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The Iraqi Invasion Of Kuwait And The Legality of Its claims In International Law And Islamic International Law.

A Thesis Submitted For The Award Of The Degree Of Doctor Of Philosophy In Law

By

Ali Bin Ghanim Ali Al-Shahwani Al-Hajri

Department Of Public International Law

University Of Kent

February 1997

But say O my God! Advance me in

Knowledge.

Holy Quran

s:xx, (114)

Acknowledgment

Thanks be to God for the completion of the present thesis.

My supervisor, Wade Mansell, senior lecturer of International Law at the School of Law, university of Kent, has guided me throughout the years of my research, work and concentration for the present thesis. My deep gratitude is herewith sincerely expressed for all the time and energy he made available to me. I wish to extend my thanks also to Dr Ahmad Ajaj who encouraged me and provide me with advise on how to tackle the issue of Islamic International Law.

A sincere cousin, Rashed Khaled Al-Shahwani, for his help in managing my affairs at home and who always encouraged me to seek knowledge.

My wife who accompanied and helped me throughout my work without waning and complaints and my sisters, brother, brothers in law and close friends have also had

a valuable share in helping me complete my work; their moral support and love deserves deeply felt thanks.

I wish to express my deep gratitude to the Qatar government for the financial sponsorship which enabled me to carry out the research for the present thesis.

Dedication

In the memory of my father who always advised and encouraged me to seek knowledge irrespective of difficulties and hardship. And to my mother who always endeavored tirelessly to provide me with every possible help in my mission.

Abstract

The Iraqi invasion of Kuwait and its subsequent annexation is, undoubtedly, one of the most daring, aggressive acts in modern time. This invasion represented a clear violation of all recognized treaties. Despite that, discussion focused entirely on the political and legal aspects of the invasion, to the detriment of no less important issues, such as Iraq's claims justifying their invasion. The main concern of this thesis is to fill this vacuum and discuss fully the legal aspect of the Iraqi invasion to prove its illegality under both International Law and Islamic International Law.

In evaluating the legality of the Iraqi claim, the thesis discusses in the first chapter the historical development of Kuwait and how it become an independent nation. In the second chapter, the focus is on the legality of the protection agreement of 1899 signed between the Emir of Kuwait and the British government. It proves that such agreement was legally sound.

The rest of the chapters are devoted to a discussion of all Iraqi claims vis a vis Kuwait and their legality under both modern International Law and Islamic International Law. The discussion is dealt with under three headings: invasion in response to Kuwait economic aggression, invasion upon the request of

Kuwaiti dissidents, and finally the legality of the invasion under Islamic International Law.

The outcome of such discussion is that all Iraqi claims failed to meet the test of legality under the rules of both laws. Moreover, it proved that states will use the ambiguity of legal rules and exploit them to their advantage as was in the case of Iraq.

Declaration

I certify that all material in this thesis which is not my own work has been identified and that no material is included for which a degree has previously been conferred upon me.

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The copyright of this thesis rests with the author. No quotation from it should be published without his prior written consent and information from it should be acknowledged.

ABBREVIATIONS

A.C.R. : Africa Contemporary Record.

A.J.I.L : American Journal Of International Law.

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

Bombay Selection : selection from the Records of Bombay Government, Vol.24, New Series, The Persian Gulf, Bombay 1856.

Cmd. Cmnd. United Kingdom, Command Papers.

C.L.R. : Commonwealth Law Reports.

Calif. West.In't.I.J. :California Western International Law Journal.

Colum.L.Rev. : Columbia Law Review.

Colombo.L. Rev. : Colombo law Review.

Current Leg.Prob. : Current Legal Problems.

Den.J. I.L.P. : Denver Journal of International Law and Policy.

Den.L.J. : Denver Law Journal.

E.C.R. : European Court Reports.

Ed. : Editor.

Eqypt.Rev.I.L.: Revue Egyptienne De Droit International (Egyptian Review of International Law).

Ga.J.In't & Comp.L.:Georgia Journal of International and Comparative Law.

G.A. Res: Resolutions of the General Assembly.

G.O.A.R.: General Assembly Official Records.

Hav. In't & Club.L.: Harvard International Law Club Journal.

I.C.O. : Islamic Conference Organisation.

I.O. : International Organisation.

I.C.J. : International Court of Justice, Reports of Judge-ments ,Advisory Opinions and Orders.

I.LL.L.Rev. : Illinois Law Review.

I.L.M. : International Legal Materials.

I.C.L.Q. : The International and Comparative Law Quarterly.

I. J. I.L: Indian Journal of International Law.

Isr.L.Rev. : Israel Law Review.

K.U.N.A.: Kuwait News Agency.

J.I. Aff. : Journal of International Affairs.

J.In't. Comm. Jur. : Journal of The International Commission of Jurists.

Lorimer: Lorimer, J.G. , Gazetteer of the Persian Gulf, Oman and Central Arabic, Official Records of the Government of India, Vol.I, Historical ,1915. and also ,Gazetteer of the Persian Gulf, Oman and Central Arabic, Official Records of the Government of India, Vol.II, Geographical and Statistical .1908.

L.N.O.J.: League of Nation , Official Journal.

Mc Gill.L.J. : Mc Gill Law Journal.

N.D.L.Rev. : North Dakota Law Review.

N.A.T.O : North Atlantic Treaty Organisation.

O.P.E.C. : Organisation of Petroleum Exporting Countries.

Proc.Am.Soc.I.L.: Proceeding of The American Society of International Law.

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

R.C. Rdc.: Receuil des Cours de I'Academe de Droit International .

Smith : Smith, H. A., Great Britain and the Law of Nations , A Selection of Documents ,Vol.I ,1932, Vol.II , 1933.

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

S/P.V. : United Nation Security Council , Provisional Verbatim Records.

S/Res : Security Council Resolution.

Soc: Transaction of the Grotius Society.

U.IIL. L.Forum. : University of Iilions Law Forum.

U.K. : United Kingdom.

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

U.N. : United Nation .

U.N. G.A. Res: Resolutions of the General Assembly

U.N.E.F. : United Nation Emergency Force .

U.N.M.C : United Nations Monthly Chronicle.

U.N.T.S. : United Nation Treaty Series .

U.N.Doc.: Unaited Nation Documents.

Va.J.Int.L : Virginia Journal of International Law .

W.L.Rev. : Washington And Lee Law Review.

GLOSSARY

ALLAH: ALMIGHTY GOD.

Al-Khalij Al-Arabi : Arabian Gulf.

BAGHI: Transgression or rebellion against a legitimate Muslim Ruler.

Canon : law.

Dalil: evidence.

Dar Al-Harb: the realm of war; land not under Muslim rule.

Dar Al-Islam: the realm of Islam; land under Muslim ruler.

Fatwa: a legal decision made by the Muslim a jurist.

Fiqh: the science of understanding Islamic Law ; the science of jurisprudence.

Hadith (Ahadith) : a tradition or report of a saying or action of the Prophet Mohammed.

Hanafis: referring to the Sunni School of jurisprudence ascribed to Abu Hanifa.How was born in the year 702 A.D, (Kufah in Iraq)and did in the year 150A.H.

Hanbalis : referring to the Sunni School of jurisprudence ascribed to Imam Ahmed Ibn Hanbal. Who was born in Baghdad in the year 778 A.D.

Ahmed studied Figh and Hadeeth science under Imaam Abu Yoosuf, the famous student of Abu Haneefah, as well as under Imaam ash-Shaafi`ee himself. Ahmed continued to teach until he died in the year 855 A.D.

Hijra: emigration; emigration of the Prophet Mohammed from Mecca to Medina in A.D. 622; the beginning of the Muslim calendar.

Imam: a religious leader of Muslim prayer and of the political community ; in Shi'ite school , Ali (the Fourth Orthodox Caliph) and his descendants are considered to be the spiritual successors of the Prophet Mohammed.

Ijma : consensus of the community of Muslim scholars as a basis for a legal decision.

Ijtihad : the practice of individual judgment to establish a juristic legal rule by interpretation of Shari'a textual sources.

Istihsan: the practice of juristic preference or discretionary opinion in breach of explicit analogy.

Istislah: the aim of mankind in Law; reasoning based on the criterion of the public interest.

Malikis: referring to the Sunni school of jurisprudence ascribed to the jurist Malik ibn Anas.died in 801 A.D.

Maslaha: that which is beneficial; term used by the Islamic modernists to express the principle of public interest in the Maliki school.

Qiyas : analogy ; parity of reasoning.

Quran : the Muslim Holy Book.

Sunnah : a custom sanctioned by tradition; rules of conduct deduced from the words, precepts, actions and decisions of the Prophet Mohammad.

Shafi'is : referring to the Sunni school of jurisprudence ascribed to the jurist Mohammed ibn -Idris Ashafi'i.He was born in Ghazzah (Al Shaam in the year 769 A.D and died.in 820 A.D.

Shari'a : the path to follow ; a name given to the sacred Law of Islam.

Trans. and ed. : Translation and edition.

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Introduction.

The Iraqi invasion of Kuwait took the whole world by surprise. No one imagined in the Arab world that a sovereign state could be invaded by others and summarily annexed. The invasion represented a clear challenge to International Law.

As was expected, the invasion generated a heated debate in the United Nations and amongst International Lawyers whose discussion focused on the legality of United Nations resolutions. These resolutions were passed with utmost haste authorizing the use of force to evict Iraq from Kuwait. Iraqi claims, however, justifying the invasion, have not generated any interest at all among the same circles, creating a hiatus of discussion on this aspect of the crisis. Such negligence raises many questions, positing the assumption that such claims by Iraq is not worth such discussion.

The purpose of this thesis is to fill this hiatus, with a view to disproving the legality of Iraqi claims. In undertaking such a task many difficulties arise. The task of deciphering legal jargon invoked in political argument, for example, presents a problem to the researcher, since the Arabs have a tendency to subsume discussion of politico-legal issues under such ideological concepts as Arabism or Islamism.

In my thesis I rely heavily on Arabic sources, especially in tracing the history of Kuwait and its relations with Iraq, with a strong bias towards Arabic newspapers for reference.

The methodology of this research is as follows: focus is primarily on Iraqi claims, their description, their justification, all with a view to positing these claims for legal examination under both International Law and Islamic International Law.

The first chapter is confined entirely to the history of both Kuwait and Iraq. It deals with the origins of Kuwait and its relationship with the Ottoman and British empires. A thorough analysis of such relations is undertaken and the treaty of protection with Britain and the independence of Kuwait is respectively discussed in detail.

The Second Chapter deals with the legal analysis of relations between Kuwait and Iraq, in particular the Protection Agreement of 1899 between Britain and Kuwait. It focuses primarily on the legality of such an Agreement with Britain, given the fact that at that time Kuwait served as a vassal state of the Ottoman Empire.

The Third Chapter deals with the Iraqi invasion undertaken in response to (a supposed) economic aggression. The definition of economic aggression is discussed in the light of Kuwaiti economic activity . This chapter investigates

also the legality of force under International Law in response to economic aggression with reference to Iraq's actions against Kuwait. The discussion is focused primarily on the definition of economic aggression and the legality of force to counter it in modern International Law.

The Fourth chapter deals with both the legality of the Iraqi intervention (supposedly, according to Iraq) called for by Kuwaiti rebels, and their quest for self-determination. An intervention upon the request of rebels pre-supposes an element of civil strife within the intervened state, and hence a definition of civil war is introduced. Later, a thorough revision for the rules of civil war is investigated to prove that the basis for Iraqi intervention, on behalf of the rebels, was spurious.
A thorough review of the principle of self-determination is undertaken to ascertain whether or not it constitutes a binding legal principle in International Law with reference to the Iraqi invasion of Kuwait.

The fifth chapter deals with the Iraqi claim that its invasion of Kuwait was legal under Islamic International Law and that the Western Alliance against it was illegal. In carrying out such investigation, it was necessary to outline briefly the origin of Islamic International Law and its sources, in comparison with Modern International Law.

We discuss also the classification of the world according to such law and, within this context, the concept of war and the conditions under which a war might be declared.

This chapter concludes with a discussion of the concept of alliance in Islamic International Law. It traces the history of alliance and its forms before and after the emergence of Islam and their legality or illegality as defined Islamic jurisprudence, taking into consideration the views of modern Islamic jurists on the subject.

Chapter six deals with the outcome of the study. It concludes that Kuwait throughout the course of history was acting in a semi independent manner and that its relations with Ottoman Empire was totally different from other dependent territories. This fact was confirmed strongly by the signing of 1899 agreement by which Kuwait become a British protectorate and later an independent state.

As to Iraqi claims, the chapter concludes that all claims starting with economic aggression, intervention upon the request of rebels, and ending with legality of invasion under Islamic International Law are illegal according to International Law and Islamic International Law.

Chapter One

Kuwait From A Historical Perspective.

1- Location and Origin.

The geographical location of Kuwait lies at the northwest corner of the Arabian Gulf between latitudes 28-and 30-N and between longitudes 46-and 48-E. It shares a border of 240 km (149miles) with the Republic of Iraq to the north and the west, and shares a border of 250km (155miles) with Saudi Arabia to the south and south west. Its coastline of 290km is located on the Arabian Gulf.[1] The total area of Kuwait is 17,818 square km (6,969 square miles).[2] The great traveller Murtadh Bin Ilwan (1121A.H-1709A.D) states in his manuscript that Kuwait is smaller in size than Al Ahsa but resembles it with regard to its architecture.[3]

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1 The state of Kuwait, The ministry of the Information, fifth edition of Kuwait, Fact and Figures, 1992 p.31.

2 Ibid.

3 Traveler Murtadha bin Ilwan,1121A.H-1709A.D (where he states in the Barlin Library, no6127) .

Nothing is really known about the origin of Kuwait before the seventeenth century, but ancient historians refer to it as Grane. Grane, up to the seventeenth century, constituted the appellation for Kuwait, a small fishing community and centre for Pearl Fishing in the Gulf. [4]

The construction of Kuwait dates from approximately 1680 .[5] The Danish traveller C.Neibuhr registered Kuwait as the town of Grane during his sojourn there in 1765 (See details of maps)[6]. Kuwait was known to have borne the title

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4 For more information about Kuwait see. Memoir Descriptive of the Navigation of the Gulf of Persia with Brief Notices of the Mannera, Custom, Religion, commerce and Resources etc. By Captain George Barnes in Bombay Selections Vol. XXXIV ,pp., 532-576. Also there is interesting information about Kuwait Population & Commerce, Measures adopted by the British Govt. between 1820 and 1844 for the effecting of the Suppression of the Slave Trade in the Persian Gulf, Bombay Selection XXIV,pp.648-110.1).

5 Tasmiat Al Madain Madint Al Kuwait Al Mashriq,(Lebanon 1904)pp.449-458. Arabic Names & words Dictionary.

6 *KUWAIT IN THE MAP : The First Map ;KUWAIT or Grane on the Dutch map of about(1660).Kuwait is shown as Grane the first name of Kuwait.1 See the Appendix.The second Map ; Carsten Niebuhre Kuwait in his Map 1765.2 See the Appendix. The Third Map; C. Ritter, the well-known German geographer and of the founders of the science of modern geography, entitled Arabien (Arabia) was published in (German)in1867.3 The fourth Map ; W.G Palgrave's, the 1862-1863 Arabian peninsula map recorded in his famous trip, where Kuwait is shown in a colour completely different from the other political entities in the region, with Ottoman state in the north and Najd in the south. It is also to be noted that the northern borders of Kuwait include Kuwait Island Warba and Bubiyan, and the western side of the southern part of Shatt al Arab, including Um Qasr and most of the Faw .4 See the Appendix. The Fifth Map; A unique Map in Harms worth's*

of Grane under the rule of Sheikh Abdallah bin Sabah,(1762-1812) the second ruler of Kuwait.[7] Several places in southern Kuwait still bear this name. The names Grane or Qurain and Kuwait are the diminuitive forms which denote 'high hill' and 'Kut'(castle or fort) respectively.[8] In the dialect of southern Iraq and the neighbouring areas Kut means a house built in the Arabian

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New Atlas (n,d.). The Map drawn dates back to the late19th century, from Harmsworth's New Atias.5 The sixth Map; The world map 1:500,000 sheets 444A,4440,445B, Published by: the War office and Air ministry. London 1962.6

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1)The record of the Dutch East Indian Company housed in the Hague, Netherlands ,(Dutch State Archives). 2)The life of Carsten Niebuhr the oriental traveller, with appendix by J.D. Michaelis. Translated from the German by Professor Robinson. Edinburh,1836. Also see Description de I'Arabie, faite sur des observations propres des avis recueillis dans les lieux memes, Amsterdam 1774.pp.287-296. Voyage en Arabie en d'autres Pays circonveisins, Amsterdam, tom premier Vol. I,1776, Tome Deuxieme,(Vol.II,1780). from p.170-300, for more interesting information about Kuwait & Iraq. Travels in Arabia, and other countries in the East, translated into English by (Robert Hersan). Two Vols, Edinburgh, 1792. 3) German1867. from his book Erdkunde which came out in eleven Volumes starting in 1818. On this map Kueit or Korein the first name of (Kuwait) appears in its present position in (voilet circle) including Kuwait Island Warba and Bubiyan and parts of southern Iraq.The map was printed in Berlin and is kept in the University of Cambrige library under Maps C.336.58.1.(cf. Map 3). 4) (cf. Map 4) Harms worth's New Atlas . For more information see the oldest map prepare by the Arab navigator in 1934, And the Arab Geography society. Also see Al Kuwait in Arabic. Egypt 1991. p.41. also Kuwait Atlas firest ed.1988.op.cit p.129. and Kuwait map in the Ottoman Empire & Great Britain Treaty 1913 op.cit. p.77.

7 Records of the Dutch East Indian Company housed in the Hague, Netherlands. (Dutch State Archives) see Appendix (1).

Peninsula. Some historians believe that the appellation 'Kuwait' dates from the rule of the Banu Khalid tribe under the leadership of Barrak.This ties in with evidence gleaned from local custom that Sheikh Barrak Ibn Ghurair Al Hamid constructed Kuwait sometime between 1669 and 1682.[9] The Utub tribe, from which the present ruling Al Sabah family descends, was the first to arrive and settle in Kuwait in 1711, under the leadership of Sabah bin Jaber.[10]

Carsten Neibuhr refers in his travels notes (written between 1763-1765) to the prosperity of Kuwait, that its people owned 800 ships and that they had developed into an urban society engaged in trade, diving and ship building. [11] The Dutch state Archives at the Hague in Holland have in their possession a

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8 The State of Kuwait the Ministry of Information op.cit ,(note1), p.30.

9 Ibn Bisher, Uthuman B.Abdallah, Al Majd fi Ta'rikh Najd, Mecca,1349-1930 British Museum MS .7718.I p.26-8.

10 (A)The life of the Danish travellar (Carsten Niebuhre the Oriental travellar,)with appendix by J.D. Michaelis. Translated from the Germanby Professor Robinson . Edinburh, 1836.

(B)Description del'Arabie, faite sur des observations propres desavis recueillis dans les lieux memes, ,Vol.1 (Amsterdam , 1774), pp. 287-296.

(C) Voyage en Arabie en d'autres Pays circonveisinsi, (Amsterdam,Tome Premier 1776, Tome Deuxieme,1780).

(D) Travels in Arabia, and other countries in the East, translated into English by Robert Herson. (Two Vols., Edinburgh,1792).

11 NEIBUHR , Travels through Arabia &Other countries in East, 2 Vols-Edinburgh 1792, Vol.11, p.103.

seventeenth century chart relating to the Dutch East India company's activities in Kuwait, but use the appellation 'Grane', suggesting that the name 'Grane' might well prove to be the original name of the town.[12] Buckingham, a European traveller in 1816, was impressed by how Kuwait always maintained its independence at a time when most of the other Gulf regions found themselves under the yoke of the Portuguese or the Ottoman Empires.[13] Buckingham speaks of Kuwait as a great seaport situation in the north western corner of the Gulf with a sizable population.[14] Stocqueler, a traveller en route to Basrah, relates of the Shaykh's influence over his people, describing it as paternal.[15] Kuwait, or Grane, extends approximately a mile

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12 Records of the Dutch East Indian Company housed in the Hague,Netherlands op.cit.(note 7).

13 Buckingham, J.S., travels in Assyria, Media and Persia, including a Journey from from Baghdad by Mount Zagros, to Hamadan, the Ancient Ecbatana, Researches in Isfahan (in Iran)and the Ruins of Persepolis and Journy from thence by Shiraz, Bushire,Hormuz,and Muscat. (1816) pp.262-263.and see pp. 370-464. Narrative of an Expedition aganist the Pirates of the Persian Gulf,with Illustrations of the Voyage of Nearchus,and Passage by the Arabian sea to Bombay, London , 1829.

