

## THE IRAQ-KUWAIT BOUNDARY : LEGAL ASPECTS

BY

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### I. INTRODUCTION

When, in 1990, Iraq purported to annex the whole territory of Kuwait, it was in pursuance of a 50 year-old claim to sovereignty over the whole country, including the adjacent islands. We have considered elsewhere (1) the history and the legal validity of Iraq's sovereignty claim. The conquest of Kuwait has now been brought to an end by a combination of military and legal means : military action by the coalition acting under the authority of the Security Council, and legal action by the Council's refusal to recognize the annexation (notably in Security Council resolution 662 of 9 August 1990), Iraq being forced in the end formally to abandon its sovereignty claim.

That action left unresolved, however, the question of where exactly the boundary between the two countries lay. Although this has been the subject of agreement between Iraq and Kuwait, the boundary has nowhere been defined with specificity and has not been demarcated. The most recent agreement on the subject is a 1963 agreement entitled Agreed Minutes Regarding the Restoration of Friendly Relations, Recognition and Related Matters, signed at Baghdad on 4 October 1963 (2) (the validity of which was, however, subsequently denied by Saddam Hussein). This agreement reaffirmed, without reiterating, an earlier agreement of 1932, which defined the frontier between the two countries. However, the 1932 agreement, which itself simply reaffirmed an earlier one of 1923, did not specify the line with any degree of precision. This has, in the past, been a source of contention between the two States and, indeed, alleged boundary encroachments by Kuwait was one of the grounds invoked by Saddam Hussein to justify his invasion.

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(1) See M.H. MENDELSON and S.C. HULTON, 'La revendication par l'Iraq de la souveraineté sur le Koweït', *XXXVI Annuaire français de droit international* (1990), 923.

(2) 485 UNTS 321.

Consequently, when, on 3 April of this year, the Security Council laid down its terms for a cease-fire with Iraq in resolution 687 (1991), it decided that the 1963 agreement expressed what the boundary is, demanded that Iraq (and Kuwait) respect the inviolability of that boundary, and called on the UN Secretary-General to lend his assistance to the parties in its demarcation. In his report a month later (3), the Secretary-General reported that resolution 687 had been accepted by the parties and that he intended setting up a boundary commission, comprising one Iraqi, one Kuwaiti and three neutrals.

The Security Council approved his report (4) and the members of the Iraq-Kuwait Boundary Demarcation Commission have now been appointed (5). The Commission can decide by a majority and its decisions will be final. The Commission has now commenced its work, and has already made an on-site visit and held three working sessions.

Aspects of the proceedings of the Security Council thus far could give rise to controversy in the future. There is no doubt as to the Council's authority, under the UN Charter, to take action needed to maintain or restore international peace and security; but the Council's affirmation of the binding force of the 1963 agreement — whose validity, as mentioned, had been questioned by Iraq — is, we think, unprecedented.

In our view, the Security Council's power to make binding decisions with regard to the maintenance of international peace and security under Chapters I, V, VI and VII of the UN Charter constitute sufficient authority for this affirmation: Iraq needed to be ordered to respect the international boundary, and for this purpose the Council had to determine what the boundary was. Having been set out in a treaty registered with the United Nations under Article 103 of the Charter, the Agreed Minutes — unchallenged for many years by Iraq — afforded a good basis for the decision. As we have concluded elsewhere (6), Iraq's challenge to the validity of that agreement was very unconvincing; and the Council evidently agreed (7).

It is, however, perhaps unfortunate that the validity of the 1963 agreement could not be determined in a more formal manner (8), for it seems

(3) Report of the Secretary-General regarding paragraph 3 of Security Council Resolution 687 (1991), UN document S/22558, 2 May 1991.

(4) Letter dated 13 May 1991 from the President of the Security Council to the UN Secretary-General, UN document S/22593.

(5) The three independent experts are: Prof. Mochtar Kusuma-Atmadja, a lawyer and former Minister of Foreign Affairs of Indonesia (Chairman); Mr. Ian Brook, a surveyor (Sweden); Mr. William Robertson, a surveyor (New Zealand). The Iraqi member is Mr. Riyadh Al-Qaysi (Iraqi lawyer and diplomat); and the Kuwaiti, Mr. Tariq A. Razouki.

(6) See MENDELSON and HULTON, *op. cit.*, pp. 946-49.

(7) See the provisional verbatim record of the Security Council's discussion of the draft of resolution 687, in which the representatives of Iraq and Kuwait were invited to, and did, participate: UN document S/PV.2981, 3 April 1991, esp. at pp. 78, 84-86, 96, 113 and 132.

(8) This sort of question would normally be more appropriate for a legal tribunal, such as the International Court of Justice. At first sight, the Council could have asked the Court for an advi-

that Iraq has not wholeheartedly abandoned its objections to the Agreed Minutes. Its letter to the Secretary-General (9) accepting resolution 687 was so hedged about with reservations about this and other matters that the latter was forced to get Iraq's Ambassador to the UN to confirm his country's unconditional acceptance of the resolution (10). Nevertheless, in its letter to the Secretary-General commenting on a draft of his Report to the Security Council on the proposed demarcation procedure (11), Iraq asserted that, by imposing a particular boundary, resolution 687 was an 'unprecedented assault' on the sovereign rights of a State, contrary to the Charter and international law and custom; that the 1963 agreement was not in force, and that Iraq was participating in the demarcation process only under duress. So far as concerns the demarcation itself, Iraq raised questions about the possible independence of the future neutral members of the Commission, since it would have no hand in their selection, and complained about certain other matters. One can see here the seeds of a future conflict. If Iraq regains anything like its former strength and outside forces are unable or unwilling to prevent it, it may some day revive its former claim, asserting that settlements imposed by force are null and void and that the demarcation process was unfair. We are not suggesting that these arguments would be well-founded, but just that an opening has been left.

That said by way of background to the current demarcation, the purpose of the present article is to identify and examine some of the main factual and legal issues which the Boundary Commission will have to confront. Since that part of the boundary which has been agreed by the two countries is a land boundary, it is primarily on this aspect of the frontier that we concentrate. For international lawyers, the demarcation here raises interesting and difficult questions of treaty interpretation, as well as the question whether the doctrine of estoppel might apply to preclude either of the parties from now putting forward a different interpretation from that previously adopted.

We begin by providing (in Part II) a brief history of the boundary, by reference to the instruments defining its course, before turning to identify

sory opinion on the point under Article 65 of the latter's Statute. However, there are at least two difficulties. Since the question of the validity of the 1963 Agreement was the subject of an actual dispute between the two States, it is questionable whether the Court would have been entitled to entertain it without the consent of both of them: cf. the *Eastern Carelia* case (1923) PCIJ, Ser. B, no.5, p. 27; and the *Western Sahara* case, *ICJ Rep.*, 1975, p. 12. Secondly, the Court might not have been able to respond with the rapidity required.

(9) Letter dated 6 April 1991 from the Permanent Representative of Iraq to the UN to the Secretary-General, UN document S/22456.

(10) Letter dated 10 April 1991 from the Permanent Representative of Iraq to the UN to the President of the Security Council, transmitting the decision of the National Assembly of Iraq adopted on 6 April 1991 accepting resolution 687, UN document S/22480, 11 April 1991.

(11) Letter dated 23 April 1991 from the Foreign Minister of Iraq to the Secretary-General, Annex II to the Report of the Secretary-General regarding paragraph 3 of Security Council Resolution 687 (1991), *loc. cit.*

(in Part III) what seem to be the main issues which arise in connection with its demarcation. This is followed (in Part IV) by a legal analysis of these issues, and (in Part V) by some brief concluding remarks (12).

## II. DEFINITION OF THE BOUNDARY : RELEVANT INSTRUMENTS (13)

The boundary between what is now Iraq and Kuwait has been defined in four instruments during the course of the twentieth century.

### (i) *Anglo-Turkish Convention, 1913*

The first formal definition of Kuwait's northern and western boundaries was contained in the Anglo-Turkish Convention of 29 July 1913 (14), by which the British and Ottoman Governments reached agreement on their respective spheres of influence in the Arabian Gulf. As part of this agreement, the status of Kuwait was settled and its boundaries fixed. Kuwait was separated from the adjacent *vilayet* or province of Basra of the Ottoman Empire to the north and west, by two lines.

Within a semi-circle having a radius of approximately 40 miles from Kuwait town, shown in red on an attached map (see map 1) (15), the Shaikh

(12) The exposition of the facts upon which this legal analysis is based has necessarily been compressed and some points of detail omitted, for reasons of space. Moreover, it is admittedly based on incomplete evidence. Not all of the official documents have been published; many languish still in the comparative obscurity of the British Public Record Office and India Office archives, amongst other places — and indeed, some are still not open to public inspection. It is also possible that there are relevant documents in these archives that, in the limited time available, we have not seen — though we believe that we have been able to consult the key files. Neither have we had recourse to the archives of other States or in private collections, nor to materials in Arabic.

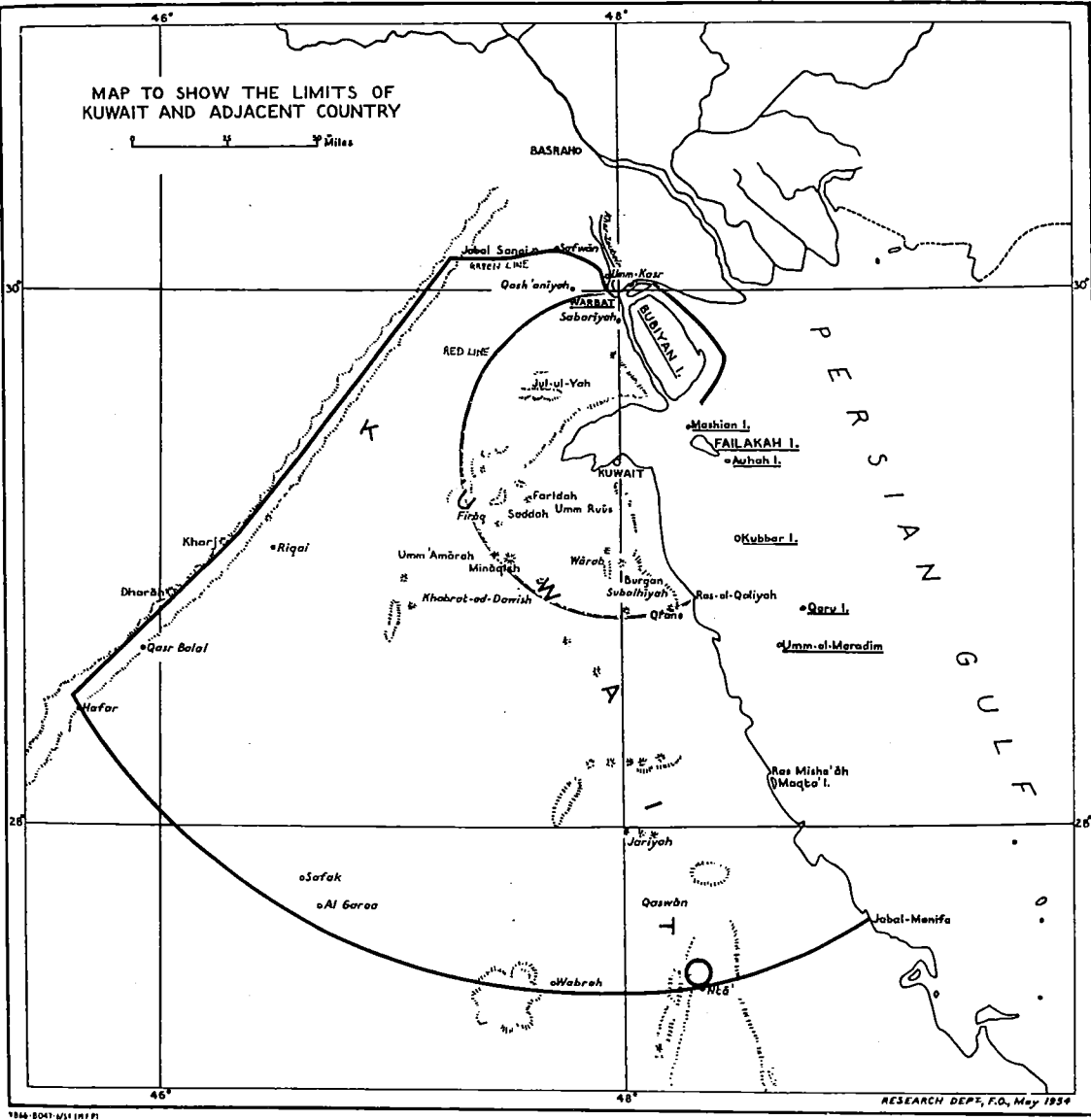
(13) A fuller account of the history of the Iraq/Kuwait frontier is given in R. SCHOFIELD, *Kuwait and Iraq: Historical Claims and Territorial Disputes* (Royal Institute of International Affairs, 1991) (hereinafter 'SCHOFIELD'). Useful published sources of official documentation include the following:

- 'Historical Summary of Events in Territories of the Ottoman Empire, Persia and Arabia affecting the British Position in the Persian Gulf, 1907-1928' printed for the Committee of Imperial Defence (hereinafter 'PG 13'), in Archive Editions, *The Persian Gulf Historical Summaries 1907-1953*, (1987) vol. I;
- 'Historical Summary of Events in the Persian Gulf Shaikhdoms and the Sultanate of Muscat and Oman, 1928-1953', printed by the British Foreign Office (hereinafter 'PG 53'), in Archive Editions, *ibid.*, vol. II.
- R. SCHOFIELD and G. BLAKE (eds.), *Arabian Boundaries: Primary Documents 1853-1957* (Archive Editions: 1988) vols. 1, 7 and 8 (hereinafter 'AB').
- E. LAUTERPACHT, C.J. GREENWOOD, M. WELLER and D. BETHLEHEM (eds.), *The Kuwait Crisis: Basic Documents*. (Grotius Publications: 1991) (hereinafter 'LAUTERPACHT et al.').

