the southern part of the Shatt al-Arab would be the starting point for the border between the two States.[40] In so doing, the eastern bank of the Shatt al-Arab was to be Persian, while the Ottomans were given full sovereignty over the areas lying on the west bank.[41] One of the key provisions of the Treaty was that it granted Persian vessels free navigation of the Shattal-Arab waterway,[42] thereby implying that the Ottomans had complete control over the Shatt al-Arab in the first place.[43] This implication was affirmed in an Explanatory Note issued by the British and Russian governments.[44]

The second Treaty of Erzerum also set out to establish more clearly the northern part of the Ottoman-Persian border. To do this, the Treaty provided that a commission be appointed whose task it would be to demarcate the northern border.[45] Once again, however, the two sides were soon in conflict. This time the dispute was not with arms, but rather on the interpretation of some of the Treaty's key provisions. For example, the nomadic tribes which traveled between the two, as well as those tribes that were spread across the border, especially around the Shatt al-Arab, were a constant source of friction between the two States for purposes such as military conscription.[46] Other disputes arose as the demarcation commission found itself in a constant argument over where exactly to mark the frontier.[47] The two sides did manage to agree in 1869 that the status quo should be preserved[48] in defining the boundary, but the vague frontiers established in the previous treaties did not make the commission's task any easier. These debates were so frequent and unending that by the time World War I commenced in 1914, the commission still had not finished its task?

The Tehran Protocol in 1911,[50] the Constantinople Protocol in 1913,[51] and the Delimitation Commission's agreement in 1914,[52] however, did help to clarify the territorial limits, which had been roughly laid out in the second Treaty of Erzerum. The Teheran Protocol was created so that disputes regarding the demarcation process would be submitted to an arbitration tribunal at the Hague.[53]

The Constantinople Protocol had a much greater impact. First and foremost, "the protocol reasserted the Ottoman Empire's sovereignty over the entire Shatt al-Arab up to the Persian side." [54] Additionally, the Protocol marked the first time that the

concept of the "thalweg" [55] was introduced into the border negotiations between the two countries. Although the Protocol limited the use of this concept to very specific waterways around islands that were given to Persia, its significance cannot be understated in the formation of later treaties and agreements. In the end, the Protocol marked the last significant compromise reached by the Ottomans and Persians before the outbreak of World War I.

B. The Emergence of Iraq and the Corresponding Need for More Agreements

World War I marked a dramatic change in the balance of power in the Middle East. The defeat of the Ottoman Empire resulted in the creation of a number of new independent states in the region. The treaties which created an independent Iraq were the Treaty of Sevres of 1920[56] (never ratified by Turkey)[57] and the Treaty of Lausanne of 1923,[58] which not only confirmed the establishment of Iraq in 1920, but also further established Iraq's borders.[59] The eastern border of Iraq was to be exactly that which the Ottoman Empire had held before.[60] As successor to the Ottoman Empire's territorial fights in the area, Iraq also inherited and became bound by the previous agreements between the Ottoman Empire and Persia.[61] This pleased neither Iraq nor Persia.

As a new state, Iraq had to rely on other States to establish its territorial borders and to help as it struggled to create its first independent government. The main foreign power to provide such help was the United Kingdom. The U.K. had begun to establish itself as a major force in the area long before World War I, but immediately after World War I its role became even greater.[62] The U.K.'s interest in the Middle East, however, was not universally well received. Iraq depended on the U.K. to help Iraq secure its borders, since Iraq needed time to organize an effective army. At the same time, the U.K. wanted both to secure unlimited access to the Shatt al-Arab as well as to maintain friendly relations with Persia whose importance in the Middle East had grown with the defeat of the Ottomans and the discovery of oil in the region. The result was that Iraq was upset that it did not get even greater rights of control over the Shatt al-Arab.[63] Persia, on the other hand, demanded a redrawing of the lines between the two countries, especially in the area of the Shatt al-Arab. In fact, because of the border issue, Persia did not even recognize the State of Iraq until 1929, at which time Persia still disputed Iraq's claim to the entire Shatt al-Arab.[64]

Shortly after Persia's recognition of Iraq, frictions again emerged between the two neighbors. In November 1934, Iraq asked the League of Nations to look into alleged violations of past Ottoman-Persian agreements by Persia.[65] Iraq's principle claims were that Persia had erected security posts in Iraqi territory, that Persia was cutting off water to Iraqi towns through the construction of dams,[66] and that Persia was interfering in the navigation of the Shatt al-Arab, all in express violation of the prior agreements.[67]

Persia responded to the Iraqi claims with a twofold argument. First, Persia argued that the agreements, to which Iraq claimed it had succeeded, were not binding. Persia claimed it had never formally recognized the earlier agreements with the Ottomans, especially the Delimitation Commission of 1914.[68] Persia further stated that since it had always objected to the provisions of the Protocol it was not valid due to the lack of joint consent, "based on the fact that Britain and Russia, as the dominant

imperialist powers in the area at the time, forced their will and interests on the Persian and Ottoman empires " [69]

Iraq's contention was that the importance of the Shatt al-Arab to Iraq was so great that principles of equity demanded that it have exclusive right of claim over the entire Shatt al-Arab.[70] Persia, on the other hand, argued that the thalweg principle should be applied to the entire length of the Shatt al-Arab as dictated by principles of international law.[71] These two arguments have always been central to each side's claims of how the Shatt al-Arab should be divided between the two States.

1. The 1937 Treaty

The result of Iraq's complaint to the League of Nations was a renewed round of negotiations between Iran and Iraq dealing with their border disputes.[72] In turn, these negotiations led to the creation of a new Iran-Iraq boundary treaty. The Boundary Treaty between the Kingdom of Irak and the Empire of Iran[73] marked the first major agreement between the newly established States of Iraq and Iran. The Treaty expressly sought the definitive settlement of " the question of the frontier between the two States," [74] and it even confirmed the validity of the Constantinople Protocol and the Minutes of the Delimitation Commission of 1914.[75] Unfortunately, like the others before it, the 1937 Treaty did not last.

The 1937 Treaty, by recognizing the 1913 Protocol, recognized Iraq's claim of sovereignty to almost the entire Shatt al-Arab. However, the 1937 Treaty, as the Protocol before it, carved out further exceptions where the thalweg principle would be used to divide the confluence around certain key Iranian port cities.[76] Furthermore, the Treaty provided that the two countries would divide any and all dues paid by foreign shipping vessels using the Shatt al-Arab,[77] that each country's vessels of war would have unrestricted passage,[78] and that either country could permit any third party to use the Shatt al-Arab for the passage of its warships.[79]

The outbreak of the Second World War, just two years after the signing of the 1937 Treaty, quickly changed the outlook of the two countries. Between 1941 and 1946, both countries were occupied by foreign forces.[80] When these forces withdrew, they left behind two States with very unstable governmental structures.[81] Revolutions in both countries brought about new calls for the redrawing of the boundary lines.[82]

2. Iraq's Denunciation of the 1937 Treaty

During the late 1950's each side wanted more land and control over the Shatt al-Arab.[83] Following the 1958 coup d'etat in Iraq, Iran called for a redrawing of the border along the Shatt al-Arab using the thalweg principle.[84] Iraq responded by claiming complete sovereignty over the entire Shatt al-Arab without regard to any of the exceptions in the Treaty.[85] Iraq did, however, continue to pilot ships into Iranian ports, but with the assumption that it did so because it controlled the entire waterway.[86]

Iran ignored Iraq's attempts to challenge Iran's free access to the waterway.[87] In early 1961, Iraq refused to aid any oil tankers in docking and anchoring in the Iranian

refinery of Abadan.[88] The economic affects of this action were so harsh that Iran ceded to the Iraqi terms? The Treaty itself, however, was still thought to be in force by both sides until 1969.

