

**STATE IDENTITY AND FACTUAL CONTINUITY
IN INTERNATIONAL AND ISLAMIC LAW:
THE CASE OF IRAQ AND KUWAIT**

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ABBREVIATIONS

A.D.: Annual Digest.

A.J.C.C.: American Journal of Comparative Law.

B.F.S.P.: British and Foreign State Papers.

B.Y.I.L.: British Yearbook of International Law.

G.B.P.P.: Great Britain Parliamentary Papers.

I.C.J.: International Court of Justice.

I.J.M.E.S.: International Journal of Middle East Studies.

I.O.L.: Indian Office Library.

J.R.C.A.S.: Journal of the Royal Central Asian Society.

L.N.Off.J.: League of Nations Official Journal.

L.N.T.S.: League of Nations Treaty Series.

M.E.E.S.: Middle East Economic Survey.

P.C.I.J.: Permanent Court of International Justice.

P.M.C.: Permanent Mandate Commission.

R.E.D.I.: Revue Egyptienne de Droit International.

R.I.A.A.: Reports of the International Arbitral Awards.

S.C.O.R.: Security Council Official Records.

U.K.T.S.: United Kingdom Treaty Series.

U.S.T.S.: United States Treaty Series.

Y.B.I.L.C.: Year Book of International Law Commission

INTRODUCTION:

The recent controversy over the identity and factual continuity of Kuwait was brought about by the Iraqi government's statement issued during its military invasion and total occupation of Kuwait, which lasted from the 2nd of August 1990 until the 26th of February 1991. The statement claimed that the people of Kuwait had risen up against the "corrupt" Al Sabah regime, and established the so-called provisional, free government of Kuwait.

This government, the claim continued, requested the Iraqi government for military assistance in order to accomplish its revolutionary aims. Subsequently, about a hundred and twenty thousand Iraqi soldiers, with air cover, crossed the border between the two states in the dead of night, and occupied the strategic points of Kuwait's capital. The Iraqi government then issued a statement alleging that the Iraqi forces would pull out of Kuwait when the situation there became stabilized.

Strangely enough, however, on the 8th of August 1990 the Iraqi government issued another statement declaring that the so-called provisional free government of Kuwait had proposed the unification of Kuwait and Iraq. This proposal was immediately accepted by the Iraqi government on the grounds that the "branch" (Kuwait) return to the "origin" (Iraq).

This creation of a puppet government and the proposed unification of Kuwait with Iraq revived the pre-1990 Iraqi claims alleged by King Ghazi in 1939, by Prime-Minister Qasim in 1961, and by Saddam Hussain in the 1990 Kuwait crisis. In these instances, the Iraqi government calimed that Kuwait had never been an independent state, but was an integral part of Iraq when the latter was a part of the Ottoman Empire.

It was also asserted by the Iraqi government that after the independence of Iraq in 1932, the imperial Western states had deprived the people of Kuwait from joining the mother state, i.e., Iraq. Thus, Kuwait in 1990, as claimed before in 1969 should subsist under the sovereignty of Iraq, a contention which has always been rejected by the government of Kuwait.

The claim touches the factual identity of Iraq, before and after her independence, and subsequently the factual identity of Kuwait, along with the legal continuity of the latter after the Iraqi occupation of 1990. Thus, the nucleus of the issue with which this study is concerned can be posed in the form of the following question: To what extent was the Ottoman Empire (the Islamic State and the predecessor of Iraq) replaced by Iraq and Kuwait as two separate and factual identities?

Iraq and Kuwait are parts of dar al-Islam (Islamic territory) and their legal evolution had occurred in the context of Islamic law. Subsequently, in the age of international organization, their legal evolution entered the arena of international law. Therefore, the answer to this question requires the application of the Islamic law rules governing state identity in dar al-Islam (Islamic territory), and the application of the rules of international law to the case of Iraq and Kuwait. Furthermore, when it is relevant, due regard will be paid to the comparison between the views of Muslim jurists and those of international jurists in dealing with this issue.

This study, therefore, is divided into three chapters. The first chapter concentrates on the evolution of Islamic legal rules governing state identity through the decentralization of the legal order and the territorial disintegration of the Islamic state. The second chapter deals with the application of the Islamic and international law tests to the case of Iraq and Kuwait in order to determine affirmatively or negatively the acquisition of the factual identity by each one of them. Lastly, in the third chapter we will apply the predominant legal principles emerging from the interaction between the Islamic law rules and those of international law governing state identity in regard to Iraq's claim of sovereignty over Kuwait in order that this issue may be decided affirmatively or negatively.

CHAPTER 1
EVOLUTION OF NEW ISLAMIC LEGAL RULES
GOVERNING STATE IDENTITY IN DAR AL-ISLAM
(ISLAMIC TERRITORY)

SECTION 1: Evolution of the Rules Through Decentralization of the Islamic State's Legal Order

The evolution of a state's legal order usually begins with the establishment of elements of statehood: territory, population and legal order ⁽¹⁾ and continues evolving as much as the state keeps gaining more strength whether by acquiring more territories, as in the pre-international organization age, or by a state's economic, technological and political powers, as occurring in the recent international community ⁽²⁾. Legal history, however, does not contain a single case in which evolution of a state continues forever, but depends upon many factors, which are different from one state to another, for every evolution of a state has certain limits⁽³⁾.

At its final stage, the evolution of a state usually leads to voluntary⁽⁴⁾ or forcible⁽⁵⁾ decentralization of the legal order of the state concerned amounting to the creation of de jure identity or identities in accordance with the legal traditions of the law under which the identities are created.

Since Iraq and Kuwait, with which this study is exclusively concerned, were parts of dar al-Islam (Islamic territory) within which the Islamic law was exclusively applicable, the development of the rules governing the creation and extinction of a state identity in dar al-Islam (Islamic territory) had developed in accordance with the traditions of Islamic law, which may be different from those of international law, even though they contributed to the development of each other⁽⁶⁾, as can be seen in the practice of the Islamic State starting from its establishment up to the emergence of Iraq and Kuwait.

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- (1) Crawford, J. *The Creation of States in International Law*, Clarendon Press, Oxford 1979, p. 31.
 - (2) Verzijl, J. *International Law in Historical Perspective*, A.W. Sijthoff-Leyden 1969, pp. 64-184.
 - (3) For example: on peaceful political changes of a state legal order, see: Crutwell, C.A *History of Peaceful Change in the Modern World*, Oxford University Press 1937, pp. 90-179.
 - (4) Ibid.
 - (5) Duchheit, L. *Secession: The Legitimacy of Self-Determination*, Yale University Press 1978, pp. 138-215.
 - (6) Hamidullah, M. *Muslim Conduct of State*, revised 5th edition, Lahore, 1968, pp. 3, 11; Ghunaim, M. *The Muslim Conception of International Law and the Western approach*, the Hague 1968, p. 193 ff.

As regards the evolution of the legal order of the Islamic state, it began after the establishment of the state in Yathrib (al-Madina) in the beginning of the seventh century A.D., in the form of expansion in strength and in the governmental administration, and more specifically during the reign of al-khilafa al-rashida (the rightly-guided government) onwards. This progressive evolution of the legal order of the Islamic State, however, reached its maximum during the time of al-Khilafa al-'Abbasiya (the Abbasid government) when the evolution took the form of decentralization of the governmental administration, resulting in the creation of several de jure species of the Islamic identity in accordance with legal rules ensuing from the traditions of Islamic law.

The rules governing such types of the Islamic identity can be followed in the practice of al-khalifa al-Abbasi (the Abbasid chief of the State) regarding the appointment of al-umara' (governors) of the provinces and the definition of each amir's authority in his province. In his practice, al-khalifa al-Abbasi (the Abbasid chief of the state) usually appoints al-umara' (governors) of the provinces and invests them with wilayat al-khalifa (the chief's delegation of authority). Depending on the importance of the province and the loyalty of the amir (governor), al-khalifa (the chief of state) would grant either of two types of al-wilaya (the delegation of authority): limited or full wilaya⁽¹⁾. The limited wilaya was designed for an amir (governor) who was in charge of certain matters, such as military affairs. Full wilaya was itself divided into two types: imarat istikfa' (authorized governorship), in which the Khalifa (the chief of state) entered into the contract of al-wilaya with the amir (governor) by his own will, and imarat Istila' (assumption of government by force), in which the Khalifa (the chief of state) entered into the contract with the amir (governor) by necessity.

According to the imarat al-istikfa' (authorized governorship), the amir (governor) resembled the 'delegated minister', and was entitled to the same unqualified obedience from his subjects as was given to the imam (leader of the people). This species of the Islamic state identity, which was acquired by peaceful means, was not new identity because of the prevailing provision in Islamic state practice that all acts and decisions of the delegated amir (governor) were legally valid and binding unless overruled by the imam (leader of the people).

In the first period of the al-khilafa al-'Abbasiya (the Abbasid government), the amirs (governors) of the provinces remained bound by this rule, but as soon

(1) Al-Mawardi, Abu al-Hassan. Al-Ahkam al-Sultaniyya, al-Matba'a al-Muhammadiyya, cairo, (no date), p. 30.

as they realized that the Abbasid Khalifa (the chief of state) was a helpless prisoner in his own palace and that the role of government was being exercised by Turkish commanders, they no longer felt constrained. Some of them relied on their military strength and ruled their provinces independently from the Khalifa (the chief of state) while others, particularly the Shi'ites, dominated the Abbasid Khalifa (the chief of state) and refused to recognize his claim to the Khilafa (government). By such means, several *de jure* species of the Islamic state identity were created in 324 A .H. (935 A .D.)⁽¹⁾.

The establishment of these species of the identity of the Islamic state technically constituted secession, but the illegality of such an act was negated by the device known as *imarat al-istilla'* (assumption of governorship by force), by which the Khalifa (the chief of state) conferred the *wilaya* (delegation of authority) of the province on the amir (governor). In return, the amir recognized the dignity of the Khalifa (the chief of state) by such specific means as including his name in the Friday Khutba (speech) in *al-djami'* (congregational mosque), and by recognizing the right of the al-Khalifa (the chief of state) to administer all religious affairs. Sometimes the Khalifa (the chief of state) made this delegation of authority a hereditary privilege⁽²⁾.

This practice encouraged the amirs (governors) to acquire not only *de jure* species of the Islamic identity but also *de Facto* territorial sovereignty.

SECTION 2: Evolution of the Rules Through Territorial Disintegration of the Islamic State:

Although the decentralization of the governmental legal order of the Islamic State through *imarat al-istilla'* (assumption of governorship by force) did encourage the development of *de jure* identities, derived from the identity of the Islamic state, until that time such decentralization did not reach the stage in which these amirs could claim the establishment of factual identities collateral to their *de jure* ones. The Islamic State enjoyed territorial integrity, as crystallized by *dar al-Islam* (Islamic territory).

However, this decentralization marked the beginning of the division of *dar al-islam* (Islamic territory) into several territorial sovereignties, which did not reach the stage of statehood, since none of these territorial entities acquired complete independence from the Islamic state.

(1) Al-Mas'udi, 'Ali. Murudj al-Dhahab, ed. by Muhammad Muhyi al-din, al-Maktaba al-Islamiyya, Beirut, (no date) vol. 2, p. 30.

(2) Shakir, Mahmud. Al-Tarikh al-Islami, 1985, vol. 6, p. 19.

This can be emphasized by the fact that in spite of the establishment of three rival khalifa's (chiefs of states) in several parts of dar al-Islam (Islamic territory), such as an Umayyid in al-Andalus (Spain); a fatimid in Afrikya (Africa); and an Abbasid in Baghdad, non of them considered his action and claim as constituting new factual identity in dar al-Islam (Islamic territory), but rather as creating territorial sovereignty. Thus the Abbasid Khilafa (government) was regarded by the others as having been duly contracted before the others, which were therefore subservient to it, and any action by the other Khalifas (the chiefs of states) which threatened to bring the deposition of the Abbasid Khalifa (the chief of state) was seen as rebellious⁽¹⁾. The numeration of al-khilafa' (chiefs of states) in dar al-Islam (has been justified by the Shi'iet Fatimids who maintained that there could not be two 'speaking' imams (leaders of the people) at one time, but there might be one 'speaking' imam and one 'silent' imam⁽²⁾.

The continuity of the Islamic identity of these territorial entities evolving in dar al-Islam (Islamic territory) can be concluded from several historical facts: the abolishment of the existing government, the division of the governmental powers and the re-establishment of the government or the transfer of the government of any of these entities from place to place within dar al-Islam (Islamic territory) did not affect the Islamic identity of the territory concerned. Many instances emphasizing the crystalization of this rule can be found in Islamic state practices; for example, the Fatimid emirate was abolished by the Ayyubid leader, Salah al-din, in 567 A .H. (1189 A .D.) and still regarded as integral part of dar al-Islam (Islamic territory). In another example, the Abbasid Khalifa (the chief of state) was heavily influenced by the Seldjukes, and again power was divided between the Khalifa and the Seldjukes, as Sultans, without affecting the existence of al-khilafa itself (government). Moreover, after the destruction of Baghdad by the Mongols in 656 A.H. (1258 A .D.) and the re-establishment of the Abbasid Khilafa (government) in Egypt by the Mamluks, the Imamate was contractually assumed by the Mamluks by virtue of their military power. However, when the Ottomans arose and overcame the former by the might of their army, the Mamluks were deposed and their victors seized the imama (leadership of the people), from which the Khalifa (the chief of state) was to be chosen, and the Khilafa (government) was transferred from Cairo to Istanbul. The basis of this action was not to create new identity different from the Islamic one, but was the well-being and unity of Muslims⁽³⁾.

(1) Al-Baghdadi. Usul al-Din, Istanbul, (1928), 274.

(2) Ibn Hizm. Al-Milal wa'l Ahwa' wa'l Nihal, Cairo, (1347-48 H.), vol. 4, p. 88.

(3) Abu Zahra. Al-Wihda al-Islamiyya, Dar al-Fikr al-'Arabi, (no date), p. 151.

Until that time, the creation, extension and disintegration of identity in dar al-Islam (Islamic territory) were exclusively governed by Islamic law. The admission of the Ottoman Empire to the Concert of Europe in 1856⁽¹⁾, the succession of incapable Khalifas (the chiefs of states), and the advent of the foreign protection, jointly accelerated not only the evolution of these territorial sovereignties into factual identities but also the interaction between the rules of Islamic law governing state identity and those of international law and the applicability of the latter's to these identities.

The applicability of the rules of international law to these identities was established on the basis of treaties which were concluded between the foreign powers and the Ottoman Empire or between these powers and the entities concerned. Examples of the former was the 1856 treaty by which the Ottoman Empire entered to the concert of Europe, while examples of the latter can be found in the 1853 Treaty between Great Britain and Arab chiefs of the Gulf⁽²⁾.