14 Buckingham J.S.,(1786 -1855)Travelled between England and India and published a number of extremely useful books on travel and other subjects. The book Quoted in this history is his travels in Assyria, media and Persian etc.,op.cit London1829.and see his biography in the Dictionary of National Biography , Vol. XV, pp. 202-203.

15 Stocqueler,J.H.,Fifteen Months Pilgrimage ,through untrodden tracts of Khuzistan and Persian in a Journey from India to England through parts of Turkish Arabia, Persia, Armenia , Russia, and Germany , performed in the years1831and1832. Two Vols. (London)1832.,Vol.1,p.5-45.

in length and quarter of a mile in width. It consisted of houses built of mud and stone, occasionally faced with coarse chunam. The town at the time may have contained about four thousand inhabitants. The wall that surrounded the town from the desert side appears to have been built more for show than protection (being only a foot thick). It had three entrances, each adorned with two honeycombed pieces of ordinance.[16] Colonel Lewis Pelly, the British Resident in the Gulf, described in his report of 1863[17] the various types of goverment (and affiliations) which obtained in the Gulf.

He predicted a prosperous future for the town of Kuwait as a harbour, telegraph station and a shipping cross - point, remarking that the town was small with a population of about 15,000 inhabitants, built on a promontory of loose sandstone covered with sand. Pelly describes the chief diseases in Kuwait as syphilis and gonorrhoea, and the consequent secondary syphilis and stricture.[18]

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16 stocqueler,J.H op.cit.(note 15).,(1800-1885) spent twenty years in india. He did much journalistic work . He also compiled several works including Fifteen Months Pilgrimage through Khuzistan and Persia two Vols, London 1832). For a fuller biography, see The Dictionary of National Biography, Vol.XVIII,pp.1282-1283 also see Stocqueler Fifteen months Pilgrimage,op.cit, Vol.I,pp.1-3& p.18 .

17 Cf. Remarks on the Tribes, Trade and Resources of the Persian Gulf, Transactions of Bombay Geographical Society XVD,1863-1864 pp.31-113. & p.47.

18 Pelly Colonel John Lewis., Recent Tour Around the Northern Portions of the Persian Gulf , Transaction of Bombay Geographical Society., XVII,(1863-1864), pp.111-141. & pp.118-121.

Pelly describes the government in Kuwait as patriarchal, with the Shaykh policing the state and the judge (qadi) responsible for religious affairs.[19]

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19 Also see A visit to the Wahhabi Capital, (Journal of the Royal Geographical Society, XXXV 1864-1865.pp.169-191. and see also Abdul Aziz Al-Rashid, History of Kuwait, II, Beirut 1962. pp.8-11.

2- Advent of the Ottoman Turks and Great Britain in the Arabian Gulf and the early interaction with Kuwait :

The Arabian Gulf has for century attracted the interests of Western powers as a conduit through which they might conduct their trade and protect their interest in the area. In earlier times i.e. before the discovery of the sea route via Cape of Good Hope in 1498, the rulers of the Arabian Gulf and the Red Sea controlled the trade between the East and the West . The Gulf remained a vital channel for the trade from the Indian SubContinent to Southern Persia and Iraq, especially after the Portuguese, and later on the British, assumed control of many of the trading centers. Ultimately Britain emerged as a dominant force in the region, outmanoeuvring the Ottoman and Persian empires. The British above all entered the Gulf in order to protect its interest in India. To this end Britain sought, towards the end of the 19th century, to conclude many treaties with the Gulf Emirates which guaranteed them full control over all the activities of these Emirates.[20] The Ottoman Empire established its presence in at around the middle of the 16th century when the

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20 Malcolm (Colonel Sir.) see Kaye.London 1815., The History of Persia ,(2 Volumes) The Malcolm report from (Asfhan-Iran) in 27th September 1800. And Dr. Jamal Zakrea Kasem ,The Arabian Gulf, A study of Arab Emerates History 184-1914, Cairo 1966 pp4-6.

Arabs of Al Ahsa and Bahrain sought their help against the Portuguese. The Portuguese had clashed with the Ottomans over the conversion of Basra into an Ottoman Protectorate. Consequently the second half of the sixteenth century witnessed continuous confrontation between the Ottomans and the Portuguese. The Ottomans were not able to take any decisive action because of a lack of a naval base in the Gulf. The north western region of the Gulf continued by and large under their nominal control. The Ottoman government despatched an envoy now and again to the region frequently to inform itself of the affairs of such places such as Al Ahsa.

The traditional policy of the Ottoman Empire was non-interference in tribal affairs.[21] After the Portuguese withdrew from the region, the Ottomans were contented with the nominal authority over this region and they remained so until the emergence of the Wahhabi Movement.

The Ottoman presence in the Arabian Peninsula was consolidated during the reign of Mohammad Ali Pasha. They were eager to maintain their presence there for two vital reasons: firstly, as a response to the deteriorating position of the Ottoman Empire elsewhere, and secondly they wished to maintain their

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21 Lorimer in his official and comprehensive work, Gazetteer of the Persian Gulf, based on the East India Company records, 1550- 1551-1553 (Gulf Directory) trans, to Arabic Vol,1 Doha 1975.p.16-17. and Salah Al-Agad, Political Streams in the Arabian Gulf, Cairo 1974 pp. 20-21,53.

influence at the heart of Islam, namely in the two holy cities of Islam (Mecca and Medina). In 1839 Reza Pasha imposed an annual Tribut on Kuwait but the latter refused to pay far from retaliating the Ottoman government elected to pay an annual sum as a privy purse to the Emir of Kuwait in lieu of his participation in the defense of the port of Basra. The Ottoman government rewarded him with 150 Karas (bags) of dates every year, and presented him with a Royal decree (Farman) and a green colour flag.[22]

The Ottomans did not take any effective steps to spread their influence in the Gulf region until the year 1869. Hitherto, the jurisdiction of the Ottoman Governor in Baghdad did not extend beyond Kuwait harbour in the north west part of the Gulf. Now the ruler of Kuwait was awarded the title of Qa'im Maqam (Administrative Officer) and was given a free hand to deal with the internal affairs of Kuwait without any interference from the Ottoman government.

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22 Dr. Hassan Soliman Mohamoud, Kuwait, Past and Present, Baghdad 1968 pp.197 ,198. and see Pr'ecis of correspondence regarding the affairs of the Persian Gulf 1800-1853. Printed 1906.,see the Selection from the Records of Bambay Government ,Vol xxiv.Bombay ,1856.

3-Emergence of competition between the British and Ottoman Empires over the Gulf States.

We will now consider the conflict between the British and Ottoman governments over the Gulf states, in particular Kuwait. Britain objected to the Ottomans' carrying out naval inspection of all the British vessels that passed through the Gulf on the pretext of suppressing the slave trade. They refused also to acknowledge the Ottoman government's protest over Britain's shelling of Dammam port in Saudia Arabia which the Ottoman government considered as its territory. Britain fully exploited the negligent attitude of the Ottoman government towards the Gulf, although the inhabitants of the Gulf states recognised the Ottoman Sultan as leader of the Islamic state (Ummah).[23]

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23 Dr. Jamal Zakrea: op.cit.(note 20), p. 172-173-174 and see Persian Gulf Gazetteer: Pt 1 Historical and Political Materials, Pr'ecis of Bahrain affairs, 1815-1904. Printed 1904. As a fall out of Ottoman negligence in the Arabian Gulf, Britain also fully exploited to its favour the family quarrel that erupted among the princes of Najd soon after the death of their father. Prince Saud wanted to assume power but was opposed by his brother Abdullah. However Saud defeated him and went to Al Ahsa and proclaimed his authority over it. Saud was supported by the British and in order to counter this support, his brother sought the help of Midhat Pasha who was Governor of Baghdad, inspite of the fact that Midhat Pasha had little regard for the Wahhabi Movement. He immediately responded to the call for support from Abdullah since he felt that he could exploit the chaotic situation in Najd to assert Ottoman sovereignty

The Ottomans, in an attempt to secure more influence in the Gulf, launched an attack in 1871 on Al Ahsa from Basra under the command of General Nafidh Pasha. Kuwait, unlike the other states that owed allegiance to the Ottoman government, played a very prominent role in this expedition. The Kuwaiti Emir Abdullah Ibn Ali AL Subah led a contingent of troops from the sea, accompanied by Nafidh Pasha. Similarly, Prince Mubarak Al Subah led a contingent of Kuwaiti tribes to Al Ahsa by land route .[24] These gestures on the part of Kuwait, made a substantial impact on Midhat Pasha. He reciprocated the Kuwaitis support by granting to the Emir large areas of date-

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on the northern coast of the Gulf. He justified his intervention as a checkmate against British manouvres to help Saud defeat his brother and thus accept protection. This move would provide an opportunity for the British to rule over Baghdad. In April 1871 Midhat Pasha confirmed Ottoman sovereignty over Najd province. And he proclaimed Prince Abdullah as the Qa'im Maqam (Administrative Officer) appointed by the Sultan and also announce that an Ottoman army contingent would be sent immediately to safeguard the Administrative Office against the rebellious brother. He also emphatically said that the military action to be launched by him was not for the purpose of occupying Najd. It was only for strengthening relations with the Ottoman government by maintaining sovereignty over it and enforcing security measures against the aggressive acts of Saud.

24 Dickson, The Arab of the Desert, London1981. p266-274. and see Al-Rasheed, op.cit.(note19),Vol.2 pp.37-44.also for more infirmation see, Disckson ,H.R.P. ,Kuwait and Her Neighbours,London 1956.

palm groves in the Shattulul-Arab area and exempted him from paying land annual Tribut .[25]

The Emir of Kuwait, for his part, hoisted the Ottoman flag over his palace, and the Turkish authorities, in return, bestowed on him the title of Pasha.[26] Midhat Pasha managed to occupy Al Ahsa in April 1871, renaming it Najd Province. Governors were appointed to rule the region, thereby affirming Ottoman sovereignty there. In the wake of these developments Qatar was also occupied by a regular contingent of the Ottoman army, consisting of bedouins from Kuwait under the command of Abdullah Al Subah.

Midhat Pasha justified his occupation of Qatar by claiming that the bedouin tribes under Saud's command were endangering its security. Thus, at this stage, Kuwait enjoyed a special relationship with the Ottoman Sultanate.

Britain, for her part, was concerned with Ottoman influence in Bahrain. She attempted to check Ottoman progress there with poltical moves of their own.[27] In June 1871 the British Resident Agent despatched to Shaykh Essa Ibn Ali copies of the treaties that the British Government had previously concluded

25 Dr. Jamal Zakrea, op.cit.(note.20), p181-182 and see Persian Gulf Gazetteer Pt 1. Historical and see Pr'ecis Political Materials-of Turkish Expansion on the Arab Littoral of the Persian Gulf and Hasa and Katif Affairs. (Printed 1904) and Ibid, Kuwait Affairs, 1896-1904 (printed 1904).

26 Dr. Hassan Soliman, op.cit.(note 22), p 198. and Lorimer: op.cit.(note 21).

27 Lorimer, op. cit, p 1521. and Dr. Jamal Zakrea: op. cit. P 183.

with the Sheikhs of Bahrain. He focussed attention especially on Clauses 2& 3 of the Treaty of 1861 which stipulated that the Shaykhs of Bahrain should aid Britain in safeguarding security in the Gulf.[28]

The British government were assured by the Sublime Porte's declared disinterest in the states of Bahrain, Muscat or the independent tribes in the southern part of the Arabian Peninsula.

Midhat Pasha was removed from office and replaced in 1872[29] by Rauf Pasha. The date coincided with the outbreak of Wahhabi activities that were directed at the 'blasphemies' of the Ottomans. In the wake of these developments Ali Beg the ruler of Qatif and Nafidh Pasha commander of the Ottoman troops in Hofuf requested military help from Mubarak ibn Al-Subah of Kuwait who was wielding great influence on the bedouins of Kuwait. This situation provoked Saud, backed by the Wahhabis, to rise against Mubarak.

Britain meanwhile was concernd with the outbreak of piratic activity in the Gulf that was harrassing her trade. The chief culprits in this regard were the tribes of the Bani Hajir and the Bani Murra who owed allegiance to the Ottomans.

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28 Dickson, op.cit.(note 24), p.266-273 and Mohammed Anees and Rajab Hraz, Memoirs in the Modern Arab History, Cairo ,1963. p45-13 .

29 Dr. Jamal Zakrea, op. cit.(note 20), p 192-193-194.

The India Office, although critical of the Ottoman's policy in the region, nevertheless recognised Ottoman sovereignty over the coastal area, but only in the Arabian Gulf- from Basra to Oaseer. It did not accept Ottoman authority in the areas south of the Gulf (excepting Bida and Wakrah) .[30] It demanded from the Sublime Port acknowledgement of the Shaykh of Bahrain's allegiance to Britain.[31]

Relations between Qatar and the Ottomans go back to 1868 under the rule of Sheikh Jassim who pledged his allegiance to the Ottomans in return for protection against Arab tribal attacks from land routes. The British expressed their displeasure but could only provide the Shaykh with protection from the sea. [32]

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30 Mohammed Jamal, The Arabian Gulf 1814-1914, Cairo pp. 211, 225.

31 Britain also insisted on stipulating the condition in writing that the Sheikhs should be kept out of any interference either from the coast or from the interior. In other words,the internal borders of the territories should be respected so that the Ottoman authorities could not compel the Sheikhs to owe twin allegiance, either to the British or to the Ottomans. Since it was expected that the Ottoman empire could not maintain its authority over the territories where it had declared its sovereignty, the British government naturally expected an opportune moment to snatch from the Ottomans, the right of naval inspection in the areas .see Ibid.

32 Ibid. For more information see , Moustafa Aqeel, Dr. Moustafa Aqeel ,(Atanafees AL Dole fi Al Khaleej),1763-1622.Doha , pp 311-321. Therefore it exploited the dispute between Sheikh Jassim and his father and tried to drive a wedge between father and son. The British advised Sheikh Jassim to change his attitude towards the Ottomans, but did not succeed because Sheikh Jassim justified himself saying he was in need of a big power to protect him, as the British had failed to maintain peace and security in

Ottoman power in the Gulf weakened during the post-Midhat Pasha era. Sheikh Jassim, disatisfied with the corrupt Turkish government, declared his allegiance to the British and announced his relinquishment of the Ottoman title of Qayim Maqam.[33] Thus began a new phase in the relations between Qatar and Britain. Ottoman control over Bahrain was effective only for a brief period when Midhat Pasha was governor of Iraq.

When Ottoman influence in Qatar and Bahrain waned, Britain stepped in to conclude the Treaty of 1880 which placed these two states under its direct protection.

Qatar. He was upset by piratical attacks on his ships by tribes from the western region, and by British disregard of the consequent loss of life and property. They instigated Sheikh Essa bin Ali al-Khalifa, ruler of Bahrain, against the, Ottomans. They asked him to protest over the occupation of Zubara harbour and to claim it as their territory. The Ottomans refused to accept this claim. This was followed by a proclamation of historical Rights over the territory by Midhat Pasha. He addressed a letter to Lord Mayo, the King's Viceroy in India, asserting the Ottoman claim over Zubara port. He gave valid documentary evidence to support his claim. But Lord Mayo turned down these claims, saying that Bahrain islands constituted a separate emirate and did not owe allegiance to any foreign country.

33 Moustafa Aqeel, op.cit.,(note 32), pp. 311-321. and Dr. Jamal Zakrea: op. cit.(note 20), p192-193-194.When the British political agent in Baghdad discussed the question of Qatar with Midhat Pasha, the latter informed him that Qatar was a part of the emirate of Najd, and that its rulers were paying Zakat (alms tax) to Prince Faisal bin Turki. He also informed the British agent that Sheikh Jassim had accepted the Ottomans because it would save him from paying Jizya tax, previously paid by the Sheikhs of Qatar to the Al-Khalifa Sheikhs of Bahrain.

The Treaty signed with the Sheikh of Bahrain stipulated the following:

1. **That the Sheikh of Bahrain shall not enter into any negotiations or agreements with any other government without the consent of the British government ;**
2. **No other government excepting the British government should be allowed to have diplomatic or consular representation, or to set up oil storage facilities for the ships without the permission of Britain; The above clauses were a recurring feature in the agreements concluded with the other Gulf Emirates. A full fledged treaty was drawn up by Britain later on in the year 1892.**

These two treaties converted Bahrain into a British Protectorate. The Emirates of the Gulf were inclined towards the Ottoman government for reasons of religious affinity. These emirates initially felt that they might find solutions to their internal problems and external dangers by aligning themselves with the Ottomans. Instead they were shocked to find that the Ottoman state was only "a paper tiger" given to corruption which had the effect of pushing these emirates into the hands of the British.

4- Ottoman hegemony over Iraq and its effect on Kuwait

Iraq first fell under the influence of the Ottomans following the dispute between Isma'il AL Safawi, the ruler of the Persian State in Iran and Iraq, and Saleem the first, ruler of the Ottoman Empire, in 1514 A.D. Saleem successfully led an expedition to secure his eastern boundaries against the Persian at the battle of Galderan. It was a victory which led to the subjection of northern Iraq , Al Mawsel and Diyar Bakr areas.[34]

Towards the end of the year 1533 A.D, Sultan Suleyman and the Grand Sadr Ibrahim Pasha organized an expedition against Iraq which resulted in the seizure of Baghdad and Basrah. Sultan Suleyman adopted a liberal policy in ruling the area. He allowed the Shiite population freedom of worship, and notwithstanding his Sunni background, intervened in the disputes between Sunnis and Shi'ites.

Rashid , the son of Sheikh AL Arbi, was appointed to govern Basra. A feudal system obtained there, with military leaders in control.[35] However, it was not long before the Arabian tribes disobeyed and rebelled against the new rule. Rasihd himself joined these rebel tribes. The Ottoman forces in

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34 Dr. Moustafa Aqeel ,(Atanafees AL Dole fi Al Khaleej), op.cit.(note 32), pp.22-23.

35 Dr. Md. Anees & Dr. Rajab Hraz ,op.cit.(note 28), Cairo,1963 p.45.

response, marched to Basra and re-occupied it in 1546 A.D. Following periods of rival Ottoman-Persian rule Iraq eventually fell under the permanent rule of the former state in 1747. The Ottomans established four provinces in Iraq, Shahr Zur, where the Kurdish tribes tended to settle [36], Mawsil and Basrah. The latter town served as a base from which the Ottomans could launch into the Gulf area.

The Ottomans recognized the Shaykhs of the ruling tribes and the tribal Sheikhs, attempting to control them through a divide and rule policy, that was alternatively facilitated somewhat or rendered inoperable by the tendency of tribes to internecine strife, particularly in the Basrah province. The Emirs of the Gulf in general respected and sympathized with the Ottoman authorities, not merely for religious reasons; their relationship with Iraq had a political and economic dimension also.[37] Kuwait's Sheikhs first approached the Ottoman governor (wali) in Basra in 1718 announcing their loyalty to the Ottoman Empire when Kuwait was placed under their nominal sovereignty without interference in its internal affairs.[38] Kuwait maintained good relations with the Ottomans. For instance, when the English pressurised the Sheikh of Kuwait to raise the British Flag and to sever relations with the

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36 See, Abdul Aziz Noar, The Modern History of Iraq, Cairo 1968 pp.6-7.

37 Dr. Mahmod Salh Mnsee ,The East Arab Modern History ,Cairo 1990, p34.

38 Ibid: p. 51 .

Ottomans, Jaber AL Sabah, in response, to the contrary, raised the Ottoman Flag on his palace. Moreover he paid the Ottoman government an annual royalty of 40 bags of rice and 400 containers of dates, in return for annual access (Khalaand) to commercial facilities on the Shatt Al Arab.[39] In 1854 he responded to an order from the Ottoman Empire to protect the port of Basra. The relationship between Sheikh Jaber and the Ottomans led to an announcement in 1847 that in particular circumstance the former might place himself under the protection of the port [40].

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39 Lorimer in his official and comprehesive work , Gazetteer of the persian Gulf, Based on the East Indian Company records,1550-1551-1553(Gulf Directory pt 1) trans. to Arabic p.1512-1518.

40 Ibid: pp.1518- 1519.

5- The Ottoman Goverment and Its Relations with Kuwait and Iraq.

The discussion has so far focused on Ottoman sovereignty in the Arabian Gulf and in particular Iraq and Kuwait. The pattern of Ottoman occupation and the boundaries drawn at that time had consequently led to conflicting claims between Gulf states, especially between Iraq and Kuwait. Iraq has persistently claimed that Kuwait was, historically, an emirate that belonged to it under Ottoman sovereignty.