(14) Original French text in India Office Records, London (hereinafter 'IOR') R/15/5/65, reproduced in 7 AB 185, with map at 199. An English translation of the relevant extracts concerning Kuwait is reprinted in LAUTERPACHT et al., 33.

(15) A version of those parts of the map forming Annex V to the Anglo-Turkish Convention of 29 July 1913 pertaining to Kuwait was produced by the Research Department of the Foreign

of Kuwait was recognized as exercising complete administrative autonomy. The northern extremity of this part of the Shaikh's territory was stated to be the Khor Zubair. The islands of Warba and Bubiyan (as well as other islands lying further south) 'avec les îlots et les eaux adjacents' were shown as being, and were stated to be, included within this zone.



Office in 1954, and published in 24 AB as map 27. We reproduce the latter here as map 1, with thanks to the publishers, Archive Editions, for permission to do so.

Within a larger outer zone, it was further recognized that the Shaikh was the tribal over-lord, and entitled to levy tribute in his capacity as a *kaima-kam* (deputy-governor) of the Ottoman Empire. The boundary of this area, which started from the mouth of the Khor Zubair, was defined in relevant part as follows :

La ligne de démarcation part de la côte à l'embouchure du Khor-Zoubair vers le nord-ouest et passe immédiatement au sud d'Oumm-Kasr, de Safouan et de Djebel-Sanam, de façon à laisser ces endroits et leur puits au vilayet de Basra ; arrivée au Batine, elle le suit vers le sud-ouest jusqu'à Hafr-el-Batine qu'elle laisse du côté de Koweit .... Cette ligne est marquée en vert sur la carte annexée à la présente convention [map 1 hereto].

The Convention provided for the establishment of a delimitation commission with the least possible delay to fix on the ground the boundaries thus laid down. Due to the outbreak of World War I, however, the Convention was never ratified, and the delimitation commission never appointed. The boundary definitions set out therein were therefore not legally binding on either Great Britain or Turkey. *A fortiori*, they were not binding on Kuwait, on whose behalf the British were acting (Kuwait being at that time a State under British protection, though not a protectorate) ; or on Iraq, which did not yet exist as a separate legal entity. Nonetheless, as we shall see, these definitions came to form the basis of the boundary agreements subsequently entered into on behalf of Iraq and Kuwait, and by the two countries themselves.

#### (ii) *Exchange of letters, 1923*

After the defeat and dissolution of the Ottoman Empire, it was decided by the Principal Allied Powers that the Mesopotamian provinces of Baghdad, Mosul and Basra should form the self-governing State of Iraq, and that Great Britain should administer it under a League of Nations mandate until it was ready for independence. Owing to the strength of nationalist sentiment, a mandate agreement in the usual form, between the League and the mandatory, was not drawn up. Instead, Great Britain concluded a Treaty of Alliance in 1922 (16) with the King of Iraq, who had been installed as a constitutional monarch the previous year. Under this agreement, the British were to provide King Faisal with advice and assistance in the administration of the country, and had the right to give binding advice to him on all important matters affecting the international and financial obligations and interests of His Britannic Majesty. It did not define the boundaries of Iraq. By the Treaty of Lausanne of 1923, which eventually established the peace between Turkey and the Allied Powers, Turkey renounced all of its former territory outside its present borders, the future of such

(16) XXXV LNTS (1925) 13. The exchange of ratifications took place on 19 December 1924.

territory to be settled by the parties concerned (17). That Treaty similarly made no provision for the determination of the boundaries of Iraq, apart from its frontier with Turkey.

In their capacity first as occupying power and then as the power administering the mandate, the British had given consideration to defining the boundaries of Iraq. In December 1918, the Civil Commissioner at Baghdad was asked to telegraph to London a draft definition of the frontiers of Iraq, other than its frontier with Turkey. In his reply, he observed that the boundary between the new State and Kuwait would have to be delimited in cooperation with the Shaikh of Kuwait (18). The question of delimiting the Iraq-Kuwait boundary came to the fore in December 1922, the other boundaries of the two countries having by then been settled. The British High Commissioner for Iraq, Sir Percy Cox, proposed to the Colonial Office that it would be reasonable for the British Government to recognize the 'green line' of the Anglo-Turkish Convention of 1913 as the boundary between the two countries (19). (He made no mention of the course of the frontier eastwards beyond the mouth of the Khor Zubair.) Cox added that the question of the Iraq-Kuwait frontier had not hitherto been raised by King Faisal of Iraq or his Government; but thought that they would presumably accept our decision in regard thereto.

The High Commissioner's proposals were approved by the British authorities. It is not clear, on the other hand, whether they were mentioned to the Iraqi Government (20). The boundary was thereupon settled by an exchange of letters in 1923 between the Ruler of Kuwait, the British Political Agent in Kuwait, and the British High Commissioner for Iraq. In a letter of 4 April 1923 to the Political Agent, the Ruler of Kuwait set out what he claimed as his northern boundary; this was forwarded on the same day to the High Commissioner for Iraq (21). In his reply of 19 April 1923, Cox recognized the Ruler's claim in virtually the same terms in which it had been formulated by him:

The Shaikh of Kuwait is understood [by his letter of 4 April 1923 to the Political Agent] to claim the frontier of Kuwait with Iraq to be as follows:

From the intersection of the Wadi-el-Audja with the Batin and thence Northwards along the Batin to a point just south of the Latitude of Safwan; thence Eastwards passing south of Safwan wells, Jabal Sanam and Um Qasr, leaving them to Iraq and so on to the junction of the Khor Zobeir with the Khor Abdullah.

(17) 28 LNTS 12.

(18) Foreign Office Memorandum by C.T. Fone, dated 21 May 1938, on 'Iraq-Koweiti frontier: events preceding the exchange of notes of 1932', *IOR R/15/5/207*, p. 25.

(19) Letter of 20 December 1922 to the Secretary of State for the Colonies, *ibid.*, p. 34.

(20) Based on his researches some years later, Fone of the Foreign Office asserted that 'we [the British] have nothing to suggest that the matter was ever mentioned to the Iraqi Government' (Foreign Office memorandum of 21 May 1938, *op. cit.*).

(21) Respectively, *IOR R/15/1/523*, 15; and *ibid.*, 14.

Shaikh Ahmed at the same time claims as appertaining to Kuwait the Islands of Warbah, Bubiyan, Maskan (or Mashjan), Failakah, Auha, Kubha Qaru and Um-el-Maradim.

The Shaikh can be informed that his claim to the frontier and islands above indicated is recognised in so far as His Majesty's Government are concerned (22).

Cox went on to state that this frontier was 'identical with the frontier indicated by the green line of the Anglo-Turkish Agreement of July 29, 1913', but saw no need for the Political Agent to make special allusion to that document in his reply to the Shaikh. (In fact, it will be noted that the boundary descriptions in these two instruments were not quite identical. Apart from the fact that the line was now described as running from west to east, there were several changes in wording.) No map depicting the line thus defined was referred to in the exchange of letters or annexed to it (23).

### (iii) *Exchange of letters, 1932*

The mandate for Iraq was terminated on 3 October 1932, Iraq having on the same day become an independent sovereign State and been admitted to membership of the League of Nations. Meanwhile, at the instigation and through the intermediary of the British, an agreement had been reached between Iraq and Kuwait to reaffirm the existing frontier between the two countries, by means of an exchange of letters in July and August 1932 between the Iraqi Prime Minister, Nuri al Sa'id, and the Ruler of Kuwait (24).

By letter dated 21 July 1932, the former suggested to the High Commissioner for Iraq that the time had come when it was desirable to reaffirm the existing frontier, and asked him to take the necessary action to obtain the agreement of the competent authority or authorities in Kuwait to the following description of the existing frontier between the two countries : the description that followed was virtually a verbatim repetition of the 1923 definition of the boundary. In his reply of 10 August 1932 to the Political Agent, the Ruler of Kuwait noted that the frontier proposed by the Iraqi Prime Minister is approved by His Majesty's Government, and agreed to reaffirm the existing frontier between Iraq and Koweit as described in the Iraq Prime Minister's letter. No map was referred to in, or attached to, this exchange of letters.

(22) Memorandum No. 5405 from the High Commissioner for Iraq to the Political Agent, Kuwait, 19 April 1923, reprinted in C.U. AITCHISON, *Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries* (Delhi, 1933) vol. XI, p. 266; and LAUTERPACHT et al., p. 49.

(23) See, further, pp. [306-307] below.

(24) The exchange of letters is on IOR R/15/5/184, reprinted in 7 AB 372-76; and LAUTERPACHT et al., pp. 49-50.



(iv) *Agreement of 1963*

Kuwait attained full independence on 19 June 1961. Six days later, the Iraqi leader, General Kassem, claimed sovereignty over the whole of Kuwait. British and Saudi troops went to Kuwait's defence, to be replaced shortly afterwards by an Arab League defence force. Following the overthrow of General Kassem in February 1963 and his replacement by President Aref, relations between Iraq and Kuwait improved; and, on 4 October 1963, an agreement was entered into by which Iraq, amongst other things, 'recognized the independence and complete sovereignty of the state of Kuwait and its boundaries as specified in the letter of the Prime Minister of Iraq dated 21.7.1932 and which was accepted by the Ruler of Kuwait in his letter dated 10.8.1932' (25).

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Iraq subsequently challenged the validity of the 1923, 1932 and 1963 agreements on grounds which we have examined in another article (26). Suffice it to say for present purposes that these grounds appear to be unfounded in law (27). In any case, Iraq has since accepted Security Council Resolution 687 of 3 April 1991, which affirmed the inviolability of the boundary set out in the 1963 Agreement (28). Whilst the boundary between the two countries has thus been agreed with binding effect in general terms, it has never been demarcated (29) and several problems arise in determining the precise line that the frontier should follow. We turn now to identify, in general terms, the main questions which the Boundary Commission will thus have to confront.

(25) Agreed Minutes between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters, 4 October 1963, 485 UNTS 321.

(26) See MENDELSON and HULTON, *op. cit.*, pp. 939-49.

(27) But see, for a different view, M. KHADDURI, 'Iraq's Claim to the Sovereignty of Kuwait', 23 *NYUJILP* (1990), 5-34.

(28) *Supra*, pp. [294-295].

(29) For the sake of completeness, it should be mentioned that the Arab League force, deployed in Kuwaiti territory in 1961 to keep the peace between the two countries, laid down a temporary boundary line by constructing a road just inside Kuwaiti territory. This was intended to serve as a working boundary until such time as Iraq and Kuwait could agree on a final demarcation. The 'Arab League line', as it came to be known, ran approximately 350 metres south of, and parallel to, Kuwait's northern boundary with Iraq (as interpreted in the British *note verbale* of 1951 — as to which see below, p. [303]), from the Batin in the west to the mouth of the Khor Zubair in the east (AL-MAYYAL, Ahmad, 'The Political Boundaries of the State of Kuwait', unpublished PhD thesis submitted to the School of Oriental and African Studies, University of London, 1986, p. 122, with map showing the line at p.140; reprinted in SCHOFIELD as Map 1). Although this seems to have been treated as a *de facto* boundary line, neither State seems to have attached juridical weight to it; and it is probable that, if either side had asserted that it constituted the legal limit of sovereignty, this would have been repudiated.

### III. THE MAIN BOUNDARY DEMARCATION ISSUES

The main issues left unresolved by the boundary definition in the 1923 and 1932 agreements, with which the Boundary Commission will have to deal, appear to be :

- 1) the meaning of the term 'along the Batin' ;
- 2) the location of the point 'just south of the latitude of Safwan' ; and
- 3) the course of the boundary eastwards to the junction of the Khor Zubair and the Khor Abdullah.

There is also a need to demarcate the course of the boundary beyond the terminal point of the land frontier, within the Khor Abdullah. However, this is not mentioned in any of the treaties and may *possibly* be outside the remit of the Commission. Although paragraph 3 of Security Council resolution 687 called on the Secretary-General, in broad terms, to lend his assistance to demarcate the boundary between the two countries, it looks rather as if this paragraph, read in the context of the resolution as a whole, including the preamble, is concerned with the boundary set out in the 1963 agreement. The preamble, after referring to the boundary set out in the Agreed Minutes, invoked the need for demarcation of the said boundary ; whilst in paragraph 2 of the *dispositif*, the Security Council demanded that Iraq and Kuwait respect the inviolability of the boundary set out in the 1963 agreement and, in paragraph 4, guaranteed its inviolability. The fact, moreover, that, as a practical matter, it would be rather untidy, not to say anomalous, if the Boundary Commission were charged with demarcating a boundary, part of which was guaranteed, the other not, suggests that this was not the intention of the Security Council. The Secretary-General, for his part, seems to have construed his mandate in the narrower sense, at least at this stage. In his report on the establishment of the Boundary Commission (30), he defined its terms of reference to be the demarcation of the boundary set out in the 1963 agreement. Despite these doubts concerning *vires*, we will consider the question of delimitation of the Khor Abdullah, as we understand that the Commission may deal with it, and the British, on behalf of the Kuwaitis, did at an earlier stage make proposals regarding it.