In an attempt to modernize the decadent and decentralized system of the Ottoman Empire, and to prevent its territorial disintegration, the Khalifa introduced reform measures known as Tanzimat, which were to no avail because of the overthrow of the Khalifa and the takeover of the Ottoman government by Turkish nationalists. This change of government did not prevent the evolution of new species of the Islamic identity in dar al-Islam (Islamic territory) and the application of international law rules to these identities, but rather accelerated them, transferring these identities, under international law to factual ones. As a reaction against a policy of Turkification adopted by the Nationalist government, the Arabs revolted, aiming to secede from the Ottoman Empire and establish an independent Arab state. The result, facilitated by the support of Great Britain, was indeed the secession of the Arab territory from the Ottoman Empire and its fragmentation into many states - one of them was Iraq - and the replacement of Ottoman sovereignty or suzerainty over Iraq and Kuwait by British responsibility for the conduct of the international relations of these territories in accordance with international law.

Therefore, these traditional rules of Islamic law governing state identity and those of international law have to be applied to Iraq's claim of sovereignty over Kuwait in order to establish certain test by which the identity of each one of them can be determined.

- (1) The Treaty of Peace (Paris) terminating the Crimean war, Great Britain, Parliamentary Papers, (herein after refer to as: G.B.P.P.), 1856, vol. 61, p. 19.
- (2) Aitchison, C.U. A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries, Calcutta, (1933), p. 240.

CHAPTER 2

APPLICATION OF THE ESTABLISHED TEST OF IDENTITY UNDER ISLAMIC AND INTERNATIONAL LAW TO IRAQ AND KUWAIT

SECTION 1: Application of the Established Test of Identity to the Case of Iraq:

1. Application of Islamic Law Test of Identity to Iraq:

It may be recalled that the Islamic law rules governing the creation of new species of the Islamic identity are two types: those governing *imarat al-istikfa'* (authorized governorship), which are analogous to the rules of international law governing the establishment of new identity by treaty and such like; and the rules of *imarat al-istila'* (assumption of governorship by force) which resemble, in many respects, the rules governing the establishment of new identity through secession in international law. Thus, it must now be decided which of the Islamic law rules can be applied to the case of Iraq in order to determine her identity under contemporary Islamic law. The answer to this question, however, can be concluded from the facts surrounding the deposition of the khalifa (chief of the state) by the Turkish nationalists and the subsequent disintegration of the Ottoman Empire itself.

Accordingly, upon the deposing of the Khalifa (the chief of state) 'Abdul Hamid by the Turkish nationalists⁽¹⁾, the Ottoman Empire was directly governed by the Turkish National Party from 1908 to 1918 in the name of a puppet Khalifa (the chief of state), aiming at complete abolishment of *al-khilafa* (the Islamic government), an act which was not a simple change of government, but change of its nature and aims. Such changes of the nature of government and aims conflicted with the Islamic law rules governing state identity, more specifically the national party's policy of Turkification and secularization. Moreover, the policy was not only alien to the Islamic state practice regarding either the change of government or the establishment of new species of the Islamic identity, but also defied the aspirations of various national groups, including Arabs, within the Empire to be governed and identified in accordance with *Shari'a* (Islamic law).

As a consequence, Arabs began to work out methods by which the Ottoman authority over the Arab territories could be denounced and an

(1) Mansi, Dr Muhammad. *Harakat al-Yakaza al-'Arabiyya fi al-Shark al-Asyawi*, Dar al-Fikr al-'Arabi, 1978, p. 125.

independent Arab state established instead. None of the rules of Islamic law can be applicable in this case except those governing the assumption of governorship by force.

The existence of the legal basis of such an assumption of governorship by force cannot be denied in Islamic State practice. Furthermore, judging by the practice of the Prophet (peace be upon him) who stated that: "No obedience to any creature in the disobedience of the creator"⁽¹⁾, as well as the judgement of the most authoritative exponents of Islamic law⁽²⁾, Muslims, both Arabs and non-Arabs, could hardly be denied their demand that the new Ottoman government should restrict itself to the law and practice of its predecessors. Failing that it ought to grant some autonomy to the territories wishing to observe such law and practice.

None of these demands were accepted by the Ottoman government, and as a result of the outbreak of World War I, the interests of Sharif Hussain and Great Britain coincided and resulted in the so-called Hussain-McMahon Exchange of Notes of 1915-1916⁽³⁾. The former was looking for support in order to assume governorship by force over the Arab territory, including Iraq, but not including Kuwait, while the latter was looking to safeguard British interests in mesopotamia against both the Ottoman Empire and Germany during the war.

Therefore, it can be concluded that upon the complete separation of the Arab territory from the Ottoman Empire, and the establishment of the territory under the name of Iraq, the territory established its de jure species of Islamic identity and territorial sovereignty in accordance with the Islamic law rules, more specifically the rules governing the assumption of governorship by force. This continued as such until the time of the replacement of the Ottoman Empire by Great Britain in the conduct of the international relations of Iraq.

2. Application of International Law Test of Identity to Iraq:

The same question can be raised here as to which test can be applied to Iraq's identity in order to establish whether it is new or a continuation of the Ottoman Empire? The answer to this question depends mainly on two findings: the first is how the Ottoman Empire was replaced by Great Britain in the conduct of the international relations of the territory of Iraq and second is how Iraq obtained its independence.

(1) Al-Bukhari. Sahih al-Bukhari, 'Alam al-Kutub, Beirut, (no date), vol. 9, p. 113.

(2) Al-Tabari, Muhammad bin Dja'far. Tarikh al-Tabari, ed. by Muhammad Abu al-Fadil, Dar Swidan, Beirut, (no date), vol. 3, p. 223.

(3) G.B.P.P., 1939, Misc. No. 3, Cmd. 5957.

A. Replacement of the Ottoman Empire by Great Britain in the Conduct of the International Relations of Iraq:

The replacement of the Ottoman Empire (the Islamic state and the predecessor of Iraq) by Great Britain in the conduct of the international relations of Iraq marked not only the interaction between Islamic law rules governing state identity in dar al-Islam (Islamic territory) and those of international law, but also the application of the latter's to Iraq on the basis of agreement either concluded with the Ottoman Empire or concluded with Iraq herself. Thus, it should be mentioned here that although the rules of international law predominated, in this period of time of Iraq's existence, they coincided with those of Islamic law dividing Iraq's identity into two types: regional identity which is exclusively governed by Islamic law; and international identity which is governed by international law.

Regarding Iraq's international identity, it will be mentioned that upon the conclusion of the so-called Sykes-Picot Agreement between Britain and France⁽¹⁾, Iraq was included in the territorial sphere of British influence, subsequently, many problems resulting from this inclusion have arisen which had certain effects, as will be investigated, on Iraq's international identity. Thus, quick solutions had to be found to the following problems: firstly, the conferring of the administration of Iraq upon Great Britain by an international body; secondly, the establishment of an internal administrative and political structure for Iraq; thirdly, the determination of the international status of Iraq; and fourthly, the determination and international acceptance of the boundaries of Iraq.

The immediate result of these solutions was the replacement of the Ottoman Empire by Great Britain in the conduct of the international relations of Iraq and the starting point of Iraq's acquisition of elements of statehood in accordance with international law.

(1) Establishment of the Territory of Iraq:

The first element of statehood is the establishment of territory upon which the respective state can conduct exclusively its authority and define its population without interference of the other states⁽²⁾. Moreover, territory has far reaching effects not only in the creation of new identity, but in the extinction

(1) Woodward, E.L. Documents on British Foreign Policy, 1919-1939, 1st Series, vol. IV, pp. 245-7.

(2) See: Island of Palmas Case, the Netherlands v. U.S. 1928, PCA, Sole Arbitrator: Huber, R.I.A.A. 1928, vol. 2, p. 829.

of state's identity as well, since the total loss of a state's territory brings about the extinction of that state identity.

As far as the establishment of Iraq's territory is concerned, at the San Remo Conference a compromise was reached which relied upon the principles embodied in the mandate system, founded on Article 22 of the Covenant of the League of Nations, and this formed an integral part of the Treaty of Peace⁽¹⁾, according to which:

«Certain communities formerly belonging to the Turkish Empire [Syria, Lebanon, Palestine, Trans-Jordan and Iraq] have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone.....»

These principles were applied by Great Britain to its new mandated territory⁽²⁾, which comprised the three Vilayets of Basra, Mosul and Baghdad⁽³⁾ with their population under the name of Iraq.

(2) Recruitment of Permanent Population for Iraq:

Equally true, compared with that of territory, permanent population, as a requirement of statehood, has certain legal effects on state's identity, since total loss of population of a state may bring its identity to an end, while the establishment of permanent population, together with the other elements of statehood, may bring into existence a new identity.

As far as the establishment of permanent population for Iraq is concerned, the British mandate of Iraq was not only a territorial entity, but also was an aggregate of individuals, who were at that time living in the three vilayets of Basra, Bagdad and Mosul⁽⁴⁾. Moreover, the population of the mandated territory - in words of Article 22 of the Covenant of the League of Nations - have reached a stage of development, emphasizing the progressive development of the mandated territory toward statehood.

This emphasized by the fact that the application of the principles of Article 22 of the Covenant of the League of Nations to the territory and its population

(1) British and Foreign State Papers, (herein after refer to as: B.F.S .P.), 1919, vol. 112, p. 21, Article 22 of the Covenant.

(2) Cmd. 2317.

(3) Secret. Note by the Secretary, Political and Secret Dept., 14 March 1915, Indian Office Library, (I.O.L.), B. 213, pp. 10-11.

(4) Toynbee, A. Survey of International Affairs, 1925, vol. 1, pp. 464, 471 ff.

and the placing of them under British mandate did not conflict with this progressive development towards statehood, since the mandate was of a special character in many respects. It resembled the contract of 'guardianship' in Islamic law⁽¹⁾. Moreover, unlike the other Arab mandated territories, the mandate for Iraq was not embodied in an agreement between the mandatory power and the League of Nations but in treaties and subsidiary agreements concluded between the mandatory power (Great Britain) and the new Iraqi government⁽²⁾.

(2) Establishment of Effective Government for Iraq:

The requirement that a new state must have an effective government is considered as crucial to that state's claim of sovereignty on her territory, and as one of the bases for one of the requirements of statehood, i.e. independence⁽³⁾.

This requirement of statehood is of paramount importance on deciding state's identity in case of dismemberment, where the identity of the mother state comes to an end and new government established in the seceding parts of that state. The same can be said with regard to revolutionary secession, where the identity of the mother state remains intact, while the seceding parts obtains new government.

Thus, the secession of Iraq from the Ottoman Empire made it necessary to establish certain governmental organization capable of exercising power in respect to that territory and to the population living therein⁽⁴⁾.

For this reason, the declared policy of the British Government was not to hold Iraq as a colony or protectorate, but to set up the beginnings of an independent government⁽⁵⁾. Accordingly, a Provisional Council of State was brought into being, headed by the Nakib of Baghdad⁽⁶⁾. An immediate question centered on which form the new constitution should take. The nationalists and

(1) It should be noted, however that according to al-Qur'an there can be no wilaya (guardianship) of non-Muslim upon Muslim person, al-Qur'an. IV, 144.

(2) Cmd. 2370.

(3) See: Island of Palmas Case, R.I.A.A., 1928, vol. 2, pp. 829, 838.

(4) See: Article 1 (c) of Montevideo Convention on Rights and Duties of State, signed 26 December 1933, League of Nations Treaty Series, (herein after refer to as: L.N.T.S.), 1933, vol. 165; U.S .T.S., 1933, vol. 19, p. 881.

(5) Report on the Administration of Iraq, by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of Nations, October, 1920-March 1922, Appendix 1, p. 123.

(6) Khadduri, M. Independent Iraq: A Study in Iraq Policies Since 1932, Oxford University Press, 2nd ed., 1960, p. 11.

the politically-minded population of the country were unanimously in favour of a monarchical, constitutional government⁽¹⁾. In response, British policy-makers found in the selection of Faisal an opportunity of combining gratitude⁽²⁾ with interest⁽³⁾, upon Faisal's acceptance, the British government made him head of the first Arab Council of State for Iraq in 1921.

Thereafter, the Iraqi community grew to possess the qualifications for independent statehood and thus demanded full recognition.

(4) Recognition of Iraq:

The value of recognition for an entity possessing the elements of statehood, can be realized in doubtful cases of birth or extinction of a state, since a state comes into existence either by acquiring the elements of statehood, and the effect of recognition here is merely declaratory, or depending on the will of third states not to recognize a *debellatio*, where the effect of recognition is completely constitutive, provided that such recognition, in both cases, is in conformity with the objective norms of international law. To apply the foregoing principles to the case of Iraq it is to be asserted that the starting -point of Iraq's life - after possessing territory, population and effective government - can be claimed to date either from its attainment of independence or from such time as other states accredited ministers to it, concluded agreement with it or in some other way entered into such relations with it as exist between states alone.

In the Eastern Greenland Case⁽⁴⁾ it was held that Norway had accepted Danish title to the disputed territory of Eastern Greenland as a result of the declaration made by the Norway Foreign Minister, an acceptance which can be construed as informal agreement.

In addition to formal agreement - the provisions of which may involve recognition of a state, a state's detrimental reaction may take form of unilateral

(1) Report on the Administration of Iraq, opcit, (Col. No. 58).

(2) Ibid.

(3) Faisal's position in the Arab world and his valuable services for the Allied Power's cause during World War I gave him an appeal to both the British and to the Iraqi people, and this was made evident at the Arab Conference in 1920, Kelidar, A. (ed.) The Integration of Modern Iraq, London, 1979, p. 34; when Faisal was elected to the throne of the short-lived Syrian Kingdom. The British took advantage of the expulsion of Amir Faisal from Syria, Al-'Akkad, Dr Salah. Al-Mashrik al-'Arabi al-'Mu'sir, Maktabat al-Anglo-al-Misriyya, (no date), p. 6; by the French by giving him the opportunity to accept the Iraqi throne on the condition that he support British Policy in Iraq. In response to his refusal to accept the Iraqi throne under a mandate, the British government promised that the relationship between Iraq and Britain would take the form of a treaty of alliance, ibid, pp. 195-199.

(4) P.C.I.J., 1933, Ser. A/B, No 53, at p. 68.

act⁽¹⁾ or conduct, implying expressed recognition, estoppel⁽²⁾ or acquiescence⁽³⁾.

In the Fisheries Case⁽⁴⁾ between the United Kingdom and Norway, it was held that the United Kingdom has acquiesced to the Norwegian system of straight baselines defining the exclusive fishery limits.