Geographically, Kuwait was the closest of the emirates to the Ottoman territory in Iraq but there is no documental evidence of any Ottoman control over Kuwait before the year 1869.

In 1829 Sheikh Jaber Ibn Al Subah however accepted nominal Ottoman control over his territory as a check on British incursion there. He raised the Ottoman flag over his palace. Kuwait`s naval strength was steadily built up to the extent that in 1845 the Ottoman government requested the ruler of Kuwait to take charge of protecting Basra port in lieu of an annual sum. We have seen how Midhat Pasha declared Kuwait in 1869 to be an independent autonomous

Sanjaq (sub-division) of the province of Baghdad,[41] to be inherited by the Al - Subah family. The sheikh was to be addressed by the title of Qa'im Maqam. The Ottomans agreed not to interfere in the internal affairs of Kuwait, whilst on the Kuwaiti side it was agreed that the Ottoman banner would be hoisted on all Kuwaiti ships without payment of taxes or custom duties. Midhat Pasha exempted the Kuwaitis from Annual Tribute and also allocated them annual sums of money as a privy purse from the treasury of Basra[42] in return for their loyal support during the al-Ahsa campaign.

Notwithstanding all the privileges granted to Kuwait, the Ottomans encountered opposition from Kuwait. When Sheikh Mohammed Ibn Al -Subah died in 1866 the affairs of the Emirate were taken over by four of his sons : Abdullah, Mohammed, Jarrah and Mubarak.

Abdullah placed in charge of the chancellory in Kuwait, Mohammed administered civil affairs, Mubarak was placed in charge of tribal affairs whilst Jarrah looked after the treasury (bait al-Maal). Within a short time the four brothers squabbled. Mubarak was exiled to Bombay, whilst the remaining three brothers cancelled each other out in an abstruse power game.

Kuwait then came under the rule of Sheikh Yusuf bin Abdullah Al Ibrahim one of the sons in law of the Al -Subah family. He was ambitious to usurp

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41 Lorimer in his official and comprehesive work , Gazetteer of the Persian Gulf, Based on the East Indian Company records,1550-1552-1553, op.cit.(note 21), p.1525-1537.

power for his own family with the help of the Ottoman government. He was opposed, however, by the able Mubarak, who had returned from exile, with the support of the people of Kuwait on the grounds that Yusuf's rule would lead to a greater domination by the Ottomans. Mubarak was eventually appointed Emir of Kuwait in 1897 .[43]

But within a short time strong opposition from the Ottomans had built up against him and he felt the need to seek foreign support. In February 1898 Mubarak requested a meeting with the British agent and conveyed to him the need for British protection against the Ottoman government The British, however, considering the circumstances to be unfavourable, endorsed Ottoman (nominal) control over the northern coast of the Gulf, as pledged in the 1878 treaty.

The British ambassador in the (Ottoman-Al Eastana) stated in 1898 that Britain had never accepted de facto Ottoman sovereignty over Kuwait at any point of time. [44] Later on Britain agreed to help Mubarak for a number of reasons. The British were concerned over the mobilisation of Ottoman troops in Basrah in preparation for deposing Mubarak. They feared also Russian

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42 Ibid.

43 Ibid.

44 Gooch and Temperley ,British Documents on the Origins of War, Vol.X,part 11,p.49. and See for more information Lorimer in his official and comprehensive work , Gazetteer of the Persian Gulf, Based on the East Indian Company records,1550-1552-1553,op.cit (note 21), p.1528.

influence over Ottoman policy in the Gulf and Egypt, and were intent on opposing the use of Kuwait harbour as a final destination for a rail link from Port Said in Egypt via Najd province. The Russians had also proposed a rail link from Tripoli in Libya to Kuwait which posed a great threat to British interests.

As a consequence the British Foreign secretary, Lord Salisbury, announced Britain's intention to make Kuwait a British Protectorate provided that there was no objection from the Sublime Porte. [45]

Lord Curzon in support of his country's policy, mentioned that although Britain had conceded Ottoman sovereignty over the territories south of Kuwait, but it was never confirmed that Ottoman had control over Kuwait at any point in time. In this context he quoted evidence put forth by Colonel Mead, the British Resident in the Gulf, which described the lack of direct or actual contact between the Ottoman government and the people of Kuwait. According to it, it was necessary to declare Kuwait a Protectorate in order to avoid any outside interference in its internal affairs .[46]

As a result of these deliberations a secret agreement was concluded with the Emir of Kuwait and Britain in 1899, principally for the following reasons: Kuwait was under constant internal threat from the Ottoman backed Saudi leader Ibn Rashid (to the south) and Yusuf Ibrahim (to the north). In addition

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45 Ibid. p.1524-1532.

Germany was believed to be keen, with the backing of the Ottomans, on building a Berlin -Baghdad rail project which was to terminate in Kuwait. This was a source of great worry to Britain. Finally, the British were apprehensive of the Russians setting up a terminal for coal in Kuwait.[47]

Britain was keen on utilising the Colonel Mead report. Britain required access to Kuwait with its unique sea port which might be converted into a major centre of trade in the Gulf besides making it the terminal point for a rail link from port Said.

The internal threat to Kuwait had made it imperative for the Emir to align himself with Britain . However he could not declare open hostility against the Ottoman state. Hence he continued to hold the title of Qa'im Maqam and at the same time maintained clandestine relations with the European nations.[48]

The agreement between Britain and Kuwait was signed on 23rd January 1899 by Shaikh Mubarak on behalf of Kuwait and by Colonel Mead on behalf of Britain. The text of the Agreement was as follows : [49]

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46 Dr. Salah Al Aqad, op.cit.(note 21), p.184.

47 Dr. Hassan Soliman Mohamoud, Kuwait Past and Present, Baghdad 1968 p.184.

48 Lorimer in his official and comprehesive work , Gazetteer of the Persian Gulf, Based on the East Indian Company records,1550-1552-1553 .op.cit.(note 21), p.1530-1537.

49 Ibid and Lorimer, op cit, pp1532-1533. Also, Lorimer, G.G. Gaazeteer of the Persian Gulf, Oman and central Arabia, Calcutta 1915.

"The purpose of signing this legal Agreement is that it has been duly agreed and consented by Colonel Malcolm John Mead on behalf of Her Majesty, The Queen of Great Britain as the First Party and His Highness Sheikh Mubarak bin Subah, Emir of Kuwait as the Second Party that His Highness Sheikh Mubarak bin Subah agrees of his own volition and desire not to accept any agent or Qayim Maqam on behalf of any other government or state in Kuwait or in any other part within his territory without the permission of the Kingdom of Great Britain. He shall also not authorise, sell, lease, mortgage or transfer through any other method. He shall also not grant any part of his lands for purposes of habitation within his territory without the consent of the Government of Her Majesty the Queen of Great Britain. This shall include those lands of the Sheikh which are under the possession of subjects of other countries. In confirmation of the above this Agreement has been duly signed by Colonel Malcolm John Mead Representative of Her Majesty the Queen of Great Britain in the Persian Gulf and His Highness Sheikh Mubarak on his own behalf and on behalf of his heirs and successors. Signed on the 10th of Holy Ramadan 1316 A.H. corresponding to 23rd January 1899." See appendix.

The agreement stipulated Kuwait's permanent alliance with Britain who assured Kuwait that it would protect its interests abroad and allow her full independence in its internal affairs. According to the agreement also:

- All problems pertaining to foreigners were to be placed under the jurisdiction of the British Agency in Kuwait;

- Sheikh Mubarak was to hand over an area of land situated in the north eastern part of Kuwait close to the Shatt ul Arab;

- Britain was to be granted several privileges and exemptions in Customs as was in practice prior to the appointment of British Consular Agent in Kuwait ; and finally

- The British Flag was to be hoisted alongside the Ottoman Flag;

In return Britain paid Sheikh Mubarak an annual sum of 15,000 Rupees from the treasury in Bushahar.[50] Britain also permitted Kuwait to import and export arms, whereafter it flourished as a centre for arms trading. These arms were used to win the support of the neighbouring tribes who were turned against the Ottoman government.[51] The above Agreement had far reaching implications for the Emir due to his possessions in Ottoman territories in the Shatt-ul - Arab area. As a consequence of this Agreement, his rights over these rich lands were forfeited. The 1899 agreement opened the door for the British, not only to establish their influence in Kuwait but in the

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50 Lorimer in his official and comprehesive work , Gazetteer of the persian Gulf, Based on the East Indian Company records, 1550-1552-1553 ,op.cit.(note21).p.1533-1534.and see also Lorimer op.cit.(note 49),p.1021-1027. And Dr. Jamal Zakrea, op.cit, (note20),p 269-272. Also see Husain Khalf Khazal, Political History of Kuwait .j,2j,3j,4 1962. p.139.

51 Jad Taha, "Weapons Trading in the East of Asia",.1910-1913.,History journal Issue, Vol.17,1970. p.150.

Najd and southern Iraq also.

It may perhaps be argued that Kuwait was a victim of political deceit since this agreement with Britain was not on an equal footing. The Emir of Kuwait might be perceived as lacking political acumen, but he was primarily concerned about safeguarding his position and influence, as were all the other Emirs in the region with whom similar agreements were made. These Emirs knew that it would be difficult for them to survive against the might of the Ottoman empire which could withdraw their rights at any time without their being able to do anything about it. Hence they were convinced that to remain under Britain's protection was the only way to safeguard themselves from such. The Ottomans, for their part, continued to create many hurdles for Kuwait. Hamdi Pasha was no sooner appointed Governor of Basra when he raised the issue of Mubarak who was allegded to have murdered his two brothers. Mubarak retaliated by imposing heavy taxes on all Ottoman imports into Kuwait. An embargo was also imposed on catering services to Ottoman ships calling at Kuwait harbour. These ships were subjected to inspection for fear of smuggling arms. Mubarak also refused to receive Ottoman officials in his Emirate. Besides these measures, Mubarak supported the British government's action in Al Ahsa in order to weaken Ottoman control there.[52]

52 Hassan Soliman, op.cit.(note 22), p 185.

The Ottomans set Ibn Rasheed against Mubarak. They bestowed on him the title of Pasha and lavished on him generous amounts of money. Mubarak, however, outmanoeuvred the Ottomans by winning over to his side all those who were close to Ibn Rasheed. With relations becoming aggravated between Kuwait and the Ottoman state, diplomatic talks between Britain and the Ottoman state resulted in the issuance of an official confirmation by Lord Lansdowne, the foreign minister, to Anthopolo Pasha, the Ottoman ambassador in London, stating that the British Government would not alter its relationship with Kuwait provided the Ottoman state did not despatch military forces to Kuwait. In the case of aggression on the part of the Ottoman state, or its ally Ibn al -Rashid, the British Government would be forced to offer its full support to the Shaikh of Kuwait. In response to this declaration the Ottoman government issued a counter declaration claiming Kuwait for itself, in conformity with the circumstances which obtained prior to the 1899 Kuwait-Britain treaty. Britain, in retaliation, invoked the treaty of 1899, offering to defend Kuwait against hostile attack. The British Kuwaiti amity assured for Kuwait Britain's support in the Shatt -ul-Arab battle of 1902 between the Emir of Kuwait and Yousef Al-Ibrahim.[53] During this battle the Ottoman state attempted to occupy the strategic places of Umm-ul -Qasr,

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53 Lorimer,J,G. Gazetter of the Persian Gulf, Oman and Central Arabia,Two Vols. Calcutta,1915p.1044.

Safwan and Al- Bubiyan island, since these places were located within the region through which the new rail track was to be built up to Baghdad.

The Ottomans succeeded in occupying the north eastern corner of Kuwait, alleging that it lay within the borders of Baghdad. Mubarak refused to accept these claims and produced historical evidence to show that these areas had been inhabited by Kuwaitis from earliest times. His claims were supported by Britain in 1904 and consequently the Ottomans withdrew their troops from those areas.

The above dispute led to the formation of a committee in 1907 to demarcate the borders. The committee decided that the Al-Bubiyan islands belonged to Kuwait but the other border problems remained unsolved until 1913.[54]

Shortly after these developments it was announced in the British House of Commons that the Emir of Kuwait was to be placed under British protection, as per the agreement of 1899, which amounted to the first official announcement to be issued with regard to the British protection of Kuwait[55].

Mubarak later signed a further two agreements with Britain, in 1904 and 1907

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54 Aitchison,C.U.,A Collection of Treaties, Engagement and Neighbouring Countries, Vol.X1-Calcutta ,India 1933.p263-67.

55 Kumar, Indian And Persian Gulf Region,1858-1907,London 1965, p.155-156. And Lorimer,J,G.op.cit.(note 53),p.1546-1547.

respectively, confirming all the pledges made in the treaty of 1899.[56] Britain allocated to Mubarak an annual sum of Four Thousand Pounds Sterling. Mubarak also signed two more agreements in 1910 and 1913 which required him to withdraw permission from pearl divers and arid sponge hunters, or those wishing to explore for oil without the consent of Britain.[57]

On the strength of the above alliance with Britain, Mubarak felt himself to be in a strong position vis-`a-vis the Ottomans and their Arab allies, the Al - Rasheed.

For Britain's part, she viewed the Arabian Gulf as a very sensitive buffer zone between itself and Russia and Iran on the one hand, and between Germans on the other.

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56 Aitchison, op.cit.(note 54), p.262-264. The Agreement of 1904 and also 1912 came to an end on 1 February 1959 by the agreement of both the British Government and Kuwait.

57 Ibid.

6- NEGOTIATION AND THE SETTLEMENT OVER KUWAIT

The dispute between the Ottoman government and Britain took a serious turn only in 1910, a period which marks the beginning of the Kuwaiti border dispute between the two sides.[58]

Lord Harding, the British viceroy in India, expressed the fear that the Ottomans may become more dangerous to British interests than the Russians and the French. France and Germany had secured substantial loans for the Ottoman government enabling them to build up their naval fleet. British fear was exacerbated further by the fact that the Ottomans had established a greater rapport with some of the Arab Sheikhs on the basis of Pan Islamism.

Lord Harding recommended continuation of British protection for the Emir of Kuwait so as to retain the Emir's confidence in Britain. Lord Harding also

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58 The British were quick to annex any territory. They noted that the Ottomans were keen on reiterating at every possible opportunity that Kuwait was an integral part of the Ottoman Empire. And the Ottoman government again affirmed its sovereignty over the Emirs of Kuwait and said that during Al Ahsa expedition in 1871 the Emir of Kuwait agreed to allow the Ottoman troops to pass through his territory. He also actively took part in the expedition. Dr. Jamal Zakrea, op.cit.(note 20), p.324-325. And Ewaqeem Raziq Mourqees, " The History Right ", The Center of the Strategic and political .Vol.66 Cairo March,1991, p.46-49.

suggested conclusion of treaties with Sheikhs in order to check Ottoman expansion in the region.[59]

The Ottomans, encountering problems in the Balkans and elsewhere, decided to resolve their problems with Britain in a peaceful manner. They were even ready to grant concessions to Britain in order to reach a settlement.

The period between the end of the Balkan war and the beginning of the First World War, in fact, witnessed the settlement of problems between the Ottomans and various European countries, notably Russia, Germany, France and Britain.[60]

The British government had no objections to negotiating a settlement with Turkey, and negotiations between the two states commenced in February 1911 and continued until July 1913, and were held in London. The issues discussed included:[61]

1. **The Baghdad Railway Project;**
2. **Mutual interests of Britain and the Ottoman government in the Gulf area;**
3. **Increase of Turkish Custom Duties in the province of Baghdad;**

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59 Salah Alaqad ,Ibid.

60 The Center of the Strategic and Politics . op.cit.(note 58)p.50.

61 Aitchison,op.cit (note 54), pp.264-7. and Dr. Jamal zakrea, op. cit.(note 20),p 333-335.

The second issue revolved around the Ottoman government's declarations of 1871 and 1872 that guaranteed non interference of the Ottomans (to gain sovereignty) in the Gulf Emirates. [62]*

It was argued during the conference that although no special treaties were signed by Britain with Kuwait until the year 1899, there had always been close relations between the two countries.[63] The negotiators on the British side pointed out that the Emirs of Kuwait ruled their country in an unique manner and made a significant impact on trade and commerce in the Gulf.

It was emphasised by the British contingent that the Emir of Kuwait should under no circumstances be allowed to become a protege of Turkey because that would seriously damage Britain's position.

The Ottoman government protested over Britain's non-recognition of Kuwait's allegiance to the Ottoman State. It also announced its repudiation of the Agreement of 1899 between Kuwait and Britain. It was claimed by the

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62 This was of particular - significance because Bahrain had developed a special relationship within Britain from the end of the nineteenth century and many Agreements were signed with the rulers of Bahrain since 1820 in order to put an end to piracy slave trade and also to organise the inheritance of power in Bahrain besides protecting it from external dangers. Thus it ensured that Bahrain will remain away from Ottoman control although it may not be under British protection directly. As regards the other Emirates, Britain proposed that any bilateral agreement between the countries concerned should stipulate the expulsion of the Ottomans from Bahrain and Qatar. Ibid.

Ottoman government that the Al Subah family had always pledged their loyalty to the Ottomans, that the majority of its leaders bore the title of Qa'im Maqam, and that Sheikh Abdullah Al Subah's participation in the Al Ahsa campaign in 1871 was in the capacity of a member of the Ottoman army. It further stipulated that the Emirs of Kuwait, in all their correspondence to the Governor of Basra, had addressed themselves as sincere subjects of the Sultan. The non-existence of Ottoman army units in Kuwait, it was emphasised, did not mean the absence of Ottoman sovereignty.

Furthermore, Britain's delimitation of the borders of Kuwait to 160 miles in width and 190 miles in length, was rejected by the Ottoman government. They claimed that the Emir's jurisdiction extended to the towns of Al Qazima (in the north-west) and to Al Jahra in the south.

In the final analysis, however, the Ottomans were constrained to arrive at an agreement with the British over the control over Kuwait. They were principally driven by the fear of Kuwait becoming a storehouse for arms that might be fed the hostile rebles in southern Iraq. The nub of the agreement was as follows:[64]

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63 Ibid.p.50-51. and Dr. Jamal zakrea ,op. cit.(note 20),p 333-335.

64 Ibid. And Lorimer in his official and comprehesive work , Gazetteer of the Persian Gulf, Based on the East Indian Company records,1550-1552-1553,op.cit.(note 21) p.1556 -1565.

-- Ottoman jurisdiction should remain over the Bubiyan Islands and the other neighbouring islands north of Kuwait;

--Britain was to continue to enjoy the economic and political privileges in Kuwait and thereby concede all previous and political and economic agreements signed before by it with Kuwait;

--Britain should accept Kuwait's allegiance to the Ottoman government and be under the control of the province of Basra.

The issue of the Kuwaiti borders constituted the most important subject in the Ottoman - British parleys. It was mentioned above that the Ottoman government reduced the extent of Kuwait's borders with Iraq and Al Ahsa, and deemed Kuwait as an integral part of the province of Basrah. Britain refused to accept these demands, in particular Ottoman sovereignty over Kuwait because of the clash between de-facto and de Jure sovereignty. It was finally agreed that Britain should accept de-jure sovereignty of the Ottomans over Kuwait and that it might be deemed as an Ottoman province provided that the Ottoman government should not interfere in its internal matters, including the question of inheritance and foreign affairs. Its jurisdiction should be limited to endorsement of all treaties or agreements concluded by Kuwait.[65] In short, the sovereignty awarded the Ottoman goverment was conditional.

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65 Salah Alaqad, op. cit. (note 21),p.196.

An agreement was signed between an Ottoman official was appointed as a representative in Kuwait in keeping with the condition of non-interference in the internal matters of Kuwait and recognition of the treaties and agreements signed by Sheikh Mubarak and the British government. [66]

The Ottoman government also conceded to Britain the right of safeguarding the Gulf [67]. This agreement consisted of 17 Clauses spread over five sections. Article 1 of the agreement dealt with Kuwait and contained a detailed description its borders. It stipulated that Kuwait was an entity separate from the Ottoman government and that the Emir had the right to rule independently under Ottoman sovereignty but should fly the Ottoman flag. The Ottoman government also gave an assurance not to enroll Kuwaiti subjects, residing in Iraq, in the Ottoman army. The Ottoman side also agreed on non-interference in Kuwaiti affairs, especial]y when the seat of the Emir fell vacant. The Emir would have the right to despatch emissaries to the provinces of the Ottoman state in order to look after the interests of his subjects. The Ottoman state would under no circumstances occupy any part of Kuwait .

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66 Husain Khalf ,op.cit. (note 50),pp 2,144.