There is, lastly, the question of the maritime boundary between the two States in the Gulf. This, similarly, is not dealt with at all in the treaties and may be outside the terms of reference of the Boundary Commission. We do not propose to consider this delimitation in the present article because it looks as if the Commission does not intend to do so ; and, in any case, it raises a whole set of different considerations.

(30) Report of the Secretary-General regarding paragraph 3 of Security Council Resolution 687 (1991), UN document S/22558, 2 May 1991, para.3.

There have been attempts in the past to make more precise the course of the land boundary. The British on behalf of Kuwait, and later Kuwait itself, pressed for this. Thus, in 1940 the British Government communicated to Iraq their interpretation of the definition in a letter from the British Ambassador in Baghdad to the Iraqi Foreign Minister, and suggested that this be embodied in an exchange of notes (31). In a *note verbale* of 18 December 1951 to the Iraqi Foreign Minister this interpretation was (with one difference to which we shall revert) reiterated, together with a request for Iraq's views (32). Iraq, however, refused to consider the question of the boundary until it had obtained the transfer, by cession of sovereignty or by lease, of Warba and/or Bubiyan, which were of strategic importance to it inasmuch as they controlled the only egress to the Gulf apart from the much disputed Shatt-al-Arab. For the British and the Kuwaitis, this was the wrong order of proceeding (33). We will return to consider the content and legal significance of the 1940 and 1951 interpretations in Part IV below.

Before going into the details of these questions about the course of the boundary, we should perhaps briefly mention the question of the map which Security Council resolution 687 specifically singles out as part of the appropriate material to be taken into account in the demarcation. This is in fact a series of maps of Kuwait on a scale of 1:50,000 (on which is depicted a boundary terminating in the Gulf to the south-east of Bubiyan) which were produced by the UK Director General of Military Survey, of the Ministry of Defence, in 1988 and revised in 1990, and which had been transmitted to the Secretary-General by the British Government with a letter dated 28 March 1991 (34). This has caused a great storm in a teacup, with the Iraqis protesting that they had no hand in its production and did not recognize it (35). However, it is to be noted that the resolution only

(31) Letter dated 7 October 1940 from Sir Basil Newton, Baghdad, to Nuri al-Said, Iraqi Minister for Foreign Affairs, Public Record Office, London — hereinafter PRO — FO 371/61445; reproduced in Appendix D to PG 53, pp. 247-48. The British Government had obtained the prior approval of the Ruler of Kuwait to the interpretation of the definition embodied in this letter (PG 53, 70), which was apparently described to him as being 'only a clarification of the existing definition': see Note of the Safwan-Khor Abdullah section of the Kuwait-Iraq Frontier, November 1941 enclosed in a letter dated 4 December 1941 from Major Hickinbotham, Political Agent Kuwait to the Political Resident in the Persian Gulf, Bushire — hereinafter the Political Resident — IOR R/15/2/209, 8 AB 121, 124, para. 7.

(32) Reproduced in Appendix D to PG 53, pp. 247-48. As before, the Ruler of Kuwait had agreed to an approach being made to the Iraqis on the lines proposed, *ibid.*, p. 70.

(33) For a (British) summary of these unsuccessful, and rather desultory, diplomatic negotiations up to 1953, see PG 53, 70-73. For a more detailed treatment, based on extensive archival research, and one which brings the story up-to-date to the autumn of 1990, see SCHOFIELD, *op. cit.*, 78-128.

(34) UN document S/22412; 30 ILM (1991) 857. The letter stated that the maps had been produced on the basis of the 1932 exchange of letters.

(35) Letter dated 23 April 1991 from the Iraqi Minister for Foreign Affairs to the Secretary-General, Annex II to the Report of the Secretary-General regarding paragraph 3 of Security Council Resolution 687 (1991), UN document S/22558.

specifies the map as *one* of the items to be considered (a point indeed emphasized by the Secretary-General in his reply to the Iraqi Foreign Minister (36)) : it does not make it in any way dispositive. And, in fact, the letter accompanying these maps drew attention to the fact that they bore on their face a note that Maps produced under the direction of the Director General of Military Survey are not to be taken as necessarily representing the view of the UK Government on boundaries or political status'. It rather looks as if the Security Council has attached more emphasis than was intended to maps forwarded by the British Government simply in order to be helpful — the maps being both recent and large-scale.

Let us turn, then, to examine more closely the issues which the Boundary Commission will have to (or may be expected to) confront (37).

#### IV. LEGAL ANALYSIS

The precise course of the land boundary between Iraq and Kuwait falls to be determined, essentially, as a matter of treaty interpretation. Before embarking upon this task, a few words may be said about the instruments to be interpreted and the principles to be applied.

Charged with demarcating the boundary set out in the 1963 agreement, the Boundary Commission will necessarily be concerned with interpreting the definition contained in the 1932 agreement, which is expressly incorporated by reference. Part of the context of that agreement is, in turn, the 1923 exchange of letters, to which it may also therefore be appropriate to have regard. Though the 1923 agreement was not referred to expressly, it certainly was by implication : *vide* the statements made by the parties in the preamble to, and *dispositif* of, the 1932 agreement regarding, respectively, their desire and agreement, to reaffirm the existing frontier between the two countries (38). Could the formulation of the boundary contained in the Anglo-Turkish Convention of 1913 likewise be said to have been incorporated by reference into the 1923 agreement, by reason of the fact that, in his memorandum of 19 April 1923, Cox described the frontier set out therein as being identical with the frontier indicated by the green line of the Anglo-Turkish Agreement (39) ? This seems doubtful, as Cox went on to state that there was no need for reference to be made to that document (i.e. the 1913 Convention) in the communication to the Shaikh of Kuwait confirming British acceptance of the boundary claimed by him. We have not seen the letter

(36) Letter dated 30 April 1991, Annex III to the Report of the Secretary-General regarding paragraph 3 of Security Council Resolution 687 (1991), UN document S/22558.

(37) The exposition of the facts upon which this legal analysis is based has necessarily been compressed and some points of detail omitted, for reasons of space.

(38) *Supra*, p. [300].

(39) *Supra*, p. [300].

actually transmitted to the Shaikh ; but assuming that such reference was indeed excluded, it is difficult to see how it could be argued that Cox's allusion to the 'green line' formed an integral part of the exchange of letters (40).

As regards the principles of interpretation to be applied, Article 31 of the Vienna Convention on the Law of Treaties, 1969 (which is not retrospective, but is generally considered to reflect customary law in this regard) stipulates that a treaty must 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. This provision does not differentiate between different types of treaty ; but the object and purpose formula clearly permits of, and indeed requires, such differentiation. In the case of a boundary treaty, one of the primary objects is, as the International Court of Justice stated in the *Temple of Préah Vihéar* case, to achieve stability and finality, with the result that rectification is not lightly to be embarked upon (41). As Professor Jennings (now President of the International Court of Justice) observed, in connexion with this pronouncement :

Interpretation of a boundary instrument is, therefore, at the opposite pole from the interpretation of a constituent instrument where stability and certainty are to be balanced with the need for flexibility and the possibility of change (42).

The present boundary delimitation may be seen to be an *a fortiori* case, the same definition having been reaffirmed twice. (This is so despite the absence in either the 1932 or 1963 agreement of any express reference to such an object and purpose.)

In addition to this general approach, certain rules and principles which have evolved in the context of boundary delimitations (such as that of the *thalweg* and median line in the case of river or maritime boundaries) may be applicable, as we shall see.

A further point which should be mentioned in this context concerns the language of the 1932 exchange of letters. The initiating letter from the Iraqi Prime Minister of 21 July 1932 to the British High Commissioner for Iraq was in English. The Ruler of Kuwait was given an Arabic translation of this letter. His reply of 10 August 1932 to the Political Agent Kuwait was in Arabic (who made an English translation). If there was a conflict between the English and Arabic versions of these two letters (or indeed between the language of the letters exchanged in 1923), this could present problems. We are not experts in Arabic and are therefore not able to eva-

(40) The separate and distinct question whether the Anglo-Turkish Convention can be treated as part of the drafting history of the later agreements so as to be relevant to their interpretation, is considered below, pp. [314-315].

(41) *ICJ Rep.*, 1962, p. 6, 34.

(42) 'General Course on Principles of International Law', 121 *Recueil des Cours* (1967-II), 323, 429.

luate this. However, we do not know of any discrepancy and, indeed, the accuracy of the translations has never been disputed so far as we know.

### 1) 'Along the Batin'

Turning to the first segment of the boundary, what exactly is meant by the phrase 'along the Batin'? The Batin is a long and fairly wide *wadi* or valley, extending for over 75 kilometres in that part of its course lying between Iraq and Kuwait, and varying in width from one to five miles. It is dry except when it rains and is used for grazing and recreation (43).

The questions which arise in this regard are whether the boundary here should run in a straight line or whether, in view of the discovery after 1923 that the course of the Batin is rather sinuous, the line should follow that course; and, if so, whether it should run along one of the banks, the *medium filum aquae* (median line) or the *thalweg* (deepest navigable channel or — here — line of the deepest depression).

This phrase is not further defined in any of the agreements under consideration. Was there any *contemporaneous interpretation* by the parties which casts light on whether and, if so, in what way, they intended the Batin to be divided? The short answer would appear to be no. According to Article 31(2) of the Vienna Convention on the Law of Treaties, the 'context' of a treaty for purposes of interpretation comprises, in addition to its text (including preamble and annexes), two other classes of document:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; and
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In the present case, no interpretative declaration was adopted at the time when the various agreements were entered into, establishing the parties' agreement as to the meaning of the phrase under consideration.

From some of the documentation one might be led to believe that a map was produced in 1923 relating to the 1923 agreement, in which case the question could arise whether it was an instrument forming part of the context within the meaning of Article 31(2)(b). However, although British officials refer, variously, to 'the sketch map of 1923' and 'the 1923 map attached to Sir Percy Cox's memorandum' (44), the map thus described would seem to have been produced by the Simla Drawing Office of the

(43) See letter from H.R.P. Dickson, Political Agent Kuwait to the Political Resident, 27 August 1935, *IOR L/P&S/12/3737*, 7 AB 252; and AL-MAYYAL, *op.cit.*, 213-214.

(44) Respectively, letter of 22 January 1936 from G.W. Rendel of the Foreign Office to the British Ambassador in Baghdad, *IOR R/15/5/184*, 7 AB 481, paras. 3 and 4; and Foreign Office memorandum dated 21 November 1935 by Hood, *IOR L/P&S/12/3737*, 7 AB 257.

Government of India in June 1925 (45) (that is, more than two years after the 1923 exchange of letters). Even if this is incorrect, and the map was originally produced by hand at an earlier date, it would still not count for this purpose. Article 31(2)(b) makes it clear that a unilateral document — such as this map — cannot be regarded as forming part of the 'context' unless it was not only made in connexion with the conclusion of the treaty, but its relation to the treaty was accepted by the other parties (46). In this case, the map was marked on its face as being 'For Official Use Only', and appeared in a compilation of treaties and agreements marked 'Confidential'. Moreover, it was treated by the British authorities not as an agreed-upon depiction of the boundary, but rather as a 'convenient map for reference', in the words of one official (47) — and one from which, as we shall see in a moment, they considered themselves free to depart. It seems, then, that this map was prepared simply for the internal purposes of the British authorities. Although it was apparently shown to the Prime Minister of Iraq in 1932 by the then British High Commissioner to Iraq, Sir Francis Humphreys (48), there is no indication that he accepted it as an accurate depiction of the boundary. His avowed concern at the time was to ensure that the proposed reaffirmation of the description of the frontier set out in the 1923 exchange of letters would not affect the position regarding Hulaiba, a watering place in the Batin, which he claimed had always been regarded as being in Iraq. It was to reassure him on this point that he was shown the sketch map, 'on which Hulaiba is clearly marked on the Iraqi side of the frontier' (49).

The fact that the so called shows a straight line dividing a winding natural feature — which would suggest division of the Batin by other than the median line — could not, therefore, be said to constitute an agreed-upon interpretation of the 1923 delimitation. At most, the map constitutes some evidence of how the British understood the boundary line to run; but it would appear to be of little probative value even in this respect for two reasons. First, it was not an officially published map. Moreover, the

(45) 'Map showing boundaries between Iraq, Kuwait and Najd', in *Treaties and Agreements between the British Government and certain Arab Rulers and Agreements between the said Rulers inter se affecting the British Government* (Calcutta: Government of India Foreign and Political Department, 1926) Confidential; *IOR L/P&S/20/C* at p. 23. The map appears following a printed copy of Cox's memorandum of 19 April 1923.

(46) See the International Law Commission's Commentary on Article 31(2) (draft Article 27), Yearbook of the ILC (1966-II), 221, stressing the requirement of acceptance.

(47) See letter of 1 August 1939 from T.C. Fowle, Political Resident, to R.T. Peel of the India Office, *IOR R/15/5/184*, 7 AB 539, Para. 3.