3. Iran's Abrogation of the 1937 Treaty

Further deterioration of relations between the two States[90] finally resulted in Iran's abrogation of the Treaty on April 19, 1969.[91] Iran did not take long to recover from the affects of the Abadan incident and began taking control over more and more of the Shatt al-Arab. Using military escort ships, Iranian tankers navigated the Shatt al-Arab without any aid from Iraqi pilot ships.[92] This led to Iraqi complaints during the mid-1960's that the government of Iran was once again violating the provisions of the 1937 Treaty. Furthermore, Iraq threatened to blockade the entire Shatt al-Arab if Iran did not cease its alleged violations of the 1937 Treaty. However, the threats and complaints did not stop Iran. The economic and strategic significance of the Shatt al-Arab was still high on the list of priorities for both countries.[93]

The Iranian denunciation in 1969 resulted in a predictable rise in the tensions dividing the two countries. In 1971, Iran acted to secure more control over the Persian Gulf by occupying three strategically located islands in the waterway.[94] In response, Iraq broke off diplomatic ties with Iran.[95] The two countries continued to aggravate each other both in the Shatt al-Arab and in the area to the north where the Kurds were located. The Kurdish population, which wanted an independent state,[96] had its greatest concentration in Iraq. The religious and philosophical differences separating the Arabs and the Kurds[97] in Iraq made it impossible for the two cultures to happily coexist. These differences were further antagonized by Iran which continually supported Kurdish moves for independence in Iraq.[198]

Iran and Iraq managed to reestablish diplomatic ties in 1973 for the purpose of renegotiating their boundary dispute. But before they could conduct any meaningful negotiations, hostilities broke out in 1974.[99] The hostilities were concentrated along the northern border and the Kurds were at the heart of the conflict.[100] The Kurds, demanding that they be granted their right to self-government, began to protest vehemently. In reaction, the Iraqi government used military force not only to quell the protests but to also drive the Kurds out of Iraq. Iran responded by coming to the aid of the Kurds and even came into direct conflict with Iraqi troops.[101]

Iraq protested to the U.N. Security Council that the Iranians had violated the territorial integrity of Iraq. Iran responded by pointing out that Iraq had started the fighting by shelling Iranian frontier posts.[102] However, the fighting did not last long. Neither side was able to get the quick victory it was looking for[103] and, therefore, U.N. mediation efforts managed to arrange a temporary cease fire in March 1974.[104] This cease fire was tenuous, and further border clashes broke out in August 1974. These clashes continued sporadically until January 1975.[105]

During the fighting of 1974, Iraq and Iran did manage to meet in talks aimed at the creation of a new treaty that could reestablish the border between the two states. These talks were aided by a convergence of various factors. For Iran's part, it sought to limit the influence of the Soviet Union in the Middle East. At the same time, Iran became more willing to put pressure on Israel[106] (an Iraqi objective) in order to

strengthen the leverage of the Organization of Petroleum Exporting Countries (OPEC).[107] Iraq also wanted to see a more strongly united OPEC. To that end it sought to break out of its self-imposed exile from the Arab world while letting its ties with the USSR wane. [108] Thus, during the OPEC meetings in Algiers in March, 1975, the two sides reached a significant reconciliation referred to as the Algiers Agreement of March 6, 1975.[109]

4. The Algiers Agreement

The Algiers Agreement (hereinafter Agreement) provided that the two sides agreed to:

- 1) Carry out a final delineation of their land boundaries in accordance with the Constantinople Protocol of 1913 and the Proceedings of the Border Delimitation Commission of 1914.
- 2) Demarcate their river boundaries according to the thalweg line. Restore security and mutual confidence along their joint borders
- 4) Consider the aforesaid arrangements as inseparable elements of a comprehensive solution. Consequently, any infringement of one of its components shall naturally contradict the spirit of the Algiers Accord [110]

The first two of these provisions are the most significant for they establish the basis for the Iran-Iraq border. Iran agreed to abide by the 1913 Protocol in establishing the land boundary, which detailed the border between Iran and Iraq north of the Shatt al-Arab. Iraq finally conceded to Iran's long standing demand that the thalweg principle be used to delimit the border in the Shatt al-Arab.

5. The Treaty of 1975

Immediately following the Agreement, Iran and Iraq resumed intense negotiations to further specify the details laid out in the Agreement. These negotiations concluded with the signing of the Treaty Concerning the State Frontier and Neighbourly Relations between Iran and Iraq[111] signed on June 13, 1975. The Treaty affirmed the principles of the Algiers Accord while at the same time Iran implicitly agreed to end its support of the Kurdish rebellion in Iraq.[112] The Treaty also contained two extremely important articles. Article 4 provided that in the event that any of the first three articles were breached, the Treaty as a whole would be considered breached. Article 6 provided for specific measures to be taken in the event that there was a dispute either to the interpretation or implementation of the Treaty. These key articles will be further expounded on later in the determination of the validity of Iraq's denunciation of the Treaty in 1980.[113]

The 1975 Treaty "was ratified by both States and its implementation went ahead with considerable smoothness." [114] Between 1975 and 1979, Iran and Iraq met frequently with great success, including the signing of six bilateral agreements in July of 1977.[115] One of the most significant of these agreements was the determination to answer the boundary question and to order troops to withdraw a distance of one kilometer from the border.[116]

6. Abrogation of the 1975 Treaty by Iraq

The revolution in Iran along with the rise to power in Iraq of Sad-dam Hussein marked the start of a rapid deterioration in relations between the two States. In February 1979, the Ayatollah Khomeini came to power following the overthrow of the Shah's Government in Iran.[117] Khomeini had lived in Iraq until 1978 when he was expelled from the country as Iraq and Iran improved relations.[118] With Khomeini's rise to power, new tensions became inevitable.

Despite Iraq's previous expulsion of the new Iranian leader, Iraq sent a telegram of congratulations to the Ayatollah on February 13, 1979.[119] This telegram, along with later follow-up cables and diplomatic overtures, was meant to convey Iraq's wishes to continue the recent improvement in friendly relations between the two countries.[120] Iran, however, largely ignored the diplomatic gestures sent by Iraq.[121] As the year pressed on, Iraq grew more concerned about the ability of the Ayatollah to control the Iranian people. Its frequent cables asked Iran to make certain that it abided by the provisions of the Treaty of 1975. A further lack of response on the part of Iran brought out the extremist factions on both sides of the border.[122]

The Iranian silence in response to the Iraqi cables and the new Iranian doctrine of exporting its Islamic revolution to its neighbors made Iraq very fearful that Iran did not intend to honor its Treaty obligations.[123] Once Iraq realized that Iran did not want to continue the previous friendly relations, Iraq felt that it was in a position to demand a revision of the 1975 Treaty even though Iran had not yet breached any article of the Treaty. This was mainly due to Iraq's belief that the revolution in Iran had so disintegrated the Iranian army that Iran would be unable to adequately defend itself.[124] Iraq hoped that it could recover some of the territory of the Shatt al-Arab that it had ceded to Iran.[125] This hope turned into a threefold demand by Iraq on Iran. The first was to abrogate the 1975 Algiers Treaty and restore Iraqi rights over the Shatt al-Arab; the second was to evacuate the Three Islands (in the Persian Gulf); and the third was to grant full autonomy to both Iranian Kurds and the Arabs in Khuzistan Province.[126] These demands were rejected outright by Iran.[127] Tensions on the border started to flare.