67 Treaty Terms (words) see Dr. Jamal, op.cit.(note 20),INDEX p.488-492.and Ahmad Mustafa Abu-Hakima, Prof. of Arabian Gulf History, McGill University, Montreal, The Modern History of Kuwait 1750- 1956, London 1983, First published. Appendix IV p.181-201. and see Loirmer op.cit.(note 21), Appendix.

Clause 3 of the agreement stated that the Ottoman government accepted all the treaties and agreements signed by the Emir of Kuwait with Britain in 1899, 1900 and 1904 as still being valid and in force.

Clause 4 of the agreement stipulated an assurance by Britain not to declare Kuwait as a protectorate or occupy it militarily as long as there occurred no violation of the status quo in Kuwait as laid out in the agreement.

Clause 2 of the agreement focused on the issue of the Baghdad Railway Project and its relevance to Kuwait. Britain was prepared to grant many concessions on the subject of the Railway Project provided the Ottoman government relinquished its right to control financial loans to Egypt.

The Clause pertaining to Kuwait's allegiance to the Ottoman state became null and void when Kuwait assisted Britain in the first World War. Sheikh Mubarak signed an undertaking that he would attack Ottoman positions in the Arabian Gulf and southern Iraq and also close the Kuwaiti harbour in order to intensify the siege on the Ottoman provinces in Iraq.[68]

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68 Section Two of the Agreement dealt with the peninsula of Qatar. The Ottoman government gave up its rights of sovereignty over Qatar and agreed that Qatar should be ruled by an independent Emir from the A l-Thani family and that the

The last section of the agreement stipulated that a committee be appointed to prepare the drawings for all the borders defined and referred to in Clauses 5 and 7 (pertaining to Kuwait and Najd) of the agreement. It also stated that the decisions taken by this committee should be incorporated in the text of the agreement. However, the outbreak of the First World War forestalled the work of the committee.

The ratification of the agreement was delayed until 31st October 1914 because of fears of the outbreak of World War,[69] when a sub clause was added relating to the sovereignty of the Shatt-ul-Arab. Britain denied Ottoman sovereignty there. It was pointed out by the British that the Treaty of Ardroom signed between Persia and the Ottoman State in 1847 did not explicitly mention Ottoman rights over the area. Britain benefited from this part of the Agreement, as follows. Firstly, Ottoman sovereignty was curtailed

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rule will be on the basis of inheritance. As regards the Ottoman Sub - Division of Najd, the Agreement stated that the borders of Najd on the south terminate at the island of Al-Zankhawiya. No doubt Prince Abdul Aziz Al Soud's occupation of Al-Ahsa in 1913 hastened the Ottomans to sign this Agreement. Section Three of the Agreement was on Bahrain regarding which the Ottoman government had relinquished its rights and declared that its subjects were deemed as foreigners in the Ottoman state. Hence the citizens of Bahrain were not obliged to do compulsory military service or pay taxes and the British Consul was made in charge of their affairs.

69 Salah AlAqad, op.cit.(note 21), p194 and Dr. Jamal Zakrea, op. cit.(note21) P 243-246 .and see Kuwait, past and present, op.cit.(note 22), p.214.

in the said area, and navigation on the Tigris and Euphrates rivers was now to be split on the basis of 50 percent of rights to Britain and the remaining 50 percent shared by the Ottomans and the Germans.

The Agreement of 1913 became a knotty issue between Saudi Arabia and Britain, particularly on the question of borders , where the Pan Islamists viewed it as a challenge to the rights of the Arab peoples ruled by the Ottomans. The Agreement was also a reflection of the failure on the part of the Arabs to stem British penetration in the Gulf.The Rulers of Kuwait on the other hand, considered this Agreement as an opportunity to give vent to their dislike of nominal Ottoman control over them, with a view to dispensing with this control over the long term.[70]

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70 For more information, Ahmad Mustafa Abu-Hakima, The Modern History of Kuwait 1750- 1956, op.cit (note 67), p.114-124.and Dr.Jamal Zakrea, op. cit.(note 20), p 207-208 and Salah AlAqad, op. cit.(note 21), p194.

Conclusion

The British Government, in the agreement 1899, ensured the soundness of its legal position. Lord Curzon, the Viceroy in India, entrusted the British Resident in the Gulf, Colonel Kembale, with the study of Kuwait's status and the extent of its subordination to the Ottoman state. Kuwait, according to Kembale, resisted successfully all the Ottoman attempts to control it and managed to preserve its entity since its foundation around the middle of the 18th century, and to protect itself from attack by neighbouring powers. Ottoman garrisons were not allowed on Kuwaiti land at any time, neither were their rulers required to pay any levies to the Ottoman authorities except for short periods and under emergencies.

The Ottoman government, for its part, paid annual salaries to the shaikhs of Kuwait in return for the protection of the Shatt al-Arab. The raising of the Ottoman flag by the Kuwaitis, as explained by Kembale was not a form of subordination but a gesture of religious homage to the state of the Islamic Caliphate.

Based on the aforemenioned facts, Kuwait must be considered on the whole to have enjoyed independent status. This is confirmed by the British report of 1899 which stated firmly that Kuwait had never been, at any time, part of the

Ottoman state. In his reply on the finding of this report, Lord Lansdowne stated in 1903 before the House of Lords that the shaikh of Kuwait was subject to British protection and that the British Government was linked with him by special treaties and agreements. This was the first British official statement regarding British protection over Kuwait.

The British identified and highlighted a clear legal contradiction between the rejection of the Ottoman government (by Kuwait) as a de facto force in Kuwait and the raising of the Ottoman flag by the Shaykh of Kuwait. In response the British requested Shaykh Mubarak to use another flag instead of the Ottoman one. The Sheikh objected saying that he raised the Ottoman flag for religious reasons alone and not as a national of the Ottoman state. This controversial problem remained unsolved for some time until it was resolved in the July 1913 Agreement .

CHAPTER TWO

The Legal Status of Kuwait.

The Legal Status of Kuwait Under the 1899 Agreement

Introduction

The status of Kuwait was and still is one of the most controversial issues in both the political and legal arena. Iraq's claim that Kuwait was part of its territory is a constant reminder of this dilemma. Iraq's insistence that Kuwait was part of Ottoman territory and that it was nothing but a mere territory belonging to the wilaya (governate) of Basra cannot be dismissed easily. With the appearance of the modern state after the Second World War, Kuwait was irrevocably cut-off from Iraq and made an independent state recognised by the United Nations.

In fact, the historical account of Kuwait's rise and its relation with both Ottoman and British was well researched but still lacks analysis in the domain of International Law.

It is the purpose of this chapter to shed light on this legal and address any legal misconception and thus clarify the legal position of Kuwait at that time.

In order to approach the issue, it is suggested that a starting point ought to be the agreements of 1899 and 1913 signed between both the ruler of Kuwait at that time and British government.

However, this cannot be discussed unless we determine before hand the form of relationship which existed at that time between both Kuwait and Britain. Having researched that, Kuwait's agreement with Britain could then be brought into the discussion with all its legal implications, both in its political and legal setting.

1- The Legal Analysis Of Relations Between Kuwait and Britain.

The Agreement of 1899 between Kuwait and Britain determined beyond any doubt that Kuwait was a British protectorate. Indeed, Kuwait agreed that this agreement was binding on her and accepted all its consequences.

However, as matter of history, Britain was asked twice by Kuwait to bring her under its protection but her application was turned down. A change of circumstances later[1], forced Britain to reverse its position and accept without hesitation the Kuwaiti request.

Irrespective of British motivation at that time, what is of great importance here is the fact that the said agreement transformed Kuwait from one legal category into another one with all the attached implications.

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[1] This issue will be discussed later thoroughly in terms of the competition between major powers over Kuwait and particularly Britian, Russia, Germany and Ottoman Empire.

The fact of the matter, is that by saying "protectorate", one cannot really determine clearly its legal implications, as it is known there are many types or forms of protectorate in international law, each of which has its own legal basis. Nevertheless it is necessary to discuss the case of Kuwait and define its legal status as a protectorate.

a) The term protectorate in International Law.

The term protectorate is not a novel principle in International Law but a well known one. It is also not free from controversy.

This type of protection was used extensively in Europe, especially in the eighteenth century. In International Law, the term was employed in medieval times to describe the relationship that existed between two states by which a more powerful state agreed to defend the territorial integrity of another weaker state[2].

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2 Husain M.Al-Baharna, The Legal Status of the Arabian Gulf States, Manchester University Press, 1968., p61-62. and see also Westlak. J, International Law , Vols 2nd, Cambridge 1910-1913, p.23-25. and Loewenfeld,E.H.,"Article on protectorates," Encyclopedia Britannica, Vol.18,1957 1957, pp.608- 609.

Grotius, on the other hand, viewed this form as "**unequal alliance**" between the two states, nevertheless he accepted it to be in conformity with the sovereignty of the weaker state[3].

However, from an historical perspective, this term has never acquired a uniform meaning in its application, as it was always adapting itself to a new reality that in the end suited the interest of powerful states.

According to Baty, the term protectorate in the past has:

> ***" sounded in contract only: all that was involved in the relationship was a promise of protection in return for a quid pro quo, notably, a certain accommodation to the wishes of the protector in matters of policy"[4].***

What is of importance here, is the fact that the term was void of its exploitative connotation and its application restricted to certain accommodations.

However, these accommodations cannot be regarded as placing real or serious restrictions on the protected state.

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3 Grotius.H, De Jure Belli Ac Pacis I, Ch. 3, p. 21-3.

4 T. Baty, "protectorate and mandate ", B.Y.I.L. Vol.2, (1921-1922), p.109-21.also for more details see, Baty. ,The Canons of International Law ,London 1930.

Vattel, one of the classical writers, considered that any stipulation that might be imposed which could remove the management of foreign affairs from the protected state is jurisdiction, would result in depriving the protected state of its international character. As such, it would not be at all an exaggeration to say it might transform the protected state into a mere possession in the hands of the protector.[5]

Whatever the view is regarding the protectorate, the fact remains that the concept has undergone slow but critical and major changes as to its content and implications. Therefore, this process has given birth to new models of protectorates developed by the British, French and other powerful states' practices. The most important pattern was that practised by the British over the Ionian Islands in 1815. This style of protection left the protected state with nothing of real independence.

Nevertheless there is near unanimity on the subject amongst classical writers regarding the definition and legal contents of the protectorate.

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5 see Vattel, Droit de Gens ,Vol, 1.ch.5.

Oppenheim defines it as follows:

> *"A protectorate arises when a weak state surrenders itself by treaty to the protection of a strong state in such a way that it transfers the management of all its more important international affairs to the protecting state. Through such a treaty an international union is called into existence between two states, and the relation between them is called protectorate. The protecting state is internationally the superior of the protected state; the latter has with the loss of the management of its more important international affairs lost its full sovereignty, and is henceforth only a half sovereign state."*[6]

Moreover, Fenwick perceived the protectorate as a ;

> **" state which has by formal treaty placed itself under the protection of a strong state"[7].**

Hall also defines the protectorate in these terms ;

> **"states may acquire rights by way of protectorate over barbarous or imperfectly civilised countries, which do not**

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6 L.Oppenheim., International Law , ed.8, Long Mans, 1955., pp.192-96.

7 G.C.Fenwick, International Law, London 1929, p 97.

amount to full rights of property of sovereignty, but which are good as against other civilised states, so as to prevent occupation or conquest by them, and so as to debar them from maintaining relations with the protected states or peoples. Protectorates of this kind differ from colonies in that the protected territory is not an integral portion of the territory of the protecting state, and differ both from colonies and protectorates of the type existing within the Indian Empire in that the protected community retains, as of right, all powers of internal sovereignty which have not been expressly surrendered by treaty, or which are not needed for the due fulfilment of the external obligations which the protecting state has directly or implicitly undertaken by the act of assuming the protectorate".[8]

Thus, the shared view amongst classical writers is that the legal position of a protectorate depends to a large measure on the agreement between the protected state and the protector.

Therefore, the type of protectorate depends on the agreement signed and as such three types of protectorates have come into existence: The real Protectorate or International Protectorate, Protected state, and Colonial

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[8] William Edward. Hall., A treatise on International Law, 4th. The Clarendon Press, 1895 pp.130-31.

Protectorate. The difference among these types is not trivial but of major importance, for from it many legal implications can be drawn.

b) Real Protectorate or International Protectorate.

Real protectorates are those territories whose governments agreed to the protection of a powerful state and to delegate to the latter the conduct of its foreign affairs. Having conceded that, the protected state still nevertheless retains some sort of independence which qualifies it to have some sort of international character. The protected state still retains the privilege of managing its internal affairs without any hindrance from the protector.

The best example of that type of protection is the status of the Ionian Islands from 1815 to 1864 under British protection, and Morocco under French protection in 1912[9].

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9 Sir Gerald Fitzmaurice, " The Law and Procedures of the International Court of Justice:1951-54. General principles and Source of Law", B.Y.I.L,Vol.30,1953, p.1-68.& for more information see also Fitzmaurice, "The Law and Procedure of the International Court of Justice: International Organization and Tribunals" B.Y.I.L, Vol.29,1952 ,p.1.

As to the Ionian Islands, the protection was based on three agreements concluded in 1864 with Britain, Russia, and Prussia and Austria respectively. The outcome of the said agreements was that the Ionian Islands should form a single state, free and independent under the immediate and exclusive protection of the King of Great Britain.

However, Britain exercised considerable control over the internal matters but the Islands were governed under a constitution adopted by a local legislator and had its own commercial flag[10]. In the Morocco case which, again, was under the full control of the French protecting state, save judicial matters, it was regarded by the International Court of Justice, despite all the restrictions placed on it, as a person in international law[11].

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[10] Robert R. Robbins, " The Legal Status of Aden and the Aden Protectorate", A. J.I.L., Vol.33, 1939 , p 713-14.& for more details see the Article's p.700-15.

[11] Thorough discussion of the court's decision will be dealt with when attention will be focused on the Agreement between Kuwait and Britian.

To sum up the matter, it could be said that this type of:

> **"protectorate has usually been exercised over a state which is well developed, and the general intention is that the state will not be absorbed by the protecting state"[12].**

Moreover, the real protectorate, despite its restricted independence, is still perceived by International Law as a person in International law.

c) Protected State.

A protected state is the type of territory which has advanced beyond the tribal stage and its established government agrees to its protection by another state.[13] Though the protected state surrenders the conduct of its foreign affairs through consent to the protecting state, nevertheless such conduct cannot be regarded as valid unless it is subject to the instruction from local government.[14]

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12 Sir Gerald Fitzmaurice ,op cit, note (9), p 714.

13 Ibid

14 Crawford, J., Creation of state in International Law, Oxford 1979,pp189-190.

Moreover, Crawford regarded ;

> **" such an arrangement a entirely consistent with local independence. This is equally so where the conduct of foreign affairs by the protecting state is accompanied by a right to advise on other matters, or by other non - essential competencies."[15]**

Examples of such protectorate were the former Malay states, and Tunisia. It is very difficult indeed to differentiate between the real protectorate and protected state but there is a basic difference between them.

In fact, both of them are creations of a British constitution and as Baty noticed there is no definite legal theory to distinguish between them.[16] However, the basic difference is the absence of expressed intention to be absorbed by the protecting power.[17] There is a common feature amongst all types of protectorate which is that;

> **" neither of them conduct their foreign relations nor enter into direct diplomatic intercourse without the**

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15 Ibid, pp.190-191.

16 Baty, op cit, note (4) p714.

17 Ibid.

permission of the protecting power."[18]

d) Colonial Protectorate.

In contrast to both Real protectorate and Protected state, a Colonial protectorate arises when the protecting power exercises its control over a " backward" community lacking an organised government.

This type of protectorate was mainly exercised over tribal chiefs mostly in Africa, sometimes with special arrangement with the chiefs and sometimes by conquest [19].

Judge Huber in the Island of Palmas Case referred to the African Colonial protectorate as;

> **" a form of internal administration of a colonial territory on the basis of autonomy for the natives"[20].**

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18 Oppenheim, pp192-3, Westlake, pp 22-3.,see the The Collected Papers of John Westlake on Public International Law,by L.Oppenheim, Cambridge 1914.and Al-Baharna, op.cit.(note 2).p.63.

19 Al-Baharna, op.cit (note 2),p.63.

20 Report of International Arbital Award, Vol.2, 1928, pp 329-358. and, for more Information see the B.Y.I.L., . Oxford 1953. Vol.XXX. pp.6-7.

The protecting power exercised a plenary power over the colonial protectorate as was defined in the British Foreign Jurisdiction Act, 1890.

The protecting power did not ;

> **"perceive the local chiefs to have the attribute of sovereignty, and thus regarded its agreements with them as a basis for the annexation of the territory under its protection"**[21]

This process led at the end of the day to the annexation of these territories to become part of the British Empire , though the above act intended to the contrary.

This led some to say that such development was not legal but political. Thus according to Alexandrowicz ;

> **" the transformation of the classic protectorate into the colonial protectorate was in its essence not a legal but a political development. It was the arrangement adopted behind the scenes of the Berlin Conference by which the signatory powers gave each other *carte blanche* to absorb protected states, which led to a deformation of the protectorate as such.**

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21 Lindley,M.F., The Acquisition and Government of Backward Territory in International Law, London, 1926, p182-183.

It has been emphasised that such an arrangement could not affect the validity of the treaties of protection with Rulers, for pacta tertiis nec nocent nec nocent. The colonial protectorate is the outcome of a para-legal metamorphosis and has no place in International Law as a juridically justifiable institution. It was at most a political expedient."[22]

Having outlined the various types of protectorates, it is still too early to say which category Kuwait falls into. For a full and confident categorization of Kuwait, an analysis of the terms of agreement between the protectorate (Kuwait) and the protecting state (Britain) must be undertaken. An in depth explanation of the relationship between international or real protectorates, protected states and colonial protectorates must also be undertaken.

Since the eighteenth century, protection has come to be regarded as a feature of the 'sphere of influence', phenomenon. This concept came to be as a direct result of the expanding provinces of a few European countries

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22 Alexander-Alexanderowicz, C.H., The European-African confrontation. A study in Treaty Making, (Leiden, 1973).69-81,80-1.

conquering many regions of the Asian and African continents. Due to the diverse socio-cultural differences that existed between the European countries and their protectorates, a new concept emerged which could easily be implemented. This concept of protection implied a degree of control, resulting in the confiscation of the state's sovereignty, leading to an open road for exploitation.[23]

An agreement of protection pre-supposed an equality between both protected and protecting states despite the wide gap in power between them. However, this new development was not accepted by the protected states due to the fact that it would lead in practice to the eradication of their self-reliant capabilities depriving them of their sovereignty, not least due to the vast socio-cultural differences that existed between both protected and protecting states.[24]

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[23] See Liebesny, H.J " The Administration and Legal Development in Arabia". (Protectorate , Middle East Journal , Vol.9, 1955. p.385. and Rutherford, G. W., "Spheres of Influence ", A.J.I.L., Vol.20 ,1926, pp.300, and Smith H. A. ,Great Britain and the Law of the Nation, a selection of documents, 2 Vols, London 1932 . 1935.1.p.67.

[24] BRINTON, J.Y., The Arabian Peninsula, The Protectorates And Shaikhdoms, Revue Egyptienne de Droit International, Vol.3, 1947, pp.5-39. and see FAWCETT, J.E.S. " The protection over these Country's Shaikhdoms"., The British Commonwealth in International Law ,1963,p.120,

Britain concluded the agreements with the Kuwaiti ruler during the nineteenth century, in which Kuwait was regarded as a sovereign state under the protection of the British Crown. It was a secret agreement signed on the 23rd of January 1899 between her Britannic Majesty's Political Resident Lieutenant-Colonel Malcolm John Meade and the Ruler of Kuwait, Sheikh Mubarak-bin Sheikh Subah. The Agreement was not a detailed one but concise in matters relating to obligations of both sides. The ruler binds himself by a term to which he agrees not to;

> **" cede, sell, lease, mortgage or give for occupation or for any other purpose any portion of his territory to the Government or subject of any other power without the previous consent of Her Majesty's Government for these purposes".**[25]

In compliance, Britain exercised extensive control over the external affairs of Kuwait, and agreed to protect her territorial integrity against any external aggression.

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[25] For More Information see Lorimer.op.cit.(Chapter One note 21&53) and see Professor. Ahmad M. Abu-Hakima.,The Modern History of Kuwait ,1750-1965.op.cit,(Chapter One note 67), Appendex p.184. and also see H.M. Al-Baharna.op.cit.(note 2), pp.323-24.and for the full text of the Agreement ,see Appendix, XI. India, Foreign and Political Departments, 5, Treaties and Undertaking In Force Between The British Gov.,and Rulers of Kuwait, 1884-1913,pp.1-5. and see ,U.K.T.S. .No.1,1961. Cmnd.