(48) Letter dated 30 October 1935 from the British Ambassador to Baghdad, Archibald Clark Kerr, to Sir Samuel Hoare of the Foreign Office, *IOR R/15/5/184*, 7 AB 464, para. 4, stating that this fact was on record in the archives of the High Commission.

(49) *Ibid.* As to whether this map and verbal assurance might be taken into account as part of the preparatory work of the 1932 exchange of letters, see below: p. [315].

Foreign Office resiled from it in 1936, being of the view that it was *incorrect* in showing the frontier along the Batin as a straight line (50).

Equally, there does not appear to have been any *subsequent agreement* by the parties regarding how this aspect of the boundary definition should be interpreted (51). Four documents fall briefly to be considered in this connexion : a 1936 map depicting a centre line ; a proposal put forward to the Iraqis by the British Adviser to the Iraqi Minister of the Interior in 1937 that the line should follow the *thalweg* ; and the proposals put forward by the British authorities in 1940 and 1951 also suggesting the *thalweg*.

The question of exactly where the boundary runs in this area came to the fore, as far as the British were concerned, in 1935 when it came to marking the Iraq-Kuwait frontier on a map. According to the British Political Agent in Kuwait (H.R.P. Dickson), local opinion was that the boundary line ran up the centre line of the Batin, thus giving both sides 'an equal share of this fertile grazing valley', and he suggested that the cartographers be so informed (52).

The Foreign Office accepted this advice and suggested to the British Ambassador at Baghdad that he should obtain the Iraqi Government's concurrence in the marking, on future maps, of the frontier as a centre line (53) ; Dickson's elaboration of this description — which suggests more precisely a median line — was not included. The Ambassador, however, did not consider it politic to raise the matter at that time (54), and the map was accordingly printed in 1936 without the concurrence of the Iraqi Government in the (centre) line shown on it (55). That being the case, it cannot be invoked as evidence that what the *parties* had had in mind was a division of the Batin by a centre or median line.

The following year, the British Adviser to the Iraqi Minister of the Interior (Edmonds) put forward to his Minister a different interpretation of the phrase along the Batin. In a note of 5 April 1937, in which he set out his

(50) See letter of 22 January 1936 from G.W. Rendel of the Foreign Office to the British Ambassador in Baghdad (note [44] *supra*), para. 3 ; see also Foreign Office memorandum dated 21 November 1935 by Hood (*ibid.*), adding that the map was also incorrect in showing the boundary running northward to a point at which it appeared to be actually north (instead of south) of the latitude of Safwan.

(51) Cf. Article 31(3)(a) of the Vienna Convention on the Law of Treaties, which provides : 'There shall be taken into account, together with the context : (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.

(52) Letter of 27 August 1935 from the Political Agent, Kuwait to the Political Resident, IOR L/P&S/12/3737, 7 AB 251.

(53) See letter of 22 January 1936 from G.W. Rendel of the Foreign Office to the British Ambassador in Baghdad (note 44 *supra*), para. 8.

(54) Letter from British Embassy Baghdad to Foreign Secretary Eden, 8 February 1936, IOR L/P&S/12/3737, 7 AB 268.

(55) PG 53, p. 70, para.44. It was initially intended that this map would be published by the Survey of India, but a change of responsibility at about this time meant that, whilst they did the mapping, the War Office in London actually produced the map : see Iraq Desert 1 :500,000 War Office 1934-1955, 6 sheets, GSGS 3954', Map Library of The British Library.



suggested interpretation of the boundary definition as a whole, he introduced, for what appears to be the first time, the concept of the *thalweg*, suggesting that the Shaikh of Kuwait be invited to agree that : in the Batin the frontier line follows the *thalweg*, i.e. the line of deepest depression (56). It is not clear what prompted this suggestion, nor why it was considered to be appropriate in the circumstances. In the event, it appears not to have elicited any response from the Iraqis. The proposal may not, in any case, however, be taken into account in interpreting this phrase as Edmonds would not have been a party competent to make an authoritative interpretation of the agreements (57) : he was simply a British employee of the Iraqi Government and, as such, would not have been giving his views on behalf of either Iraq or Britain.

Edmond's *thalweg* proposal was adopted, however, by the British authorities and incorporated into the formal proposals, regarding the interpretation of the 1932 agreement, put forward to the Iraqi Government in 1940 and 1951. The Iraqi Government's formal reply to the 1940 proposals was simply that consideration of them should be deferred ; the British Ambassador ascertained privately that the Iraqi Minister of Defence had deprecated the demarcation of the boundary until the question of the cession of the islands of Warba and Bubiyan to Iraq had been settled (58). The Iraqi Government's reply of May 1952 to the British *note verbale* of 1951 made explicit their position that demarcation should wait until the question of the cession to them of Warba had been settled (59). They seem thereafter to have maintained the stance that questions of demarcation should be deferred until they had secured their *desiderata* as regards one or other or both of these islands. Neither the 1940 nor the 1951 proposal would appear, then, to qualify as an authoritative interpretation of the 1932 definition, for want of Iraqi acceptance (60).

### *Excursus on estoppel.*

Before proceeding, it is relevant to consider the question whether, having put forward, in 1940 and 1951, the interpretation that the boundary fol-

(56) Note No.480 dated 5 April 1937, forwarded by the British Ambassador in Baghdad to G.W. Rendel of the Foreign Office under cover of letter dated 3 May 1937, *IOR R/15/5/184*, 7 AB 487.

(57) As the Permanent Court of International Justice observed in its Advisory Opinion in the *Jaworzina Boundary* case (1923) PCIJ, Ser. B, No. 8, 6 at 37 : ... it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it.

(58) PG 53, pp. 70-71, para.45.

(59) *Ibid.*, p. 72, para.51.

(60) So, too, it would seem, the maps of Kuwait which were submitted by the UK to the UN Secretary-General on 28 March 1991, in connexion with the current demarcation. The boundary marked thereon appears not to have been agreed with Iraq ; and, in any case, the caveat on the maps means that they do not necessarily represent the views of the British Government, let alone those of Kuwait.

lows the *thalweg*, the British authorities were thereafter estopped (i.e. precluded in law) from putting forward another interpretation. And would their successors (so to speak), the Kuwaitis, now be precluded from putting forward a different interpretation? The question of estoppel is potentially very important in all sectors of the boundary. It is worth considering with some care, therefore, the essential elements of this doctrine in international law.

Originally, in the absence of much judicial authority on the point, some doubt was expressed in the literature concerning the extent to which estoppel on the international plane incorporated the exacting requirements of the concept of estoppel at common law, from which, by analogy, it is derived. It was questioned, in particular, whether reliance was a necessary requirement (61). A number of jurists (62) considered that it was not, viewing estoppel under international law as a much broader and more flexible concept than its common law analogue, and one which operated generally to preclude a State from maintaining towards a given factual or legal situation an attitude inconsistent with that which it was known to have adopted previously with regard to the same circumstances. Others (63), however, stressed that estoppel ought to be defined more rigorously, and carefully distinguished it from other concepts — such as, acceptance of an obligation and recognition — which also operate to preclude a State from going back on a position previously adopted, but without evidence of reliance. In their view, reliance was an essential (for Judge Sir Gerald Fitzmaurice, the essential) requirement of estoppel, as there would otherwise be nothing which good faith, operating through the doctrine of estoppel, was required to put right (64).

As Martin observes in a recent detailed study of the subject (65), the latter view has come to prevail among writers (66), in conformity with judicial developments. The decisions of the International Court of Justice in the *Barcelona Traction case (Preliminary Objections)* (67) and *North Sea Continental Shelf* cases (68), like that of the Permanent Court of Justice in the

(61) See, for example, McNair, *The Law of Treaties* (2nd ed. 1961), 487.

(62) Cf., notably, I.C. Mac GIBBON, 'Estoppel in International Law' (1958) ICLQ 468; and Judge ALFARO, separate opinion in the *Temple case*, ICJ Rep., 1962, p. 6, 39.

(63) See D. BOWETT, 'Estoppel before International Tribunals and its Relation to Acquiescence', 33 BYIL (1957) 176, 193-94; and Judge Sir Gerald FITZMAURICE, separate opinion in the *Temple case*, *op. cit.*, at 63.

(64) Cf., to similar effect, C. DOMINICÉ, 'A Propos du principe de l'estoppel en droit des gens', in *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), 327-365 at p.364.

(65) A. MARTIN, *L'Estoppel en Droit International Public : précédé d'un aperçu de la théorie de l'estoppel en droit anglais* (1979), 173-74.

(66) See, for example, Prof. (now Judge Sir Robert) JENNINGS, *The Acquisition of Territory in International Law* (1963), 41-43; ROUSSEAU, *Droit international public*, vol.I (1970), 387-88; and DOMINICÉ, *op.cit.*

(67) ICJ Rep., 1964, p. 6, 24-25.

(68) ICJ Rep., 1969, p. 3, 25-26.

earlier *Serbian Loans* case (69), are authority for the proposition that two conditions must be met for estoppel to apply. There must be : (a) a clear and unequivocal statement or representation of a particular state of things by one State to another ; and (b) reliance, in good faith, on that representation by the second State, either to its detriment or to the advantage of the State making it. In each of these cases, estoppel was held not to operate as these conditions had not been fulfilled.

A Chamber of the International Court of Justice has recently reaffirmed these two constituent elements of estoppel in its judgment in the *Application by Nicaragua for permission to intervene in the Case concerning the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras* (70). Nicaragua had put forward the argument that it should be absolved from producing evidence that its legal interests might be affected by the Chamber's decision in the El Salvador/Honduras case, since the assertions made by those two countries in the course of the proceedings constituted recognition that major legal interests pertaining to Nicaragua would indeed be affected. These assertions, it submitted, gave rise, *inter alia*, to equitable estoppel. Rejecting this argument, the Chamber stated :

So far as Nicaragua relies on estoppel, the Chamber will only say that it sees no evidence of some essential elements required by estoppel : a statement or representation made by one party to another and reliance upon it by that party to his detriment or to the advantage of the party making it (para.63).

In the circumstances under consideration, it should perhaps be noted at the outset that the Kuwaitis could, theoretically, be estopped by the interpretation put forward by the British despite the fact that they were not parties to it in the strict sense. An estoppel may bear not only upon parties, but also upon those between whom there is privity in the sense of an identity of interest (71). Here, this condition may be seen to have been met inasmuch as Kuwait was, at the time, a British-protected State (which entailed that Great Britain had the conduct of Kuwait's foreign relations). Moreover, the approval of the Ruler of Kuwait had been sought and obtained on both the 1940 and 1951 proposals before these were conveyed to Iraq.

That said, there are serious difficulties in concluding that estoppel would operate here to bind the British and hence the Kuwaitis. In the first place, it is difficult to see that the interpretation put forward in 1940 and 1951 is the kind of representation that can give rise to an estoppel. Put forward in the course of diplomatic negotiations, it would hardly seem to constitute a clear and unequivocal statement of the British position, so much as a pro-

(69) (1929) PCIJ Ser. A, No. 20, p. 5, 38-39.

(70) ICJ Rep., 1990, p. 92.

(71) See BOWETT, *op.cit.*, 194.

posals for consideration (72). Moreover, if, as appears to be the case, the British were saying this is our interpretation of what this treaty means, then that is a statement about the law, in respect of which estoppel would seem not to operate in any case : given that States may be considered to be in an equally good position to know or to ascertain the law, it would be difficult (if not impossible) ever to establish reliance in respect of a representation of law. Even if this is wrong, however, there is no evidence that Iraq did, in fact, rely on the British interpretation either to its detriment or to the advantage of Kuwait. That being the case, neither the British nor the Kuwaitis would, it seems to us, be precluded from putting forward a different interpretation from that set out in the 1940 and 1951 proposals.

Could Iraq, on the other hand, be estopped from now challenging the British interpretation, by virtue of having acquiesced in it ? There is some evidence to suggest that, whilst the Iraqis formally preserved their position in respect of *demarkation* of the boundary (that is, the marking of its alignment on the ground), they did not do so in respect of its *delimitation* (that is, the description of the alignment). As reported by the British, the Iraqi response to the British proposal of 1951 was that demarcation should be deferred until their other *desiderata* had been met. There is no mention of their having given any reaction to the substance of the British interpretation as to how the boundary should run, a matter on which their views were expressly sought. We have not, however, seen the original of the Iraqi letter to be able to confirm whether this is an accurate reading of it. And, even if the Iraqis did only use the term demarcation, it may not be possible to draw any legal consequences from this, given the fact that the terms demarcation and delimitation are so often used interchangeably — not only by officials, but also by legal draftsmen (73).

Be that as it may, were the Iraqis obliged, as a matter of law, to repudiate the British interpretation if they disagreed with it, in order to preserve their own position ? It would seem not, since the boundary question as a whole was still being discussed on the diplomatic level. According to a Chamber of the International Court in the *Eletronica Sicula S.p.A. (ELSI)* case :

... although it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said, there are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges (74).

(72) Cf. BOWETT, *op. cit.*, 191, expressing the view that a representation made in the course of negotiations with a view to settlement which does not materialize cannot create a binding estoppel.

(73) Cf. Ian BROWNIE, *African Boundaries : A Legal and Diplomatic Encyclopaedia* (London, 1979), 4.

(74) *ICJ Rep.*, 1989, p. 15, para.54.