In 1980, violations of territorial sovereignty were alleged by both countries in growing numbers.[128] Finally, on September 4, 1980, Iranian troops located in unreturned Iraqi frontier towns[129] began shelling several villages located in Iraqi territory.[130] For Iran, this marked the official start of the Iran-Iraq war.[131]

Iraq did not hesitate in condemning the Iranian action, indicating that it would not stand idly by while Iran committed such illegal acts.[132] On September 7, 1980, Iraq forcibly reclaimed the area of Zain al-Qaws, territory that was to have been returned to Iraq following the 1975 Treaty.[133] The following day, Iraq demanded that the rest of the unreturned territories be given back without further delay.[134] On September 11, 1980, Iraq reiterated its position that Iran cease hostilities and return Iraq's territory.[135] Iran choose to simply ignore these cables.[136]

Finally, on September 17, 1980, Iraq declared the 1975 Treaty abrogated. Iraq claimed that Iran's frequent and blatant violations of the accord necessitated the Iraqi announcement.[137] In abrogating the 1975 Treaty, Iraq stated that its sovereign

rights to the entire Shatt el-Arab should be reestablished as they had existed before the Treaty.[138] In response, Iran sent a letter to the United Nations which denounced and rejected the Iraqi unilateral abrogation of the Treaty.[139] On September 22, 1980 at 2:00 p.m. Iranian time,[140] Iraq launched a full scale assault on Iran along the entire length of the border between the two countries.

III. INTERNATIONAL TREATY PRINCIPLES

A. Introduction

Historically, relations between Iran and Iraq have never been amicable. Their history, however, does provide a unique opportunity to study the legal principles of treaty creation, implementation, interpretation, and termination.[141] This section examines these issues in determining what the legal status of the 1937 and 1975 Treaties was when war broke out in 1980.

B. The Abrogation of the 1937 Treaty

On April 19, 1969, Iran abrogated the 1937 Treaty.[142] The Iranians argued that there existed three different grounds by which it could legally abrogate the Treaty.[143] The first was that it was the Iraqi government which had first breached the 1937 Treaty. Iran claimed that terms laid out in articles 4 and 5 of the Treaty, along with clause 2 of the attached protocol, had never been fulfilled by Iraq, thus causing the Treaty to be materially breached.[144] The Law of Treaties defines a material breach as consisting of "(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty." [145]

To this end, Iran noted that the asserted Convention provided for in article 5[146] of the 1937 Treaty had never been established. The Convention was to deal with all questions relating to the navigation of the Shatt al-Arab.[147] Clause 2 of the protocol attached to the Treaty further stated that the Convention was to be concluded within one year after the signing of the Treaty.[148] The Convention was never adopted due to a disagreement over how the river should be managed. Iran asserted that such management should be done equally by the two countries, while Iraq claimed exclusive right of control over the Shatt al-Arab's management. [149]

Article 31 of the Vienna Convention states "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [150] Thus, the Iranian argument is not without merit. The overall object of the 1937 Treaty was to reaffirm Iraq's sovereignty to the whole Shatt al-Arab.[151] At the same time, however, the Treaty also sought to affirm the "common interest" shared by both countries in being able to freely navigate the Shatt al-Arab, including the passage of "vessels of war," as well as in the collection of dues for the "exclusive" purpose of maintaining the Shatt Al-Arab.[152] The Convention was to be aimed at seeing the specific details of the "common interest" more fully elaborated. Although the Convention never came to fruition, it would appear in light of the 'object and purpose' of the 1937 Treaty that Iran and Iraq should share equally in the maintenance of the Shatt al-Arab. This, however, never seemed to be the case.

Iran accused Iraq of using the dues collected "to build several hotels and an airport at Basra." [153] Further, it charged that Iraq had "conducted the affairs of the Shattul-Arab [sic] in a unilateral manner illegally keeping the administration under its own control." [154] These charges, if accurate, would constitute a breach of the 1937 Treaty, for Iraq would have clearly contravened the intent of the Treaty to encourage joint participation in the administration of the Shatt al-Arab.

Iraq's response did not deny these charges. Instead, the Iraqi government pointed to Iranian breaches of the 1937 Treaty. Iraq's main contention was that Iranian troops massed on the border had "actually been used in violating Iraqi sovereignty in Shatt al-Arab " [155] Iraq's basic argument was that since the 1937 Treaty had confirmed Iraqi sovereignty over the entire Shatt al-Arab, it was the exclusive province of Iraq to administer the area.[156] This "principle of international law," as referred to by Iraq,[157] allows for joint administration of areas under the exclusive jurisdiction of one country as may be agreed upon by express agreement between two States. In this case, there was a non-self-executing agreement that such joint administration should take place.[158] Because the actual Convention designed to give Iran the power of joint administration was never convened, Iran never received actual authority to have joint powers of administration.[159] Thus, Iran's argument that Iraq had materially breached the 1937 Treaty does not appear valid.

The second basis for Iran's abrogation was based on the doctrine of *rebus sic stantibus*. [160] The Law of Treaties states that a "fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary .," [161] The 1937 Treaty clearly falls under this rubric, thus extinguishing Iran's use of the doctrine.

Iran, however, tried to invoke the doctrine of *rebus sic stantibus* to argue further that the 1937 Treaty was invalid because of lack of consent.[162] Iran claimed that the overwhelming influence of the U.K.'s presence in the Shatt al-Arab [163] and its close alliance with Iraq had made it impossible for Iran to have freely consented to the 1937 Treaty.[164] Iran clearly sought to establish the fact that the failure of the Treaty to follow the *thalweg* principle was a direct indication of Iran's inability to have freely negotiated the terms of the 1937 Treaty.

However, there are two weaknesses in Iran's argument. First, although Article 11 of the Law of Treaties does list the various means by which a State may consent to a treaty,[165] there also exists the principle of international custom and practice. The State of Iraq and its predecessor [166] had always claimed and exercised complete sovereignty over the Shatt al-Arab. Iran, furthermore, acknowledged Iraq's rights over the Shatt al-Arab through its recognition of the 1913 Protocol, which was reaffirmed in the 1975 Treaty.[167] By negotiating for the right of free passage through the Shatt al-Arab, Iran clearly realized Iraq's historic claim to sovereignty over the entire River.[168]

Secondly, one must note that to divide the Shatt al-Arab equally between the two States using the *thalweg* principle is difficult. The *thalweg* of the Shatt al-Arab does not approximate the median line of the river. Instead, the *thalweg* crosses from one bank to another in a constant yet inconsistent manner.[169] The winding *thalweg* made it clear that the Shatt al-Arab's border could not be based on conventional

Iraq had not brought up the issue of nonconsent until it claimed that the Treaty was abrogated. Following the downfall of the Shah and the resulting turmoil in Iran, Iraq, knowing that it was suddenly in a superior negotiating position, did not claim that it had been coerced until it announced the abrogation. This clearly shows Iraq's intent to justify its actions based on principles which Iraq itself had earlier argued against when set forth by Iran. The sanctity which treaties are given in international law, as confirmed in the preamble clauses to the Law of Treaties,[182] does not and cannot allow for such arbitrary arguments to succeed in justifying unilateral declarations.

The first two arguments by Iraq involve the interpretation of the 1975 Treaty. The Law of Treaties instructs parties to interpret treaties with regard to their ordinary meaning in light of their overall purpose and objective. In examining the Iraqi interpretation, it is necessary to see exactly what Articles 4 and 6 of the 1975 Treaty state.

Article 4. The ... Parties confirm that the provisions of the three Protocols ... referred to in articles 1, 2, and 3[183] above . . . as an integral part thereof shall be final and permanent. They shall not be infringed under any circumstances and shall constitute the indivisible elements of an over-all settlement. Accordingly, a breach of any of the components of this over-all settlement shall clearly be incompatible with the spirit of the Algiers Agreement.