Where Kuwait stands with respect to these agreements has aroused great controversy, despite the fact that the British Government continuously declared Kuwait as being completely independent of Britain, but under her protection.[26]

Some critics were sceptical about Kuwait's degree of independence if any existed all[27]. Other critics classified Oman as the only Gulf State with a degree of international status as well as being endowed with total independence.[28]

The fact that Kuwait was a relatively small country and could hardly protect itself, resulted in signing the said agreement which in turn led to handing over all management and foreign relations affairs to the protecting state, Britain in this case. This was probably why critics suggested that Kuwait was not a totally sovereign state.

Considering Oppenheim's definition of protection, in International law a protected state has total sovereignty until it becomes a protectorate after which

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26 Sir B. Eyrs, House of Commons April 19-1934, Hansard ,Article 6 Vol 88, cols.973-974.and also see India , Foreign and Political Departments, 5, Treaties and undertakings in force between the British Gov.,and Rulers of Kuwait, op.cit. (note 25).

27 AMIN, S.H., Political and Strategic Issue in the Persian Arabian Gulf, Royston Ltd.1948., p.15.

28 Al-Baharna, op.cit (note 2).p.79-80.

this sovereignty is greatly diminished , if not totally curtailed. But this does not mean that the protectorate is totally rejected as an international subject. [29]

Kuwait's foreign affairs, and to a great extent internal afffairs, were subject to British scrutiny. However, when it came to internal matters the British role was very limited.

From the facts briefly highlighted in the agreement, one could say that Kuwait fulfilled some of the criteria required to be categorized as a colonial protectorate.

But under colonial protection, there is an imposition of authority from the protecting state. This imposition of authority was not demonstrated on the part of the British Empire. Kuwait of her own free will requested protection from Great Britain.

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29 Oppenheim , op.cit.(Note 6)p.190-9.

Oppenheim distinguishes between 'a number' of British protected states in Asia of which, he says :

> **" their international status is not clear', and 'protectorates over African tribes, acquired through a treaty with the chiefs of these tribes'. 'These latter protectorates', he continues, 'possess no international status whatsoever".**[30]

Also, according to Max Huber, a colonial protectorate;

> **"is rather a form of internal organisation of a colonial territory on the basis of autonomy for the natives."**[31]

Thus, the British government, in line with its signed agreement, had to fulfill the agreement which involved protecting the territorial integrity of Kuwait.

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30 Oppnheim ., op.cit.(note 6), pp. 194 -6.

31 see Judge Huber in the Palmas Island Case by Sir Gerald Fitzmaurice, " The Law and Procedures of the International Court of Justice: 1951-54. General principles and Source of Law ", the B.Y.I.L, Vol. 30, 1953, p.5-68. and see Concerning the Island of Palmas, A.J.I.L., Vol.22,1928, p.21- 23,& 897-8.and for more details see Jussup,P.C. " The Palmas Island Arbitration ". A.J.I.L., Vol.22, 1928, p.735. and see Fitzmaurice " The Law and Procedure of the International Court of Justice: International Organization and Tribunals" .op.cit (note 9).

Hence the classification of Kuwait as a colonial protectorate can confidently be ruled out.

This leaves us with protected states as real or international protectorates. These two terms are closely linked, and can sometimes be confused. But there is a distinguishing factor. This factor is based on the particular circumstances of a state and its relationship with the stronger state.

It is evident that one single definition cannot be singled out to describe the international position of protectorates due to the fact that the circumstances of each protectorate state varies according to the agreement stated by the treaties establishing the protectorate.[32] Under the protectorate treaties ;

> **" protectorate states have individual legal character resulting from the special conditions under which they were created and the stage of their development".**[33]

With the Gulf States (Kuwait included), Herbert J. Liebesny has considered them as having a similar status to Tunisia and Morocco, whose protectorate treaties with France were internationally binding despite all the attached

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32 Oppenheim .op.cit.(note 6) p.192. and Cavare,L.,Le droit international public positif, Vol.1, Paris,1951 , p.424-30.

33 P.C.I.J. Series. 1923. B No.4, p.27.

restriction on sovereignty.[34] Also the International Court of Justice , in the case of the Rights of the United States Nationals in Morocco (1952), accepted the principle that Morocco even under the protectorate, had retained its personality as a state in International Law .[35]

Other writers such as Westlake, Fenwick and Cavare share the same views with respect to the fact that on the international level, a sovereign state before becoming a protectorate has existing facilities (full capacity) to get involved in international agreements with other sovereign states.[36]

As to Kuwait's international position with respect to the protection treaty, it could be looked at from Crawford's alternative point of view.

Due to the fact that Kuwait's degree of independence was uncertain, Crawford says that :

> **" The principality of Morocco is recognised as an independent state in special treaty relations with France. It is a member**

34 Liebesny,H.,"International Relation of Arabia ", Middle East Journal, 1947, p.192-3.& see pp.148-168.

35 I.C.J(International Court Of Justice) Reports.1952. pp. 184-8. and B.Y.I.L, .op.cit (note 9) , p.2-7.

36 Fenwick,C.G. ,International Law, London,1924.p.96-8.and see Cavrare. L.,Le droit International public positif, Paris. 1951Vol,1. p.424-44 . and Westlake , J. International Law .op.cit.(note 2), p.21-23.

of international organisation and party to a substantial number of bilateral treaties."[37]

This criterion, by way of analogy, could be used to relate Kuwait to the United Kingdom.

The characteristics which Kuwait displayed as a protectorate could be related to the 'real' protectorate or protected state.

Due to the delicate and intricate diplomatic conditions which led to Kuwait being a protectorate it is extermely difficult to categorise Kuwait into a particular type protectorate.

But a critical analysis of the events which led to it being a protectorate should be taken into consideration. Examples of such similar protectorates as stated before according to Crawford are Morocco and Tunisia.[38]

These states were initially sovereign states which had entered into agreements with other sovereign states in which some of their sovereignty,

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[37] Crawford , J., Creation of State in International law , op.cit.(note14), p.193.

[38] Ibid.

in areas particularly related to foreign matters, were passed on as the responsibility of the latter.[39]

Nevertheless the protection has been considered as the result of unequal treaties establishing gross inequalities between the obligations of the parties.[40]

From the above, it is clear that the degree of control over protectorates varies from one case to another.

The basic similarity between these protectorates is that the protecting powers specify limits which determine the protectorates actions in such areas as foreign affairs and diplomatic discussions.

However, the fact still remains that Kuwait was sovereign at the time of signing the agreement, and that the British government beyond any doubt had no desire of incorporating it into its dominion, leaves us with one category of the protected state. There is no doubt that Kuwait requested a

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39 Lindley,M.F. The Acquisition and Government of Backward Territory in International Law ,op.cit (note 21), p.187-202.

40 African Legal Consultative Committee (Unequal Treaties in International Law) 1975.

protection agreement, and this agreement was in no way imposed on it, as mentioned in the first chapter of the history of Kuwait .

The verdict issued in Tunis and Morocco by the international court on protectorates illustrate clearly the discussed case. It is said that the extent of power conferred on the protecting power depends on two things; firstly upon the treaty or ;

> **"treaties between the protecting state and the protected state establishing the protectorate, and secondly upon the conditions by which under the protectorate has been recognised by third powers against whom there is an intention to rely on the provisions of these treaties."[41]**

To sum up matters, as Kuwait freely signed the Agreement and since there was nothing in it pointing clearly or unclearly to any desire on the part of the British to incorporate it at later date, one can confidently say that Kuwait was indeed a protected state. Having said that , one is left with an important

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[41] Sir Gerald Fitzmaurice, "The Law And Procedure Of The International Court Of Justice, 1951-54: General Principles And Sources Of Law", op.cit. (note31), Vol XXX, 1953, p 4.

question as to whether or not Kuwait at that time had the right to enter into an agreement with Britian. In other words, did Kuwait have sufficient international personality to enter into an international agreement?
To answer this question one has first to look into the legal relationship that existed between Kuwait and Ottoman Empire.

The Legal Relationships between Kuwait and Ottoman Authorities.

Very few writers have addressed this issue but the most detailed attempt is an article written by R.V. Pillai and Mahendra Kumar.[42] In this article both authors argue that Kuwait's relation was a vassal- suzerain type with all its legal implications. In fact, asserting that the relationship that existed between Kuwait and the Ottoman Empire was a vassal- suzerian relationship is not quite accurate and does not reflect the historical fact prevailing at that time.

According to Oppenheim, suzerainty was employed in the middle ages to describe the relation between the feudal lord and his vassal[43]. In fact, as Oppenheim asserts, the term of suzeranity is not so different from the term 'protectorate' except for the fact that in the latter case the state in question surrenders its rights voluntarily to the protecting state while in the former the opposite is true[44]. Verzijl, on the other hand, asserts that vassalage and

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42 R.V. PILLAI and MAHENDRA KUMAR., " The Political And Legal Status Of Kuwait",I.C.L.Q. Vol.11, 1963.,p.108-130.

43 Oppenheim,op.cit.(note 6), p.188

44 Ibid, p192.

suzerainty are just feudal concepts introduced later into the law of nations and they " **have become more and more an anachronism**"[45].

Judging by the practice that prevailed at that time, a vassal state could not be considered so unless it fullfils certain ceremonies which were not always uniform but at least were continuous. However, these practices were transformed into an international institution proper with all its complexity especially in the legal domain.

The relationship that existed between the suzerian and vassal states was mutual in the sense that the vassal state had to perform certain obligations such as paying tribute and homage while it received in return a pledge of protection from the suzerain.

In fact, Turkish authorities used this system extensively whether in Eastern Europe or the Middle East. As an example, the princes of Transylvania often requested the support and protection of the Ottoman authorities, but in 1547 a treaty was signed between the parties concerned. In this treaty, the princes of Transylvania acheived the protection of the Sultan against Hungary in return for undertaking to pay annual tribute[46].

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45 J.H.W.Verzijl, International Law in Historical Perspective, Vol,11,Leiden1969, p 339.

46 ibid.,p .52-353

What is noticeable in this case is that the position of the vassal state with the passing of time was increasingly culminating in independence and that annual monetary tribute tended to increase constantly **"especially with every concession which the vassal state succeeded in wringing from his suzerain"** as was the case in Latin American states.[47] This development was a logical conclusion as a vassal state was forced to pay more with every concession made to it by its suzerain state.

In such a context, one could say that Kuwait's relationship with the Ottoman authorities could be anything but a vassal-suzerain relationship. As was mentioned in the first chapter, Kuwait came under the Ottoman rule in 1718, and with the passing of time Kuwait became a focal point in the competition between the European and Ottoman Empires. However, in 1829, the Ottoman authority intervened to put Kuwait under its direct rule as a compensation for its losses in the Balkan area[48]. Midhat Pasha imposed on Kuwait an annual tribute.[49]

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47 Ibid.,p 359-360

48 Dr.Yuwaqim Raziq Murqas, Al-Haq al Tarikhi wa Azmat al-Khalki, (The Historical rights and Gulf crisis, Murqaz al dirassat al sisassia wa al istratijia, al-ahram, 1991,pp28-29

49 Ibid

This tribute amounted, during Jaber al-Sabah's rule, in 1829 to forty bags of rice and four hundred containers of dates, as well as raising the Ottoman flag.[50]

Having paid this tribute to Ottoman authority , Kuwait became as a matter of fact a vassal state as defined above. Indeed, Ottoman authority, upon the payment of the stated annual tribute, bestowed its formal legitimacy on the ruler of Kuwait with the pledge of protection. Moreover, the Ottoman authority, on various occasions, granted the ruler the title of Qaim Maqam (deputy Governor) which is solely honorific. Furthermore, the Kuwait authority followed strictly the pattern of the vassal state when it declared war on Ibn Saud whom the army of the Ottoman authorities attacked at Al-Ahsa, then under Ibn Saud's control. He was allied with the British[51]. The Kuwaiti assistance and participation was so great as to determine the success of the mission. This participation is by itself another indication of the vassal relationship that existed between Kuwait and the Ottoman authority.

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50 Lormier, op cit (note 25).

51 see Murqas, Al-Haq al Tarikhi wa Azmat al-Khalki op cit. (note 48) p 31 and see (Tareekh Al Kuwait Al Jaded) , Kuwait Modern History ,op.cit. (note 25). p.1546.

Verzijl asserts that the concept of war and neutrality is also binding on the vassal state, in a sense that if a suzerain state declared war the vassal had to follow suit. Moreover, a vassal state could not stay neutral if the suzerain state declared war on the third power[52].

However, saying that the vassal-suzerain relationship is evident is not quite accurate as historical fact was at best inconsistent and contradictory. For on many occasions and under certain circumstances, Kuwait acted in a way contradictory to this type of relationship. The Ottoman authority which is considered as a suzerain state was forced to pay annual tribute to secure the loyalty and assistance of the Amir of Kuwait, especially his military help in defending Al-Basra port which was of great importance. In recognition of his assistance the Ottoman authority paid him 150 baskets of dates, bestowed upon him an honorific title and exempted from paying an annual tribute[53]. Indeed, history books point clearly to the independence of Kuwait and its resistance to any serious attempt to curtail or limit that independence.

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[52] Verzijl, International Law in Historical Perspective, op.cit. (note 45) p364

[53] Murqas ,Al-Haq al Tarikhi wa Azmat al-Khalki, op cit. (note 48) p 28-29

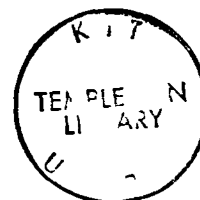
Based on these facts one cannot say precisely that Kuwait was a vassal state nor can one say it was an independent one but was a mixture of both. It is very difficult indeed to draw a legal conclusion from these facts. Faced with this reality one is left with two options; if Kuwait was an independent state, it follows that it enjoyed the full capacity to enter into an international treaty. However, if this was not the case, one is forced then to discuss its right as a vassal state to conclude a treaty, such as the one signed with Britain in 1899.

The right of Kuwait as a Vassal state to conclude a treaty with British government.

It is accepted in International Law that a vassal state lacks the sovereignty and with it the international personality which qualifies it to conclude an international agreement. Indeed, a vassal state is tied up completely to its suzerain state in the sense that the latter is responsible for any wrongful act or damages incurred by the former. This principle has been fully recognized on various occasions, especially in article (7) of the Yassi treaty between Turkish authorities and Ottoman Empire, in which the Ottomans admitted bearing responsibility for crimes committed by Tripolitanian, Tunisian and Algerian pirates and promised in return to pay damages if its vassal states refused to pay what was due.[54]

There are numerous examples of this trend which prove beyond doubt, that a vassal state is not an International person, since it lacks the obligation to shoulder responsibility. When it comes to treaty- making capacity, the legal

[54] see Verzijl op.cit. (note 45), p363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position is not very different. It is recognised that a vassal state has no right to conclude a treaty without prior agreement by the suzerain state.
This was highlighted in Article (2) of the Russo-Turkish treaty of 21st July 1774, which stipulated that :

> **" if Russia should wish to conclude commercial treaties with the African Regencies of Tripoli, Tunis, and Algeria, she was to seek the intermediary of the Sublime Porte"[55].**

Moreover, para (4) the Sultan's Firman (royal decree) of investiture of Charles of Hohenzollern as a prince of the United Principalities of Moldavia and Wallachia of 23 October 1866, reaffirmed the principle that:

> **" no treaty or convention could be concluded directly by them with a foreign power"[56].**

Furthermore, any treaty signed by a suzerain state would be binding upon its vassal state as the former is responsible for the latter according to International

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55 Ibid, p 361.

56 Ibid and see also Oppenhiem, op.cit. (note 6) pp 190-191.

Law. This is underlined in the peace of Berlin, and in particular Article (20) regarding Eastern Roumelia, which affirmed that this future treaty of the Porte with foreign powers would be obligatory upon it unless ;

> **"a special exception was made or unless the contrary was obvious"[57].**

Another example is demonstrated when the government of India in 1904 had signed a treaty with Tibet regarding opening certain Tibetan markets to Indian merchants. The Chinese government based its protest on the fact that Tibet as a vassal state of China, lacked the right to sign an international treaty. The Chinese government asked for direct negotiation between China and the British government to which the latter adhered and a new treaty of 27 April 1906 was substituted for the irregular one of 1904[58].

Having said this, it is still valid to say that there are some precedents which point to a different conclusion; a vassal state may be permitted in its special relation with a suzerain state to have the right to conclude an international treaty. Egypt, as an example, was in 1517 a vassal state under Ottoman

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57 Verzijl ,Ibid, p.363.

58 Ibid, p.368

suzerainty but was given in 1873 a wide range of legislative power in the field of administration and finance. Moreover, its ruler the Khedive was vested with competence to enter into international agreements with foreign powers in the field of customs and commerce. However, an attempt made later by the Ottoman sultan to curtail the power of the Khedive in the matter of treaty making, if not approved in advance by him, failed to materialise due to the opposition of both Britain and France[59].

It is obvious from the above discussion that a vassal state has no right to sign a treaty with a foreign power, though there are cases in which a vassal state could sign an international agreement as was illustrated by Egypt. However, one cannot say that the agreement concluded between Kuwait and Britain in 1899 was of this type. In this agreement the Kuwaiti ruler bound himself and his successor ;

> **" 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 consent of Her Majesty's government for these purposes".**

59 Ibid, p.395

It is clear that this agreement is radically different from a customs or commercial treaty as was the case with Egypt. Not only that, the Kuwaiti ruler, as it transpires from the text of the agreement, distanced himself from his suzerain and accepted the British government's protection. This cannot be seen as anything but a clear violation of the right of suzerain state; a vassal state cannot conclude an international agreement, and certainly not if it was detrimental to its suzerain.

Indeed, the Ottoman authority protested against this agreement which was supposed to be secret and asserted in various ways its authority over Kuwait. The Porte thereafter issued a decree appointing an Ottoman administrator for the Porte of Kuwait and sent a warning to the ruler of Kuwait as well as an official to exile him.[60]

Moreover, the Ottoman authority in the face of British protest against its action, made life difficult for the Kuwait ruler by inciting neighboring tribes against him, as was detailed in the first chapter. These actions on the part of the Ottoman authorities, illustrated beyond doubt that it considered the action

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[60] Selection from the Records of Bombay government, document no 26, Vol xxiv, Bombay, 1856, and see Kuwait waujoud wa hudoud, (Kuwait existence as a territory and state), Kuwait liltakakum al almi, Egypt, 1990, p 71.

of the Kuwaiti ruler as a clear violation of its suzerain's rights. Acknowledging that, Sir Oacnor asserted in a memorandum, regarding the legal status of Kuwait, that the ruler of Kuwait could not be recognised as an independent ruler due to his acceptance of the Ottoman title of Deputy Governor[61].

However, there are some who say that, by the mere signing of an agreement with Britain, Kuwait was in practice recognised as a special entity, which meant it was not recognised as a vassal state.

Moreover, Britain would not have signed this agreement had it not accepted this fact[62]. However, such an argument is not convincing on two accounts: historically and legally.

As to historical fact, further to what has already been mentioned, the Sheikh of Kuwait, Sabah, followed the path of Mubarak when he affirmed to the British political resident that he had put himself under the protection of Ottoman authority and had insisted on the fact that Kuwait had always paid

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61 see Ibid., Kuwait woujoud wa hudoud, p 68. and The Foreign Office Memorandum respecting Kuwait 78-5174., pp.13-16.

62 Ibid. p 69

tribute to Ottoman state.[63] In addition, the British Colonel Pelly investigated personally the matter from different sources and found that the ruler of Kuwait had raised the Turkish flag for many years; when it ceased it was for the maltreatment that the Kuwaiti commercial fleet received at the hands of the Ottoman authorities in Bombay.[64]

Regarding the legal aspect, it is obvious that an agreement, if it does not fulfill all necessary conditions, is in danger of becoming invalid.
Hall on this account affirmed that ;

> **" all contracts therefore are void which are entered into by such (protected and subordinate) states in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior states"[65].**

The British government itself recognised this fact in considering the South African Republic as a vassal state which had no right whatsoever to sign an

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63 see Lormier, op.cit. (note 25) p 1518-1519.