As to the issue regarding Iraq's recognition, the new State of Iraq was formed by breaking off from the Ottoman Empire. Recognition could have been accorded by the Ottoman Empire; this would have implied the abandonment of all Ottoman intentions over the territory. Moreover, it would have provided more conclusive evidence of independence than recognition by a third state, thereby removing all doubt as to the statehood of the new entity. Yet, in the case of Iraq, recognition by the Ottoman Empire was not a gift of independence; the latter merely acknowledged that the Iraqi community's claim to possess certain elements of statehood was well-founded. Recognition by a third state would have performed this function equally well.

Formal recognition of Iraq by the Ottoman Empire is embodied in Article 16 of the Treaty of Lausanne of 1923⁽⁵⁾ which states:

«Turkey hereby renounces all rights and titles whatsoever, over or respecting, the territories situated outside the frontiers laid down in the present treaty, and the islands other than those over which her sovereignty is recognized by the said treaty; the future of these territories and islands being settled, or to be settled, by the parties concerned.

The provisions of the present article do not prejudice any special arrangements arising from neighbourly relations which have been, or may be concluded between Turkey and any limitrophe countries.»

Moreover, the frontiers of Turkey were restated in the Treaty of Lausanne. Article 3 provided that the:

«...frontier between Turkey and Iraq shall be laid down in the friendly arrangement to be concluded between Turkey and Great Britain within nine

(1) See: South West Africa Case (Preliminary Objection) I.C.J. Reports, 1962, pp. 402-404, 417-418; Nuclear Tests Case, I.C.J. Reports, 1974, p. 253 at p. 267.

(2) See Judge Fitzmaurice in the Temple of Preah Vihear Case, I.C.J. Reports, 1962, pp. 6, 63-4.

(3) See Island of Palmas Case, U.N. Reports of International Arbitral Awards, 1928, opcit, vol. ii, pp. 829, 843.

(4) I.C.J. Reports, 1951, p. 116.

(5) L.N.T.S., 1924, vol. xxviii, p. 11.

months, failing which a reference was to be made to the Council of the League of Nations.»

The Iraqi section of the new Turkish frontier was the subject of a serious dispute in 1925 between Turkey and Great Britain over the exclusion of the Mosul Vilayet from Turkey. With the ultimate settlement of this dispute, the Iraqi-Turkish boundaries were finally delimited by the 1926 Treaty⁽¹⁾.

As regards recognition by third states, collective recognition was accorded to Iraq by Muslim and non-Muslim states. The Arab states' recognition of Iraq was expressed in the conclusion of boundary treaties: Iraqi boundaries were defined with Saudi Arabia by the 1922 Muhamerah⁽²⁾ and Ugair Arrangements⁽³⁾; with Kuwait by the 1922 Ugair Convention⁽⁴⁾ and by the subsequent 1923 and 1932 Exchange of Notes⁽⁵⁾; with Syria by the 1920 Convention and the subsequent actions of the mandatory powers⁽⁶⁾; and recognition was exchanged between Iraq and Jordan by the 1931 Treaty of Friendship and Control of Frontier⁽⁷⁾. Similarly, on 2 April 1929, the Minister of the other adjoining Muslim state, Persia, sent a telegram to the Iraqi government stating that:

«...I trust that our two states will quickly give effect to the measures necessary for the establishment of friendly relations between the two countries and that a true friendship will be built up between us on a new and firm basis...»⁽⁸⁾.

In reply, the Iraqi government sent a telegram stating that:

«...I approach your Imperial Majesty with an expression of sincere thanks, trusting that this auspicious occasion will be a happy augury for the restoration of the means of stable and friendly relations between two neighbouring nations which are bound together by strong and old established ties of fraternity...»⁽⁹⁾.

(1) Report on the Administration of Iraq, op. cit., (Col. No. 29), p. 19.

(2) Report on the Administration of Iraq, op. cit., (Col. No. 4), p. 9.

(3) Saudi Arabia, Treaty Collection 1922-1944, (Makka: Government Publication 1944), p. 8.

(4) Aitchison, C.U. A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries, Calcutta, 1933, vol. XI, p. 213.

(5) Azzam, I.A. R. The International Status of the Persian Gulf states, Revue Egyptienne de Droit International (R.E.D.I.), 1959, vol. 15, p. 53.

(6) Report on the Administration of Iraq, op. cit., (Col. No. 74), p. 83.

(7) *ibid.*

(8) Report on the Administration of Iraq, op. cit., (Col. No. 55), p. 37.

(9) *ibid.*

In a similar manner, recognition was extended to Iraq⁽¹⁾ by many non-islamic states.

This international recognition opened the path for Iraq towards evolution of international personality and treaty-making competence.

(5) Evolution of the Personality and Treaty-Making Competence of Iraq:

In international law, the term 'treaty-making competence' - when it possessed by an entity - implies a recognition of the personality of the entity as being competent to conclude treaties⁽²⁾. In a similar way, the term 'personality' - when it possessed by an entity such as international organization or a state - denotes the recognition in international law of the entity as possessing the ability to enjoy rights and to bear obligations including those which created by the conclusion of treaties⁽³⁾. The logical conclusion, therefore, is that the capacity of an entity, which possesses certain factual elements of statehood⁽⁴⁾, to make treaties provides valuable evidence of that entity's statehood.

Moreover, personality and treaty-making competence of a state are intimately connected with its legal and factual identity, respectively: identity of its customary and conventional rights and obligations and the identity of the physical elements of statehood, such as territory, population, effective legal order and independence. The question of personality or identity of a state does not arise except upon the occurrence of changes in its physical elements of statehood, that is to say: any change of the factual identity of a state, such as the loss of the whole territory, or of the whole population or the loss of independence, precedes and inevitably leads to the change in its legal identity. Thus, the evolution of Iraq's personality and treaty-making competence, as well be seen, has certain legal effects on its factual identity.

Leaving aside the relationship between a state's personality and its identity, and to concentrate on the rules governing the evolution of state's personality and treaty-making competence, this question has risen in many cases, such as: capacity to bring claims in respect of breaches of international law, capacity to

(1) Report on the Administration of Iraq, op. cit, (Col. No. 58), p. 37.

(2) Lewis, M.M. The International Status of the British Self-Governing Dominions, British Yearbook of International Law, (herein after refer to as: B.Y.I.L.), 1922-23, 3rd Year of Issue, p. 31 ff.

(3) Baker, P. The Present Juridical Status of the British Dominions in International Law, Longmans, Green & Co., 1929, p. 130 ff.

(4) Such as territory, permanent population and government, see in general, Crawford. The Criterion of States, opcit.

conclude treaties and the ability to enjoy privileges and immunities from national jurisdictions⁽¹⁾.

With regard to Iraq, despite of her acquisition of some elements of statehood, while under the mandate system, it did not possess some of these capacities and immunities, even though the mandated territories in general were given under Article 22 of the Covenant of the League of Nations international status and limited capacities⁽²⁾.

As far as Iraq was concerned, however, the mandate over her was of special character since it was not embodied in an agreement, but expressed in a treaty of alliance concluded between the mandatory power and Iraq, which emphasizes Iraq's acquisition of certain international personality and treaty-making competence.

This personality and treaty-making competence enabled Iraq and Great Britain to conclude a series of bilateral agreements such accords replaced the mandate system by which Iraq, as the principal, delegated the conduct of her external relations to Great Britain as an agent⁽³⁾, despite the fact that the League of Nations continued to recognize the mandate over Iraq until the official independence of Iraq in 1932.

This unusual relationship between mandatory power and mandated territory enabled Britain, from 1922 until 1932, to extend many treaties to, or deposit accessions on behalf of, Iraq⁽⁴⁾. In addition to this, Iraq herself acceded to several international agreements⁽⁵⁾ under the supervision of the mandatory power.

It must be stressed, however, that this personality and treaty-making competence were not the same as those of a full-fledged independent state, because Iraq was excluded by the 1922 Treaty of Alliance (agency) from entering into political treaties without the previous consent, expressed through the British High Commissioner, of Great Britain (agent). Thus it may be concluded that under the terms of Article 22 para. (4) of the Covenant of the League of Nations, together with the terms of the 1922 Treaty of Alliance, Iraq had a limited international

(1) See Reparation for Injuries Case, I.C.J. Reports, 1949, p. 179.

(2) See: Judge Bustamante in his separate opinion, the South West Africa Case, I.C.J. Reports, 1962, p. 354.

(3) Art. 10, Cmd. 2370.

(4) U.N. Doc. ST/LEG/SER. E/3, Iraq.

(5) Report on the Administration of Iraq, op. cit. (Col. No. 29), p. 19.

personality and treaty-making competence, which was similar to that of a protected state. The only difference between the status of a protected state and that of the mandated territory of Iraq was that the international limitations on Iraq's personality and treaty-making competence (by means of the supervision exercised by the mandatory power over the said territory), was of a temporary nature. The authority of the mandatory power was thus limited only to necessary administrative advice and assistance to Iraq, as contemplated in Article 22 of the Covenant of the League of Nations under the supervision of the League itself, until Iraq was able to stand alone as an independent state. These strictly temporary limitations on Iraq's personality and treaty-making competence raised several questions. These included the criteria by which the progress of Iraq towards independence should be judged; the provision of a definite time-limit for the mandate; and the methods by which the mandate over Iraq could be terminated and replaced by independence.

B. Replacement of British Mandate Over Iraq by Independence:

Independence of a state may be legal or actual: legal independence denotes that the state concerned is formally and directly delimited from the other states by means of its own legal order and it is not subordinated to any other authority except that of international law; actual independence means that the state is in fact free from any subjection of other states or a group of states.

Thus, as independence, in its legal and actual meaning, is indispensable to the continuity of a state's identity, it is also so to the birth of a new state, such as Iraq. In other words, as long as the independence of a state is preserved, there is no change of its identity and its continuity; while the acquisition of independence by an entity possessing the elements of statehood marks the starting points of its life, as a state under international law.

In applying these principles to the case of Iraq, the independence of the mandated territory of Iraq was not only the last stage in her evolution, but also the central elements of her statehood, as Judge Huber stated in the Island of Palmas Case:

«Sovereignty in relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. ...»⁽¹⁾.

Thus, the main elements of independence are the separate existence of Iraq within coherent frontiers, and she is not subject to any authority of a state, except that of international law.

(1) R.I.A.A., 1928, vol. 2, pp. 829, 838.

Iraq, however, did not obtain the elements of independence in one time, but through a long series of legal changes, starting with the Treaty of Alliance between Great Britain and Iraq of the 10th October 1922 and ending with the former Treaty of Alliance drafted on 30th of June 1930⁽¹⁾.

Before the conclusion of the 1930 Treaty, however, on the 14th November 1929⁽²⁾, the British government expressed its intention to recommend Iraq for admission to membership of the League of Nations in 1932. Consequently, on 13th January 1930 the League Council requested that the Permanent Mandate Commission submit any suggestions that could assist the Council in coming to a conclusion as to what general conditions had to be fulfilled before the mandatory regime could be brought to an end with respect to any country placed under such a regime.

After careful examination the Commission submitted its suggestions⁽³⁾.

- (1) In the 1922 Treaty of Alliance between Great Britain and Iraq, Cmd. 2370., Great Britain recognized the Kingdom of Iraq as a sovereign state (Article 1). In Article 18 of this treaty, provision was made for its termination and for the complete independence of Iraq within 20 years. However, before the Treaty was ratified and accepted by the League of Nations Council, this Article was modified by the Protocol of 30th April 1923, B.F.S.P., 1924, Part I, vol. Cxix, at p. 394, reducing Iraq's period of dependence to four years from the date of the ratification of the Treaty of Peace with Turkey. After the ratification of the Treaty of 1922 on 19th December 1924, the League of Nations Council eventually adopted the draft as it stood. It was only thereafter that the League council, by a resolution of 27th September 1924, officially conferred an 'A' Mandate upon Great Britain's role in Iraq, League of Nations, Minutes of the 30th Session of the Council, pp. 1345-1347; and see also decision of 11 March 1926, *ibid*, Minutes of the 39th Session of the Council, p. 502. Four subsidiary agreements of the 2nd March 1924 were subsequently concluded between Great Britain and Iraq, B.F.S.P., 1924, Part I, vol. cxix, pp. 395, 410, 416, 419. After the settlement of the controversy over the Mosul Vilayet by the League Council's Resolution of 16th December 1925, the League accepted a new amendment to this treaty, in the form of a treaty between Great Britain and Iraq of 13th January 1926. This amendment extended the period to elapse before the expiry of the Treaty of 1922 and Iraq's independence from 20 to 25 years, unless Iraq should previously be admitted to the League of Nations, Cmd. 2662. The British government once again attempted to replace the Treaty of 1922 with another new one drafted on 14th December 1927, but this new treaty was later withdrawn, Cmd. 2998. Finally, the Treaty of 1922 was superseded by a formal Treaty of Alliance, drafted on 30th June 1930, B.F.S.P., 1930, Part I, vol. cxxxii, at p. 280.
- (2) Cmd. 3440.
- (3) These includes: (i) Procedure for termination: (a) a unanimous decision of the League Council to free Great Britain from its responsibility; (b) a decision of the Assembly by a two-thirds majority to admit Iraq to membership of the League of Nations; (c) the necessity of obtaining the agreement of the mandatory authority before terminating the mandate, Permanent Mandate Commission, (herein after refer to as: P.M.C.), Minutes of the 16th session, p. 20; Minutes of the 19th session, p. 175.

The Commission suggested that before Iraq was released from the mandate it should make a declaration regarding the following points⁽¹⁾: (a) protection of minorities; (b) privileges and immunities of foreigners in the Near Eastern territories, including consular jurisdiction and protection; (c) interests of foreigners in judicial, civil and criminal cases not guaranteed by capitulations; (d) freedom of religion and exercise of religious, educational and medical activities; (e) financial obligations regularly assumed by the former mandatory power; (f) rights legally acquired under the mandate system; and (g) maintenance in force of international conventions to which the mandatory power acceded on behalf of Iraq.

After being satisfied by the Permanent Mandates Commission's report, the Council of the League of Nations, on the 28th January 1932, adopted a Resolution declaring itself "prepared, in principle, to pronounce the termination of the regime in Iraq" at which point Iraq had to give undertakings to the Council in conformity with the suggestions contained in the Permanent Mandate Commission's report. The declaration of the termination of the mandate was to be made after an examination of the undertakings given by Iraq and was not to be effective until the date of admission of Iraq into the League of Nations⁽²⁾. On the 19th May 1932 the League Council approved the declaration of guarantees given by her and Iraq was formally admitted to the League of Nations on 3rd October 1932⁽³⁾, upon which Iraq acquired new factual identity under international law, while continued reserving her Islamic identity in its new Arabic context on the regional plane.