The Chamber accordingly held, in that case, that Italy's failure to inform the United States of its opinion that the latter had not exhausted domestic remedies did not estop her from raising this argument before the Court. In the present case, whilst it would certainly have been prudent for the Iraqis to repudiate the British interpretation promptly if they did not agree with it, it would seem not to have been legally necessary (75).

Neither party, then, it would seem, would be estopped from arguing that the *thalweg* was not the right line despite its inclusion in the British interpretation. And that interpretation would not be conclusive upon a court which was called upon to interpret the treaty (76).

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Returning to our attempt to ascertain the intention of the parties, Article 31(3)(b) of the Vienna Convention on the Law of Treaties further specifies as an element to be taken into account together with the context : any *subsequent practice* in the application of the treaty which establishes the understanding of the parties regarding its interpretation (emphasis added).

The subsequent practice of Iraq and Kuwait under the 1923, 1932 and 1963 agreements casts some, but not much, light on what they meant by the phrase along the Batin. Both countries have built a series of police/border posts along the high edge of their respective banks of the valley (77). This could suggest that the banks themselves constitute the respective boundaries of the two riparians and that the river-bed belongs to the two

(75) Cf. McNAIR, *The Law of Treaties* (2nd ed., 1961), 429-31 (by implication).

It might be thought, at first sight, that the *Temple* case (*ICJ Rep.*, 1962, p. 6) casts some doubt on this conclusion. In that case, which concerned a dispute over title to a small area of frontier between Cambodia and Thailand containing the ruins of an ancient shrine called the Temple of Vihéar, Cambodia relied, in part, on a map produced by the French authorities at the request of Siam (now Thailand), which purported to depict the boundary agreed upon by treaty and which clearly showed the Temple area as part of what is now Cambodia. The International Court of Justice held the boundary line on this map to be binding on Thailand — despite the fact that it did not conform with the method of fixing the boundary laid down in the treaty — since Thailand had failed to protest against it. Closer examination, however, reveals that the Court found, as a matter of fact, that Thailand had clearly accepted the map. What was at issue, therefore, was whether Thailand had thereby also accepted the boundary line depicted on it, or could challenge that line several years later on the ground of the alleged error. The Court concluded that the circumstances (in particular, the fact that the alleged error was manifest on the face of the map and the circumstances of the map's preparation and presentation), were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. As they did not do so, either then or for many years, they were held to have acquiesced (*ibid.*, pp. 23-26).

(76) See the Advisory Opinion of the International Court on the *International Status of South-West Africa*, *ICJ Rep.*, 1950, p. 128, 135.

(77) AL MAYYAL, *op. cit.*, 214. See also (undated) Map of Kuwait produced by GEO projects, Beirut, showing the Kuwaiti police posts; reprinted in AL-MAYYAL, 140 and in SCHOFIELD, Map 1.

States jointly (78). A number of other factors, however, suggest that the parties have long regarded the boundary as *dividing* the Batin; that is, as running through it as opposed to along one or other or both of its banks. Most notably, there is the use made of the valley by the populations of the two States and apparently sanctioned by the authorities: *viz.*, grazing and recreation on each side of a notional dividing line running down the middle (the term being used here in a non-technical sense) (79). It is not possible to conclude, however, that this practice speaks in favour of division by median line, *thalweg*, or on some other broadly middle line or, indeed, is even consistent in this regard.

In the light of the ambiguity which thus remains concerning the meaning of this phrase, it is permissible to have regard to the *travaux préparatoires* (if any) of the three agreements, to ascertain whether they shed any light on the question. Thus Article 32 (a) of the Vienna Convention on the Law of Treaties provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure ...

It is clear from the internal discussions of the British officials leading up to the 1923 exchange of letters that *they* intended the boundary as defined therein to conform with the frontier as described in the (unratified) Anglo-Turkish Convention of 1913 and shown by the green line on the map annexed thereto. It will be recalled that, at the time of the 1923 agreement, Iraq was a Kingdom under British mandate. The British High Commissioner for Iraq, in entering into the agreement, was therefore either acting as the Government of Iraq or as agent on their behalf (80). That being the case, Iraq could be attributed with knowledge of the British intention that the agreement was to give effect to the description in the earlier Conven-

(78) Cf. A.O. CUKWURAH, *The Settlement of Boundary Disputes in International Law* (1967), 46-47, citing, as an example of such an arrangement, Article 27 of the Delimitation Treaty of 26 June 1816 between Prussia and the Netherlands.

(79) AL-MAYYAL, *op. cit.*, 213. Additional factors pointing to this conclusion include the following: (i) an assertion by the Iraqi Prime Minister in 1932, which was not challenged by the British High Commissioner in Iraq, that the Iraqis had, on several occasions, and notably in 1927, maintained a police post at Hulaiba, described as a watering hole in the Batin (as reported in a letter of 30 October 1935 from the British Embassy, Baghdad, to the Foreign Office, *IOR* R/15/5/184, 7 AB 463 at 464, emphasis added); (ii) an assurance given to the Iraqi Prime Minister in 1932 that Hulaiba clearly fell on the Iraqi side of the frontier line (*ibid.*, 7 AB 464); and (iii) an Iraqi protest in January 1931 against an unauthorized crossing of the Batin by four armed cars belonging to the Shaikh of Kuwait in pursuit of two suspected murderers, which elicited an apology from the Ruler of Kuwait (respectively, *IOR* R/15/5/184, 7 AB 345-47; and *ibid.*, 348-49; cf. the report of this incident by the Political Agent, Kuwait, to the Political Resident, *ibid.*, 350-51).

(80) As to the *vires* of the British to do so, see MENDELSON and HULTON, *op. cit.*, 940-44.

tion. The British were not, on the other hand, acting as agents for Kuwait (the Ruler of Kuwait entered into the agreement in his own right); but only as intermediaries with the Iraqis. It is not known whether the contents of the Anglo-Turkish Convention were ever brought to the Ruler's attention. Nor is it clear whether it was accessible to him. Even if it was, however, it is not clear that his intention was to replicate, rather than approximate, the text of that Convention. That being the case, it could scarcely be contended that the Convention affords evidence of the *common* intention of the parties. It is doubtful, therefore, that it can be treated as part of the drafting history of the 1923 agreement so as to be relevant to its interpretation (81).

There seems to have been minimal discussion between the British authorities and the Iraqis concerning the boundary definition preceding the 1932 exchange of letters. What does emerge of relevance in the present context is that the Iraqi Prime Minister was apparently given an assurance at the time by the then British High Commissioner in Baghdad that the exchange of notes was merely a reaffirmation of the *status quo* and that no change in the frontier line was intended or involved. Further, he was assured that, as depicted on the (confidential) British sketch map illustrating Cox's memorandum of April 1923, which he was shown, Hulaiba (a watering hole in the Batin) lay on the Iraqi side of the boundary line which it was proposed to reaffirm (82). This assurance would seem to form part of the drafting history of the 1932 agreement, confirming that the parties had in mind a line dividing the Batin; but, again, it is not possible to deduce from this

(81) Cf. McNAIR, *op. cit.* pp. 421-23, on the inappropriateness of having regard to unilateral preparatory work. Cf., further, the *International Commission of the River Oder* case (1929) PCIJ, Ser. A, No. 23, p. 29 and *Young Loan* arbitration (1980) 59 ILR 495, holding that preparatory work may only be invoked against a State which has participated in it; and cf. the ILC Commentary on draft Article 28 (now Article 32) of the Vienna Convention on the Law of Treaties; and I. SINCLAIR, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984), 144, stating that the approach which accords more with practice is that participation is not essential, but that the preparatory work sought to be relied upon must have been published or be otherwise accessible.

Even if, contrary to the foregoing, the Anglo-Turkish Convention could be taken into account, it is not particularly helpful on this issue. The text says that the line 'follows' the Batin, which would seem to rule out a straight line. However, the line on the map annexed and expressly referred to in that treaty (map 1 hereto) may be seen to follow (and was described by the Foreign Office in 1936 (letter of 22 January 1936 to the British Ambassador, Baghdad, R/15/5/184, 7 AB 481, para.3) as following) a virtually rectilinear course. The question as to whether the description or the map prevails in the light of this discrepancy would seem to be a matter of treaty interpretation since both, according to Article 31 of the Vienna Convention on the Law of Treaties, form part of the text of the treaty. (Cf. G. RESS, *The Delimitation and Demarcation of Frontiers in International Treaties and Maps*, in XIV *Thesaurus Acroasium, National and International Boundaries* (1985), 395, 432; cf. also the approach taken by the ICJ in the *Temple* case, *ICJ Rep.*, 1962, p. 6.) Apart from this, the map is on such a small scale, and contains so few geographical features that it is not much use as a basis for determining where precisely the boundary runs (cf. Foreign Office minute of 21 November 1935 by Hood, 'Delineation of the Koweit-Iraq Frontier', *IOR L/P&S/12/3737*, 7 AB 257): the most that can be said with any certainty is that it runs *through* the Batin, dividing it between the two countries.

(82) *Supra*, p. [307].

the precise course of the line. The map, on the other hand, cannot similarly be treated as part of the drafting history, in the light of the evidence that the British themselves did not regard it as an accurate depiction of the boundary, and in the absence of any indication that the Iraqis so regarded it (83).

We have not seen the records of the negotiations, if any, which preceded the signing of the 1963 Agreed Minutes. However, given the political background to the agreement and its emphasis on recognition — both of the independent status of Kuwait and of the existing boundary — it seems unlikely that consideration was given at the time to a detailed working out of the course of the boundary.

To summarize thus far, subsequent practice under the 1923, 1932 and 1963 agreements, and the drafting history of the 1932 agreement reveal an implied agreement between the parties that the boundary in this sector was to be drawn so as to divide the Batin. On the other hand, the parties appear not to have agreed — either expressly or by necessary implication — on how it was to be divided. It must be concluded, therefore, that they either intended this question to be dealt with by customary international law or simply left it undetermined. This brings us to the question of what general international law has to say about the apportionment of a river-bed (84).

#### *The position at customary international law*

Historically, the starting point in the division of boundary rivers seems to have been the presumption of equal ownership of the river, requiring equal division by a median line (85). This presumption came to be displaced, however, in the case of *navigable* rivers, for functional reasons: it was

(83) See note 81 above and the accompanying text.

(84) That the general law applies to the division of a *wadi*, such as the Batin, is affirmed by A.M. Hirsch, 'Utilization of International Rivers in the Middle East: A Study of Conventional International Law' 50 AJIL (1956) 81, 99. Based on an examination of treaty law concerning the utilization of international rivers in the Middle East (including Iraq), he concludes that no distinction seems to exist in principle between *wadis* (intermittent streams) and regular perennial rivers. They are treated alike with respect to boundary delineation and other questions.

(85) According to WESTLAKE, the older authorities generally took the middle of the line of the river as the boundary, in conformity with the rule of Roman law for the delimitation of properties (*International Law*, Part I (2nd ed., 1910), p. 144). The same presumption operates at common law as a rule of construction, where it is applied to the division of, for example, rivers and highways abutting private property (A.S. WISDOM, *The Medium Filum Rule*, CXIX *Justice of the Peace and Local Government Review* (1955) 218). Verzijl casts some doubt on whether State (treaty) practice in early times outside the Holy Roman Empire could be said to support a customary rule of division of rivers by median line (or on any other basis) (*International Law in Historical Perspective*, Part III (1970), 543-44). However, by the early 17th century, at any rate, the practice was evidently sufficiently consistent among the States of Europe to lead Grotius to conclude that in case of doubt the jurisdiction of two states bordering on the same river extends to the middle of the stream ... (*De Jure Belli ac Pacis Libri Tres* (trans. of the 1646 edition by F.W. Kelsey, 1925; reprinted in 1964), Vol. II, Book II, Ch.III, p. 218).



found that a division by median line did not always secure the interests of both riparian States in freedom of navigation since it did not necessarily correspond with the main (or indeed any) navigable channel (86). By the beginning of the 19th century, States began to adopt as their boundary in such rivers the *thalweg* (87) — a term variously defined as the middle of the main navigable channel or the line of deepest soundings of the river. The principle of division by the *thalweg* is now viewed by writers and tribunals applying international law as a presumption to be applied in the division of navigable rivers (88).

In the case of *non-navigable* rivers, however — where the same functional considerations do not apply — the *thalweg* is not the starting point. There, the presumption remains division by the median line (89).

*A fortiori*, the *thalweg* would seem not to be applicable to divide the Batin — a river-bed which is not only not navigable, but dry for most parts of the year. On the contrary, there would appear, on the basis of the foregoing, to be a presumption in favour of division by median line. As a presumption, it can of course, be rebutted by agreement by the parties (as to which, see below). It is less clear whether it might also be rebutted by special circumstances, as that concept has been developed and applied in the context of maritime delimitations.

This brings us to the practical technical question of how one would actually achieve a division based on equidistance in the present circumstances. Ordinarily, one would specify from what points on the shoreline and at what state of the water the median line is to be determined. Thus S.W. Boggs, former Geographer at the United States Department of State, suggests the following definition of a median line in relation to a lake or river :

a line every point of which is equidistant from the nearest points on the shores of the two respective sovereignties ; the shore line being the line of mean high water [mean low water, or other indicated stage of the water] (90).