64 Ibid

65 Hall, International Law (8ed., 1924), p.380.

extradition treaty with the Netherlands. For such a treaty contradicts Article (4) of the agreement between them on 27 February 1884.[66] Article (4) states that :

> **" The South African Republic will conclude no Treaty or engagement with any state or nation other than the Orange Free State, nor with any native tribe to the eastward or westward of the Republic, until the same has been approved by Her Majesty the Queen. Such approval shall be considered to have been granted if Her Majesty's Government shall not, within six months after receiving a copy of such Treaty (which shall be delivered to them immediately upon its conclusion), have notified that the conclusion of such Treaty is in conflict with the interests of Great Britain, or any of Her Majesty's possessions in South Africa".**[67]

Indeed, the Turkish Ambassador later on protested at the signing of this agreement and likewise the German Ambassador, but the British response

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66 Lord Mc Nair, The Law of Treaties, Oxford, 1961, p 44

67 Ibid.

was that Britain did not wish to change the status quo.[68]

The 1899 Agreement, thus, on the strength of the arguments outlined above could not be perceived as valid agreement. However, one has to take note of the fact of the developments that took place later , which have contributed somehow to its validity. The British considered Kuwait as an entity under its protection irrespective of its legal status vis-`a-vis the Ottoman authorities. Acknowledging that, the British authority authorised its military representative to prevent any landing of Turkish troops in Kuwait in 1901, and permitted him to use force if necessary.[69] The conflict between Britain and the Ottoman authority over Kuwait led to a series of negotiations which culminated in the signing of another treaty on 29 July 1913.

In this agreement, both sides agreed that Kuwait was an entity independent from the Ottoman Empire and that it had the right to raise its own flag[70].

Article (2) of the Agreement recognised the right of the Kuwaiti ruler to;

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68 see Lormier, op.cit.(note 25), p.1534

69 ibid, p.1542

70 For the full text of this agreement see Murqas , Al-Haq al Tarikhi wa Azmat al-Khalki, op.cit.(note 48), pp.127-131.and for more information, see op.cit.(note 25).

" exercise an independent administration in the regional area as defined in Article (5)[71] of this agreement. The Imperial Ottoman state shall refrain from any intervention in the affairs of Kuwait, including the inheritance (of ruler ship), and any other administrative act as well as any occupation or military action in the provinces belonging to Kuwait".

However, the most important article in the agreement was the recognition of the validity of 1899 agreement by the Ottoman authority. Article (3) states:

" The imperial Ottoman Government recognises the validity of the agreements formerly concluded by the Sheikh of Kuwait with the Government of His Majesty the King of Britain dated January, 23, 1899, May 24,1900 and 28 of February 1904 with their appended texts (Annexes 1-3). It also recognises the validity of the land concession granted from the said Sheikh to the Government of His Majesty, the King , and to the British nationals...".

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71 The independence of the Sheikh of Kuwait can be exercised in the defined district forming a semi-circle with the City of Kuwait in the centre and Khor al Zubair in the northern border and the Grane in the Southern border, and this line (drawn in red on the map attached to this agreement) and the islands of Warba, Bubiyan, Meskan, Failaka,Auha, Kubbar, Garoa, and Um al-Maradem in addition to the neighbouring islands and the waters in this region.

There is no doubt that this agreement has clearly rectified the legal deficiencies of the 1899 agreement and validates it legally. However, the only hurdle left was the fact that the agreement of 1913 was not ratified by Turkey, due to the outbreak of the First World War. The question which will arise in this context was whether or not such a treaty was binding on the parties in the absence of this ratification?

There are many writers who consider a treaty without ratification is not necessarily invalid.[72] Fitzmaurice asserts that;

> **" ratification in the constitutional sense is not an international but a purely domestic act, and that per se it has no international force or effect"[73].**

Hall on the other hand said that the prevailing custom in the early part of the last century and which was recognised by Bynkershoek was that ratification was necessary to give validity to treaties concluded by a plenipotentiary. He added that later writers said that the mere signing of a treaty by an

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72 G.G. Fitzmaurice, " Do Treaties need Ratification", B.Y.I.L., Vol, 15, 1934, pp 113-116.

73 ibid

agent is binding so long as he acted within his power; but they are obliged to add that the necessity of ratification is recognised by the positive law of nations.[74]

Ratification was insisted upon as a kind of protection for the state not to enter into unsuitable agreement.

McNair in his seminal book, the Law of Treaties, points out that in the olden days the manner in which the king agreed on what his representative signed, provided the latter did not exceed his power and ratification, was just a mere formality.[75] However, ratification whenever stipulated in the treaty becomes an act of vital importance, as was illustrated clearly in ruling of the International Court of Justice in Ambatielos case[76]. However, the common theme amongst writers is that during the ;

> **"past century and half there was no legal duty upon a state to ratify a treaty by its representatives"[77].**

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74 William Edward Hall, International Law, Oxford, 4ed, 1895. pp 346-47.

75 McNair, The Law of Treaties ,op cit (note 66), pp130-131.

76 I.C.J., Reports, 1952, p43.

77 McNair, The Law of Treaties ,op cit (note 66), p. 135.

Moreover, Oppenheim is of the opinion that if a treaty is not ratified it is still not void of any legal effect but only an imperfect one[78].

He asserts that:

> **" Governments act, as a rule, on the view that a treaty is concluded as soon as their mutual consent is clearly apparent"[79].**

It is therefore clear that ratification is nowadays important but this was not the case in the past. Assuming the importance of the ratification, one cannot deny that the mere signing of an agreement is not without legal force and at worst is considered to be imperfect. However, a treaty concluded by proper authority and within the power limit, cannot be dismissed and considered irrelevant at all.

Keeping this fact in mind, one cannot dismiss the 1913 Agreement on the ground of non ratification. The prevailing practice in the past was not to give ratification as much importance as today. McNair was right in saying after thorough research that:

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78 Oppenheim, International Law, 8ed, Vol,1, 1724, pp904-906.

79 Ibid

" ..No state which has purported to become bound by an international engagement, through the due performance of all that is necessary from the international point of view to achieve that object, ought to be permitted to deny the validity of its own action by pleading a failure to observe its own constitutional requirements".[80]

Thus the agreement in question, though not ratified, it is still a legal document expressing the intention of the parties, acknowledging retrospectively the validity of the 1899 agreement between Kuwait and Britain.

Having affirmed the validity of the Agreement in question, one is left with the question of the effect of the First World War on its continuing validity. For this treaty contained an important provision as to the status of Kuwait vis a vis Turkey as well as Britain vis-`a-vis Turkey.

It is very difficult to determine clearly the legal effect of war on a valid treaty for the practice of states has been so confused and lacks uniformity. However, legal writers have explored it and given their opinion. Sir Cecil Hurst argued that treaties which are designed to keep things permanent continue to be in

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[80] McNair, The Law of Treaties ,op cit (note 66), pp. 132-33.

force despite war[81]. Moreover, the draft project which was adopted by the Institute of International Law at its session in Christiania in August 1912, recognised the difficulties but asserted first of all that the outbreak of war does not impair the binding force of treaties previously concluded between the belligerents.[82]

The Institute made an exception to this rule by acknowledging that Agreements that:

> **"contemplate the continued existence of normal peaceful relations between the parties, such as those, for example, which regulate commercial intercourse, tariff concession, postal conventions... and the like, are obviously deprived of their obligatory force by the outbreak of war"[83].**

Therefore, the 1913 Agreement between Britain and Turkey is of the type which is intended to keep matters permanent and thus remain in force.

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81 Sir Cecil Hurst, " The effect of War on Treaties", (1921-22), see footnote 70 B.Y.I.L., pp 38-47.

82 see " the Effect of war upon Treaties and International Conventions. A Project Adopted By The Institute of International Law At Its Session in Christiania, August,1912.", A.J.I.L., Vol,7, 1913, pp 149-151.

83 Ibid, p 150.

However, Kumar in his writing on the subject revealed that Britain by persuading the ruler of Kuwait to attack Turkish possessions, in return for recognition of his independence cannot be considered anything but a violation of the spirit of the said agreement. He considered also the attack of Kuwait's ruler on the island of Bubiyan and the port of Umm Qarsar, deserved condemnation due to his legal status in the Ottoman Empire at that time.[84] However, Kumar has overlooked the record of history where the Kuwait ruler, just before the 1913 agreement, had prevented Turkish soldiers from landing in Kuwait and continued to challenge them wherever there was any chance to do so. Moreover, upon the signing of the agreement between Britain and Turkey in 1913, the Kuwaiti ruler protested vigorously because it re-established somehow the Ottoman influence in Kuwait. Sir Percy Cox who played a major role in the history of Kuwait and Iraq expressed his views on

the Agreement by saying :

> **" ....Mubark (the ruler of Kuwait) did not welcome the recognition of Turkish sovereignty which we never taught him to admit; he did not like the final loss of Umm Kasar and Safawn... but these were points he did not feel very**

[84] see PILLAI and Kumar op.cit.(note 42),p122-23.

> **acutely. The admission of a Turkish Agent he was most bitterly opposed to. It was what he had fought successfully all his life and had thought that such a thing had long ago vanished from the horizon of practical polities."[85]**

Taking that into account, it is inaccurate to consider the act of the ruler as a violation of his status vis-`a-vis Ottoman authority. For after the 1913 Agreement, Kuwait was no longer a vassal state but an autonomous entity under the Ottoman de jure sovereignty. Moreover, the Turkish authority itself recognised the validity of 1899 Agreement which binds the ruler of Kuwait not to sell, lease, or mortgage any land without first consulting the British government, not the Ottoman Empire. Indeed, the Kuwait ruler stood in the way of Ottoman authority, in conjunction with Germany, with regard to the construction of a rail way line through his land[86]. Therefore, rather than perceiving the act of the Kuwaiti ruler as a violation of his legal obligation, it would be better to consider his action as a final step in a long battle toward freeing his country from Ottoman constraints.

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85 P. Graves, The life of Sir Percy Cox, London, 1941,pp 168-69.

86 see the first chapter (history of Kuwait).

As to Britain's obligation, Kumar considered its incitement to revolt against the Turkish authority as a clear violation of 1913 Agreement. He underlined the fact that Britain's, request in offer's to recognise the ruler of Kuwait in return for his attack on Turkey, was contrary to the said agreement[87]. However, such an argument is not convincing since Britain could not bind itself, even if it wished, by the Agreement. Article 4 of the International Institute clearly states that :

> **" Treaties remaining in force, the execution of which persists in spite of the hostilities, must be observed as in the past. Belligerent states can disregard them only in so far as, the necessities of war require such a course"[88].**

As such, it could be said that the 1913 Agreement changed the status of the 1899 Agreement and established officially the special status of Kuwait which indeed has no parallel in International Law.

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87 see PILLAI and Kumar op.cit.(note 42), p.122.

88 see " the Effect of war upon Treaties and International Conventions. A Project Adopted By The Institute of International Law At Its Session in Christiania, August, 1912.", A.J.L.I., op.cit.(note 82), p.154.

Conclusion

It is clear that the Agreement of 1899 was not valid at the date of its conclusion, but changing circumstances that led to the conclusion of the1913 Agreement transformed the 1899 Agreement from an invalid document into a valid one. Moreover, the 1913 treaty, despite its non-ratification, is still binding in International Law and its legal force does not necessarily cease due to the outbreak of war.

Thus one might say that Kuwait, before the demise of Ottoman Empire , occupied a very special legal category and thus it cannot be classified in the same way as those other entities under Ottoman dominion. It was recognised for long time in the same way as independent by Britain, irrespective of Ottoman protest and political expediency.

Following the defeat of Turkey in the war, Turkey signed on August 10, 1920, the treaty of Seffre with the Allied Power. In this treaty the frontier of Turkey was defined and again restated in the Treaty of Lausanne. The most important part of the Seffre Treaty is Turkey's renunciation of all rights of **"suzerainty or jurisdiction of any kind over Muslims who are subjects to the**

sovereignty or protectorate of any other State".[89] Article 16 of the Lausanne Treaty which Turkey signed on 24 July, 1923[90] with the Allied Power stated that Turkey renounced all its rights over Syria and Iraq (which was formed of three provinces: Mousil, Baghdad, and Basra). However, Iraq's claim that Kuwait was a part of the province of Basra, and hence it must be part of its territory, ran against the course of the historical and legal tide. For Iraq itself cannot be considered the successor of the Ottoman Empire to the territory in question, as nothing like that was mentioned in the Seffre or Lausanne Treaties. Moreover, Iraq itself was not perceived under the Ottoman rule as a territory in its present boundaries. It was at best a mere province under Ottoman rule, but its boundaries were never defined. It is a matter of great irony to say that Basra itself was at some point of history under the administrative rule of Kuwait. Moreover, the three provinces that formed modern Iraq after the Seffre and Lausanne treaties, were the creation of the League of Nation's mandate. Turkey protested against the award of the province of Mousil to Iraq on the grounds that it forms part of its territory[91]. Despite that, modern Turkey accepted the new boundaries, Kuwait never having claimed that Basrah was part of their state. On the contrary, Kuwait

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89 see British and Foreign State Paper (19200, LXIII, Article 139).

90 see League of Nation Treaty Series, Vol, XXVIII, 1924, Nos.1,2,3 and 4, p 11.

accepted the rule of International Law and its basic principles that boundaries are permenant and cannot be changed by force.

Following the dismemberment of the Ottoman Empire, correspondence between the regimes of Kuwait and Iraq continued from 1923 to 1932 when the Prime Minister of Iraq Nouri Al-Saeed confirmed (in a letter) the boundaries of Kuwait as stretching :

> **" From the juncture of Wadi al-Aouja with Al-Bat in the East, with Al-Batin extension to the south of Safwan wells, Sanam Mountain and Um-Qasr to the cross-point of Khor al-Zubair with Khor Abdullan. The Islands of Warba, Bubiyan, Meskan, Failaka, Oaha, Kubbar, Qaroo and Um al-Maradem return to Kuwait"[92].**

Though differences over border have continued, Iraqi officials made many pubic statements which clearly affirmed the independence of Kuwait and its special status during the Ottoman rule. As an example, The Iraqi Prime Minister Nouri al-Saeed, in his enthusiasm for the creation of the Hashemite Union in 1958, attempted to convince the British government of the

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91 Quincy Wright, " The Mousl Dispute", A.J.L.I. , Vol.32, 1938, pp. 526-35

92 seeKuwait-Iraq Demarcation, Historical Rights and International Will, Prepared by a panel of specialists, National Centre for Documents of Iraqi Aggression on Kuwait, 1992, p 30.

desirability of declaring the independence of Kuwait so it could join the Union[93]. Moreover, the same Iraqi Prime Minister, when he decided to join the League of Nations, was asked to define his country's boundary. As a consequence he contacted Sir F.Humphrys in Baghdad suggesting the possiblity of an agreement between Iraq and Kuwait on the delimitation of their border from the date of 2 July 1932. This suggestion was passed on to the ruler of Kuwait, Ahmad Al-Jabar Al-Sabah who did not hestitate to accept it.[94] Indeed examples of such are numerous, all of which point clearly to the recognition by the Iraqi leader of the independence of Kuwait.

93 Ibid, p 33

94 see Rashid Hamad AL-Anazi, " Ths stand of International Law against Iraqi claims', official Gazzet, University of Kuwait, 15 October 1994, p6

Chapter three.

The Iraqi invasion in response to economic aggression.

1- *Events from independence to Iraqi invasion of Kuwait.*

On the 19th of June 1961 the British government reached an agreement with the late Sheikh Abdullah Al-Salim Al Sabah, according to which Kuwait was declared an independent state. Despite its independence Kuwait has maintained a special arrangement with Britain.The latter, according to the agreement of 1899, took upon itself the responsibility of defending the new Kuwaiti state against foreign aggression[1].

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[1] For full text see U.K.T.S No.1-1961, Cmnd.1409, Appendix XI. and see Kessing's Contemporary Archives, (1961-62), p181.59. **The relevant condition of the agreement signed between Her Majesty's Political Resident in the Arabian Gulf and His Highness the Ruler of Kuwait were as follows:**

(a) The Agreement of the 23rd of January 1899, shall be terminated as being inconsistent with the sovereignty and independence of Kuwait.
(b) The relation 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

On 22 of June 1961 the Kuwaiti government submitted an application to join the Arab league, but General Abdul Karim Qassem, following his military coup against the King of Iraq, objected. He declared on 25 of June, 1961 that :

> **"Kuwait was an integral part of Iraq and that the sheikhdom had always been part of the walyat (Province) Al Basra and therefore belonged to Iraq and alluded to the possible use of armed force to redress this historical wrong, backing his threat by the deployment of troops along the joint border"[2].**

Fearing Iraqi aggression, the ruler of Kuwait requested the military help of Britain and informed the Arab League of the situation, and requested the support of Arab leaders. The Arab League promptly despatched its secretary General Abdul Khaliq Hossouna to Baghdad, Kuwait and Taif in an effort to solve the crisis. The British response was immediate. British forces landed in Kuwait on the 1st July but Arab aid did not materialise until sometime later. In response to the crisis the Security Council met in an emergency session

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Government to assist the Government of Kuwait if the latter request such assistance .

In an exchange of letters between Sheikh Abdullah and the British political Resident in the Gulf , Sir William Luce, the British declared their continued readiness to assist the Government of Kuwait if the latter requested such assistance.[1]

2 Daily Telegraph., London, 26 June 1961.

on the second of July to discuss Kuwait's complaint against Iraq [3]. After debating the crisis on the 7th and 8th of July [4], the Security Council passed a resolution calling on all states to respect the territorial integrity and independence of Kuwait and urged all parties concerned to work for peace and tranquillity. However, the resolution faltered due to the veto of the Soviet Union. Likewise, a resolution sponsored by the United Arab Republic calling for the withdrawal of British troops gained the support of none but the Soviet Union and Ceylon[5].

The Arab League met in Cairo on the 12 July and again on the 20th of the same month to discuss the crisis. It was decided first that Kuwait's independence must be recognized, and second that British troops should be replaced by an Arab force [6].

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3 The Guardian, 3 July 1961.

4 * Iraq objected to hearing Kuwait's application on the ground that Kuwait is not a member of the United Nations, but objection was overruled and the Organization discussed the dispute and issued its recommendation.

5 A. G. Mezerik, " The Kuwait and Iraq Dispute", International Review Services, Vol, V11, 1961, p 66

6 For full text see the Arab League Document **(the Secretary General report to the Arab League Council)** Cairo, 1961, Appendix.2. It reads as follow:

(1)Kuwait shall be committed to the withdrawal of the British forces as soon as possible.

(2) The Government of Iraq shall be committed to the non-use of force in annexing Kuwait .

What is of importance here is the fact that Iraq had withdrawn from the Arab League meeting in protest, and later on announced that it would boycott it. Arab forces drawn from several Arab countries arrived in Kuwait in August 1963, whilst British forces started withdrawing in compliance with Security Council and Arab League Resolutions and the Amir of Kuwait's request.[7] On the 8th of February 1963, General Qassem was toppled in a military coup and a new Ba'th regime emerged under the leadership of Ahmad Hassan Al Bakr and his deputy Saddam Hussein. The new regime decided to change course and put an end to the dispute with Kuwait[8]. Indeed, the two governments (Kuwait and Iraq), after thorough discussion, signed an agreement in October 1963 in which the following was confirmed:

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(3) Supporting every Kuwaiti desire to unite or confederate with its charter.

(4) Welcoming Kuwait as a member of the Arab League.

(5) Arab State members of Arab League are committed to offer effective assistance to safeguard its independence provided that this be at Kuwait's request.

7 The Kuwait -Iraq Boundary Demarcation., Historical Rights and International Will, Prepared by. A Panel of Specialists, 1992., p.42 and see A.G. Mezerik : "The Kuwait -Iraq Dispute", International Review Service.,Vol.,V11,No.66,1961.

8 Lawrence Freedman and Efraim Karsh, The Gulf Conflict:1990-91, London, 1993, p.43.

1) The recognition by the Republic of Iraq of the independence and total sovereignty of the state of Kuwait within its borders as defined in the letter of the Prime Minister of Iraq dated July 21, 1932.

2) The two governments would bolster their fraternal relations between their two brotherly countries inspired by their national obligation, common interests and aspiration to a comprehensive Arab Unity.

3) The two governments would undertake to establish bilateral cultural, commercial and economic co-operation and to exchange technical information.

4) To accomplish the above goals, the two countries have decided to promptly exchange diplomatic representation at the ambassadorial level.[9]

As a result, Kuwait joined the United Nations Organization and became one of its members once its application had been approved by the Security Council in May 1963[10].

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9 Registered at the UN. Under the **UN. Documents No.7063** ., Treaty group of U.N.T.S. 1964 . also for more information see Minutes approved by the Iraqi Republic and the State of Kuwait, Baghdad, 4 - October- 1963. and see the **foreign Ministry of Kuwait, Formula submitted to the UN. during Iraqi innovation of Kuwait**., 1991. Also see the Security Council **(Distr. General - S/ res / 687 (1991**) 3 April 1991), Clause,(a) Part 2.