Article 6. 1. In the event of a dispute regarding the interpretation or implementation of this Treaty,... any solution to such a dispute shall strictly respect the course of the Iraqi-Iranian frontier referred to in articles 1 and 2 above and shall take into account the need to maintain security on the Iraqi-Iranian frontier in accordance with article 3 above.

2. Such disputes shall be resolved in the first instance by... direct bilateral negotiations . . . [or through] the good offices of a friendly third State ... [or] by arbitration[184]

Iraq's claim was that, since Iran had violated Article 3 of the 1975 Treaty by supporting renewed attacks on Iraqi frontier towns as well as terrorist bombings in Baghdad, then Article 4 came into force, completely invalidating the 1975 Treaty.[185] Iraq claimed the "application of Article 6 pre-supposes the existence of the Treaty through the non-violation of any of its indivisible elements." [186] Thus, Iraq's assertion was that for Article 6 to be applicable, the Treaty must first still remain valid under Article 4.

Even though the Treaty provides an express means to resolve disputes concerning treaty implementation and interpretation, Iraq still argues that it first has the power to interpret the Treaty to ascertain whether or not Article 6 may be invoked at all. This logic enables Iraq effectively to defeat the entire purpose and existence of Article 6. Clearly, the purpose behind the insertion of Article 6 was to avoid exactly the type of behavior Iraq engaged in since the two States were trying to avoid conflict and build more neighbourly relations when they concluded their agreement. The preamble to the Treaty confirms this interpretation.[187]

The best and most realistic reading of Articles 4 and 6 together would be as follows. Article 6 will be invoked any time there is a dispute concerning any part of the Treaty.

If the dispute revolves around the interpretation or implementation of any of the first three articles, then there must be adherence to the specific objectives of those individual articles. In the event that the resolution of Article 6 is a finding that a violation of one of the first three articles has taken place, then article 4 will be invoked, rendering the Treaty null and void if the violated party so chooses. This interpretation seems best suited to the purposes and objectives of all the clauses and articles of the 1975 Treaty taken as a whole. Thus, the Iraqi denunciation of the 1975 Treaty proves to be no more justifiable than that of Iran eleven years earlier.

IV. CONCLUSION

The treaties that have marked the development of relations between Iran and Iraq provide a unique opportunity to reexamine some of the fundamental international principles regarding treaty law. As can be seen, States will go to great ends to justify their claims that their actions are always, in some way, justifiable despite what might appear to be the clear intentions of a given treaty. Iran, and later Iraq, both attempted to construe facts and principles to meet their final goals of gaining control of the Shatt al-Arab and claiming as much territory in the Kurdish region as possible. In the end, their unilateral terminations of the treaties were not justified. Although one could say that Iraq's blatant use of military force to back its claim is a more severe violation of international law,^[188] neither country comes out unscathed. It appears that the two States have an equal claim to the Shatt al-Arab based on the thalweg principle and the basis of the 1975 Treaty should be the established border along the entire frontier until a new agreement is drawn.^[189]

* J.D. Candidate, Case Western Reserve School of Law (1992):

1 This date is listed as the official start of the war by most sources because of Iraq's direct invasion of Iranian territory " at 2 o'clock [Iranian time] on the afternoon of September 22, 1980." H. FARIDANI, *THE--IMPOSED WAR* 9 (1983); see also J.M. ABDULGHANI, *IRAQ & IRAN: THE YEAR OF CRISIS* 204 (1984).

2 In the early days of the Iran-Iraq War, Saddam Hussein, the President of Iraq, told his people that the war had roots dating back to AD 637 when Iraq, then a part of the Sassanian empire, ended a long reign of oppressive Persian rule at the battle of Qadisiya, located on one of the canals on the Euphrates River. It All Goes Back to AD 637, *THE ECONOMIST*, Sept. 27, 1980 at 41. See also Geoffrey Godsell, Behind Iran-Iraq Clash: Battle to Control Gulf, *THE CHRISTIAN SCI. MONITOR*, Apr. 15, 1980, at 1; A.O. Sulzberger Jr., Roots of Fear in the Gulf: Mesopotamia and Persia, *N.Y. TIMES*, Sept. 24, 1980, at A 10.

3 The word treaty is defined by the Vienna Convention on the Law of Treaties [hereinafter Law of Treaties] as " an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 2(a), 8 I.L.M. 679, 681. The phrase " whatever particular designation" is used to cover all other terms that carry the same meaning in international law as the word 'treaty' such as, " conventions, protocols, pacts, acts, statutes, charters, covenants,

concordats, declarations, agreements, and modi vivendi." T.O. ELIAS, *THE MODERN LAW OF TREATIES* 13-14 (1974).

4 Treaty of Lausanne, July 24, 1923, 28 L.N.T.S. 11; see also EDGAR O'BALLANCE, *THE GULF WAR* 5 (1988).

5 Anglo-Iraq Treaty of 1930, June 30, 1930, Great Britain-Northern Ireland-Iraq, 132 L.N.T.S. 363. At the end of WWI, Iraq was formally made a Class A mandate territory which was to be administered by Britain. The running of the Iraqi government by Britain continued until the signing of the Anglo-Treaty in June 1930. This treaty paved the way for Iraq's admittance into the League of Nations in 1932, while insuring that the large British influence in the area would continue. IRAQ; A COUNTRY STUDY 32, 39 (Helen C. Metz ed. 1990); MAJID KHADDURI, *THE GULF WAR* 31 (1988).

6 O'BALLANCE, *supra* note 4, at 2.

7 "In 1935, Reza Shah decreed that his country's name should be changed to 'Iran,' meaning loosely 'Homeland of the Arayans.'" *Id.* at 7.

8 DAVID E. LONG, Islamic Republic of Iran, in *THE GOVERNMENT AND POLITICS OF THE MIDDLE EAST AND NORTH AMERICA* 60 (1986); O'BALLANCE, *supra* note 4, at 2.

9 *Id.* at 2; Sulzberger, *supra* note 2, at A10.

10 See *supra* note 2, and accompanying text.

11 The spread of Islam did not immediately follow. Not until the sixteenth century did Islam become widespread in Persia. When Islam did reach Persia, it was not the main branch of Islam, the Sunni branch which is predominant in the Middle East, but rather the Shiite division, a heterodox division of Islam. Today, Iran is controlled by the Shiite Muslims while Iraq is ruled by Sunni Muslims, even though slightly more than half of Iraq is Shiite. KHADDURI, *supra* note 5, at 6-11; Sulzberger, *supra* note 2, at A10; Godsell, *supra* note 2, at 1; IRAQ; A COUNTRY STUDY, *supra* note 5, at xiv.

12 KHADDURI, *supra* note 5, at 11.

13 Shatt al-Arab, meaning "Shore of the Arabs" is the name given to the confluence of the Tigris and Euphrates rivers before they disgorge into the Persian Gulf. Sayed Hassan Amin, *The Iran-Iraq Conflict: Legal Implications*, 31 *INT'L & COMP. L.Q.* 167, 169 (1982).

14 Harold Ticktin, *Persians and Arabs Divided by Same Waterway for Millenniums*, *N.Y. TIMES*, Sept. 18, 1988, at E22.

15 These major port cities include Khorramshar in Iran and Basra in Iraq. SAYED HASSAN AMIN, *POLITICAL AND STRATEGIC ISSUES IN THE PERSIAN-ARABIAN GULF* 55 (1984) [hereinafter *PERSIAN-ARABIAN GULF*].