A new Arabic context of the Islamic identity came into existence as a result of Sharif Hussain's assumption of governorship by force over the Arab territories from the Ottoman Empire, since the movement was based not only on legal grounds, such as the Islamic rules governing the assumption of governorship by force, but also on factual factors, such as the ethnic assimilation of the populations on these territories and the historical and geographical links between them. Subsequently, the fragmentation of the Arab territories into many states, including Iraq, did not affect the Islamic identities of these states, since they remained as parts of dar al-Islam (Islamic territory). At the same time these states related to lesser territorial sphere, i.e., the Arabic

(1) League of Nations Official Journal, (herein after refer to as: L.N. Off. J.), 1932 Annex 1373, pp. 1342-50.

(2) L.N. Off. J., 1932, pp. 474, 1212-13.

(3) *ibid*, pp. 1212-6.

region, since each Arab state is contiguous to, or an historical continuation of, the others.

These links have created several territorial claims between the neighbouring Arab states, one of which was Iraq's claim that Kuwait constituted a part of her territory on the grounds that Kuwait had been a part of the Ottoman Empire (the parent state of Iraq). The claim has brought about the issue of Kuwait's factual identity before and after the independence of Iraq in 1932. Specifically, the question under scrutiny concerned whether Kuwait was an integral part of the Ottoman Empire, and if upon her independence, Iraq succeeded to Ottoman territorial sovereignty, suzerainty over Kuwait, or to none?

SECTION 2: APPLICATION OF THE ESTABLISHED TEST OF IDENTITY UNDER ISLAMIC AND INTERNATIONAL LAW TO THE CASE OF KUWAIT:

1. Application of the Islamic Law Test of Identity to the Case of Kuwait:

Pre-existing practice to the emergence of Kuwait confirms that Shari'a (Islamic law) contains certain traditional and substantive rules, governing the evolution of identity in dar al-Islam (Islamic territory). In this practice, assumption of governorship by force was certainly the most conspicuous, and probably the most usual, method of the evolution of identity in dar al-Islam (Islamic territory). This fact has been previously emphasized in a definite Islamic state practice, more specifically in the period starting from the destruction of Baghdad by the Monguls to the outbreak of the World war I, in which many amirs (governors) had assumed governorship by force from the Islamic state. At the beginning of this century attempts at assumption of governorship by force have been frequent, the most successful of which was that of Iraq.

It must be noted, however, that assumption of governorship by peaceful means has been recognized in Islamic state practice, even though the distinction between the creation of an Islamic identity through the assumption of governorship by peaceful means in one hand and the creation of an Islamic identity through the assumption of governorship by force in another can not be successfully reached, since elements of forceable and peaceful assumption of governorship may be combined.

None the less, the two types of the assumption of governorship constitute an Islamic law test for any identity emerging in dar al-Islam (Islamic territory), more specifically if the identity in question has been disputed by the previous sovereign and may thus be a controversial issue, such as the emergence of Kuwait and subsequently Iraq's claim of sovereignty over her.

Thus, the application of the test to the case of Kuwait shows that Kuwait followed the Islamic state practice, which had been followed by Iraq herself; and acquired her identity in accordance with the Islamic law rules governing the assumption of governorship by force, as will subsequently be analyzed. Thus, Iraq's claim of sovereignty over Kuwait has no legal ground in Islamic law. However, such claim may have legal sense in respect of recognition of Kuwait's identity either by third state or by the previous sovereign, i.e., the Ottoman Empire or Iraq; an issue where the rules of Islamic law and those of international law are coincided. This issue can subsequently be determined by applying the international law test of identity to Kuwait.

2. Application of International Law Test of Identity to the Case of Kuwait:

In order to be fair enough in dealing with Iraq's claim of sovereignty over Kuwait, we must apply the same test to the case of Kuwait, and to inquire whether Kuwait was an integral part of the Ottoman Iraq, or even of the Ottoman Empire itself?

Following the same formula which applied to the case of Iraq, the answer of this question also depends mostly on two findings: the first one is how the Ottoman Empire was replaced by Great Britain in the conduct of the international relations for Kuwait, and the second findings is, how Kuwait obtained her independence?

A. Replacement of the Ottoman Empire by Great Britain in the Conduct of the International relations of Kuwait:

As has been seen in the previous section, which is exclusively devoted to the establishment of Iraq's factual identity, the most effective test in international law for examining a state's factual identity is a criteria of statehood, i.e., the establishment of territory and effective government, the achievement of international recognition and international personality, and lastly the obtaining of independence, which can be applied to the case of Kuwait in order to determine her identity.

(1) Acquisition of Gurayn Territory by the 'Uttubi Tribe:

A claim to statehood must be supported by some area of territory, upon which the state exclusively displays its sovereign activities, as stressed by Judge Huber in the Island of Palmas Case⁽¹⁾. Although a state must possess a territory,

(1) R.I.A.A. , 1928, vol. 1, pp. 829, 839.

small or big, the boundaries of the territory must be defined, and after that no matter what so ever if there are boundary disputes or even claim of another state to the whole of that territory⁽¹⁾. The German-Polish Mixed Arbitral Tribunal stated that:

«...in order to say that a state exists...it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the state actually exercises independent public authority over that territory»⁽²⁾.

Moreover, in the North Sea Continental Shelf Cases this rule was precisely confirmed⁽³⁾.

As regards the acquisition of territory, traditional international law is concerned only with the acquisition of territory by an existing state, on the ground that the acquisition of territory by a state is similar to the ownership of land by a natural person⁽⁴⁾. Also traditional international law differentiates between the acquisition of territory by an existing state and the acquisition of territory by an individual or a tribe. The former constitutes an acquisition of territorial sovereignty unlike the latter, unless the individual or the tribe have acquired the territory on behalf of a national state⁽⁵⁾. For this reason, none of the traditional modes of the transfer of territorial sovereignty⁽⁶⁾ fit a description of how the transfer of territory from the Islamic State to the newly-independent State of Kuwait occurred since they all assume the transfer of territory from one state to an already-existing one, or at least that there were some activities towards acquiring the territory in question by a recognized state. Moreover, because Kuwait emerged through an evolutionary process within the sphere of internal law, traditional international law did not concern with this matter until the moment when recognition, in one form or another, came into question.

In resolving this drawback, it is necessary to go back to the early development of title to territory by the State of Kuwait, under the law and practice of the Islamic State, in order to discover the mode by which the 'Uttubi tribe acquired the territory

(1) AlBaharna, H.M. The Legal Status of the Arabian Gulf States, Manchester University press, 1968, p. 250.

(2) Annual Digest, (herein after refer to as: A.D.), 1929, vol. 5, No. 5, p. 14.

(3) I.C.J. Reports, 1969, p. 3.

(4) Akehurst, L. A Modern Introduction to International Law, 5th ed., 1984, p. 141 ff.

(5) Island of Palmas Case, Netherlands v. U.S., R.I.A.A., 1928, opcit, vol. 2, at p. 829.

(6) Shaw, M. Title to Territory in Africa , International Legal Issues, 1986, p. 17.

of Gurayn. In interpreting this issue, the Hanafid jurists have maintained that every individual owner of land has authority on that land and the authority of the Islamic State is a manifestation of the collective authority of all owners⁽¹⁾. Thus, unlike traditional international law, the Islamic law rules of that time did not differentiate between the modes of acquisition of territory⁽²⁾ by an individual, tribe or state, which facilitate the development of the al-Uttub tribe's title to Gurayn territory.

The development of the title emphasized by the fact that the inhabitants of Eastern Arabia, though nomadic, were socially organized into political entities, such as tribes, confederations of tribes and emirates under the leadership of shaykhs who separately exercised authority over the area which included what is now known as Kuwait. When the Ottomans took over the Islamic Khilafa (government) in 923 A.H. (1517 A.D.), the shaykhs and the area itself came under the political and spiritual suzerainty of the Khalifa (the chief of state). This was later on transformed into territorial sovereignty when the Ottoman Empire annexed Baghdad in 941 A.H. (1534 A.D.), Basra in 953 A.H. (1546 A.D.), and al-Ihsa', the homeland of the Bani Khalid tribe, in 963 A.H. (1555 A.D.) as security measures against foreign powers. However, the Bani Khalid Shaykh restored their authority and their independence in al-Ihsa' in 1081 A.H. (1670 A.D.), subsequently extending their sheikhdom from Qatar in the South to Kuwait in the North under the Ottoman spiritual suzerainty not sovereignty.

With the permission of the Bani Khalid ruler, a federation of three Arabian tribes by the name of 'al-'Uttub' settled in Kuwait and gradually exercised effective authority more than the previous occupant and achieved some measures of independence as a result of the demolishing of the Bani Khalid's authority by internal disputes and by external forces. Thereafter, the al-'Uttub agreed, inter alia, to divide the affairs of their new territory (Kuwait) in which Al Sabah were chosen to conduct governmental affairs of the territory⁽³⁾.

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- (1) Al-Sarkhasi, Shams al-Din. Al-Mabsut, Dar al-Ma'rifa, Beirut, (1406 H. - 1986 A.D.) vol. 10, p. 93
 - (2) On the modes of acquisition of territory in Islamic law, see al-Ansari, Abu Yusuf. Kitab al-Khardj, Dar al-Ma'rifa, Beirut, (no date), p. 91.
 - (3) The affairs of the new territory were divided as follows: al-Djalahima (later to be the ruling family of Qatar) were to conduct maritime affairs; AL Khalifa (Later to become the ruling family of Bahrain) were responsible for commercial affairs; and Al Sabah (the present ruling family of Kuwait) were to conduct governmental affairs, Warden, Frances, Member of Council at Bombay under Uttoabee Arabs, Extracts from brief notes relative to the rise and progress of the Arab tribes of the (Persian) Gulf: Prepared in August 1819, (Bahrain) I.S.Bo, vol. xxiv, pp. 362-372.

(2) Establishment of Government in the Territory of Kuwait:

As mentioned above, the real importance of effective government - as one of the requirements for statehood - is linked with territory, upon which it exercises governmental power, and with independence, i.e., the entity's right of existence within coherent boundaries; and the right not to be subject to any authority except that of international law⁽¹⁾. Thus, crucially linked with the position of the al-'Uttub in their new territory was their ability to exercise effective control over that territory since there was no strong, centralized Islamic authority in the area to protect the Eastern boundaries of Dar al-Islam. In such a case it is required by the Sunna of the Prophet (peace be upon him) that any group of individuals travelling or living in a territory remote from the central authority should appoint one amongst them as an amir⁽²⁾.

According to al-shura (consultation), a principle required by al-Qur'an⁽³⁾ and subsequently developed through practice, in 1170 A.H. (1756 A.D.) the 'Uttubis elected Sabah bin Jabir, from the Al Sabah family, as the first ruling Shaykh in Kuwait from among the 'Uttubis⁽⁴⁾. The new government in Kuwait was only able to maintain its position in the new territory among the surrounding forces by seeking the protection of one or other of them. The main threat came from the previous occupants of the territory of Kuwait - the Bani Khalid - by whom the new 'Uttubi government of Kuwait agreed to be protected in return for their being accorded recognition⁽⁵⁾. When the Bani Khalid finally lost their authority to the Wahhabis and Kuwait consequently lost its protector, Kuwait turned towards the Ottoman authority in Baghdad, as the Islamic authority, to fill this role.

Since then, it has been claimed that, in 1288 A .H. (1871 A.D.) the Turkish governor of Baghdad, Midhat Basha, conferred the title of Ka'imakam (deputy governor) on the Shaykh of Kuwait. It has been alleged also that from that time Kuwait gradually became an administrative unit of Mesopotamia and its ruler

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- (1) See: Advisory Opinion, of the P.C.I.J., Austro-German Customs Union Case, P.C.I.J. Reports, 1931, ser. A/B, No. 41.
 - (2) Ibn Taymiyya. Al-Siyasa al-Shar'iyya, Dar al-Kitab al-'Arabi, cairo, (1969), p. 161.
 - (3) Al-Qur'an. XLII.
 - (4) In 1176 A.H. (1762 A.D.), Sabah was succeeded by his youngest son 'Abdullah, under whose reign Kuwait was to emerge as an important sheikhdom among competing forces such as the Rashidis, the Wahhabis and the Bani Khalid, Al-Khususi, Dr Badr. Dirasat fi Tarikh al-Khalidj al'Arabi al-Hadith wa'l Mu'asir, Dhat al-Salasil, 2nd ed., Kuwait, 1984, p. 103.
 - (5) ibid, p. 104.

became subordinate to the governor of the Baghdad province⁽¹⁾, a claim which has always been denied by Kuwait.

(a) The Relationship between the Shaykh of Kuwait and the Ottoman Empire:

On the basis of the historical evidence just presented, two probable assumptions arise; firstly, that the new government of Kuwait had complete authority over its territory and secondly, that it was an imara (sheikhdom) under Ottoman political and spiritual suzerainty. The assumption that the Ottoman authority over Kuwait was nominal and that in reality the government of Kuwait enjoyed absolute freedom and possessed absolute authority, both in internal and in external affairs, has been postulated by many non-Muslim authorities, such as Graves⁽²⁾ and Chirol⁽³⁾. Conversely, another non-Muslim authority, Lockhart⁽⁴⁾ regarded the shaykhs acceptance of the title as an acknowledgement of Ottoman suzerainty. Concurring with Graves and Chirol, Muslim and Arab authorities such as Altug⁽⁵⁾, Saleh⁽⁶⁾, Azzam⁽⁷⁾ and al-Baharna⁽⁸⁾, deny that the Ottoman government was conscious of any notion of its 'sovereignty' over Kuwait. However, they admit that the argument asserting the Ottoman Empire's political and spiritual suzerainty over Kuwait cannot easily be dismissed.

Although it is true that the Ottoman authority over Kuwait was more nominal than real, Kuwait's independence cannot thereby be presumed and neither can the view that Kuwait at that time enjoyed legal personality in international law, if the meaning of the title of 'Ka'imakam', is taken into consideration, and if it was true that the Shaykh of Kuwait accepted this title from the Turkish authority. For the sake of argument, however, though this title

- (1) The Republic of Iraq (Ministry of Foreign Affairs). The Truth About Kuwait, July 1961, p. 24.
- (2) Graves, P. The Life of Sir Percy Cox, London, (1941), p. 102.
- (3) Chirol, V. The Middle Eastern Question or Some Political problems of Indian Defence, London, (1903), p. 232.
- (4) Lockhart, L. Outline of the History of Kuwait, Journal of the Royal Central Asian Society, (J.R.C.A.S.), 1947, vol. xxiv, p. 263, at p. 268.
- (5) A Turkish authority, Altug, Y.M. Turkey and Some Problems of International Law, Istanbul, (1958), pp. 108-136.
- (6) An Iraqi national, saleh, Z. Mesopotamia (Iraq) 1600-1914, al-Ma'arif Press, Baghdad, (1957), p. 275.
- (7) An Egyptian authority. Was the General-Secretary of the Arab League, Azzam, op. cit., p. 43.
- (8) A Bahraini national, and a well-known scholar in this field, Al-Baharna. The Legal Status of the Arabian Gulf States, opcit, p. 253 ff.

does not provide conclusive evidence of the legal status of Kuwait in international law it does under Islamic law, according to which, it denotes either the governor of a kada' (province)⁽¹⁾ appointed by the sultan, a meaning which evidently does not cover the position of the Shaykh of Kuwait, or a governor who assumed his governorship by force. In order to ensure the governor's spiritual allegiance, the sultan usually conferred such title upon him, as in the case of the Shaykh of Kuwait. The evidence therefore, tends to emphasize that the government of Kuwait had the status of 'imara' (governorship) under the spiritual suzerainty of the Ottoman Khalifa (the chief of state), who was regarded by all Muslims as the protector of dar al-Islam (the Islamic territory).