(86) On the practical differences, in the case of a meandering river, see S.B. JONES, *Boundary-making : A Handbook for Statesmen, Treaty Editors and Boundary Commissions* (Washington 1945), fig. 14, p. 111, and discussion at pp. 110-18.

(87) VERZIJL, *op. cit.*, 553 ; CUKWURAH, *op. cit.*, 52.

(88) See OPPENHEIM-LAUTERPACHT, *International Law*, vol. I (8th ed. : 1955), p. 532 ; BROWNLIE, *African Boundaries : A Legal and Diplomatic Encyclopaedia* (London, 1979), 17 ; and the inter-state cases decided by the US Supreme Court on the basis of international law cited by VERZIJL, *op. cit.*, 557-58.

(89) See OPPENHEIM-LAUTERPACHT, *loc. cit.* ; and BROWNLIE, *loc. cit.* These different presumptions were reflected in the rule to be applied in each of the five peace treaties adopted after the First World War : see, for example, Article 6 of the Treaty of Lausanne, 24 July 1923, which specified that : In so far as concerns frontiers defined by a waterway as distinct from its banks, the phrases 'course' or 'channel' used in the description of the present Treaty signify, as regards non-navigable rivers, the median line of the waterway or of its principal branch, and, as regards navigable rivers, the median line of the principal channel of navigation (28 LNTS 11, 19).

(90) S.W. BOGGS, *International Boundaries : A Study of boundary functions and problems* (1940), 184.

Where, as here, however, one is dealing with a virtually dry river-bed, how does one distinguish the banks from the river-bed? It might be possible to identify a high-water mark. Alternatively, it might be feasible to operate from a fixed altitude on both sides of the river-bed. This would be an easy enough matter where the banks of the Batin are sharply angled, and descend to a flat river-bed. We understand, however, that, through much of its length, the Batin is a relatively shallow depression surrounded by unstable banks and shifting sand. In those places where the middle cannot be readily identified it might well be sensible (and justifiable) to use instead the deepest channel (91).

It is by this rather meandering course that we return to the *thalweg*, originally proposed by the British, as the criterion for the division of the Batin: not because it is required by the treaties (which are silent) or customary law (since the wadi is *non-navigable*), but, because it may be the only, or at any rate the best, practical means of division in the particular circumstances.

The UN-appointed Boundary Commission recently approved the 'methodology to be applied in demarcating the western portion' of the boundary (92). And it is understood that in early September it was agreed by Kuwait and Iraq that the line will follow the lowest point of the Batin (i.e. the *thalweg*), and that an aerial survey will be carried out to determine where that point is.

## 2) Just south of the latitude of Safwan

Turning to the second segment of the boundary, what is meant by the expression in the 1923 and 1932 agreements: 'just south of the latitude of Safwan', the point at which the frontier line turns eastwards from the Batin? Similarly, what is meant by 'south of Safwan wells', which is the point through which the line then passes on its course to the east? (93)

(91) Interestingly, the line on the British Military Survey maps to which Security Council Resolution 687 refers — which is understood to have been based on the *thalweg* — does not seem to follow the deepest channel throughout the course of the Batin, so far as could be discerned from a brief inspection, and bearing in mind that we are not geographers. For one thing, it looks as if, at some points on the Batin, the Military Survey line crosses small hill-like features, which is not really consistent with the idea of following the deepest channel. We understand, moreover, that in some places the bed of the Batin is flat and gravelly and that, in such cases, the midway point between the highest points on the banks was actually used.

(92) UN Press Release IK/34, 16 July 1991.

(93) Where the frontier runs in this area is particularly significant for two reasons. First, important oil fields lie close to (and possibly straddle) the boundary: Rumaila to the north-west of Safwan, in Iraqi territory; and Ratga south of it, just within Kuwaiti territory. (See Map 10 in SCHOFIELD, *op. cit.*, p. 127, showing the configuration of oilfields north and south of the Kuwait-Iraq international boundary). It is unclear whether these two fields are related or quite separate geological features: *ibid.*, p. 126. It is also unclear whether Iraq's claim (see press release of the Iraqi Embassy, London, 'The Political Background to the Current Events', 12 September 1990, p. 4) that Kuwait was stealing oil from the South Rumaila oil field was a claim that Kuwait was drilling diagonally across the border; that Kuwait was drilling vertically, but

This, of course, raises a question of fact as to what the parties had in mind. It seems that there was originally a large notice board painted with the words Iraq-Kuwait Boundary situated one mile south of Safwan, which had been erected by the Ruler of Kuwait and the British Political Agent, Kuwait, in about 1923 (94). This board was apparently removed, however, by the Iraqis in 1932, restored by them, but once again removed in March 1939 by persons unknown. In June 1940, the Political Agent had it replaced again in the presence of an Iraqi frontier official. The Iraqis protested that the new board had been erected at a point far from the site of the old one — at a distance of 250 metres within Iraqi territory. They removed it and it was not subsequently replaced, leading to suggestions that it should be reinstated or that some other point, selected by reference to co-ordinates or to a fixed landmark, should be used. At one stage, the most southerly palm in Safwan was considered for the landmark, but matters were complicated by the Iraqis putting in new plantations south of Safwan.

In their communication to Iraq in 1940, the British authorities proposed the point a little to the south of Safwan at which the post and notice-board marking the frontier stood until March 1939. We have already seen that the Ruler of Kuwait had given his prior approval to the 1940 interpretation, as a whole. When, in 1950, he approved a further approach to the Iraqis on the same basis (which was not in fact made), he apparently stressed his understanding that this particular point was less than a mile from Safwan (95). The proposal put forward by the British in 1951 was more precise, but possibly specifies a different point: *viz.* the point 1,000 metres due south of the customs post at Safwan, i.e. the building which, on 25th June 1940, was used as the customs post at Safwan'. Whilst the Ruler of Kuwait had agreed to an approach being made to the Iraqis on the lines proposed, it is not clear that this new definition of the point south of Safwan was explained to him (96).

Were the parties ever in agreement that the original notice board (or any other point) did mark the boundary? If so, the only unresolved question would be the factual one as to where *that* point was. Whilst there is cer-

in a location which was on Iraq's side of what should be the border (an argument incidentally inconsistent with the position it adopted that there was no entity of Kuwait entitled to a border); or thirdly that, even though Kuwait was drilling vertically, on its side of the border, it was tapping into a field which straddled the border and that the manner of extraction was unlawful. Secondly, the area surrounding Abdaly, just south of the border on the Kuwaiti side, is (or at least was, prior to Iraqi invasion of August 1990) an important agricultural area. (See AL-MAYYAL, *op. cit.*, 216; and SCHOFIELD, *op. cit.*, 123.) Lying on the main Basra to Kuwait road, Abdaly itself is the main border and customs post for northern Kuwait.

(94) See, for example, two letters from the Political Agent, Kuwait (H.R. Dickson) to the Political Resident dated, respectively, 7 June 1932 (*JOR* R/15/5/184, 7) AB 359, para. 7; and 27 August 1935 (*ibid.*, 7 AB 443, para. 7).

(95) PG 53, p. 72, para. 49.

(96) See PG 53, p. 72, para. 51.

tainly considerable evidence that the British (and Kuwaitis), for their part, regarded the original board as marking the boundary (97), we have not seen any evidence that the Iraqis did so. The Ruler of Kuwait did reportedly assert that it had been erected in consultation with the Iraq authorities (98). However, even if that were the case, the board may, as far as the Iraqis were concerned, simply have served a traffic function, as it was apparently marked with a warning to motorists to keep to the right or left, depending on whether they were going to Iraq or Kuwait (the rule of the road in the two countries being different) (99). As regards the point 1,000 metres south of the Safwan customs post, the Iraqis expressly disputed that this correctly marked the boundary, in their protest of June 1940 against the erection of a replacement board at that location (100). Nor have we seen any suggestion that they subsequently came to accept it.

It would seem, therefore, that we are thrown back on the difficult questions as to what Safwan meant and where 'just south' of it might be. The important thing to underline here is that, as a matter of treaty interpretation, it is the intention of the parties *at the time of the agreement* that one is trying to ascertain. It is therefore Safwan as it was known in 1923 with which we are concerned, not as it has since become. Thus, for example, if it were established that the parties had had in mind the village itself or the date grove to the south, it would be the limits of these as they then were which would be relevant — a question on which historical and geographical evidence would be relevant (101). As to how far south of this place 'just south' might be, the ordinary (dictionary) meaning of the word just, used (as here) as an adverb of place or position, seems to be either (a) 'exactly', as in the phrases just there, just at that spot; or (b) closely, as in the phrases the house was just by, he sat just before me (102). The latter use more closely approximates the one under consideration. It could perhaps be argued from this that, say, three, or perhaps even two, miles south of Safwan would not be just south.

How far can the Anglo-Turkish Convention, which specified that the line passed 'immediately south' of Safwan, leaving it and its well(s) to Basra (Iraq), be used to confirm or clarify this interpretation? For the reasons

(97) See, notably, the wording of the *note verbale* dated 3 August 1940 from the British Embassy, Baghdad to the Iraqi Ministry of Foreign Affairs, *IOR R/15/5/185*, 8 AB 40.

(98) See letter of 6 June 1932 from the Kuwait Political Agency to Administrative Inspector, Basra, *R/15/5/184*, 7 AB 357.

(99) *Ibid.*

(100) Letter from the Iraqi Ministry of Foreign Affairs to the British Embassy in Baghdad, 25 June 1940, *IOR R/15/5/185*, 8 AB 23.

(101) It is interesting to note in this connexion the description of Safwan given by J.G. LORIMER, of the Indian Civil Service, in 1908: 'A village in Turkish Iraq situated on slightly rising ground, ... [t]he place consists of two or three small enclosures containing a few houses and of a date grove, surrounded by a wall, belonging to the Naqib of Basrah ...' (*Gazetteer of the Persian Gulf, Oman, and Central Arabia*, vol.II (Government Printing, India, 1908), p. 1642).

(102) *The Oxford English Dictionary* (2nd ed., 1989), vol.VIII, 324.

set out above (103), we consider it doubtful that the Convention can be treated as part of the drafting history of the 1923 agreement so as to be relevant to its interpretation at all. *A fortiori*, it would not be permissible for one party to invoke against the other, for purposes of interpreting this phrase, the description of this sector of the boundary given in Lorimer's *Gazetteer of India*, which was thought to have been the sole documentary authority upon which the British Government relied in the negotiations with the Turkish Government leading to the Anglo-Turkish Convention, when defining the northern frontier of Kuwait (104).

The nature of oil exploitation in this area or other use of the territory may well afford some evidence of the parties' understanding as to where exactly the boundary lies; but a careful distinction would have to be drawn in this regard between conduct which may properly be attributed to the parties as an interpretation of the boundary definition, and conduct seeking rectification of the boundary or violating it. As we have seen, rectification will not lightly be presumed. In the absence of any decisive evidence on this issue, agreement would have to be reached between the parties on the disputed area, there being no general law applicable to how it should otherwise be divided.

It remains to be considered, however, whether either party might be estopped from putting forward a view on the meaning of this phrase inconsistent with a view espoused or a position taken earlier. Having put forward one interpretation in 1940, were the British authorities precluded from putting forward another in 1951? And were they or the Kuwaitis precluded from putting forward a different interpretation after 1951 (105)? It would seem not. We have already concluded that, as proposals concerning the meaning of an agreement and put forward in the course of negotiations, they are not the kind of statement which would give rise to an estoppel (106). Moreover, what we have submitted to be an essential condition of estoppel — namely, proof of reliance by Iraq to its detriment, or to the advantage of Kuwait — would appear to be missing. We have not seen such proof, and doubt that it exists given that Iraq's claim was more extensive. Furthermore, in so far as the proposals were made in the course

(103) *Supra*, pp. [314-315].

(104) Cf. 'Note on the Safwan-Khor Abdullah section of the Kuwait/Iraq Frontier, November 1941' by T. Hickinbotham, Political Agent, Kuwait (*IOR* R/15/5/209, 8 AB 121, paras. 10 and 12). The relevant part of Lorimer's definition reads as follows: On the north the most advanced Turkish outposts upon the mainland are at Umm Qasr and Safwan and the influence of the Shaikh of Kuwait is unquestioned *up to the very walls of those places*; we may accordingly consider the frontier on this side to be a line running from Khor-as-Sabiyah so as to pass *immediately south* of Umm Qasr and Safwan to Jabal Sanam and thence to the Batin (*Gazetteer of the Persian Gulf* (1908) vol.II, p. 1060 — emphasis added).

(105) For instance, it appears that the point 1,000 metres south of the Safwan customs post which was specified in 1951 is well to the north of where the line on the British Military Survey map runs. The latter appears to pass approximately 1.6 kilometres south of Safwan.

(106) *Supra*, p. [311].

of negotiations, they would not appear either to amount to implied recognition as to the limits of Iraq's sovereignty. Nevertheless, from a forensic point of view, it would obviously be embarrassing for Kuwait to go back on these earlier interpretations even if it would not be strictly precluded from doing so.

Positive conduct going beyond mere proposals for delimitation or statements as to the interpretation of the meaning of the treaty gives rise to more difficult questions. If a State solemnly declares — as in the case of the British — that a notice board marks the boundary and persistently re-erects the board when it is removed ; or formally protests — as in the case of the Iraqis — against an incursion into its territory by a specified distance, why is it not precluded from saying that the boundary does not lie further north or south (as the case may be) of that point ? Or, to put it another way, why does such conduct not amount to implied recognition that the respective points referred to by the parties constitutes the utmost limit of their territory ?