16 *Id.* at 56-57. This is in large part due to the emergence of oil as a strategic resource. When Britain entered the area following the demise of the Ottoman Empire, it immediately began constructing high volume ports in both Iran and Iraq to help Britain access the large oil fields located along the Shatt al-Arab's banks.

17 The Shatt al-Arab not only provides Iraq with its only access to the sea, it is also the source of Iraq's large fishing industry. PERSIAN-ARABIAN GULF, *supra* note 15, at 55, 62, 70; E. Lauterpacht, River Boundaries' Legal Aspects of the Shatt-al-Arab Frontier, 9 INT'L & COMP. L.Q. 208, 226 (1960) [hereinafter River Boundaries].

18 This point was made clear by the Iraqi representative Noury Pasha Said in his address to the League of Nations in 1935 when he stated, "[t]he Shatt-al-Arab ... constitutes Iraq's only access to the sea; ... and Basra, 100 kilometres from the mouth, is Iraq's only port." 16 LEAGUE OF NATIONS O.J. 113 (1935) [hereinafter League of Nations].

19 It should be noted that Iran has, in recent years, reduced its dependence on the Shatt al-Arab. ABDULGHANI, *supra* note 1, at 120. Nevertheless, the Shatt al-Arab still provides with a valuable outlet to the sea for its Khuzistan oil fields and for its industry on the island of Abndan both located on the Shatt al-Arab. PERSIAN-ARABIAN GULF, *supra* note 15, at 55, 62.

20 PERSIAN-ARABIAN GULF, *supra* note 15, at 54.

21 IRAQ; A COUNTRY STUDY, *supra* note 5, at 84.

22 KHADDURI, *supra* note 5, at 33.

23 *Id.*

24 O'BALLANCE, *supra* note 4, at 2.

25 *Id.*

26 Sulh is defined as a truce. KHADDURI, *supra* note 5, at 33.

27 "Indeed, neither the Ottoman Empire nor the Persian Shah intended that the treaty concluded between them last too long, since both were anxious to resume fighting at the earliest possible moment in order to reestablish the unity of the house of Islam under one supreme authority." *Id.* 28 Treaty of Peace between Persia and Turkey, 1746, Persia-Turkey, 37 PARRY'S T.S. 441.

29 O'BALLANCE, *Supra* note 4, at 2.

30 Treaty of Erzerum, July 28, 1823, Persia-Turkey, 73 PAHMY'S T.S. 283.

31 MALCOLM E. YAPP, THE MAKING OF THE MODERN NEAR EAST 1792-1923, 127 (1987).

32 The idea of a "zone" instead of a distinct border line was developed to allow the tribes that occupied the area separating the countries to decide for themselves to which State they would adhere. Thus, the allegiances of the nomadic tribes in the border zone determined the limits of each State's control. KHADDUHI, *supra* note 5, at 33.

33 Treaty of Limits between Persia and Turkey, May 1847, Persia-Turkey, 101 Parry's T.S. 85 [hereinafter Second Treaty]; see also O'BALLANCE, *supra* note 4, at 4.

34 ABDULGHANI, *supra* note 1, at 6.

35 KHADDURI, *supra* note 5, at 35.

36 *Id.*; see also ABDULGHANI, *supra* note 1, at 6.

37 Treaty of Erzerum, *supra* note 30, at 288; KHADDURI, *Supra* note 5, at 35; see also *supra* notes 25-26 and accompanying text.

38 KHADDURI, *supra* note 5, at 35. The Russian and British governments acted as the official mediators during the formation of the treaty, even though their interests were slighted in favor of Persia. TAREQ Y. ISMAEL, *IRAQ AND IRAN: ROOTS OF CONFLICT* 6 (1982).

39 Second Treaty, *supra* note 33. For an English Translation see 16 LEAGUE OF NATIONS O.J. 197 (1935); ISMAEL, *supra* note 38, at 41.

40 O'BALLANCE, *supra* note 4, at 4.

41 ABDULGHANI, *supra* note 1, at 7. The Treaty did not clearly specify who had sovereignty over the actual river. The Ottoman Empire, therefore, refused to sign the Treaty until it had assurances to such a claim. ISMAEL, *supra* note 38, at 6. This concern was resolved by an Explanatory Note, issued by the British and Russian governments. This Note asked that the Persian government cede any and all possible claims to sovereignty over the Shatt al-Arab itself. The Persian government, represented by Mohammad Ali, approved and signed the Note. *Id.* at 45, 47. However, the Persian government later denied that its representative possessed the power to bind Persia to the terms of the Note stating, more than a century later:

When he arrived at Istanbul the Russian and British representatives requested him to sign, over and above the exchange of instruments of approval, a note containing an interpretation of the articles of the Treaty which were in favor of the Ottoman government. The Government of Iran had not the slightest information on the text of the interpretation, and the said Mirza Mohammad Ali Khan, trusting in the influence of the Russians and the British upon the Iranian Court of that time, signed it on his own initiative and without any authority to do so. *Id.* at 8.

42 Second Treaty, *supra* note 30, an. II at 87; KHADDURI, *supra* note 5, at 35; O'BALLANCE, *supra* note 4, at 4.

43 River Boundaries, *supra* note 17, at 210.

44 The Note stated:

The undersign Representatives [Persia and the Ottoman Empire] further declare that Persia will not be entitled on any pretext whatsoever to put forward claims in regard to the regions situated on the right bank of the Shatt-al-Arab, or to the territory on the left bank belonging to Turkey, even where Persian tribes or parts of such tribes are established on the said bank or in the said territory. LEAGUE OF NATIONS, *supra* note 18, at 231-233. But see ABDULGHANI, *supra* note 41 and accompanying text.

45 Second Treaty, *supra* note 33, an. III at 86. This provision, however, was not very accurate. It simply stated that the two Contracting Parties would appoint commissioners to determine the frontier without going into any further detail as to the length of office, their authority or how many were to be named. *Id.*

46 ABDULGHANI, *supra* note 1, at 7. Article VIII was supposed to deal with this question but it only stated that the two parties would choose which tribe went to whom without laying any foundation for how such a decision would or should be made. Second Treaty, *supra* note 33, art. VIII at 88,

47 This was mainly due to the fact that the Treaty did not specify how the commission should be run. Second Treaty, *supra* note 33, an. III at 87.

48 Provisional Arrangement between Persia and Turkey for Frontier Delimitation, Aug. 2, 1969, Persia-Turkey, an. II, 139 Parry's T.S. 425, at 426; see also ABDULGHANI, *supra* note 1, at 7.

49 KHADDURI, *supra* note 5, at 36-7.

50 LEAGUE OF NATIONS, *supra* note 18, at 234.

51 *Id.* at 227.

52 *Id.* at 235.

53 The Teheran Protocol specifically states:

Should the delegates of the two Parties fail to agree on the interpretation and application of certain clauses of [the Treaty of Erzerum of 1847], it is agreed that, at the end of a period of six months of negotiation, in order completely to settle the question of the delimitation of the frontiers, all the points on which any divergence exists shall be submitted together to the Hague Court of Arbitration, in order that the entire question may thus be definitely settled.

Id. art. 4, at 234.

54 ABDULGHANI, *supra* note 1, at 111. The Constantinople Protocol states, "From this point the frontier shall follow the course of the Shatt-al-Arab as far as the sea,

leaving under Ottoman sovereignty the river and all the islands therein "LEAGUE OF NATIONS supra note 18, at 230; see also O'BALLANCE., supra note 4, at 4-5.