The good relationship between Kuwait and the Ottoman Empire, however, was disturbed by the attempts of the Ottoman Empire to annex Kuwait, attempts which compelled Shaykh Mubarak to repent his acceptance of the office of Ka'imakam (if any) in 1897, and in 1898 led to his request for British protection.

(b) Delegation of the Conduct of the External Affairs of Kuwait to Britain by the 1899 Exclusive Agreement:

On January 23, 1899, Britain signed with Kuwait a secret agreement known as the 'Exclusive Agreement', according to which Shaykh Mubarak bound himself and his heirs.

«not to receive the agent or representative of any [even from the Ottoman Empire] power or government at Kuwait ... without the previous sanction of the British government.»

and furthermore,

«not to cede, sell, lease, mortgage, or give for occupation or for any other purpose any portion of his territory to the government or subjects of any other power without the previous consent of Her Majesty's Government for these purposes»⁽²⁾. Subsequently, in 1904 a British Political Agent was sent to Kuwait where he became adviser to the Ruler of Kuwait on foreign affairs⁽³⁾. By virtue of this agreement Kuwait came under the direct protection of Britain even though the legality of this was disputed by the Ottoman authority.

(1) See Encyclopaedia of Islam, under the word Ka'imakam.

(2) Aitchison, op. cit, (No. XXXVI), p. 262.

(3) Azzam, op. cit. p. 44.

(c) Legality of the Delegation of the Conduct of External Affairs of Kuwait to Britain:

With regard to the legality of the delegation of the conduct of the external affairs of Kuwait to Great Britain, the first question to arise is whether the Shaykh of Kuwait, as a spiritual vassal of the Ottoman Khalifa, possessed a treaty-making competence which entitled him to enter into treaties with non-Muslims states.

It was true that the Shaykh of Kuwait had a strong religious tie with the Khalifa and recognized him as his spiritual suzerain⁽¹⁾. The Khalifa also recognized each race as comprising a separate nation which was self-governed or represented by more than one government⁽²⁾. One such was the Arab nation represented by separate governments⁽³⁾, one of which was Kuwait under Shaykh Mubarak. The relationship between the Khalifa (chief of the state) and Shaykh Mubarak had never been defined by a treaty but by existing practice.

If this was the case, then it seems questionable to state that Shaykh Mubarak, in view of his relationship with the Khalifa, was entirely precluded from entering into treaty relations with non-Muslim states or that Shaykh Mubarak did not have treaty-making competence under Islamic or international law. However, even if the shaykh was entitled to enter into such treaties, there are important restrictions under general international law regarding the right of a vassal to enter into political treaties. Similarly, Islamic law imposes certain restrictions on the competence of an amir to enter into treaties with non-Muslim states⁽⁴⁾.

An examination shows that the 1899 Exclusive Agreement should be classified as a 'political treaty' under general international law since it restricted the shaykh's competence: "to receive the agent or representative of any power or government at Kuwait...", even from the Ottoman Empire without the previous consent of the British government.

If measured against the accepted norms of vassal - suzerain relations, the instrument of protection which Shaykh Mubarak secretly signed with the British

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- (1) Ghunaimi, M. *The Muslim Conception of International Law and the Western Approach*, Martinus Nijhoff/the Hague, (1968), p. 27.
 - (2) Altug, op. cit, p. 127.
 - (3) Such as the Government of Egypt, the Governments of the North African Arabs, and the Arab chiefs of Eastern Arabia.
 - (4) One of these restrictions is the obligation placed on the amir to take into account the general interest of Muslims since the treaty will be binding on all Muslims, see in general: Muhammad, Dr. Ahmad Abu al-Wafa. *Al-Mu'ahadat al-Dawliya fi al-Shari'a al-Islamiyya*, Dar al-Nahda al-Arabiyya, al-Qahira, 1990, p. 68 ff.

government, without the consent of the Khalifa, was highly questionable, if not illegal. Consequently, the British government was keen on gaining some legal acceptance for the agreement in order that Kuwait should come under its de jure protection⁽¹⁾. For this reason Britain concluded with the Ottoman Empire the so-called 'Anglo-Ottoman Draft Convention of 1913', and by virtue of Article 1 Kuwait was transformed into an autonomous Kaza of the Ottoman Empire, without the consent of Shaykh Mubarak⁽²⁾.

The Ottoman authority, however, did not realize that the British government's recognition of Ottoman sovereignty, instead of suzerainty, over Kuwait, actually served as an expedient means to get around the dubious legality of the 1899 Exclusive Agreement between Britain and the Shaykh of Kuwait.

By virtue of the Anglo-Ottoman Draft Convention, the status of the Shaykh was transformed from that of a vassal into a Kaza Governor and all treaties concluded by the shaykh prior to this transformation, including the Exclusive Agreement, would devolve or be succeeded to by the Ottoman Empire. In this way, Britain was able to extend its protection to Kuwait, a fact recognized by the Ottoman authority in article 3.

Since the Draft Convention was never ratified by either party, owing to the outbreak of World War I, it might be contended that it was not binding on the parties. This contention is not without support in international law. For example, Oppenheim⁽³⁾ has stated that:

«...although it is now a generally recognized customary rule of international law that treaties regularly require ratification, even if this is not expressly stipulated...», Other international law jurists, however, such as McNair⁽⁴⁾ and Fitzmaurice⁽⁵⁾ maintain that the absence of a ratification clause in a treaty should be taken as indicative of an implied understanding between the contracting parties that the treaty will become binding upon signature. During the codification of the law of treaties these conflicting views were reflected in the

(1) Hurewitz, J.C. *Diplomacy in the Near and Middle East: A Documentary Records*, D. Van Nostrand Co., New York, (1956), vol. I, pp. 265-267.

(2) *ibid*, p. 270.

(3) Oppenheim, I.F. *International Law: a Treatise*, ed. by Lauterpacht, London, (1955), vol. 1, p. 906.

(4) McNair, A. *The Law of Treaties*, (1961), p. 132 ff.

(5) Fitzmaurice, G. *Do Treaties Need Ratification?* B.Y.I.L., 1934, vol. 15, p. 129.

I.L.C. in the discussion regarding the incorporation in the proposed codification of a residual rule. This rule favoured either signature or ratification when a treaty was silent as to how consent to be bound should be expressed. At the beginning, the I.L.C. adopted in the Draft Article the formula that:

«Treaties in principle require ratification unless they fall within one of the exceptions... below,» but this was criticized by a number of states including the U.K. who suggested that the general formula should be reversed. Other states suggested that the I.L.C. should not adopt any position towards such a doctrinal issue. In the light of these arguments the I.L.C. reformulated the rule so as:

«simply to set out the conditions under which the consent of a state to be bound by a treaty is expressed by ratification in modern international law,»

and

«to leave the question of ratification as a matter of intention of the negotiating states without recourse to a statement of a controversial residual rule⁽¹⁾.»

In the Ottoman Draft Convention, however, the parties can be said to have adopted the approach of a residual rule of signature, since from the published extract of the convention⁽²⁾ it does not appear that any provision indicates any express intention to ratify it. Thus, as Sir Percy Cox emphasized⁽³⁾, the 1913 Anglo-Ottoman Draft Convention cannot be denied to have exercised any binding force on the contracting parties before and after World War I. It was by means of this convention that the 1899 Anglo-Kuwaiti Exclusive Agreement was cured of its seeming illegality and Kuwait's status was finally recognized.

(3) Recognition of the Protected State of Kuwait:

At the time of Kuwait's acquisition of these elements of statehood - territory and effective government - a great debate on the legal effect of recognition has reached its maturity⁽⁴⁾, and the preponderant view concluded therefrom is not to categorize the recognition of a state as either declaratory or

(1) Year Book of International Law Commission, (Y.B.I.L.C.), 1966, vol. II, p. 198.

(2) Hurewitz, op. cit., vol. I, p. 270.

(3) Graves, op. cit., p. 168.

(4) Cf. Chen, T. The International Law of Recognition: With Special Enference to Practice in Great Britain and the United States, ed., L.C. Green, London, 1951, and Lauterpacht, H. Recognition in International Law, London, 1948.

constitutive⁽¹⁾, but as possessing both elements in state practice. Thus, it is accepted that the constitutive view that considers the entity which qualifies as a state is not as such with regard to non-recognising states. In The Tinoco Arbitration Case⁽²⁾, the Tribunal held that:

«The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.»

In practice the wide recognition of an entity - though not conclusive - is an ample evidence on the statehood of the entity concerned; this is also equally true, only in respect of recognizing states, even though the entity in question lacks certain elements of statehood. Thus the determination of an entity's international status is to be in accordance with international law, more specifically the criteria of statehood, not with recognition, except for an entity which lacks certain element of statehood, and even in this case the recognition must be discussionary⁽³⁾.

As regards recognition, it may be implied or expressed; expressed recognition may be through declaration of a state or formal agreements, as the case of Kuwait, which was accorded recognition by the Anglo-Ottoman Draft Convention of 1913⁽⁴⁾. Since then, Kuwait became a subject of international law. This simultaneously implied the recognition by the Ottoman

(1) Akehurst, M. A Modern Introduction to International Law, 3rd edition, London 1977, p. 78.

(2) Great Britain v. Costa Rica 1923, R.I.A. A., 1923, vol. I, p. 369.

(3) Kanza. T. Conflict in the Congo, Tenguin 1972, p. 192.

(4) Cf. the Hudaibiya Treaty by which Makka recognized the Islamic State in al-Madina, Ibn Hisham. Al-Sira al-Nabawiyya, (no date) Part II, p. 316, with the Anglo-Ottoman Draft Convention of 1913, Hurewitz, op. cit, vol. I, p. 269.

government of Kuwait's title to her own territory and it was irrelevant how this title was acquired, whether it was regarded as having arisen from the fact of the emergence of the new entity or as having been constituted by recognition⁽¹⁾.

Generally speaking, this justification of Kuwait's title to her territory may not always be helpful in determining the precise line that frontiers of the new entity should follow, but, in the case of the recognition of the State of Kuwait, Articles 5, 6, 7 of the Anglo-Ottoman Draft Convention of 1913⁽²⁾ specifically define the boundaries of Kuwait.

Moreover, recognition of the legal status of Kuwait has been accorded by both international and Islamic law. On the international plane, as a part of the Arab revolt against the Turkish government, when war was declared between Britain and the Ottoman Empire in 1914, Shaykh Mubarak assumed the governorship of Kuwait by force, adopted his own flag and entered into formal treaty relations with Britain⁽³⁾. Sir Percy Cox (the British Political Resident in the Gulf) stated to Shaykh Mubarak that:

«... the British government does recognize and admit that the Sheikhdom of Kuwait is an independent government under British protection.»

On the Islamic plane, following the downfall of the Ottoman Empire and its disintegration after World War I into many states, Turkey formally renounced all rights to suzerainty over, and title to, any territories which were subject to the sovereignty or protection of any other state. This renunciation was formalized by the 1923 Lausanne Treaty⁽⁴⁾ between Turkey and the principle Allied Powers, in which she implicitly gave up her rights over Kuwait, if any.

Britain concluded the 1927 Jiddah Treaty⁽⁵⁾ with Saudi Arabia, a successor state to the Ottoman Empire, by which King 'Abdul 'Aziz promised not to commit any act of aggression against Kuwait since it was in special treaty relations with Britain.

Despite this recognition of the new status of the Sheikhdom of Kuwait, its legal personality and its relations with Britain were somewhat anomalous in character.

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- (1) Islamic law does not recognise the constitutive theory of recognition and it has been relied upon it here only for the sake of argument.
 - (2) Hurewitz, op. cit, vol. I, p. 270.
 - (3) Aitchison, op. cit, vol. XI, XLII.
 - (4) L.N.T.S., 1924, vol. xxviii, p. 11, Articles 16, p. 23 and 27, p. 27.
 - (5) United Kingdom Treaty Series, (herein after refer to as: U.K.T.S.), 1927, No. 25; Cmd. 2951.

(4) Evolution of the Personality and Treaty-Making Competence of Kuwait:

Generally speaking, international person is that person recognized by customary international law as capable of possessing rights and duties and of bringing an international claim⁽¹⁾; a definition which may include not only states and international organizations, but also another type of persons such as non-self-governing territories and protected states, but the permanent persons in international plane are states as subjects of international law⁽²⁾.

The question that now presents itself is whether Kuwait prior to 19th of June 1961, had a legal personality and treaty-making competence.

As a prelude to answering this question, it is necessary to determine the nature of the relationship that existed between Kuwait and Great Britain. Generally speaking, some non-Muslim authorities⁽³⁾ have considered a protected state such as Kuwait, which delegates the conduct of international affairs to another, not to be a state at all. However, other non-Muslim as well as Muslim jurists⁽⁴⁾, have not espoused any definite rule and state that in such cases the exact relations between the protecting and protected state may be ascertained by reference to the relevant agreement, in this case the 1899 Exclusive Agreement between Great Britain and Kuwait.

An examination of the above views shows that the first opinion cannot be applied to Kuwait on the grounds that she possessed territory and an independent government which had special treaty relations with Britain. Individuals born in Kuwait were not British subjects⁽⁵⁾ and imperial legislation was not applicable to Kuwait, which had its own legislature and flag. The conduct of her international affairs was the responsibility of the Foreign Office as distinct from the Colonial Office, indicating at least that Kuwait was not a colony or a colonial protectorate⁽⁶⁾.

The second of the views cited above concurs with the Decision of

(1) I.C.J. Reports, 1949, p. 179.

(2) Jessup. A Modern Law of Nations, 1948, p. 17.

(3) Generally see Baty. Protectorates and Mandates, B.Y.I.L., 1921-22, vol. 2, pp. 114-115.

(4) Oppenheim, op. cit., pp. 195-196; Azzam, op. cit, p. 56.