10 Kuwait applied on the 2nd of July 1961 for the membership of United Nations, but the Soviet Union, in view of its special relations with Iraq, had used the veto to block Kuwait's application.

The issue of border demarcation between Kuwait and Iraq erupted again following the Iraqi government's revocation of the Agreement of 1932, in 25th June1961. Despite many attempts to settle the dispute, nothing came to fruition and as a result Iraq sent military units to occupy Kuwaiti land, namely at Al-Samitah post. In late 1971, Saddam Hussein declared that Kuwait could solve the border issue permanently if it adopted **"national popular initiatives"** which were described by the Iraqi Foreign Minister, H.I.Sa'id Abdul-Baqi, during his visit to Kuwait in May1971. The said initiatives were as follows:

1- **Political co-ordination between Kuwait and Iraq;**
2- **Investing Kuwaiti capital in Iraq;**
3- **Allowing the movement of Iraqi labour in to Kuwait;**
4- **Joint defense co-operation;**
5- **Granting Iraq strategic areas in Kuwait** [11]**.**

The fifth demand was the most important one for Iraq, given its status as a

11 A study prepared by a panel of Specialists, Kuwait- Iraq Boundary Demarcation: Historical Rights and International Will, National Center for Documents of Iraqi Aggression on Kuwait, op.cit (note7), p 50 and see Kuwait formula to the UN. Secretary General , on 21May 1992 against the Iraqi claim., Kuwait National Center Documents of Iraqi Aggression., Kuwait. May 1992,p.9-87.and see for all the U.N. Documents regarding the Iraqi invasion of Kuwait see, Iraq Responses to International Demands, Kuwait,1994,p.13-68.

land locked country. The only exit for Iraq to the sea was through the Shatt-al-Arab waterway, but Iraqi navigation rights had been restricted there by the Algiers Accord of 6 March 1975. According to this agreement, Iraq conceded full control of the Shatt al-Arab to Iran in return for the cessation of all military aid by the latter to the Kurds in north Iraq[12]. Despite Saddam's war against Iran, undertaken to restore full control of Shatt al-Arab waterway to Iraq, as he claimed[13], he nevertheless found himself, after several years of war, still in dire need for an exit to the sea to pursue this war successfully against Iran. To this end, Iraq approached the Kuwait government to discuss the lease of half of Bubiyan island to Iraq for 99 years, as well as the transfer of Warba Island to Iraqi sovereignty.

Due to Kuwait's assistance to Iraq in its war against Iran (1980-1988), the issue of the border witnessed a lull, as relations between the two states

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12 H.A. Dughman, Two Contemporary British Newspaper of Record and Two Iraqi Invasions, M.A. thesis , submitted to the University of Kent, 1992.

13 Many reasons lay behind the Iran-Iraq war, for a full account and historical background see Iraqi - Iranian Dispute . Facts V. Allegations , Ministry of Foreign Affairs of The Republic of Iraq (1984). and see Abdulghani ,J., Iraq and Iran. Years of crisis ,.London (1984).and see also Dessouki ,A. (ed) , The Iraq - Iran War . Issues of Conflict and Prospects of Settlement , Centre of International Studies ,Princeton University,1981.

improved.[14] However, on cessation of the Iraq-Iran war, Iraq renewed its claims to part of Kuwait territory.

Following a visit by the Emir of Kuwait on the 23 September, 1989 to Iraq, the Iraqi government sent Dr Sadoun Hammadi, Deputy Prime Minister, to Kuwait to settle the dispute. The Kuwaiti government referred Dr Hammadi to the agreement of 1963 in which the border between Iraq and Kuwait was provisionally defined and fixed. [15]

The Iraqi government, however, considered this agreement to be invalid because it was not endorsed by any legislative body in Iraq and hence had no legal standing according to the Iraqi constitution.[16]

Iraq's economy had been devastated by the eight years war with Iran. As Iraq had fought a war on behalf of Gulf regimes, in containing the Khomeini

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14 During the war, Kuwait assumed that the border issue was no longer an obstacle in its relation with Iraq and that sooner or later Iraq would demarcate it to its satisfaction. However, as soon as the war stopped, Iraq expressed more irritation with Kuwait, and the old dispute came back to life to haunt the Kuwaiti regime. For more information see A.A. Al-Muslemani ,The Legal Aspect Of The Gulf Cooperation Council, Ph.D.,Thesis submitted at University Of London.October1989.

15 The vital question that was asked by the Iraqi side to its Kuwaiti counterpart was " **What in your opinion could be the final solution to the border problem**"? The Kuwaiti answer was " **We should go back to the Agreement of 1963**"Kuwait News Agency (KUNA) , " The Amir Of Kuwait Visits Iraq" ,The Treachery , Al- Qabas Press, 1990. Ch,1p.7-21.and see Saad Al-Bazzaz, Harrab Talid Aukhra ,(war and the one after), 3ed., Al- Ahliaa press.,Jordan.,1992.,p.43.

16 For full discussion about unratified treaty see **chapter two**. It was proved that non-ratification of a treaty does not necessarily mean it has no legal force.

Shi'ite regime, it was presumed by them that these states would be now willing to offer, in return, economic assistance[17]. Iraq, consequently, requested from Kuwait to write-off a loan of 13 billion dollars granted to her during the Iraq-Iran war[18]. The Kuwaiti government, however, aware of the outstanding dispute which obtained between themselves and Iraq, hedged its bets intending to use the loan issue as a trump card to pressure Iraq to sign border and security arrangements similar to those concluded between Iraq and the Kingdom of Saudi Arabia and Jordan[19].

In the face of Kuwaiti intransigence, the Iraqi leader requested the members of the Arab Co-operation Council in Amman at a summit in February 1990, which included the presidents of Egypt and Jordan, Hosni Mubarak and King Hussein, for a moratorium on Iraq's debt and a sum of 30 billion dollars.

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17 Saad Al-Bazzaz, Harrab Talid Aukhra ,(war and the one after).,op.cit.(15).,p.38-39. and see A.A. Al-Muslemani ,The Legal Aspect Of The Gulf Cooperation Council , Ph.D., Thesis op.cit,(note14).

18 Jarimat Gazoou Al-Iraqi lil Kuwiat, (The Crime of Iraqi Invasion of Kuwait), Kuwait Media Center, Cairo, 1990 .,p.10.

19 Ministry of Information and Culture The STATE OF QATAR NEWS AGENCY (AL MEHNAH- Discover) Kuwait From The Invasion To The Liberation , Documents, Doha 1991.p.16. and see Jarimat Gazoou Al-Iraqi lil Kuwiat (The Crime of Iraqi Invasion of Kuwait), op.cit.(18).,p.6.

He added ;

> **" Let the Gulf regimes know that if they do not give this money to me, I will know how to get it".**[20]

Soon after this the Iraqi leader dispatched his army to the neutral zone which buffers the Kuwaiti border[21] to carry out a military exercise with the aim of intimidating Kuwait's government.

The dispute intensified when Iraq accused Kuwait and the United Arab Emirates of exceeding their share of oil production and thus bringing down the oil prices to the considerable detriment of Iraq's economy[22]. President Saddam Hussein outlined his country's predicament in this respect in an extraordinary close session of the Arab summit convened in Baghdad in the presence of the visiting heads of Arab states. He said:

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20 See Lawerence and Efriam, op.cit note (8), p 45.

21 Ibid.

22 However, both Kuwait United Arab Emirates ignored Iraq's threat and continued pumping more oil on the basis that what they are doing was little different from what others were doing. This policy was of great consequence to Iraq as it hurts its finances very severely. D. Hiro, Desert Shield to Desert Storm, Paladin, London, 1992, p 84 and Saad Al-Bazzaz, Harrab Talid Aukhra (war and the one after)., op.cit.,(15),p.49-51.

" For every single dollar decrease in the price of a barrel of oil our loss amounts to 1 billion dollars a year[23] . Is the Arab Nation in a position to endure a loss of ten billions as a result of an unjustified mistake by some technicians or non-technicians, especially as the oil markets, or let us say, the clients are, at least, prepared to pay up to 25 dollar for the next two years, as we have learned or heard from the Westerners who are the main clients in the oil market [24]?

He continued :

" War is fought with soldiers and much harm is done by explosions, killing, and coup attempts- but it is also done by economic means. Therefore, we would ask our brothers who do not mean to wage war on Iraq: this is in fact a kind of war against Iraq... we have reached a point where we can no longer withstand pressure".[25]

Despite Iraq's protests, neither Kuwait nor the United Arab Emirates relented on this issue. Iraq on the other hand continued its efforts to resolve the dispute outlined above. The Iraqi Deputy Prime Minister Saddoun Hammadi went on a

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23 H.A. Dughman, Two Contemporary British Newspaper of Record and Two Iraqi Invasions ,op.cit.(note 12).,p.88.

24 Ministry of Information and Culture The STATE OF QATAR NEWS AGENCY, AL MEHNAH, (Discover) op.cit. (note 19).,p13.see Lawerence and Efiram, op.cit. (not 8), p.46.

25 Ibid and Saad Al-Bazzaz, Harrab Talid Aukhra , op.cit.(note 15)p.47.

tour which included Saudi Arabia, Qatar, United Arab Emirates, and Kuwait with a proposal to hold a five nations summit. Saudi Arabia and Kuwait preferred contact to be at a ministerial level [26]. Sadoun Hammadi met the Emir of Kuwait and explained to him the effect of Kuwait oil policy on Iraq, but the former once again hedged his bets [27].

More to the astonishment of the Iraqi leader, the United Arab Emirates announced that it would not abide by the Iraqi plea for reducing oil production[28]. The United Arab Emirate's minister of petroleum declared in a press conference that his country ; " **made enough sacrifices...It will stick**

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26 Saad Al-Bazzaz, Harrab Talid Aukhra (war give birth to another war) op.cit. (note 15)p.48-50.

27 What of importance here is that when Sadoun Hammadi met the Emir of Kuwait and explained to him the effect of Kuwait oil policy on Iraq, the Emir affirmed to him that his country would abide by its OPEC quota but to his surprise, Kuwait's foreign minister declared later that the Kuwait quota determined by OPEC should be increased . This stand puzzled the Iraqi envoy and made him wonder " **how can it be increased when we want to maintain the oil price at a certain level?**". Ramsey Clarke ., (former U.S. Secretary for Legal Affairs) , AN NAAR HATHIHE AL-MARAH- JARAYIM Al-HARAB AL - AMREEKIYA FI-LKHALIJ, in Arabic (This Bitter Fire : American War Crime in the Gulf) 1ed., Jordan .,1993.p.30-35.

28 see Pierre Salinger and Eric Laurent ,Guerre Du Golfe, Harb Al-Khalij Al-Malf Al-sire Le Dossier Secret ,Paris and Lebanon1991-1992, p.56.and also see Saad Al-Bazzaz, Harrab Talid Aukhra (war give birth to another war), op.cit,(note 15) p.49-50.

to the policy of increasing its oil production". [29] As Iraq's financial need became more desperate so Kuwait became more intransigent refusing to make concessions unless Iraq agreed to the demarcation of the border between the two countries [30].

On the 17th July 1990, the Foreign Minister of Iraq, Tariq Aziz met the Secretary of the Arab League Al Shadhili Al-Qulaibi, and presented him with an ultimatum to declare war against Kuwait [31], if the following issues were not resolved to Iraq's satisfaction. Iraq focused in its complaint not only on Kuwait's non-adherence to the ceiling fixed on oil production but also accused

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29 Saad Al-Bazzaz, Harrab Talid Aukhra (war give birth to another war), op.cit (note 15).,pp 48-51.

30 According to the authors of the book, Secret Dossier, the Iraqi envoy Dr.Sadoun Hammadi had visited the United Arab Emirates and Kuwait prior to the OPEC meeting. He first met Shaikh Zayed and conveyed to him President Saddam Husain's request for payment of U.S. dollars ten billion but Shaikh Zayed evaded an answer. When the same request was conveyed to the Emir of Kuwait, the later reported saying: **"This is impossible. We do not have that amount of money."** Dr. Hammadi had however during the course of the discussion revealed a detailed list of Kuwaiti funds invested abroad which to tolled U.S.dollars one hundred billion. The Emir of Kuwait then agreed to pay as a donation to Iraq a sum of U.S.dollars five hundred million over a period of three years. But the Emir said: **"Let us first discuss the border problem and when we sign the agreement on this problem, we shall then discuss other matters."** see Pierre. Salinger, and Eric.Laurent, Secret Dossier: The Hidden Agenda Behind the Gulf War, Penguin, op.cit.(note 28), (Arabic version), p 47.

31 see Laurent and Salinger, op.cit.(note 28), p58-59.

Kuwait of setting up military check posts on Iraqi territory, and pumping out crude oil illegally to the value of 2.4 billion dollars from Al-Rumailah oil field belonging to Iraq[32].

The Iraqi government accused Kuwait and the UAE of conspiring with Zionists against the Arab Nation[33]. The Secretary General demanded a period of 24 hours to consult with both Kuwait and Saudi Arabia before the circulation of the said ultimatum.

However, Saddam Hussein pre-empted any possible mediation with the following speech:

> **"The imperialists will not dare to attack us any more, because of the quality of the new weapons that we have in our possession now. It is for this reason that they have now resorted to economic guerrilla warfare with the help of their stooges..... the Gulf Arab leaders. Their policy of keeping the oil price at a low level is a poisonous dagger with which they have stabbed Iraq. If words cannot**

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32 Ministry of Information and Culture The STATE OF QATAR NEWS AGENCY, op.cit.,(note 19) pp.13-17. and for the Memoranda see Laurent and Salinger, op.cit. (note 28), pp.58-286. and see The Iraqi Government Formula to the General Secretary of Arab League on 15, July 1990 , The Arab League Documents, Cairo 1990.

33 Ibid.

protect us, we shall have to set things straight and redeem our rights [34]."

The relations between Kuwait and Iraq became very tense, and with it Arab mediation moved fast to break the deadlock before it became too late. The Emir of Kuwait informed the Secretary General of the Arab League, in a meeting held in response to a request made by the former, that the Iraqi ultimatum came as a shock to him given the level of assistance and sacrifices made by Kuwait to shore up the Iraqi machine during the Gulf war.

The Emir urged the Secretary General to solve the problem and expressed his government's willingness to engage in dialogue. The Arab league, in response, authorized the Egyptian president Hosni Mubarak to mediate and try to establish some common ground between the two parties. He arrived in Baghdad on 24 July 1990 and held a meeting with president Saddam. According to some sources, Saddam gave President Mubarak the impression that he did not intend to invade Kuwait and phrased his statement in the following terms:

" As long as discussions last between Iraq and Kuwait, I will not use force. I will not intervene with force before I have

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34 see AL-Thawurah the Iraqi's News Paper, 18 Jun1990.and see Laurent and Salinger, op.cit. (note 28), pp 58-60 .

exhausted all possibilities through negotiation."[35]

Again Saddam was quoted as saying to Mubarak that:

" I will not use force so long as negotiation between Kuwait and Iraq are in operation. Please brother Mubarak do not reveal (that) to Kuwait for fear of increasing their arrogance and hostility".[36]

Mubarak, however, assured Kuwait that Saddam would not invade, but later on in the face of criticism denied that Saddam had made such a statment. Following the failure of the Jedda meeting, the United States of America despatched many warnings to Kuwait, Saudi Arabia and Egypt notifying them of the Iraqi military operations at the Iraqi-Kuwaiti border. The prevailing wisdom was that Iraq's action was a mere manoeuvre designed to intimidate Kuwait and make it bow to her demands. However, an Iraqi spokesman had declared in unambiguous terms before the Jedda meeting that:

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35 Lawerence and Efiram, op.cit.(not 8), p 50.

36 Ibid. and see Laurent and Salinger, op.cit.(note 28), p 64-65.also see Al-Bazaz op.cit.(note 15)p.62-63. According to the Iraqi account Saddam Hussein urged President Mubarak to keep from Kuwait his intention to invade otherwise they would take a tough stand at the negotiation table in Jeddah.

> **" ..The prime minister of Kuwait who comes to meet us (in Jedda) must know he should be ready to remove the injury and aggression inflicted upon Iraq and should respond to legitimate Iraqi rights".[37]**

The Jedda meeting, held on 31 July, 1990 was not successful, despite Saudi and Arab efforts to persuade the Emir of Kuwait to show flexibility on the issue. It appears that the Emir was :

> **" placing the risks of appeasing Saddam higher than those of failing to do so".[38]**

After a heated debate between the Iraqi and Kuwaiti delegations, the head of the Iraqi team, Ibrahim Izat, left the meeting in protest at the Kuwaiti intransigence. However, the Kuwaitis did not consider the matter as too serious, and hoped that further negotiation would allow them sufficient room to manoeuvre in this respect[39].

On the return of the Iraqi delegation to Baghdad, a spokesman commented :

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37 Ibid and see Al-Bazaz,op.cit.(note 15) p 81-86.

38 See Lawerence and Efiram, Op.cit. (note 8), p 56.

39 Ibid p 60.

" No agreement was reached (in Jedda) for we have not noticed any seriousness on the part of Kuwaitis to deal with injury that was inflicted upon Iraq by their conduct " [40].

On the 1st of August 1990, a secret meeting was held in an unidentified place in Iraq which included president Saddam Hussain and members of the Iraqi leadership to discuss the options available to Iraq following the failure of the Jedda meeting. The meeting decided, after thorough discussion, that all means to obtain peace have been exhausted and that there was no option but to invade. The next day orders were given to the Iraqi army to invade Kuwait in an attempt to restore what was deemed to belong historically to Iraq.

40 Bazaz,op.cit.(note 15), p 83.

2- The Iraqi Justification of its Invasion.

Iraqi insistence that Kuwait had waged an 'economic' war against her was often repeated as a mantra by the Iraqi leader as a justification of the invasion of Kuwait. The Iraqi president, Saddam Hussien, as discussed previously, underlined the reason for military action by saying :

> **" War is fought with soldiers and much harm is done by explosions, killing, and coup attempts- but it is also done by economic means. Therefore, we would ask our brothers who do not mean to wage war on Iraq: this is in fact a kind of war against Iraq... we have reached a point where we can no longer withstand pressure".**[41]

On other occasions, Iraqi high ranking officials issued statements which underlined this accusation. The Iraqi foreign minister Tarek Aziz, for example, in a meeting for Foreign Ministers of the Arab League, clarified his

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41 Ibid; and see Saad Al-Bazzaz, Harrab Talid Aukhra (war gives birth to another war) op.cit.(note 15), p.47.

country's stand, saying:

> **" We are convinced that some Arab countries are involved in the conspiracy against us. Surely you know that our country will never bow and that our women will not become prostitutes and our children will not be deprived of food"[42].**

Later on, president Saddam Hussein in a speech on the occasion of 17th anniversary of the Iraqi Revolution, stated clearly :

> **"...With our new weapons the imperialists will never be able, after now, to wage a battle against us; the evidence of that is that they resorted to a war of economic attrition with the help of some agents of the Gulf rulers. The policy of bringing the price of oil down which is applied by Gulf rulers is the poisonous dagger in the back of Iraq"[43]**

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42 see Laurent and Salinger, Op.cit. (note 28), p 57.

43 Ibid, pp 58-59.

Two questions arise in this context:[44] Was Kuwait's conduct tantamount to an illegal economic aggression directed against Iraq? If the answer was in the positive, then another question arises: Was Kuwait's aggression of sufficient magnitude to justify the Iraqi invasion?

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44 These statements by high Iraqi officials underline the basis of Iraqi force against Kuwait. The Iraqi considered these justifications more than enough to legitimise their action. However, these statements cannot be considered as such without thorough examinations.

3- Definition of Economic Aggression.

It is difficult indeed to define economic aggression, as every state perceives it in different shades and colour. Third World countries, whose economies are very vulnerable, argue that economic aggression is impermissible since it seriously affects the independence of the victim state. The aggressor will force another nation to submit to its will which results in compromising its independence. The former Cuban representative in the General Assembly's Sixth Committee, Garcia-Amador, stated, in this respect, in 1949 that :

> **" Economic aggression could assume many forms, ranging from threats, or the effective application of enforcement measures intended to obtain or maintain advantages or specific situations, to the suppression of free competition in the international market and the economic subjugation of the country which was the victim of that kind of aggression. In all those cases, it was the economic integrity and independence of the state which were undermined and even completely destroyed. All states are vulnerable to that type of aggression, but those it affected most were the countries with the least developed or the least diversified economy,**

> **because an attack upon one of their products could upset their entire economic structure".**[45]

In an attempt to define economic aggression, attention is directed more often at the purpose of this economic aggression and not the means used to perpetrate it. If the purpose of such an act is to extract advantages or gains, then a case for a finding of economic aggression exists, irrespective of the means employed. Among those states who adhere to this view is Bolivia which in its draft, in 1952, defined economic aggression as ;

> **" unilateral action to deprive a state of the economic resources derived from the fair practice of international trade or to endanger its basic economy, thus jeopardizing the security of that state".**[46]

Adherents to this view, argue that measures which are in essence legal, may become illegal **" only upon the proof of an improper motive or purpose"**.[47]

Sir Gerald Fitzmaurce highlighted this point by saying:

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45 see M. Whiteman, Digest of International Law, Vol,5,1965, p 831.