55 "Thalweg" is defined as "the middle of the deepest or most navigable channel" and usually refers to water boundaries, BLACK'S LAW DICTIONARY 1477 (6th ed. 1990), such as the Shatt al- Arab. It is usual, where a navigable river forms an international boundary, for the thalweg to constitute the dividing line, but this is by no means a universal rule. The boundary can be, and sometimes is, fixed at the bank by agreement, and when this is the case, the agreement is incontestably valid. Former Iraqi Foreign Minister, Nuri al-Sa'id, quoted in ABDULGHANI, supra note 1, at 114.

56 O'BALLANCE, Supra note 4, at 5.

57 After the defeat of the Ottoman Empire in World War I, the Empire not only lost a great deal of territory, but also renamed itself Turkey.

58 Treaty of Lausanne, supra note 4.

59 Id. art. 3(2).

60 Id. art. 3.

61 Iraq inherited and became bound by the previous treaties based on the international principle of State succession, which recognizes that when two parties sign a treaty it is the State itself that is being bound, not any particular government which happens to be representing the State at the time. This assumes, however, that the government is the legitimate government at the time it acts to bind the State to a given treaty. See The Vienna Convention on Succession of States in respect of Treaties, 17 I.L.M. 1488 (1978).

62 After WWI, France and the U.K. divided up the remnants of the defeated Ottoman Empire, with the U.K. gaining control over Iraq. ISMAEL, supra note 38, at 14. The U.K. retained its dominating control over Iraq until the Treaty of Lausanne, supra note 4. In Persia, the U.K. stepped up its influence by signing an agreement with the Shah of Persia in 1919, which included the reform of Persian soldiers by British officers and the sale of arms to Persia. ISMAEL, supra note 38, at 12; see also O'BALLANCE, supra note 4, at 6. The U.K. further secured its influence in Persia by supporting a coup by Reza Khan on February 21, 1921, which resulted in a very strong relationship between the two States for several years thereafter. ISMAEL, supra note 38, at 12.

63 O'BALLANCE, supra note 4, at 5.

64 ABDULGHANI, supra note 1, at 112.

65 ISMAEL, supra note 38, at 14-15.

66 Although the Shatt al-Arab is formed primarily by the Tigris and Euphrates rivers, much of the water resources that form the Shatt al-Arab come from Iranian rivers such as the Karun, the upper and lower Zab, the Dialeh and the Kabur. ABDULGHANI,

supra note 1, at 112-13. In particular, Iraq claimed that a Persian dam across the Gunjan Chain river, which formed approximately 12 miles of the Iraq-Persian border, resulted in a serious depletion of water resources for the Iraqi town of Zurbatiya. Although both sides seemed to agree that the Delimitation Agreement of 1914 did not adequately address this issue, the two States did not agree as to what impact the Persian dam had on Iraqi water resources. LEAGUE OF NATIONS, SUPRA note 18, at 114, 213-15.

67 LEAGUE OF NATIONS, SUPRA note 18, at 114; Amin, supra note 13, at 170; KHADDURI, SUPRA note 5, at 37. The claim that Iran was diminishing the water supply to the Shatt al-Arab was based on the Constantinople Protocol which allocated water resources to Iraq for irrigation purposes. ABDULGHANI, SUPRA note 1, at 112.

68 LEAGUE OF NATIONS, supra note 18, at 118-21; ABDULGHANI, supra note 1, at 112. The Iranian government denied the validity of the Constantinople Protocol because it was based on the second Treaty of Erzerum, which had recognized Iraqi sovereignty over the entire Shatt al-Arab. See supra notes 42-44 and accompanying text. Iran claimed that treaty was invalid because its representative did not have the authority to sign the Explanatory Note that accompanied the treaty. See supra note 41 and accompanying text.

69 ISMAEL, supra note 38, at 15; see also LEAGUE OF NATIONS supra note 18, at 118-23; Amin, supra note 13, at 171.

70 Iraq argued that the Shatt al-Arab constituted Iraq's only access to the sea. On the other hand, Iran had a coast-line of almost 2,000 kilometres, including the deep water port of Khor Musa located just 50 kilometres to the east of the River. LEAGUE OF NATIONS, supra note 18, at 113. Iran, however, argued that this should not entitle Iraq to sovereignty over the entire Shatt al-Arab since there were other States whose only access to the sea was through a single river yet those States had never been able to legally claim sovereignty over the entire course of the river to the sea. Id. at 120, 122. See also Amin, supra note 13, at 171; see generally ABDULGHANI, supra note 1, at 113-14.

71 LEAGUE OF NATIONS, supra note 18, at 122-23.

72 Iraq withdrew the border dispute from the agenda of the Council of the League of Nations shortly after the Iraq and Iran settlement was announced in September of 1937. Although it is not certain what role the League played in the negotiations between Iran and Iraq, it would appear that the League likely influenced the peaceful settlement through the League's appointed Rapporteur, Baron Aloisi, of Italy. River Boundaries, supra note 17, at 215.

73 Boundary Treaty Between the Kingdom of Irak and the Empire of Iran, July 4, 1938, Iraq-Iran, 189 L.N.T.S. 256 (1938) [hereinafter 1937 Treaty].

74 Id.

75 Id. art. I(a) and (b), at 256. The Protocol along with the Commission had reaffirmed Iraqi sovereignty over the Shatt al-Arab, with a few exceptions, and

introduced the "thalweg" principle for the first time in Iran-Iraq border treaties. See supra notes 55-56 and accompanying text.

76 *Id.* art. 2, at 256.

77 *Id.* art. 4(a), at 257.

78 *Id.* art. 4(b), at 257.

79 *Id.* Protocol art. III, at 258.

80 At the beginning of WWII, both Iran and Iraq remained neutral. However, by August of 1941 both States were occupied by Allied forces. Iraq, in April 1941, invited a German Military Mission to Baghdad but before the Germans arrived, forces from the U.K. landed at Basra and managed to seize Baghdad themselves where they remained until October 1947. Iran's occupation by Soviet and U.K. forces began in August of 1941 and lasted until 1946. O'BALLANCE, supra note 4, at 8.

81 KHADDURI, supra note 5, at 42.

82 PERSIAN-ARABIAN GULF, supra note 15, at 60-61.

83 *Id.* at 60-63.

84 ISMAEL, supra note 38, at 18; ABDULGHANI, supra note 1, at 17.

85 KHADDURI, supra note 5, at 45.

86 Amin, supra note 13, at 172-73.

87 Iran, which had previously been paying fees to the Iraqi Port Authority in order to be piloted along the River, ceased payment of such fees and began using Iran's own pilots to navigate the Shatt al-Arab. ISMAEL, supra note 38, at 18.

88 This made it virtually impossible for ships to get in and out of Abadan for several weeks. Amin, supra note 13, at 173.

89 These terms were that Iraq was to be the one who would have exclusive right to control river traffic, to navigation licenses, and to port duties. PERSIAN-ARABIAN GULF, supra note 15, at 61.

90 In July of 1968, a coup by the Ba'th Party in Iraq served to hinder relations between the two States. *Id.*

91 The Iranian government based its abrogation on the fact that no treaty could be based on a principle other than one encompassing the median base line (thalweg) and therefore the 1937 Treaty was null and void. ISMAEL, supra note 38, at 19.

92 KHADDURI, supra note 5, at 51.

93 PERSIAN-ARABIAN GULF, *supra* note 15, at 62-63.

94 The islands of Abu Musa, which was administered by Shajah, Greater Tumb and Lesser Tumb, which were previously controlled by Ras el-Khaimah, were occupied by Iran on November 4, 1971. O'BALLANCE, *supra* note 4, at 10; ISMAEL, *supra* note 38, at 20.