(5) They are protected persons, Jones, J.M. Who Are British Protected Persons?, B.Y.I.L., 1945, 26th Year of Issue, p. 123.

(6) Azzam, op. cit. p. 26.

International Tribunal in the Nationality Decrees in Tunis and Morocco Case⁽¹⁾, in which the court held that:

«The extent of the powers of a protecting state in the Territory of a protected state depends, first, upon the Treaties between the protecting state and the protected state establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these treaties. In spite of Common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.»

Unfortunately, the 1899 Exclusive Agreement, which delegated the conduct of Kuwait's foreign affairs to Britain, did not define exactly the legal nature of the relations between Kuwait and Britain, nor did it expressly prohibit the Shaykh from entering into treaties with non-British governments or subjects. This situation resembles that of Morocco under the 1912 Treaty of Fez in which the I.C.J. held, in the Rights of Nationals of the United States in Morocco Case of 1952⁽²⁾ that:

«it is not disputed by the French government that Morocco, even under the Protectorate, has retained its personality as a state in international law...

Under this treaty, Morocco remained a sovereign state but it made an arrangement of a contractual nature whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco. France, in the exercise of this function, is bound not only by the provisions of the Treaty of Fez, but also by all treaty obligations to which Morocco had been subject before the protectorate and which have not since been terminated or suspended by arrangement with the interested states.»

As regards the effects of the 1899 Exclusive Agreement, the treaty-making competence of the Shaykh was suspended but not toto. The Shaykh of Kuwait was still the sole authority in which the right to conclude treaties was vested, albeit subject to the previous sanction of the British government. The result of this situation was that if the shaykh concluded a treaty without the previous sanction of the British government it might not have been binding under international law⁽³⁾. However, this is not the case under Islamic law.

(1) Advisory Opinion, P.C.I.J., Reports 1923, Ser. B. No. 4, p. 27.

(2) U.S. v. France, I.C.J. Reports, 1952, p. 176.

(3) Oppenheim, op. cit., vol. 1, pp. 882-883.

For example, Article 3 para. (2) of the Agreement for the Establishment of an Arab Financial Institution for Economic Development⁽¹⁾ provides for the admission to its membership of "any other Arab state or Arab country...", without any requirement of independence. If, under British protection, Kuwait entered into an agreement with an Arab state, the agreement would be binding between the parties but not vis a vis Great Britain. Even a multilateral treaty between the Arab states such as the 1945 Pact of the Arab League⁽²⁾ which requires the independence of a state for admission, could waive this requirement if admission would help in bringing about the independence of an Arab state. This was borne out by the fact that the Secretary-General of the Arab League visited Kuwait in 1959, just two years before her formal independence, to discuss her possible membership, following which the announcement was made that Kuwait was going to join the Arab League as a member state. This was denied by a British Foreign Office Spokesman⁽³⁾.

Thus the authority for Great Britain to exercise treaty-making competence on behalf of the Shaykh was derived from the Shaykh's tacit consent. Initially, the British government concluded treaties on behalf of Kuwait⁽⁴⁾, and such treaties could not be ratified without the Shaykh's approval. This facilitated the gradual assumption of treaty-making competence by the Shaykh of Kuwait without the necessity for any revision of the 1899 Exclusive Agreement. From the start, the Shaykh had been able to conclude oil concession agreements directly with foreign investors.

Finally, it became obvious that Kuwait had a degree of legal personality and treaty-making competence when, before attaining full independence in 1961, she was able to accede to certain international conventions and became a member of a number of inter-governmental organizations⁽⁵⁾. However, this legal personality was limited and not the same as that of a fully independent state, a status which Kuwait had yet to attain, as she was not yet entitled to enter into political treaties with foreign states without the consent of the British government.

(1) Khalil, M. (trans.) *The Arab States and the Arab League: A Documentary Record*, Khayats, Beirut, (1962), vol. II, p. 131.

(2) *ibid*, p. 56.

(3) *The Times*, 30 September, 2 October 1959.

(4) Cmd. 6380.

(5) *The Times*, 10th, 23rd Jan. 1961; *The Financial Times*, 30th Jan. 1961.

B. Replacement of British Protection Over Kuwait by Independence:

Despite Kuwait's acquisition of elements of statehood under British protection, she lacked the central element of statehood before the 19th of June 1961. Independence as central element of statehood has been affirmed by Judge Huber who stated in the Island of Palmas Case⁽¹⁾ that:

«Sovereignty in relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. The development of the national organization of states during the last few centuries, and as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concerns international relations2.»

Thus independence is not only a central element of statehood, but also a right of a state protected by international law against illegal invasion by another state.

Kuwait's acquisition of these elements of statehood, however, accelerated the grant of independence by the protecting state, since the 1899 Exclusive Agreement and all its related instrument were formally terminated by a treaty entitled 'Exchange of Notes Regarding Relations between the United Kingdom of Great Britain and Northern Ireland and the State of Kuwait, June 19, 1961'⁽²⁾ between Britain and the Ruler of Kuwait, Shaykh 'Abdullah al-Sabah. By this treaty the Shaykh of Kuwait became solely responsible for the conduct of both the internal and external affairs of Kuwait. Also, the treaty established a common understanding dealing with the future relations of the two countries as follows:

- « b) The relations between the two countries shall continue to be governed by a spirit of close friendship.
- (c) When appropriate, the two governments shall consult together on matters which concern them both.
- (d) Nothing in these conclusions shall affect the readiness of Her Majesty's Government to assist the Government of Kuwait, if the latter requests assistance.»

Furthermore, the Treaty:

«...shall continue in force until either party gives the other at least three years notice of thier intention to terminate it, and that the Agreement of 23 January 1899 shall be regarded as terminated on this day's date.»

(1) R.I.A.A ., 1928, vol. 2, pp. 829, 838.

(2) U.K.T.S ., 1961, No. 1; Cmd. 1409.

Provision (d) of the treaty, regarding Britain's pledge to "assist" in the defence of Kuwait, has been regarded by certain states as constituting a derogation from the formal independence proclaimed in the treaty. One such objection was made shortly after Kuwait's formal application for membership of the Arab League, when the Iraqi Prime Minister, Major-General Qasim, declared at a press conference on 22 June 1961 that he did not recognize the 'forged' Treaties of 1899 and 1961 between Britain and Kuwait. Iraq's argument was that all foreign powers, including Great Britain, had recognized that the Ottoman Empire had sovereignty over Kuwait because, by a decree issued by the Sultan, the title of 'Ka'imakam had been conferred upon the Kuwaiti Shaykh, thus making him a representative in Kuwait for the Vali in Basra. It was thus claimed that in this manner all shaykhs of Kuwait had derived their administrative powers from the Ottoman Vali in Basra and had continually affirmed their allegiance to the Ottoman Sultan up until 1914.

Therefore, Iraq believed that the secret Exclusive Agreement of 1899, concluded between the Ruler of Kuwait, Shaykh Mubarak, and Great Britain, was invalid because the Shaykh of Kuwait had at that time no competence to conclude such agreements without the consent of the Ottoman Porte. Therefore, what was in the past a territorial unit of Ottoman Iraq should persist under the sovereignty of the new State of Iraq⁽¹⁾.

The Kuwaiti government reacted swiftly to the Iraqi claim by issuing a statement on the following day stating that Kuwait was never subjected to the Ottoman sovereignty and that:

«the title of ka'imakam... was never used in Kuwait and never influenced the course of life or the independence of Kuwait from the Turkish Empire.» With regard to the 1899 Exclusive Agreement, the statement continued, it was terminated on 19 June 1961 and consequently Kuwait became a fully independent state⁽²⁾. Following the Iraqi military threat, the Kuwaiti government requested on 2 July 1961 that the U.N. Security Council consider the Iraqi "threat of intervention in Kuwait" together with the formal application of Kuwait to membership of the U.N.⁽³⁾. Supporting the Iraqi claim, the Soviet Union vetoed a U.N. Resolution that recognized the independence of Kuwait⁽⁴⁾.

(1) Daily Telegraph, 26th June 1961, London.

(2) The Kuwaiti Government. The Kuwaiti-Iraqi Crisis, op. cit, p. 3.

(3) Security Council Official Records, (S.C.O.R.), 16th Year, 6th July 1961, 959th Meeting, p. 1; ibid, 7th July, 960th meeting, p. 1.

(4) Year Book of the United Nations, (herein after refer to as: Y.B.U.N.), 1961, pp. 168-169.

On 8 February 1963, Qasim's government was overthrown by a military revolution and the new government declared their intention to ease the tension between their state and Kuwait and renounce the Iraqi claim to Kuwait. Kuwait's application for U.N. membership was approved by the Security Council on May 7, 1963, making Kuwait the 111th member of the U.N. ⁽¹⁾. Subsequently, agreed minutes between the State of Kuwait and the Republic of Iraq regarding the restoration of friendly relations, recognition and related matters was concluded between Iraq and Kuwait on 4 October 1963⁽²⁾.

Although the 1963 Minutes terminated the Iraqi claim of sovereignty over Kuwait, this document did not bring to an end the problem of boundary demarcation between the two states, which subsequently created many crises, such as the 1970 Sanitah problem⁽³⁾ and the 1990 Iraqi military occupation of Kuwait⁽⁴⁾.

Therefore, the Islamic law test of identity and that of international law have interacted upon their application to the case of Iraq and Kuwait, resulting into the emergence of new principles governing state identity in dar al-Islam (Islamic territory), the application of which to Iraq's claim of sovereignty over Kuwait can effectively determine this issue.

(1) Y.B.U.N., 1963, pp. 91-92.

(2) United Nations Treaty Series, (herein after refer to as: U.N.T.S.), 1963, vol. 485, p. 321; according to information furnished by the U.N. Treaty Office, Iraq had not revoked this instrument as of 2 August 1990.

(3) After the end of the 1961 Kuwait-Iraq crisis, the two states reached an agreement in 1966 to form a joint technical committee for the demarcation of the Kuwait-Iraq boundaries. The members of this committee have never reached an agreement on the boundary line to be demarcated, Kuwait-Iraq Boundary Demarcation: Historical Rights and International Will, prepared by a Panel of Specialists, National Centre for Documents of Iraqi Aggression on Kuwait, 1992, p. 47 ff.

(4) In the middle of July 1990, the Iraqi Foreign Minister sent a memorandum to the Secretary-General of the League of Arab States, in which Iraq alleged that the Kuwaiti Government and Emirates Government had been involved in the conspiracy against Iraq in shaking her economy, in dismembering her lands piece by piece and in stealing her oil from Rimela South field, the Iraqi Foreign Minister, Tarek Aziz, on 15 July 1990, sent a morandum to al-Shazli al-Gulaibi, Secretary-General of the League of Arab States, see this memorandum in Lauterpacht, E. and others (editors). The Kuwait Crisis: Basic Documents, Cambridge 1991, vol. 1, p. 74.

As a result of the mediation of the Arab leaders, Iraq agreed to attend a bilateral meeting to be held in Jaddah on 30th of July 1990 between Mr Izat Ibrahim, the Vice-Chairman of the Iraqi Revolution Council, and the Crown Prince of Kuwait, Shaykh Sa'd El-'Abdella. This meeting was factually held on 31st of July 1990, and it ended unsuccessfully. The Iraqis blamed the failure of the meeting on Kuwait's ignorance and denial of the Justified demands that made by Iraq, *ibid*.

CHAPTER 3

INTERACTION BETWEEN THE ISLAMIC LAW RULES GOVERNING STATE IDENTITY AND THOSE OF INTERNATIONAL LAW AND THE APPLICATION OF THE EMERGING PRINCIPLES TO IRAQ'S CLAIM

SECTION 1: Interaction Between Different Legal Rules Governing State Identity:

The time has now come to inquire whether any useful legal principles governing state's identity and its factual continuity can be derived from the very interaction between Islamic law rules governing state identity and those of international law as has been seen in the practice of Iraq and Kuwait.

However difficult to follow the emerging principles of such interaction, in that practice, may be, some legal principles of such kind must exist. If it did not it must be improper and illogical to speak of any state identity at all arising in dar al-Islam (Islamic territory), which is certainly not. However, if these principles do exist, then they should be able to supply not only the solution of Iraq's claim of sovereignty over Kuwait, but also the determination of identity of each one of them. Thus, the evidence of, which may be indirect, and the outcome of such interaction must be defined and applied to the claim.

In addition to the evidence on the interaction between Islamic law rules governing state identity in dar al-Islam (Islamic territory) and those of international law just presented in the practice of Iraq and Kuwait.

some general background may be useful in asserting some coordinated legal principles applicable to the main issue.

In this regard, just as a historical example on the interaction in influence between Islamic law and the European law, the latter of which is the historical source of modern international law, may exchangeably be presented. With regard to the Islamic law influence on international law, many Western legal scholars have recognized it even before the emergence of Iraq and Kuwait. The late Professor David De Santillana⁽¹⁾ has stated that:

«Among our positive acquisitions from Arab law, there are legal institutions such as limited partnership (qirad), and certain technicalities of

(1) Schacht, J. and Bosworth, C. (eds). *The Legacy of Islam*, Oxford 1974, p. 309.

commercial law. But even omitting these, there is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts; and herein lies its enduring merit.»

Marcel Boisard⁽¹⁾ has argued that the influence of Islamic legal principles on the fathers of international law is not easily denied; even on Grotius who had a good knowledge of Islamic law⁽²⁾.

At the middle of the last century onwards, however, the influence of European law in general on Islamic law was greater. In addition to the influence of European law through treaties concluded between Muslim and non-Muslim states, some Islamic Arab states more specifically Egypt adopted codes derived from western law and Islamic law was considered as subsidiary source of law while other states, more specifically Saudi Arabia observed the application of the pure Islamic law. The Egyptian experience had been transferred to Iraq and Kuwait, which led gradually to the modernization of their legal system in the pattern of Western states' system and the limitation of Islamic law, except in Saudi Arabia, to the matters of personal character⁽³⁾.

In the beginning, however, of the 1970s, movements of criticism had come into existence regarding the total acceptance of Western legal system in these states⁽⁴⁾. One of these movement set up a committee in 1977 in Kuwait in order to amend and develop the legal system in accordance with Islamic law⁽⁵⁾.

The principles emerging from such interaction must now be applied to Iraq's claim of sovereignty over Kuwait in order to determine this issue.