These are very difficult questions. But, tentatively, we would suggest the following. In normal estoppel analysis, such conduct would not constitute estoppel since there was no reliance by the other side. In so far as recognition is concerned, the conduct could — as a formal act — amount to implied recognition, but this would depend on the circumstances. If — as here — the other side completely rejected the claim, the whole thing would be thrown back into the melting pot, with the result that neither side has committed any act which is legally opposable against it. An analogy might be a case where a counter-offer is made in negotiations, in which event the original offer would be revoked. Of course, to go back on a firmly asserted position could create forensic embarrassment, but that is another matter.

It has been announced that the Boundary Commission has already agreed on the approximate location of the boundary in the vicinity of Safwan in the northern section (107) ; but we understand that this is only a very approximate location at this stage.

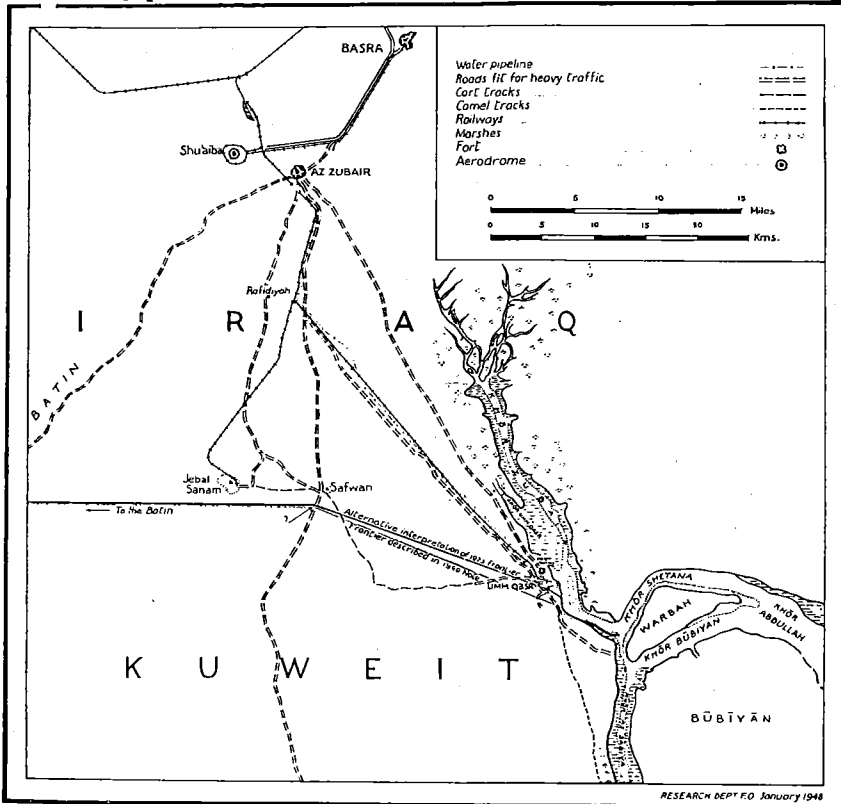
### 3) The line running east of Safwan to the Khors

A third issue concerns the course to be followed by the boundary in the segment from Safwan to the junction of the Khor Abdullah with the Khor Zubair. The language, it will be recalled, of the 1923 and 1932 agreements is that, after the point just south of the latitude of Safwan, the line runs 'eastwards passing south of Safwan Wells, Janam Sanam and Umm Qasr leaving them to Iraq and so on to the junction of the Khor Zubair with the Khor Abdullah. Does the boundary run in a straight line from the

point south of Safwan to the junction of the Khor Zubair and Khor Abdullah, or in a direct line to a point immediately south of Umm Qasr, then turning south-east to the junction of the two Khors? (See map 2 (108)).

SECRET

## IRAQ-KUWAIT FRONTIER (UMM QASR)



Originally, and due it seems to an error of geography, the British authorities thought that a straight line would run about one mile south of each of the named locations until it met the Khors (109), and it was therefore a straight line which they proposed to Iraq in 1940. They realized their mistake when, during the early stages of World War II, the question arose

(108) A map showing this segment of the Iraq-Kuwait frontier, with lines depicting these two possibilities, was produced by the Research Department of the Foreign Office in 1948, and reproduced in 24 AB as map 26. We reproduce this here as map 2, with thanks to the publishers, Archive Editions, for permission to do so.

(109) Letter dated 27 August 1935 from the Political Agent Kuwait (Dickson) to the Political Resident, IOR L/P&S/12/3737, 7 AB 252.

as to whether the site proposed for the development of an Allied port some three miles south of Umm Qasr lay within Iraqi or Kuwaiti territory, and a map was (belatedly) prepared showing how the boundary, as interpreted in the 1940 proposal, ran. The India Office argued strongly that the 1940 interpretation (which seemed to leave the proposed site in Iraqi territory) was incorrect, and that the line should not turn to the south until after Umm Qasr (110). The difference concerned a small wedge of territory, but potentially an important one as regards oil and the development of a port at Umm Qasr.

Although the Foreign Office agreed that the 1940 proposal probably erred in favour of Iraq so far as this particular point was concerned, it did not think that the British Government could now go back on it. Resolution of the departmental controversy was deferred, however, until after the War, and for its duration the Allied port built at Umm Qasr was administered entirely by the British military authorities (111). (The port was dismantled after the War because of its sensitive location.) Following the War, the Foreign Office view — that it could not now put forward a different line — prevailed, and the line proposed to the Iraqis in 1951 was the same as that set out in its 1940 proposal (112).

Iraq, for its part, had informed the British as early as 1938 that, if it decided to develop a port at Umm Qasr, it would require a slight rectification of the frontier in this area, to enable it to proceed without having to obtain Kuwaiti approval and in order to secure the approaches thereto (113). It took this up in earnest in 1955, the Iraqi Prime Minister suggesting that (in the words of the British Ambassador in Baghdad) a change in the frontier between Iraq and Kuwait would be desirable in order that Iraq might develop Umm Qasr as a subsidiary port to Basra and the Iraqi Foreign Minister requesting that this proposition be referred to the Ruler

(110) See PG 53, p. 71.

(111) When, in June 1942, the Iraqi Government published a schedule of charges to be levied at the port, the British authorities protested and sought to secure its withdrawal. This proving unsuccessful, the British Ambassador at Baghdad delivered a *note verbale* to the Iraqi Ministry of Foreign Affairs, stating that the British Government thought it well formally to notify the Iraqi Government that nothing that is done or has been done with regard to the port of Umm Qasr can be held in any way to prejudice the question of where the frontier lies (*note verbale* from the British Embassy, Baghdad, to the Iraqi Ministry of Foreign Affairs, 28 November 1943, IOR R/15/5/210, 8 AB 160).

(112) The line on the British Military Survey map sent to the Security Council is also straight: it does not follow the course proposed by the India Office. However, on an Iraqi military map seen by one of us, which shows their view of the course of the line in the area of Umm Qasr, it appears to run well to the south of the airport at that town, whereas the British map shows the line as running through the airport.

(113) The then Iraqi Foreign Minister (Taufiq Suwaidi) stated that such a rectification would be needed during discussions with the British Foreign Office in October 1938 (see letter from Sir B. Newton, British Embassy, Baghdad, to Viscount Halifax, 1 July 1939, IOR R/15/5/184, 7 AB 529, para. 5). He also mentioned it in an *aide mémoire* prepared for these discussions (copy enclosed with letter dated 30 September 1943 from R.M.A. Hankey, Foreign Office to the British Embassy, Baghdad, IOR R/15/5/210, 8 AB 157, 159).



of Kuwait (114). A sketch map (115) given to the Ambassador by the Iraqi Prime Minister reveals (as observed by the former) that the Iraqi Government wished 'to advance their frontier to a depth of some four kilometres, covering a desert strip, the uninhabited island of Warba and the waters of the Khor Abdullah which surround it'. The starting point, from which the four kilometres were measured, was a line marked on the sketch map as Boundary Line, which looks similar (if not identical) to the 1951 line. The British Political Agent in Kuwait doubted that the Ruler of Kuwait would agree to cede sovereignty of this territory to Iraq, but thought that he might agree to lease it for a long period (e.g. 99 years). Although this was indeed initially the case, the Kuwaitis eventually decided, following protracted negotiations, not to proceed with the lease agreement (116). Iraq proceeded, nevertheless, to develop a port at Umm Qasr and, by 1966, it was open to commercial traffic (117). Although we do not have details as to the precise area this development encompassed, there is some indication that it did not include the above-mentioned territory inasmuch as Iraq was, according to one source, still at that time seeking to secure this territory by negotiation (118).

Amongst the questions which come to mind here are : first, does or does not the 1932 definition require a single straight line ? ; secondly, can the Anglo-Turkish Convention, which supports an angular line, be used as an aid to interpretation ? ; thirdly, is Kuwait estopped from putting forward a line different from that proposed by Great Britain in 1940 and 1951 ? ; and, fourthly, is either party precluded, by reason of the position adopted by it during the boundary rectification negotiations, from now putting forward a different position ?

Turning, first, to the wording of the 1932 definition, it falls to be considered at the outset what the word eastwards means in this context. Does it signify a direction due east, or simply towards the east, somewhere between the north and south ? The geographer Holdich has recalled that, in the demarcation of the Pamir boundary (a range of mountains between the Soviet Union and Afghanistan), the term easterly was interpreted in the latter sense (119). The analogous expression southwards was interpreted to like effect in the *Plateau of Manica boundary arbitration* (120). The arbi-

(114) Letter of 24 May 1955 from the British Ambassador in Baghdad, Sir Michael WRIGHT, to the Foreign Office, PRO FO 371/114644, 8 AB 349.

(115) Map dated 31-12-54 and entitled 'Port Development at Umm Qasr Iraq-Kuwait-Boundary', enclosed with the Ambassador's letter, *ibid.*, p. 352 ; reprinted, with some modifications, as Map 9, in SCHOFIELD, *op. cit.*, p. 97.

(116) See, respectively, telegram from Kuwait Agency to the Foreign Office, 28 June 1955, PRO FO 371/114644, 8 AB 359 ; and Brief for Secretary of State prepared by British Embassy, Baghdad, on Umm Qasr, undated (c. 1955), PRO FO 371/120634, 8 AB 441.

(117) SCHOFIELD, 114.

(118) *Ibid.*

(119) (1899) 13 *Geographical Journal* 465, 468.

(120) *Hertslet's Commercial Treaties*, vol. XX (1898), 827, 839.

trator (Vigliani) there expressed the view that the term southwards (as it appeared in the text of the boundary treaty between Great Britain and Portugal delimiting their respective spheres of influence south of the Zambezi) meant not due south but should be interpreted in a broad sense as in the direction of the southern side or pretty nearly towards the south. He concluded that the boundary line should not, therefore, run in a straight line to the south, but should bend at times to the southeast, at others to the southwest. This seems a compelling interpretation. If, then, the expression eastwards stood alone, it would appear to require a line running towards the east, but not due east.

In the present context, however, this direction is expressly modified by the condition imposed on the tracing of the line — *viz.*, that it run south of the three places named. Which brings us to the question of how far south is 'south'. It is not a defined term. In theory, it could permit of a line running to any distance south of these locations. However, the words 'leaving them to Iraq' suggests that these locations were not far north of the line; and, at the same time, the line could not run so far south as to bring it outside the controlling requirement that it run in an eastwards direction. The natural meaning of the words in their context, then, would seem to require that a line be drawn running east/south-east to Umm Qasr somewhere between these two limits.

The concluding words, 'and so on to the junction' of the two Khors suggest a continuation of this line. However, the geography of the area (which must also form part of the context of the agreement for purposes of interpretation) would appear to necessitate that this continuation line run in a rather different direction, the two Khors lying as they do south/southeast of Umm Qasr (quite outside the bounds of a line running eastwards from the original starting point). It seems reasonably clear, then, that the phrase under consideration, when read as a whole and in its context, entails an angled line, not a straight one.

Can the Anglo-Turkish Convention be invoked to confirm this interpretation? Its text is consistent with an angular line (in specifying that the line was to run north-west from the coast and pass 'immediately south' of the three named places); so, too, is the map annexed, which depicts such a line. However, whilst it is permissible to have regard to the preparatory work of an agreement not only in case of ambiguity, but also to *confirm* an interpretation arrived at resulting from the examination of the terms of the treaty in their context (121), we have seen that there are difficulties in treating this Convention as part of the drafting history of the later agree-

(121) Article 32 Vienna Convention on the Law of Treaties, quoted in relevant part, *supra*, p. [314].

ments (122), and there does not seem to be any other basis on which it can be treated as an aid to interpretation.

Was there any agreement on the straight line interpretation put forward by the British authorities ? We have already seen (123) that there was no express agreement by Iraq to the 1940/1951 interpretations and, indeed, Iraq subsequently sought to have the line in this sector redrawn, although the means by which it did so was through negotiation for a cession or lease of territory.