95 Amin, *supra* note 13, at 175.

96 The Treaty of Sevres of 1920 actually contained provisions for a Kurdish independent state. But when none was formed immediately following the Treaty's creation, the Kurds seemed to have lost their best hope for independence for, in 1923, the Treaty of Lausanne was signed without any reference to the Kurds.

O'BALLANCE, *supra* note 4, at 5. The Kurds, however, did have their hopes revived by an agreement dated March 11, 1970, between the ruling Ba' thist Party of Iraq and the Kurds, which " promised that the Kurds would be granted self-rule. ..." The agreement's promises did not materialize due to strife within the Kurdish leadership. KHADDURI, *supra* note 5, at 53.

97 The Kurds make up approximately 19% of the Iraqi population and, although they share the same religion as the Iraqi government, (Sunni Muslim), they are a distinct people with their own language and identity. The Kurds live almost exclusively in northern Iraq and have been at odds with the Iraqi government about the possibility of their own home land for almost fifty years. IRAQ; A COUNTRY STUDY, *supra* note 5, at 82-84.

98 *Id.* at 54-56.

99 Amin, *supra* note 13, at 176.

100 KHADDURI, *supra* note 5, at 55-56.

101 Amin, *supra* note 13, at 176.

102 *Id.*

103 KHADDURI, *supra* note 5, at 56.

104 Amin, *supra* note 13, at 176.

105 *Id.*

106 Iran and Israel had become strategic allies in the Middle East, despite their ideological differences, following the defection of Iraq from the Baghdad Pact in 1959. The Baghdad Pact was originally formed in February 1955 by Iraq, Turkey, the U.K., Pakistan, and Iran as a way to counter the " common perceptions and fears of potential Soviet threats" in the Middle East. ABDULGHANI, *supra* note 1, at 13, 16.

107 *Id.* at 157.

108 Id.

109 Id. at 152.

110 KHADDURI, *supra* note 5, at 199.

111 Treaty Concerning the State Frontier and Neighbourly Relations between Iran and Iraq, June 13, 1975, Iran-Iraq, 1017 U.N.T.S. 136 [hereinafter 1975 Treaty].

112 Id. at art. 3, 137.

113 See *infra* notes 185, 187 and accompanying text.

114 Amin, *supra* note 13, at 178.

115 These bilateral agreements, a result of the new period of "entente" in Iran-Iraq relations following the signing of the 1975 Treaty, dealt with "trade and cultural relations; freedom of movement by Iranians in visiting Shi'it holy places in Iraq; agriculture and fishing; railway systems linkages; and co-ordination of activities concerning the movement of 'subversive elements.'" Id.

116 ABDULGHANI, *supra* note 1, at 160.

117 KHADDURI, *supra* note 5, at 80.

118 Even before Iran and Iraq became friendlier, the presence of the Ayatollah in Iraq was not particularly welcomed. Khomeini's lectures on Islamic government did not coincide with the ruling Ba'thist party ideology in Iraq. Id. at 79.

119 ABDULGHANI, *supra* note 1, at 182.

120 KHADDURI, *supra* note 5, at 81.

121 Id.

122 Id.

123 Id. at 82.

124 Amin, *supra* note 13, at 179.

125 This was territory that Iraq had parted with when it signed the 1975 Treaty with Iran. Iraq later felt that it been given up this territory under duress and therefore demanded the return of the territory's in question by Iran to Iraq. PERSIAN-ARABIAN GULF, *supra* note 15, at 70-71.

126 O'BALLANCE, *supra* note 4, at 11.

127 Id.

128 Iraq claimed, among other things, that Iran repeatedly violated Iraqi airspace and that Iran had instigated two separate terrorist bombings in Baghdad in April 1980. KHADDURI, *supra* note 5, at 83; O'BALLANCE, *supra* note 4, at 11.

129 The towns were supposed to have been returned to Iraq in accordance with the Algiers Agreement of 1975. KHADDURI, *supra* note 5, at 83.

130 *Id.*

131 O'BALLANCE *supra* note 4, at xii.

132 KHADDURI, *supra* note 5, at 83-84.

133 ABDULGHANI, *supra* note 1, at 201. Although the 1975 Treaty had not laid down a precise time table for the returning of these areas, most of the land frontier marks should have been established within one year from May 20, 1975. Protocol Concerning the Redemarcation of the Land Frontier Between Iran and Iraq, June 13, 1975, Iran-Iraq, art. 1(c), 1017 U.N.T.S. 136, 141.

134 KHADDURI, *supra* note 5, at 83.

135 *Id.* at 84.

136 *Id.* at 81.

137 ABDULGHANI, *supra* note 1, at 202.

138 PERSIAN-ARABIAN GULF, *supra* note 15, at 71.

139 KHADDURI, *supra* note 5, at 86.

140 See *supra* note 1.

141 The Vienna Convention on the Law of Treaties will be used as the reference point in analyzing the legal claims of Iran and Iraq concerning the Treaties of 1937 and 1975. Although it was not officially ratified until 1981, the Law of Treaties has been recognized as the primary source of international law regarding treaties between countries. IAN M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 1-21 (1973). Furthermore, it should be noted that Iran became a signatory to the Convention on May 23, 1969, although Iraq has not yet become a signatory. Law of Treaties, *supra* note 3, at 679.

The Law of Treaties is designed to be a comprehensive codification of customary custom and practice as defined throughout the centuries. Article 2(a) of the Treaty defines "'treaty' [as] an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." *Id.* at 681. In short, therefore, "treaty" is meant to cover all written agreements between States. The rest of the articles of the Law of Treaties will be examined in relation to their applicability to the Iran-Iraq treaty series.

142 See supra notes 90-109 and accompanying text.

143 Iranian Statement Concerning Abrogation of 1937 Treaty Between Iraq and Iran, 8 I.L.M. 481, 481-83 [hereinafter Iranian Statement]; see also Amin, supra note 13, at 174 (analyzing the grounds for abrogation).

144 Iranian Statement, supra note 143, at 482-83.

145 Law of Treaties, supra note 3, art. 60(3) at 701.

146 Article 5 states that the parties "undertake to conclude a Convention for the maintenance and improvement of the navigable channel ... and [for] all other questions concerning navigation in the Shatt 61-Arab as defined in Article 4 of the present Treaty." 1937 Treaty, supra note 73, at art. 5, at 257.

147 Id.

148 Id. cl. 2.

149 Amin, supra note 13, at 172.

150 Law of Treaties, supra note 3, art. 31 at 693. It should also be noted that "Articles 31 to 33 of the Convention have been said by the European Court of Human Rights ... to 'enunciate in essence generally accepted principles of international law' Accordingly, there is now strong judicial support for the view that the rules of treaty interpretation incorporated in the Convention are declaratory of customary international law." SINCLAIR, supra note 141, at 19.

151 1937 Treaty, supra note 73, art. 1, at 256.

152 Id. art. 4 and art. 5, at 257.

153 Iranian Letter to the President of the U.N. Security Council, 8 I.L.M. 489, 490 (1969) [hereinafter Iranian Letter]. According to article 4 of the 1937 Treaty, supra note 73, art. 4, at 257, the dues were to be "devoted exclusively to meeting in [an] equitable manner the cost of upkeep, maintenance of navigability or improvement of the navigable channel and the approach to the Shatt el-Arab from the sea, or to the expenditure incurred in the interests of navigation."

154 Iranian Statement, supra note 143, at 482.

155 Iraqi Letter to the President of the U.N. Security Council, 8 I.L.M. 487, 487 (1969) [hereinafter Iraqi Letter].

156 Id. at 487.

157 Id. at 487.

158 A non-self-executing agreement is one where two States agree to agree upon something on a future date. In the 1937 Treaty, this agreement was that Iran and Iraq

would "undertake to conclude a Convention for the maintenance and improvement of the navigable channel, and for dredging, pilotage, collection of dues, health measures, measures for preventing smuggling, and all other questions concerning navigation in the Shatt-el-Arab " 1937 Treaty, supra note 73, art. 5, at 257.