SECTION 2: Application of the Emerging Principles to Iraq's Claim of Sovereignty over Kuwait:

For the convenience, the Iraqi claim of sovereignty over Kuwait can be divided into three parts: firstly, the effects of territorial changes on state identity - secession of Iraq from the Ottoman Empire and (if any) secession of Kuwait

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- (1) Boisard, M. On the Propable Influence of Islam on Western and Public International Law, *International Journal of Middle East Studies* (herein after refer to as: I.J.M.E.S.), p. 429.
 - (2) Hamidullah, M. *Muslim Conduct of State*, revised 5th edition, Lahore, 1968, p. 70.
 - (3) Ballantyne, W. *Legal development in Arabia: A Selection of Articles and Addresses on the Arabian Gulf*, London 1980, p. 21.
 - (4) Anderson, J. *The Significance of Islamic Law in the World Today*, *American Journal of Comparative Law* (herein after refer to as: A.J.C.L.), 1960, p. 187.
 - (5) Ballantyne. *Legal Development in Arabia*, opcit, p. 86.

from the Ottoman Empire or even from Iraq itself; secondly, the effects of change of governments on state identity - the effects of the establishment of the 1990 puppet government on Kuwait's identity and thirdly, the effects on state identity of belligerent occupation, such as the 1990 Iraqi occupation of Kuwait and annexation making it the 19th district of Iraq.

1. Effects of the Territorial Changes on the Identity of Iraq and Kuwait:

In international customary and conventional law, territorial changes, such as the secession of Iraq from the Ottoman Empire in 1914, do not affect the identity and legal continuity of a state, such as the Ottoman Empire in this example⁽¹⁾, while Iraq is considered as a new state obtaining new identity⁽²⁾.

This fact discloses the illegality of Iraq's claim of sovereignty over Kuwait as a successor to the Ottoman Empire's position in Gurayn (the old name of the territory of Kuwait) territory, on the grounds that Kuwait had seceded from the Ottoman suzerainty, not sovereignty, and also on the grounds that had occurred before the secession of Iraq from the Ottoman Empire in 1914. In international law, when the predecessor state is in existence, such as the Ottoman Empire, the successor state, i.e. Iraq, must come into existence before the state, such as Kuwait, to which the former claims to succeed⁽³⁾.

In Islamic law, however, the issue of the identity of Iraq and Kuwait, upon their secession *inter alios* from the Ottoman Empire, and the separateness of each one of them, do not arise so long as they continue to be an integral part of dar al-Islam (Islamic territory)⁽⁴⁾.

2. Effects of the 1990 Puppet Government on Kuwait's Identity:

The Iraqi government have denied invading Kuwait on the 2nd of August 1990, justifying what happened on the grounds of assisting the provisional free government established upon the uprising of the people of Kuwait against the

(1) This rule has been codified in Article 43 of the Hague Regulations on the Laws and Customs of War on land; Moore, J. A Digest of International Law, Washington, Government Printing Office 1906, vol. 1, p. 248.

(2) For more elaboration on secession as a mode of the creation of states, see: Crawford, J. The Creations of States in International Law, 1979, p. 247.

(3) Article 2/d of the Vienna Convention on Succession of the States in Respect of Treaties, defines the term: "successor state" as signifying: "the state which has replaced another state on the occurrence of a succession of state", U.N. Doc.A/CONF.80/31.

(4) On the concept of dar al-Islam (Islamic territory) see: Al-Ghunaimi, Dr. Muhammad. Qanoon al-Salam fi al-Islam, Munsha'at al-Ma'arif bi al-Iskandriya, p.63; Khadduri, M. War and Peace in the Law of Islam, 1979, p. 155.

so-called regime. Subsequently, as a result of the request to unify Kuwait and Iraq made by the provisional free government of Kuwait, and the acceptance of that request by the Iraqi government, the identity of pre-revolutionary Kuwait came to an end. Thorough investigation of this claim shows that it does not stand any more firmly than the previous one in the face of the existing rules of international law governing the effects of government changes on state identity.

It is a well-established principle of international law that changes in a state government do not affect the identity and factual continuity of that state⁽¹⁾. Thus the establishment of the so-called provisional free government of Kuwait, if we believe that this government was established upon the uprising of the people of Kuwait against the so-called regime, which it was not, did not by itself affect the identity and factual continuity of Kuwait. Furthermore, that government did not have the legal competence by which it could have brought about an extinction of the identity of Kuwait, because it was a puppet government established by Iraq upon her invasion and military occupation of Kuwait.

International law has dealt with several types of such governments. One of these types of puppet governments was set up by the Japanese in Manchuria in 1910 after the invasion and occupation of that territory by Japan. Unlike the puppet government of Kuwait, later on, the Manchukuo's independence was declared on 18 February 1932 under the former Chinese Emperor, Henry Tu'yi. In spite of the premature recognition of that puppet government by Japan, san Salvador, Germany, Italy and Poland, the world community did not uphold that recognition.

The Japanese action in Manchuria, as the Iraqi action in Kuwait, was found by the international community to be illegal, since the Lytton Commission's report on October 1932 stated that:

«The independence movement, which had never been heard of in Manchuria before September 1931, was only made possible by the presence of Japanese troops and for this reason the present regime cannot be considered to have been called into existence by a genuine and spontaneous independence movement»⁽²⁾.

(1) Changes of governments may be constitutional or revolutionary, McNair, A. Aspects of State Sovereignty, B.Y.I.L., 1949, p. 9.

(2) Wright, Q. Legal Problems in the Far Eastern Conflict, New York 1941, p. 57; *ibid.* note on the Manchurian Crisis, A.J.I.L., 1932, vol. 26, p. 342.

The League Assembly endorsed this conclusion and considered Manchuria as Chinese territory, even though it remained under the Japanese control until 1945⁽¹⁾. This emphasized that the establishment of a puppet government in a territory occupied illegally by force, does not affect the identity and factual continuity of that territory.

Similarly, in Islamic law, a puppet government may be established by Baghi (an attempt at dissension) within dar al-Islam (Islamic territory) by Muslim dissenters, and the rules governing the identity of the territory under the dissenters, control have crystallized in Islamic state practice throughout its history. The Khariji dissension was a case in point when they opposed the rule of the Khalifa Ali, and established their own government in a part of the Islamic State territory⁽²⁾.

3. The Effects of Iraq's Occupation on the Identity of Kuwait:

The third and last claim made by Iraq during her occupation of Kuwait on August 1990, was that Iraq did not invade Kuwait, but she entered Kuwait to provide assistance to the Kuwaiti provisional free government set up upon the uprising of the people of Kuwait against the so-called regime, and Iraq would withdraw her forces from Kuwait when the situation there became stabilized. Soon after, on 8th August 1990, the Iraqi government declared that the Kuwaiti provisional free government proposed the unification of Kuwait and Iraq, which was immediately accepted by the Iraqi government, making Kuwait the 19th district of Iraq. at the same time the Iraqi government reiterated their previous claim, when they declared that upon that unification the "branch" (Kuwait) returned to the "origin" (Iraq), and subsequently the identity and factual continuity of the so-called state of Kuwait came to an end.

This extinction of Kuwait's identity which was alleged by Iraq occurred during the actual hostilities, i.e., during the Iraqi military seizure of the whole territory of Kuwait, an act known in international law as belligerent occupation *sensu stricto*. Thus, it is a well established principle in international law that it is prohibited to transfer sovereignty over occupied territory by force⁽³⁾.

Islamic law concurs with international law with respect to the effects of military occupation on identity and factual continuity of any part of dar al-

(1) L.N. Off. J., Supp. No. 101, vol. 1, p. 87.

(2) Sahnun. Al-Mudawwana al-Kubra, Cairo 1323 A.H., vol. 3, p. 47; al-Mawardi. Al-Ahkam al-Sultaniyya, ed., L. Enger. Bonn 1953, p. 97.

(3) Marek, K. Identity and Continuity of States in Public International Law, Geneva, 1955, p. 75.

Islam (Islamic territory). Abu Hanifa the founder of the Hanafid School of Iraq, which became the official school of the Ottoman Empire, stated that:

«All parts of the Islamic territory are under the authority of the Khalifa [the chief of state] and the authority of the Khalifa is the collective authority of the umma [Islamic nation]»⁽¹⁾.

This means that dar al-Islam (the Islamic territory) is the property of the umma (Islamic nation)⁽²⁾ and by 'akd al-wilaya (the contract of delegation of authority) the umma (Islamic nation) delegated its authority over dar al-Islam (Islamic territory) to the Khalifa (the chief of state). Accordingly, once a territory acquires an Islamic identity it cannot lose it⁽³⁾ except by the consent of the Khalifa (the chief of state) or any legally delegated authority of the umma by a treaty of cession or suchlike. Under this principle of Islamic law, the belligerent occupation of the territory of Kuwait by Iraq did not affect the identity and factual continuity of Kuwait, since Kuwait has continued as an integral part of dar al-Islam (Islamic territory) before and after that occupation, not only because of the illegality of the occupation, but also because it did not legally transfer the territory out of dar al-Islam by a means recognized in Islamic law. Moreover, the legally transferred territory of one state to another within dar al-Islam (Islamic territory) does not constitute change of identity of the former but rather amounting to the fusion of two identities.

CONCLUSION

From all what has been said above, thorough investigation has found out that the recent controversy over the factual identity and legal continuity of Kuwait, which was brought about by the Iraqi government's statement issued during the Iraqi occupation of Kuwait on the 2nd of August 1990 onwards, had no legal ground whatsoever whether justifying the invasion or the annexation of Kuwait. All the justifications given in that statement regarding: the 1990 Iraqi invasion, the establishment of provisional free government of Kuwait and the unification of Kuwait and Iraq on the 8th of August 1990 were legally and logically contradictory and were proved to be fallacious in nature, as the

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- (1) Al-Sarkhasi, Shams al-Din. Al-Mabsut, Dar al-Ma'rifa, Beirut, (1406 H. - 1986 A.D.) vol. 10, p. 93.
 - (2) Abu 'Ubayd. Kitab al-Amwal, (no date), p. 674.
 - (3) Djirisha, 'Ali, Al-mashru'iyya al-Islamiyya al-'Ulya, Dar al-Ghareeb li al-Tiba'a, Cairo, (no date), pp. 245-246.

evidence in this study proves. The evidence has been realized through extensive survey of the evolution of the rules of Islamic law governing state identity arising in dar al-Islam (Islamic territory); the establishment of certain tests of identity of Iraq and Kuwait under Islamic and international law. The survey has also covered the interaction between Islamic law rules governing state identity and those of international law and the application of the emerging legal principles to Iraq's claim of sovereignty over Kuwait in order to prove or to negate this issue.

As regards Islamic law rules governing the creation and extinction of state identity in dar al-Islam (Islamic territory), they have developed and have crystallized as a result of the evolution of the Islamic state legal order in two stages. The first stage has taken the form of decentralization of the governmental legal order, as a result of the amirs (governors) being invested with the Khalifa's wilaya (delegation of authority by the chief of state).

Al-wilaya (the delegation of authority), however, includes what is known, in Islamic legal literature, as al-wilaya al-kamila (full delegation of authority), which comprises two types of al-wilaya al-kamila (the delegation of full authority): the first type is imarat istikfa' (authorized governorship), in which al-Khalifa (the chief of state) enters into the contract of al-wilaya (delegation of authority) with the amir (governor) of his own will. The second type is imarat Istila' (assumption of governorship by force), in which the Khalifa (the chief of state) enters into the contract with the amir (governor) by necessity, i.e., against his will. Subsequently, the development of certain legal rules governing the delegation of such types of al-wilaya (delegation of authority) began and were recognized in Islamic state practice.

By such means, several amirs (governor) have established their own self-government under the Islamic State sovereignty and within dar al-Islam (Islamic territory). The establishment of these self-governing emirates has technically constituted secession, but its illegality has been refuted by the device known as imarat al-istilla' (assumption of governorship by force), as embodied in the Islamic law rules governing this type of wilaya (delegation of authority).

By imarat al-istila' (assumption of governorship by force), the Khalifa (the chief of state) conferred the wilaya (delegation of authority) of the province on the amir (governor). In return, the amir recognized the right of the Khalifa (the chief of state) to administer not only the internal religious affairs of the amir's (governor) province but also its international affairs.

Although the decentralization of the governmental legal order of the Islamic State had occurred as a result of the development of the Islamic law rules governing

the delegation of wilayat al-istila' (assumption of governorship by force), up till that time no new factual identities were created, since the Islamic State enjoyed territorial integrity, as crystallized by dar al-Islam (Islamic territory).

However, the so-called wilayat al-istila' (assumption of governorship by force) has encouraged amirs (governor) to acquire not only self administration, but also territorial independence from the Islamic State according to generally recognized rules of Islamic law.

The second stage of the crystallization of the rules of Islamic law governing state identity began upon the development of the political powers of some of these emirates, resulting in the creation of three rival Khalifas, (the chiefs of states) when each one acquired territorial sovereignty separate from that under the duly contracted khilafa (Islamic government) in Baghdad, even though they continued observing the Islamic identity. The extinction of any of these emirates, the division of the governmental power, and the transfer of the khilafa (Islamic government) from one place to another within dar al-Islam did not affect the Islamic identity of the territory concerned. Thus, new species of the Islamic identity evolved through the process of the decentralization of the governmental legal order and the territorial disintegration of the Islamic state in accordance with the Islamic law rules.

Up till that time, the creation, extinction and disintegration of identity in dar al-Islam (Islamic territory) were exclusively governed by Islamic law. However, the conclusion of treaties between the foreign powers and either the Islamic state (the Ottoman Empire), such as the 1856 treaty on the admission of the Ottoman Empire to the Concert of Europe, or between the foreign powers and these entities in dar al-Islam, such as the 1853 Treaty with the chiefs of the Gulf, accelerated not only the evolution of new Islamic identities, through assumption of governorship by force, but also the applicability of the rules of international law to these identities.

As a result, many territories of the Ottoman Empire, more particularly in the Arab World adopted this practice, and either fell under the protection of foreign powers, such as Kuwait, or assumed governorship by force and obtained new factual identity under international law, such as Iraq after World War I.

In spite of these well-established rules of Islamic law governing the creation of new species of the Islamic identity upon which Iraq embarked in establishing her identity in 1932 in the territory previously known as Mesopotamia, Iraq has continued ever since to maintain a claim to sovereignty over Kuwait, after the latter's independence in 1932, based on the principle of historical continuity of

the Ottoman Iraq identity. Thus, we have applied the well-established tests of identity under Islamic and international law to the case of Iraq and Kuwait in order to verify Iraq's claim of sovereignty over Kuwait.

The verification has concentrated on the claim from two angles: the first is the application of the test of identity under Islamic and international law to the case of Iraq. The aim of the test is to determine whether Iraq after her independence in 1932 was a continuation of the Ottoman Iraq, and thus succeeded to the Ottoman sovereignty or suzerainty, if any, over Gurayn territory (now known as Kuwait), or Iraq is considered as new identity. This can only be determined by the rules of Islamic law governing the assumption of governorship by force. Moreover, the new statehood of Iraq can only be determined by the criterion of statehood under general international law. The other angle of the claim is whether or not Kuwait has ever been under the Ottomans sovereignty or suzerainty when Iraq was an integral part of the latter by applying the same tests of identity to this part of the issue.