However, the very fact that Iraq was actually prepared to accept and pay for a cession or lease from Kuwait of a 4-kilometre wide band of territory measured south from a line drawn in accordance with the 1951 interpretation suggests, in the absence of an appropriate reservation, an implied recognition by Iraq that Kuwait had sovereignty over this territory. Iraq would therefore be precluded in law from now arguing that the boundary runs further south than the 1951 line in this area. The point is that here we are not dealing merely with negotiating positions, but the very reason for and premise of those negotiations, *viz.*, that Kuwait had sovereignty over the strip in question.

Is Kuwait, for its part, precluded from asserting that its sovereignty in fact extends *further* north than the 1951 line — up to the course proposed by the India Office or beyond ? It would not be estopped from taking such a stance, by reason of the interpretations put forward on its behalf in 1940 and 1951. In our view, as proposals made in the course of negotiations, these were not statements of a kind which could give rise to an estoppel (124). It might be argued, on the other hand, that Kuwait (through the UK) was obliged to inform Iraq of its more extensive claim (if it had one) during the later boundary rectification negotiations, and that its failure to do so could operate as an estoppel, precluding it from making such a claim now. As we have seen, Iraq's stated objective in these negotiations was to be able to develop the port at Umm Qasr (and to secure the approaches thereto) without having to seek Kuwaiti approval. This objective would have been entirely thwarted if Kuwaiti sovereignty in fact extended north of the 1951 line upon which the negotiations were based, as it would have left the crucial wedge or strip of territory just south of Umm Qasr under Kuwaiti control. However, although Kuwait's failure to make known any broader claim it might have had could, conceivably, give rise to an estoppel in other circumstances, it would seem not to do so here ; the negotiations having been unsuccessful, there is no evidence of the essential condition of reliance on the part of the Iraqis. On the other hand, since Iraq made it clear that it was an extension of territory under its sovereignty that it was

(122) *Supra*, pp. [314-315].

(123) *Supra*, p. [303].

(124) See further, *supra*, p. [311].

seeking and since Kuwait apparently entered into negotiations on that basis, it could be argued that Kuwait had *recognized Iraq's* sovereignty north of the 1951 line. At the least, its conduct would be very embarrassing to it from an evidential point of view if it subsequently sought to draw the line further north.

To summarize it seems, then, that the India Office was right in thinking that an angular line drawn from the point south of Safwan to a point immediately south of Umm Qasr, and thence south-east to the junction of the two Khors, would be in conformity with the 1932 definition. However, such a line was not reflected in the interpretations put forward by the British authorities in their proposals of 1940 and 1951. But Iraq, having impliedly recognized that Kuwaiti sovereignty extended north to the 1951 line, would certainly be precluded from arguing that the line runs further south than that. What makes the Iraqi recognition clear-cut is the fact that the preparedness to negotiate for a cession or lease of territory south of that line from Kuwait is inconsistent with their ownership of it. Kuwait, for its part, would arguably be precluded from contending that the line runs further north than the 1951 line, but this is less certain : it depends on whether its conduct during the boundary rectification negotiations could properly be construed as recognition of Iraqi sovereignty north of the line. Its stance during these negotiations would, however, make it difficult for it convincingly to argue that the boundary should follow a more northerly route.

The UN-appointed Boundary Commission has announced that it has completed consideration of material available for the demarcation of the eastern portion of the boundary (125) ; but we have no further information as to what this means in the context of the present discussion and since the Press Release goes on to say that the Commission has authorized its independent experts to undertake a survey and mapping of the entire border, this may mean only that they have considered the material available so far.

Before leaving this segment of the line, a word should be said about the identification of the terminus of the land boundary, defined in the 1923 and 1932 agreements as the junction of Khor Zubair with the Khor Abdullah. In their proposals of 1940 and 1951, the British suggested that this meant the junction of the *thalwegs* of the two Khors. There is no indication that there was any agreement on this ; nor have we seen any relevant practice of the parties which might shed light on it. As to the position under general international law, this cannot be determined in the abstract, but depends on how the Khor Abdullah (a body of water lying between the Kuwaiti

(125) UN Press Release IK/47, 16 August 1991.

island of Warba and the Iraqi mainland) is to be divided. It is to this question that we turn now.

#### 4) Delimitation of the Khor Abdullah

So far, we have been considering the definition of the land boundary between Iraq and Kuwait, as specified in the 1923 and 1932 agreements, and what it means — as to which there has been a fair amount of practice of the parties. This definition also allocates sovereignty over certain islands in the Gulf, as between the two countries (notably, for present purposes, stating that Bubiyan and Warba belong to Kuwait). However, it contains no description of how the Khor Abdullah is to be delimited. The discussion of this aspect of the boundary question will, necessarily, therefore, be more speculative. We shall consider whether there is any other treaty guidance on the matter; and, if not, identify, in general terms, what appear to be the issues and the law applicable to such a delimitation.

There seems not to have been any other agreement — express or implied — between the parties as to how the boundary should run from the coast to the Gulf. The map annexed to the 1913 Anglo-Turkish Convention (see map 1 hereto) does show a red line running first, between Warba and what is now the Iraqi mainland (the map is on too small a scale to discern exactly where it runs here); then roughly midway between Bubiyan and the mainland; and ending in the Gulf, south-east of Bubiyan (126). However, regard to the text of the Convention suggests that this line was not thereby intended to do more than designate Kuwait's sovereignty over these islands. In any case, the Convention was never ratified, and the line shown has not subsequently been agreed by the two countries.

The British Government's proposals of 1940 and 1951 expressly dealt with the question how the boundary should along the Khor Abdullah, suggesting that it should follow the *thalweg* to the open sea. This idea seems to have originated with Edmonds, the British Adviser to the Iraqi Minister of the Interior, who put it forward to his Minister in April 1937 (127) (together with his other suggestions as to how the boundary should run, including, as we have seen, that the Batin should be divided by the *thalweg*). He did so without explanation, except to say that it accorded with the existing practical interpretation. So much for the possible provenance of the idea. We have not, however, seen any evidence to suggest that the Iraqis or the Kuwaitis ever agreed to it.

(126) This would seem to be the line depicted in United States Department of State, Bureau of Intelligence and Research, *Limits in the Seas*, No. 94, Continental Shelf Boundaries: The Persian Gulf (1981).

(127) Note No.480 dated 5 April 1937, forwarded by the British Ambassador in Baghdad to G.W. Rendel of the Foreign Office under cover of letter dated 3 May 1937, IOR R/15/5/184, 7 AB 487.

In the absence of agreement, the first question that arises for determination is what is the nature of the waters under consideration. Are they a river or an inlet of the sea? The characterisation is important as it could affect the presumptions that apply, and hence the burden of proof. As we have seen, in the case of a navigable boundary river, the presumption is division by the *thalweg* (128). The matter is otherwise, however, as we shall see, in the case of coastal waters or territorial waters.

Although we do not have a detailed knowledge of the geography of this area, the Khor Abdullah seems to be sea, rather than inland waters. The very word khor itself means coastal inlet (129). Lorimer, writing in 1908, described the Khor Abdullah as 'an important inlet running north-westwards ... from the head of the Persian Gulf to Warbah island, from whence a deep channel (the Khor Shetana) connects the Khor Abdullah with the Khor-ath-Thal'lab, the inlet on which Umm Qasr stands. He went on to describe what transpired in the Khor and the surrounding area at various states of the tide, and to refer to it as the sea (130). The British Political Resident, writing in 1939, similarly referred to the 'sea frontier down the Khor Abdullah' (131). That anything to the east of the Khor Zubair is sea would fit, moreover, with what the British did in the boundary definitions: that is, delimit the land territory and allocate the islands, but not delimit the maritime areas.

That being the case, we are dealing with a maritime boundary, rather than a river boundary. As the Khor Abdullah is only 12 miles wide at its entrance (132), and thereafter narrows considerably, it is relevant to have regard to the breadth of the two countries' territorial sea claims. Kuwait has formulated its claim as extending 12 miles from the base-line, which is defined basically as the low water mark, with the normal exceptions for permanent harbour works and low tide elevations (133). Iraq also claims a territorial sea of 12 miles extending from low water mark (134). These overlapping claims bring into play the principles governing a delimitation of the territorial sea, in the absence of agreement between the parties. There is a presumption in such a case that, as between opposite or adjacent States,

(128) *Supra*, p. [316-317].

(129) *Per* J.B. KELLY, *Eastern Arabian Frontiers* (1964), 14; *The Times Atlas of the World* (7th ed., 1987), 2.

(130) J.G. LORIMER, *Gazetteer of the Persian Gulf, Oman, and Central Arabia*, vol.II, 1908, p. 15-16. See also the descriptions of Bubiyan and Warba islands by B.C. BUSCH in *Britain and the Persian Gulf, 1894-1914* (1967), pp. 34-35, which make it clear that the bordering waters are tidal, salt water.

(131) Letter of 1 August 1939 from T.C. Fowle, Political Resident, to R.T. Peel of the India Office, *IOR R/15/5/184*, 7 AB 539, para. 3.

(132) LORIMER, *op. cit.*, p. 15.

(133) Decree regarding the Breadth of the Territorial Seas of Kuwait, 17 December 1967, UN Legislative Series, *National Legislation and Treaties relating to the Territorial Seas etc.*, ST/LEG/Ser.B/15 (1970), 96.

(134) Proclamation of 10 April 1958, UN Legislative Series, *ibid.*, pp. 89-90.

division is by the median line unless an historic title or other special circumstances justify the adoption of some other line (135). This normal rule is considered to represent customary law, with the result that it is binding on Iraq and Kuwait despite the fact that neither has ratified the Geneva Convention on the Territorial Sea in which it is embodied (136).

In the present case, the two States are opposite States in that part of the Khor Shetana/Khor Abdullah lying between Warba and the Iraqi mainland. *Prima facie*, this would call for division by median line. However, if a median line would compromise access by the Iraqis to their port at Umm Qasr by denying to them a navigable channel, this might quite possibly constitute a special circumstance (137). The two countries continue to be opposite States until the point at which a line is drawn from the eastern side of Bubiyan north to Iraq. From that point onwards, they may be adjacent (138). The significance of this is that special circumstances (such as the presence of offshore islands or the general configuration of the coast) necessitating deviation from a strict median line are more likely to be found in the case of adjacent, than in that of opposite, States (139).

#### *The maritime boundary in the open Gulf*

As we have mentioned, a further possible issue concerns the maritime boundary between the two countries in the open waters of the Gulf. However, this is not dealt with at all in the treaties; it is very possibly outside the terms of reference of the Boundary Commission; and that body does not seem to be considering it. Consequently, although there are fascinating further questions to be considered in this connexion, and issues which would be better resolved before further conflict breaks out, we shall not examine them here.

(135) Geneva Convention on the Territorial Sea, 1958, Art. 12.

(136) They have, on the other hand, both ratified the UN Law of the Sea Convention, 1982, which contains a substantially identical provision (Art. 15); but this treaty is not yet in force.

(137) In its commentary on its draft articles on the delimitation of the territorial sea, the International Law Commission recognized that the presence of a navigable channel could make a boundary based on equidistance inequitable and could indicate the appropriateness of utilizing the *thalweg* as the boundary: Y.B.L.C. (1952-II), commentary to draft Art. 13 (4). See also the ILC Reports to the General Assembly in 1953 and 1956, dealing with the draft convention on the law of the sea, which said that 'As in the case of boundaries of coastal waters, provision must be made [in continental shelf delimitations] for departures necessitated by ... the presence of ... navigable channels': respectively, YBILC (1954-II), 216, para. 82 (commentary on Art. 7); and YBILC (1956-II), 300 (Art. 72, commentary para. 1). See also the Award in the *Beagle Channel Arbitration* (1977) 52 ILR 93, para.110) in which some modification of a strict median line was made to take account of, *inter alia*, 'navigability and the desirability of enabling each party so far as possible to navigate in its own waters'.

(138) See *Anglo-French Continental Shelf Case (Western Approaches Arbitration)*, 54 ILR 6; and *Delimitation of the Maritime Boundary in the Gulf of Maine area (Canada/United States)*, ICJ Rep., 1984, p. 246, though these were not really concerned with territorial or inland waters.

(139) See *dictum* in the *North Sea Continental Shelf cases*, ICJ Rep., 1969, p. 3, 36-37 (concerning the continental shelf). Cf. P. WEIL, *The Law of Maritime Delimitation — Reflections* (1989), 244-48.

## V. CONCLUSION

The foregoing gives some indication of the complex factual and legal issues raised by the demarcation of the Iraq-Kuwait boundary. The body which has been established with the help of the UN Secretary-General is a boundary commission, not an arbitral tribunal whose main function is to make a legal determination. It has a practical job of demarcation to do (that is, marking the line on the ground); some of its members are non-lawyers; and it may quite possibly feel impatient about some of the legal subtleties we have discussed (not to mention others which, for reasons of space, we have not been able to allude to).

In our view, however, it is important for both the parties and the Commission to deal properly with the legal aspects of the case. This is not said merely because, as international lawyers, we would be disappointed if these fascinating questions were not ventilated and decided. There is a much more important reason why the legal issues should be properly addressed.

We have seen that Iraq has already begun to sow the seeds for a possible challenge to the demarcation which will be carried out. For the sake of stability in the region it is vitally important that the boundary the Commission lays down can hold: we have seen too many instances of boundaries which have apparently been settled by a tribunal being subsequently challenged on legal grounds (well-founded or not). In our view, it is therefore vital that the determinations by the Commission be as convincing as possible, not merely technically and factually, but legally too. The world awaits the outcome with interest.