159 The Protocol attached to the 1937 Treaty stated: The High Contracting Parties undertake to conclude the Convention to which Article 5 of the Treaty relates within one year from the entry into force of the Treaty.

In the event of the said Convention not being concluded within the year despite their utmost efforts, the said time-limit may be extended by the High Contracting Parties by common accord.

The Imperial Government of Iran agrees that, during the period of one year to which the first paragraph of the present Article relates or the extension (if any) of such period, the Royal Government of Iraq shall be responsible as at present for all questions to be settled under the said Convention. The Royal Government of Iraq shall notify the Imperial Government of Iran every six months as to the works executed, dues collected, expenditure incurred or any other measures undertaken. *Id.* Protocol art. II, at 258. This Protocol makes it clear that in the absence of a Convention establishing the rights and duties of both States, it would be up to Iraq to settle all issues concerning the administration of the Shatt al-Arab. Since no such Convention was ever concluded it would follow that Iraq retains the exclusive right to administer the river, with the small duty of keeping Iran informed about the dues being collected and spent.

160 In drawing up the Law of Treaties, the International Law Commission stated the doctrine of *rebus sic stantibus* could not be used to terminate a treaty unless two conditions were met: " a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and b) The effect of the change was radically to transform the extent of obligations still to be performed under the treaty." SINCLAIR, supra note 141, at 106; see Law of Treaties, supra note 3, art. 62(1)(a)-(b), at 702. Along these lines, Iran claimed that the treaty had been signed at the height of British colonial power in the region. Consequently, the end of that system brought about the fundamental change necessary to invoke the doctrine of *rebus sic stantibus*. Iranian Statement, supra note 143, at 483.

161 Law of Treaties, supra note 3, art. 62(2xa), at 702; see also SINCLAIR, supra note 141, at 47.

162 The doctrines of *rebus sic stantibus* and lack of consent are generally two very separate principles of international law. This is seen in the fact that the doctrine of coercion--lack of consent--is found at Law of Treaties, supra note 3, art. 52, at 698, while *rebus sic stantibus* is found at Law of Treaties, supra note 3, art. 62, at 702. Iran, however, seems to have combined these two very different principles of international law in order to try and put forth an argument that is not solidly based on any individual principle of international law.

163 In 1937, Britain actually accounted for over 90 percent of the shipping in the Shatt al-Arab, while over 80 percent of the port traffic in the Abadan harbor was needed for British owned oil. Amin, *supra* note 13, at 174.

164 Iranian Statement, *supra* note 143, at 483-84. Iran reenforced this argument by stating that:

In the entire world no similar case can be found when a river as large and as navigable as the Shatul-Arab [sic] which is the common frontier between the two countries, is controlled by one of the two parties alone.

It is impossible to conceive that a frontier river which draws most of its waters from Iranian sources should belong to another government.

Id. at 484.

165 Namely by "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." Law of Treaties, *supra* note 3, at art. 11.

166 See *supra* notes 23-55, and accompanying text.

167 See *supra* note 110 and accompanying text.

168 1937 Treaty, *supra* note 73, art. 4(a), at 257.

169 Amin, *supra* note 13, at 174.

170 The Treaty specifically states: "[t]he High Contracting Parties undertake to submit for peaceful settlement, in the manner provided in the present Treaty, any dispute arising between them which is not possible to settle by the ordinary method of diplomatic negotiation." Treaty for the Pacific Settlement of Disputes between the Kingdom of Iraq and the Empire of Iran, July 24, 1937, Iraq-Iran art. I, 4425 L.N.T.S. 271, 271. [hereinafter Settlement Treaty].

171 *Id.* arts. 1 and 2.

172 See *supra* notes 117-140, and accompanying text.

173 ABDULGHANI, *supra* note 1, at 202-04.

174 Amin, *supra* note 13, at 178-79.

175 *Id.*

176 Law of Treaties, *supra* note 3, art. 52, at 698: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." The U.N. Charter does not clarify or add to what is meant by threat or use of force, stating that, "[a]ll Members shall refrain in their international relations from the threat or use of force

against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, *4. However, in drafting Article 52, participating States vigorously contended that "force" as used in Article 2(4) of the Charter was meant to cover only physical or armed force. SINCLAIR, supra note 141, at 97.

177 SINCLAIR, supra note 141, at 98-99.

178 Amin, supra note 13, at 179.

179 SINCLAIR, supra note 141, at 97-99.

180 Iraq's argument becomes even stronger when one takes note that the States involved in the drafting of the Law of Treaties, although completely agreeing on exactly what "the use of force" fully entailed, did manage to unanimously adopt "a declaration condemning the threat or use of pressure in any form by a State to coerce any other State to conclude a treaty." Id. at 99.

181 PERSIAN-ARABIAN GULF, supra note 15, at 65.

182 Law of Treaties, supra note 3, at 680.

183 The first three articles of the 1975 Treaty state:

Article I. The High Contracting Parties confirm that the State land frontier in the Shatt al'Arab between Iraq and Iran shall be that which has been redemarcated on the basis of and in accordance with the provisions of the Protocol concerning redemarcation of the land frontier, and the annexes thereto, attached to this Treaty.

Article 2. The High Contracting Parties confirm that the State frontier shall be that which has been delimited on the basis of and in accordance with the provisions of the Protocol concerning the delimitation of the river frontier

Article 3. The High Contracting Parties undertake to exercise strict and effective permanent control over the frontier in order to put an end to any infiltration of a subversive nature from any source, on the basis of and in accordance with the provisions of the Protocol concerning frontier security

1975 Treaty, supra note 111, arts. 1-3, at 136-37.

184 1975 Treaty, supra note 111, at art. 4 and art. 6, at 137.

185 In an address to the United Nations Security Council, Foreign Minister Saadun Hamadi of Iraq stated:

The Algiers Agreement represented a package deal, Mr. President, the spirit of which was to arrive at a final and terminal solution to the existing problems between the two countries in application of the principles of territorial integrity, inviolability of frontiers and noninterference in internal affairs.

When article four is violated, this means that the whole treaty becomes nonexistent. Any argument to the contrary makes the provisions of these two articles contradictory and impossible to apply.

The continuous violations of the elements of the treaty mentioned in article four left Iraq with no treaty to implement.

Excerpts from Iranian, Iraqi and U.S. Addresses at U.N. Council, N.Y. TIMES, Oct. 18, 1980, at 4.

186 KHADDURI, *supra* note 5, at 86.

187 Article 31(2) states that the text of any treaty shall "includ[e] its preamble." Law of Treaties, *supra* note 3, art 31(2), at 692.

188 See Amin, *supra* note 13, at 181.

189 This conclusion appears to be the direction in which the two States are presently headed. On August 17, 1990, the President of Iraq, Saddam Hussein, announced his acceptance of the Iranian terms for a peace treaty. Those terms would basically reestablish the 1975 Treaty between Iran and Iraq, giving Iran sovereignty over roughly half the Shatt al-Arab and returning approximately 1,000 square miles of land to Iran. Claude Van England, *Iran Jubilant Over Iraq's Proposal but Won't Alter Policy*, CHRISTIAN SCI. MONITOR, Aug. 17, 1990, at 1; Nick Williams Jr., *Iraq Bids For Peace with Iran*, L.A. TIMES, Aug. 16, 1990, at A1, col. 6.