According to the tests of identity, the practice of Iraq towards assumption of governorship by force has shown that the Islamic State (Ottoman Empire and predecessor of Iraq) was replaced by a member state of the covenant territory (Great Britain) in the conduct of the international relations of the territory of Iraq, in accordance with recognized rules in Islamic law (the rules of assumption of governorship by force) and in international law (the rules governing secession).

Upon Iraq's assumption of governorship by force from the Ottoman Empire during World War I, which was facilitated and supported by Great Britain, and the replacement of Iraq under the mandate system and subsequently the assignment of the conduct of Iraq's international relations to Great Britain, Iraq gradually obtained the qualification of statehood. These qualifications included the establishment of a government, international recognition, international personality, and finally independence in 1932.

These elements of statehood constituted a new factual identity under international law and resulted in the replacement of the Ottoman Empire by Iraq with respect to the former's position in Mesopotamia within the boundaries established by the 1923 Lausanne Treaty, and in accordance with the declaration of guarantees given by Iraq to the League of Nations in 1932.

This new identity of the territory previously known as Mesopotamia was derived from the Arab identity, which is one of the species identities derived from Islamic identity in accordance with generally recognized rules of Islamic

law. This can be emphasized by the fact that, in addition to sharing geographical links with other Arab states, Iraq is also related to them ethnically. Each Arab state is contiguous to, or an historical continuation of, the others.

Mistakenly, however, these links have created several territorial claims between neighbouring Arab states, one of which was Iraq's claim that Kuwait constituted a part of her territory on the grounds that Kuwait had been a part of the Ottoman Empire (the parent state of Iraq), and upon the independence of Iraq the new identity covered not only the territory previously known as Mesopotamia, but also the other territory known as Gurayn (now known as Kuwait).

In spite of the Kuwaiti government's rejection of this claim, it has highlighted the issue of Kuwait's identity before and after the independence of Iraq in 1932.

The application of the well-established tests of identity under Islamic and international law has emphasized that Kuwait's assumption of governorship by force, which occurred long before the independence of Iraq in 1932, led to the establishment of the new identity in Gurayn territory (now known as Kuwait) in accordance with the rules of Islamic law. Latter on, after World War I, Iraq relied upon these rules in establishing her identity in the territory known as Mesopotamia.

Moreover, before Iraq's secession from the Ottoman Empire, Kuwait had acquired Gurayn territory (now known as the Kuwaiti territory), established a democratic government there, assumed governorship by force from the Islamic State, delegated the conduct of her international relations to Great Britain, obtained international recognition, acquired international legal personality, defined her territorial boundaries and in 1961 attained her independence in accordance with criteria of statehood established under international law.

Through this practice of Iraq and Kuwait, the interaction between the rules of Islamic law governing state identity and those of international law has been evidenced resulting in the emergence of certain legal principles. Such examples includes the effects of secession, of change of government and belligerent occupation on state identity in both Islamic and international law, effective principles which can be applied to Iraq's claim of sovereignty over Kuwait in order to negate or to affirm this claim.

The application of these principles shows that Iraq's claim of 1961 and of 1990 that Kuwait constitutes an integral part of Iraq contradicts not only the

widely recognized legal rules governing the establishment of state factual identity, as mentioned above, but also those legal rules of Islamic and of international law governing territorial changes, internal revolution and belligerent occupation. According to the rules governing territorial changes, Kuwait had assumed governorship by force under Islamic law (or had seceded under international law) and established her new identity; and Iraq followed the same practice in 1932, without affecting the identity of the predecessor of Iraq, i.e. the Ottoman Empire. Therefore, Iraq and Kuwait continued observing on a regional plane their Islamic identity, while obtaining on the international plane new factual identity under contemporary international law.

Similarly, the 1990 Kuwaiti puppet government established by Iraq upon the latter's invasion of the former, did not have the competence, under both Islamic and international law, to fuse the Kuwait identity with that of Iraq. This is based on the fact that that government was not established in accordance with the free will of the Kuwaiti people, but was forced upon them by Iraq during the occupation.

In the same manner, the belligerent occupation of Kuwait in 1990 by Iraq did not bring the identity of Kuwait to an end. Military occupation does not affect the identity of the occupied state since in international law it is prohibited to transfer sovereignty from one state to another by force, while in Islamic law the transfer of sovereignty must be carried out by a legally authorized person and that transfer must be from dar al-Islam (Islamic territory) to dar al-'ahd (the covenant territory), and none of these things happened during the Iraqi belligerent occupation of Kuwait.

Finally, Iraq's claim of sovereignty over Kuwait has no legal ground in Islamic law or in international law. This is largely because Kuwait had obtained new factual identity and Iraq followed the same way in obtaining her's, even though both states have continued to be integral parts of dar al-Islam (Islamic territory). Any proposed unification between Kuwait and Iraq must be based on the free will of the peoples of the two states, and that, if it happened, would not constitute change of identity but rather fusion between two identities.

SELECTED BIBLIOGRAPHY

1. English References:

A. DOCUMENTS:

- Aitchison, C,U. A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries, calcutta, (1933).
- B.F .S.P., 1919, vol. 112, p. 21, Article 22 of the Covenant.
- Secret. Note by the Secretary, Political and Secret dept., 14 March 1915, Indian Office Library, (I.O.L.), B. 213.
- Report on the Administration of Iraq, by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of Nations, October, 1920-March 1922, Appendix 1.
- U.N. Doc. ST/LEG/SER.E/3, Iraq.
- P.M.C., Minutes of the 16th session.
- Extracts from brief notes relative to the rise and progress of the Arab tribes of the (Persian) Gulf: Prepared in August 1819, (Bahrain) I.S.Bo. vol. xxiv, pp. 362-372.
- The Republic of Iraq (Ministry of Foreign Affairs). The Truth About Kuwait, July 1961.
- Security Council Official records, (S.C.O.R.), 16th Year, 6th July 1961, 959th Meeting, 7th July, 960th Meeting.
- Woodward, E.L. Documents on British Foreign Policy, 1919-1939, 1st Series, vol. IV.

B. Books:

- Akehurst, L. A Modern Introduction to International Law, 5th ed., 1984; 3rd ed. London 1977.
- Al Baharna, H.M. The Legal Status of the Arabian Gulf States, Manchester University Press, 1968.
- Altug, Y.M. Turkey and Some Problems of International Law, Istanbul, 1958.
- Baker, P. The Present Juridical Status of the British Dominions in International Law, Longmans, Green & Co., 1929.
- Ballantyne, W. Legal development in Arabia: A Selection of Articles and Addresses on the Arabian Gulf, London 1980.
- Chen, T. The International Law of Recognition: With Special Enference to Practice in Great Britain and the United States, ed., L.C. Green, London, 1951.
- Chirol, V. The Middle Eastern Question or Some Political problems of Indian Defence, London, 1903.
- Crawford, J. The Creation of States in International Law, Clarendon Press, Oxford 1979.

- Cruttwell, C, A History of Peaceful Change in the Modern World, Oxford University Press 1937.
- Duchheit, L. Secession: The Legitimacy of Self-Determination, Yale University Press 1978.
- Encyclopaedia of Islam.
- Ghunaimi, M. The Muslim Conception of International Law and the Western Approach, the Hague 1968.
- Graves, P. The Life of Sir Percy Cox, London, 1941.
- Hamidullah, M. Muslim Conduct of State, revised 5th edition, Lahore, 1968.
- Hurewitz, J.C. Diplomacy in the Near and Middle East: A Documentary Records, D. Van Norstrand Co., New York, 1956.
- Jessup. A Modern Law of Nations, 1948.
- Kanza. T. Conflict in the Congo, Tenguin 1972.
- Kelidar, A. (ed.) The Integration of Modern Iraq, London, 1979.
- Khadduri, M. Independent Iraq: A Study in Iraq Policies Since 1932, Oxford University Press, 2nd ed., 1960.
- Khadduri, M. War and Peace in the Law of Islam, 1979.
- Khalil, M. (trans.) The Arab States and the Arab League: A Documentary Record, Khayats, Beirut, 1962, vol. II.
- Kuwait-Iraq Boundary Demarcation: Historical Rights and International Will, prepared by a Panel of Sepecialists, National centre for Documents of Iraqi Aggression on Kuwait, 1992.
- Lauterpacht, E, and others (editors). The Kuwait Crisis: Basic Documents, Camrbidge 1991, vol. 1.
- Lauterpacht, H. Recognition in International Law, London, 1948.
- Marek, K, Identity and Continuity of States in Public International Law, Geneva, 1955.
- McNair, A. The Law of Treaties, 1961.
- Moore, J. A Digest of International Law, Washington, Government Printing Office 1906, vol. 1.
- Schacht, J. and Bosworth, C. (eds). The Legacy of Islam, Oxford 1974.
- Oppenheim, I.F. International Law: A Treatise, ed. by Lauterpacht, London, 1955, vol. 1.
- Saleh, Z. Mesopotamia (Iraq) 1600-1914, al-Ma;arif Press, Bagdad, 1957.
- Shaw, M. Title to Territory in Africa, International Legal Issues, 1986.
- Verzijl, J. International Law in Historical Perspective, A.W. Sijthoff-Leyden 1969.
- Wright, Q. Legal Problems in the Far Eastern Conflict, New York 1941.

C. ARTICLES:

- Anderson, J. The Significance of Islamic Law in the World Today, A.J.C.L., 1960.

- Azzam, I.A.R. The International Status of the Persian Gulf States, R.E.D.I., 1959, vol. 15.
- Baty. Protectorates and Mandates, B.Y.I.L., 1921-22, vol. 2.
- Boisard, M. On the Propable Influence of Islam on Western Public and International Law, I.J.M.E.S., 1980, vol. II.
- Fitzmaurice, G. Do Treaties Need Ratification? B.Y.I.L., 1934, vol. 15.
- Jones, J.M. Who Are British Protected Persons?, B.Y.I.L., 1945, 26th Year of Issue.
- Lewis, M.M. The International Status of the British Self-Governing Dominions, B.Y.I.L., 1922-23, 3rd year of Issue.
- Lockhart, L. Outline of the History of Kuwait, J.R.C.A.S., 1947, vol. xxiv.
- M.E.E.S., No. 22, 23 March 1973.
- McNair, A. Aspects of State of Sovereignty, B.Y.I.L., 1949.
- Toynbee, A. Survey of International Affairs, 1925, vol. 1.
- Wright, Q. Note on the Manchurian Crisis, A.J.I.L., 1932, vol. 26.

D. NEWSPAPERS:

- The Times, London, 30 September, 2 October 1959.
- The Times, London, 10th, 23rd Jan, 1961.
- The Financial Times, London, 30th Jan. 1961.
- Daily Telegraph, London, 26th June 1961, London.
- The Times, London, 6 April 1973.

2. Arabic References:

A. BOOKS:

- Abu 'Ubayd. Kitab al-Amwal, (no date).
- Abu Zahra. Al-Wihda al-Islamiyya, Dar al-Fikr al-'Arabi, (no date).
- Al-'Akkad, Dr Salah. Al-Mashrik al-'Arabi al-Mu'asir, Maktabat al-Anglo-al-Misriyya, (no date),
- Al-Ansari, Abu Yusuf. Kitab al-Khardj, Dar al-Ma'rifa, Beirut, (no date).
- Al-Baghdadi. Usul al-Din, Istanbul, (1928).
- Al-Bukhari. Sahih al-Bukhari, 'Alam al-Kutub, Beirut, (no date), vol. 9.
- Djirisha, 'Ali. Al-Mashru'iyya al-Islamiyya al-'Ulya, Dar al-Gharib li al-Tiba'a, cairo, (no date).
- Al-Ghunaimi, Dr. Muhammad. Qanoon al-Salam fi al-Islam, Munsha'at al-Ma'arif bi al-isknadariya.
- Ibn Hizm. Al-Milal wa'l Ahwa' wa'l Nihal, Cairo, (1347-48 H.), vol. 4.
- Ibn Taymiyya. Al-Siyasa al-Shar'iyya, dar al-Kitab al-'Arabi, cairo, (1969).
- Al-Khususi, Dr Badr. Dirasat fi Tarikh al-Khalidj al-'Arabi al-Hadith wa'l Mu'asir, Dhat al-Salasil, 2nd ed., Kuwait, 1984.
- Mansi, Dr Muhammad Harakat al-Yakaza al-'Arabiyya fi al-Shark al-Asyawi, Dar al-Fikr al-'Arabi, 1978.

- Al-Mas'udi, 'Ali. Murudj al-dhahab, ed. by Muhammad Muhyi al-Din, al-Maktaba al-Islamiyya, Beirut, (no date) vol. 2.
- Al-Mawardi, Abu al-Hassan al-Ahkam al-Sultaniyya, al-Matba'a al-Muhammadiyya, cairo, (no date).
- Muhammad, Dr Ahmad Abu al-Wafa. Al-Mu'ahadat al-Dawliya fi al-Shari'a al-Islamiyya, Dar al-Nahda al-Arabiyya, al-Qahira, 1990.
- Sarhan, Dr Abdul Aziz Muhammad. Al-Ghazu al-Iraqi fi al-Kuwait, Dar al-Nahda al-Arabiyya, al-Qahira, 1991.
- Al-Sarkhasi, Shams al-Din. Al-Mabsut, Dar al-Ma'rifa, beirut, (1406 H. - 1986 A.D.) vol. 10.
- Sahnun. Al-Mudawwana al-Kubra, Cairo 1323 A.H., vol. 3.
- Shakir, Mahmud. Al-Tarikh al-Islami, 1985, vol. 6.
- Al-Tabari, Muhammad bin Dja'far. Tarikh al-Tabari, ed. by Muhammad Abu al-Fadil, Dar Swidan, Beirut, (no date), vol. 3.

SELECTED CASES

- Great Britain v. Costa Rica 1923, R.I.A.A., 1923, vol. 1.
- Island of Palmas case, the Netherlands v. U.S. 1928, PCA. Sole Arbitrator: Huber, R.I.A.A. 1928, vol. 2.
- Reparation for Injuries Case, I.C.J. Reports, 1949.
- South West Africa Case (Preliminary Objection) I.C.J. Reports, 1962.
- The Temple of Preah Vihear Case, I.C.J. Reports, 1962.
- Nuclear Tests Case, I.C.J. Reports, 1974.
- Advisory Opinion, of the P.C.I.J., Austro-German Customs Union Case, P.C.I.J. Reports, 1931, Ser.A/B, No. 41.
- P.C.I.J., 1933, Ser. A/B, No. 53.