46 Report of Secretary General on " Question of the Definition of Aggression" 7 U.N. GAOR, Annexes, Agenda Item 54, Doc.A/2211, p.73 (1952), p 74.

47 Derek. W. Bowett, "Economic Aggression and Reprisals by states"in, Va.J.Int.L, Vol.13, 1972, p 5.

> **"One and the same act may be aggression or may be the reverse if committed from different motives and in different circumstances... An enumerated definition could...do little more than list a number of acts which are fairly obvious cases of aggression, if committed without adequate justification.. The whole problem is to determine when certain acts are justified and, therefore, are not aggressive, and when they are not justified and therefore are aggressive... This determination... cannot be achieved by a prori rule laid down in advance."**

Such an approach could not be considered very sound today. Nations nowadays are more than ever economically interdependent; thus an action by one state against another cannot be necessarily regarded an aggression even though it has affected negatively the other state[48]. It is quite important in this context to recognize the necessity of considering the means by which such an act is committed.

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48 "....A great many economic relationship are established on the basis of reciprocal advantage and it would be ludicrous to characterise a state's economic action as illegal simply because it sought some advantage from another state. One only has to recall the outcry which arose when the United States withdrew financial support from the Egyptian project for the Aswan dam. Was the United States free to do this, or was the action illegal because it was "coercive" and aimed at the subordination of Egypt or securing advantages from Egypt?". It must be noted that the Supreme Court of the United States in its ruling on the decision of the United States to cut the Cuban sugar made no comment on the motives for the United States action in reducing sugar quota.see Derek W. Bowett, Ibid , pp 3-4.

In fact, in my opinion, it is erroneous to rely only on motive to identify the economic aggression. This approach, though it is very useful, yet still is not comprehensive since it relies on intention which is very hard to detect especially in the domain of international trade.[49] Moreover, it could be said that if the element of motive was "included in the definition it might lead an aggressor to rely on such spurious defenses as anticipatory self-defense, duress per-mines or mistake" to justify its illegal action[50].

The Soviet Union suggested in 1954 the two most important constituents of illegal economic aggression; coercive measures and illegal purpose. The draft asserts that an act of economic aggression is committed when a state shall take the following steps:

(a)- Take against another state measures of economic pressure which violate its sovereignty and economic independence and threatening the bases of its economic life;

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49 J.N Rosenau, " Intervention as a scientific concept", Journal of Conflict Resolution, Vol, 13,1969, p154.

50 Report of Special Committee on Question of Defining Aggression, 24 Feb-3 April 1969, 24 U.N. GOAR, supp.20, doc A/7620,1969, p 19.

(b) Take against another state measures preventing it from exploiting or nationalizing its own national riches [51].

This draft, though it was rejected by the UN delegates, has the advantage of including the two variables; paragraph (a) highlights the coercive measures while paragraph (b) focuses on the purpose of such coercive measures. Thus, if a coercive measure has been employed by a state against another, and the target of such measure is recognized, then it would not be too difficult to infer the motive of the aggressor.

In fact, an attempt to reach such a definition is not difficult but to have such definition, as poninted out by Professor Rolling, accepted by all or the majority of nations " would be remarkable and astonishing".[52] Nevertheless, promoting a definition has a great advantage, irrespective of the difficulties involved, for;

> **" the impossibility of absolute precision (of a definition) does not necessarily render complete confusion desirable. In this most fundamental problem of all, as in the lesser problems, legal principles might be formulated which would serve the**

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51 Draft resolution introduced by the Soviet Union, 9 U.N.GAOR, Ad Hoc Political committee annexes, Agenda item 51, doc. A/C.6/L. 332/Rev.1, 1954, pp 6-7.

52 B.Rolling, "On Aggression, On International Criminal Law, On International Criminal Jurisdictoin" cited in Ann Van Awynen Thomas, A.J. Thomas,Jr, Concept of Aggression, Dallas, 1972, p 4.

same functions that other legal principles serve- that of bringing to the focus of attention of a decision-maker relevant factors in context which should rationally affect decision. From this perspective, the basic task is one of categorizing such variable contextual factors with respect to the distinction between permissible and non-permissible coercion".[53]

In view of above, and for the purpose of this study, one can define economic aggression as coercive measures employed by a state against another state to force it to submit to its will and deprive it of its economic resources and thus jeopardize its security.

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53 M. McDougal and F. Feliciano, Law and Minimum World Public Order, 1961, p62.

4-The legality Of Kuwait's Economic Actions Against Iraq.

The accusation that Kuwait perpetrated economic aggression against Iraq's economy deserves to be looked at carefully and examined in the light of International Law. Iraq initiated a propaganda campaign directly after its war with Iran against the Kuwait government to force it to submit to a list of Iraqi demands. The Iraqi government accused Kuwait of pursuing an economic policy aimed at inflicting injury and harm on Iraq's economy and people. The accusation was that Kuwait was pumping more than its share of oil in to the international market, contributing to a depression of prices, adversely affecting the return of Iraqi income from oil. Iraqi officials repeated this accusation many times and hinted that such practice could not be allowed . The stakes were high, especially in the light of the economic difficulties which Iraq was facing in the wake of its eight years war with Iran.

The intensity of the crisis reached its apogee with Saddam Hussein's declaration delivered in an extraordinary closed session of the Arab summit convened in Baghdad, in which he stated that flooding the market with unrestrained production of oil, forced Iraq to pay a very high price.

He said :

> **" ...For every single dollar in the price of a barrel of oil our loss amounts to a one billion dollars a year"**

adding in a threatening tone that ;

> **" war is fought with soldiers and much harm is done by explosions, killing and coup attempts but it is also done by flooding the market with oil and economic means. Therefore, we would ask our brothers who do not mean to wage war on Iraq: this is in fact a kind of war against Iraq ...We have reached a point where we can no longer withstand pressure".[54]**

According to the authors of the book 'Guerre Du Golf', Eric Laurent and Pierre Salinger, President Saddam turned to the Emir of Kuwait and said to him ;

> **" In accordance with OPEC agreements, Kuwait's share of oil must not exceed 1.5 million barrels per day but Kuwait pumps out 2.1 million barrels per day and this takes place against our interest"[55].**

He added that Iraq required its economic position to be restored to the level it was before the war with Iran.

> **"At present', he remarked, 'we need urgently ten billion dollars and the debt 30 billion dollars granted to us during**

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54 Saad Al- Bazzaz op.cit. (note 15),p.45-47.

55 See Laurent and Salinger, Op.cit. (note 28), p 48.

the war by Kuwait and United Arab Emirates and the Kingdom of Saudi Arabia, to be written off."[56].

The Emir of Kuwait responded to this pressure with characteristic aplomb.[57] The prime minister of Iraq, Sadoun Hammadi, on his visit to Kuwait at the end of June 1990, met the Emir of Kuwait and asked him to pay the sum of ten billion dollars (the same sum that was demanded by president Saddam) to help Iraq overcome its financial difficulties. The Emir replied in the negative,[58] despite being reminded by the Iraqi envoy of the 100 billion dollar assets held in capitals around the world. The Emir did agree, however, to grant Iraq an unpaid loan of 500 million dollars provided Iraq agreed to demarcate the border with Kuwait[59].

Viewing such a record of events, one might wonder whether it was Kuwait or Iraq here using forceful measures to achieve a specific purpose. It is a well known fact that nothing in International Law prevents a state from following an economic policy to protect its interest and promote its economy. Indeed, it was stated, in this respect, by Professor Bowett that;

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56 Ibid, pp 48-49.

57 The Iraqi officials highlighted Kuwait's behavior and demanded that it should refrain from its current injurious conduct otherwise Iraq would be forced to take necessary action to put matter right.Ibid.

58 Ibid, p 56

59 Ibid.

> **"state economic activity is harmful to other states for the very obvious reason that state economies are competitive and that promoting one's own economy may well be injurious to another's".** [60]

Thus, if a state in pursuance of a certain policy ended up affecting another state's economy, then International Law at the very least requires from both parties a resort to peaceful procedures to sort out their differences and interests. The Charter of the United Nations stresses this point in its Article 2 (3) which reads as follows:

> **"All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice, are not endangered".**

Article 2 paragraph 4 reads:

> **" All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."**

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60 Derek W. Bowett,"Economic Aggression and Reprisals by states" in ,Va.J.Int.L. op.cit. note (47), p 5.

Iraq, in assuming that Kuwait was the wrongdoer, refused on the whole to negotiate in order to settle the disputed issue, as required by International Law. As has been outlined above, the Iraqi leader took the path of threat and pressure to solve what he perceived as an act of economic aggression against the Iraqi economy. Admittedly, Iraq did on one occasion submit its dispute to the Arab League. Iraq submitted a memorandum to the Arab League in which it alleged that Kuwait had conspired to confiscate Iraqi land and set upon it military and economic facilities. Iraq, moreover, accused Kuwait, alongside the United Arab Emirates, of exceeding its production quota of oil and bringing the prices down which cost Iraq a billion dollars a year[61]. Iraq appealed in the memorandum to all Arab brothers to put pressure on Kuwait and bring it back to the right path[62].

Kuwait in its turn replied in a letter to the Secretary General of the Arab League, in which it outlined its stand and refuted Iraqi allegations. According to the letter, Kuwait condemned the threatening tone of the Iraqi memorandum, and expressed its desire to work with other Arab sister states to solve the outstanding issues with Iraq[63]. Kuwait denied the legality of Iraq's claim over the border between the two states, counter claiming that it was Iraq who was the violator of border sanctity[64].

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61 see Eric and Pierre, op.cit. (note 28), p280-281.

62 Ibid, p 284.

63 Al-Raya, a Qatari newspaper, 20, June 1990.

64 Ibid.

In an attempt to resolve the border dispute Kuwait suggested the establishment of an Arab committee. As to the oil dispute, Kuwait pointed out that the slump in oil prices was due to an international crisis, and that to shore up her economy, particularly after suffering during the Iraq-Iran war,[65] she was obliged to over produce.

Iraq refused Kuwait's offer, and continued to pressurise it to reduce her oil quota and write off its debt, as well as denoting a large sum of money. Indeed, the Iraqi president in a meeting with King Hussein and the president of Egypt Hosni Mubarak, affirmed in their presence that he would use deterrent measures to enforce his claims unless the Gulf states granted him thirty billion dollars[66].

Iraq specifically complained about the oil policy of both the United Arab Emirates and Kuwait but attacked only Kuwait, even though the minister of petroleum for the United Arab Emirates had stated that his country had already made many sacrifices and had no plans to abandon its policy of pumping more oil.[67]

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65 Ibid.

66 see Pierre and Eric Laurent, op.cit. (not 28), p 14.

67 Saad Al-Bazzaz, Harrab Talid Aukhra (war gives birth to another war) op.cit. (note 15)p.48-50.

The Iraqi government would only accept mediation on the condition that Kuwait comply with its legitimate demands.[68] The Iraqi newspaper, Al-Jumuhria,[69] in its editorial said;

> **"...Official circles in Kuwait are keen on describing the present crisis as a summer cloud and nothing more in order to play down its magnitude. This crisis could diminish, if Kuwait changed its stand and removed the harm inflicted on Iraq"[70].**

Al-Thawra stated that ;

> **" without acknowledging the legitimate rights of Iraq it is impossible to achieve any progress in the Iraqi-Kuwaiti negotiation"[71].**

It appears Kuwait had the right to exploit its own resources in the way it pleased, to trade with whatever nations it wished, and also had the right to market its commodities in any quantity to other nations, without even being accountable to OPEC, for the latter has no internal mechanism to settle disputes.[72]

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68 Al-Raya, 26 July 1996.

69 It worth mentioning here that the Iraqi press reflect the government views, as it is not permitted to the press to publish anything not agreed in advance with the government. In another word, the Iraqi press is a true respresentative of the government stand.

70 Al-Raya, 2 Agust 1990.

71 Ibid.

72 For more information Mattione, Richard P, OPEC's Investments and the International Financial System ,The Brooking Institution, Washington ,1985.

According to the Kuwaiti Crown Prince Saad Al-Abdullah Al Sabah, Kuwait challenged Iraq on the issue of exceeding its quota of oil. In a meeting between Saad-Abdullah and the Iraqi deputy president Izaat Al-Douri in 31July1990, the former asked the latter to set up a team of experts to examine records of oil production to compare the quota of Iraq's production with that of Kuwait's. [73] According to the Crown Prince, Izaat Al-Douri declined to accept this suggestion but insisted on Kuwait meeting Iraq's claim of 2.4 billion dollars by way of compensation[74].

After the meeting, the Crown Prince conferred on the 1st of August, 1990 with the ruler of Kuwait and advised him to arrange another meeting with Iraq in Kuwait[75], only to hear the disturbing news that Iraqi forces had crossed the border and occupied Kuwaiti customs posts and facilities.[76]

Thus Kuwait, because it refused to accede to Iraq's demands, was invaded.[77]

Iraq did not accept peaceful negotiation, but attempted to blackmail Kuwait with demands which, if not acceded to, would lead to war. Waldock describes

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73 Interview with the Kuwaiti Crown Prince Saad Al-Abdullah Al-Sabah, Al-Majala (An Arabic Magazine), 10 August, 1996. p 16.

74 Ibid

75 Ibid

76 Ibid, and see Pierre and Eric Laurent, op.cit. (not 28),p.64.

77 Op.cit. note (18), p 64-65. see Pierre and Eric Laurent, op.cit. (not 28),p.85&p.93-111.

the tendency towards adopting such intractable attitudes, as follows:

> **"...the tendency is to devote so much attention to the obvious evil of settling international disputes unilaterally by violence that the other evil of refusing to accept any peaceful form of settlement is almost overlooked. There are two ways in which a state may make itself judge of its own cause and effect a unilateral settlement. One is by resort to violence; the other is by asserting its point of view and declining any form of impartial settlement"**[78]

This conduct has no parallel in International Law and runs contrary to its rules, specifically with regard to Article 2 (3) which obliges parties to settle their differences in a peaceful manner. However, if they fail to do so, the Charter, in Chapter VI requires them to submit their dispute (if it endangers peace) to the Security Council.

Taking all these factors into account, one is constrained to describe Iraq as the aggressor, its action striking at the heart of International Law.

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78 C.H.M. Waldock, " The Regulation Of The Use Of Force By Individual Sates In International Law", R.C.Rdc , 1952. Vol.81, part,11, p456.

5-The legality of using force in response to economic aggression.

Assuming Kuwait committed an economic aggression against Iraq one is nevertheless tempted to ask a question: Is it valid under International Law for a state to use force in response to economic aggression? It is an accepted fact that states have an inherent right to use force by way of defence under the Charter of the United Nations. However, use of force outside the limits of self-defense is considered illegal and contrary to the Charter of the United Nations. Those who adhere to that interpretation invoke article 51 of the Charter of the United Nations which reads:

> **"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the security Council has taken measures necessary to maintain international peace and security. Measures taken by member in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems**

necessary in order to maintain or restore international peace and security"[79].

Proponents and opponents of restricted interpretation disagree more than ever before on this issue of whether or not economic aggression can be equated with armed attack. A number of distinguished writers and scholars, however, do not consider Article 51 to be restricted only to armed attack but to include other forms of action. These actions cannot be considered illegal if taken in self-defense and legitimised by International Law based on custom[80]. It was argued that, though Article 51 curtailed many of states' prérogatives in matters related to the use of force, yet there can be no doubt that bodies of armed 'volunteers' crossing a frontier or cease-fire line, such as the Chinese in the Korean hostilities of 1950, or ostensibly private 'military expeditions' or 'armed bands' leaving one country for the purpose of attacking another, like the Cuban refugees in the Bay of Pigs affair of 1961, constituted 'an armed attack'[81].

Indeed, the International Court of Justice in its ruling in the Nicaragua case

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79 Maloclm D. Evans, Blackstone's International Law Documents, 2ed, London, 1991,pp16-17.

80 D.W. Bowett, Self defence in International Law, 1958, p187-192. see also, Mc Dougal and Feliciano, op.cit. (note 53), p 232; J. Stone, Aggression and World Order, 1958, p 44.

81 Q.Wright, "Legal Aspects of the Viet-Nam Situation", A. J.I.L, Vol 60, 1966, p 765.

avoided the issue of lawfulness of the use of force in response to the imminent threat of armed attack[82]. However, the court ruling cannot be taken as a proof of the lawfulness of using force other than in self-defense. Any reading of the court's ruling will establish this fact beyond doubt, especially when some judges protested against its ruling for failing to legitimise the use of force outside the parameters of Article 51. Judge Schwebel in his dissenting opinion rejected a reading of the text which would imply that the right of self-defence under Article 51 exists "if, and only if, an armed attack occurs"[83].

Concurring with this view, Waldock perceives Article 51 as a continuation of the inherent right of a state which the Charter has not curtailed. To him Article 51;

> **"...was not inserted for the purpose of defining the individual right of self-defence but of clarifying the position in regard to collective understanding for mutual defence".**

He continued :

> **Article 51 also has to be read in the light of the fact that it is part of Chapter VII. It is concerned with defence to grave breaches of the peace which are appropriately referred to as armed attack. It would be a misreading of the whole intention of Article 51 to interpret it by mere**

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82 Case Concerning Military And Paramilitary Against Nicaragua.(Merits), I.C.J. Rep.102-106.

83 Ibid, p 347.

implication as forbidding forcible self-defence in resistance to illegal use of force not constituting an armed attack"[84].

Those who opposed this interpretation used a different reading of Article 51 to underline the illegality of the use of force except in the event an armed attack in accordance with Article 51. The starting point of those calling for a narrow interpretation is Article 2 (4) which call on states to refrain from using force or the threat of force or in any other manner inconsistent with the purpose of the United Nations. Therefore, any use of force or threat of force is ultimately illegal.

Professor Rosalyn Higgins asserts that Article 51 cannot be invoked unless there is an armed attack. In illustrating her view, she pointed to the practice of states which clearly points to the thesis that self-defence is only permissible when an armed attack occurs[85].

Others say that Article 2 (4) has no exception whatsoever, and any reference to traveaux preparation will prove this point[86]. Akehurst in his defence of strict interpretation refers to Article (1) of the Charter of the United Nations which

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84 See Waldock, op.cit. (note 78) pp 496-97.

85 Rosalyn Higgins, " The Legal Limits To The Use Of Force By Sovereign States, United Nations Practice," B.Y.I.L. p 299-300.

86 I. Brownlie, International Law And The Use Of Force By States, Oxford, 1963, p 267-268.

enumerates the various goals that the Organization strives to achieve by peaceful methods. Realization of such goals by force would run counter to the Charter of the United Nations[87]. He went on to say that there is no place for the use of force except in self-defence which has to be interpreted narrowly in conformity with the Charter of the United Nations. Judge Jessup, stressed that military preparation by a state does not permit the threatened state to use anticipatory force. He said:

> **" under the Charter alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by a state which believed itself threatened"**[88]

What is noticeable here is that both opponents and proponents are nearly in agreement on the fact that minor use of force cannot be invoked as a justification for self-defence. Miller affirms that a mere mobilization or "bellicose utterance" cannot at all justify using force in the name of self-defence[89]. During the debate on formulating a definition for aggression the

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87 M.Akehurst, " The Use Of Force To Protect Nationals", International Relations, Vol 5.(1975-77), p 16; Scott Davidson, Grenada: A Study in Politics and the Limit of International Law, Avebury, 1987.

88 Jessup, A Modern Law of Nations, 1948, p 166.

89 E. Miller, " Self-Defence, International Law and the Six Day War", Vol.20 ,Isr.L.Rev., 1985, p 49-60.

last;

> **"phrase of paragraph 9 of the Declaration of Principles Concerning Friendly Relations, 'when the acts....involve a threat or use of force', was added in an effort to avoid states' asserting a right to exercise their inherent right of self-defence by way of pre-emptive attack before there had been any use of force against them. The expression reflected an effort to respond to the view sometimes asserted that anything that violates Article 2 (4), gives rise to rights under Article 51"[90].**

Others argue that :

> **" Once it is realized that Article 2 (4), proscribes much more than a use of force against the territorial integrity, political independence, or security interest of another state, it should also be realized that all violations of Article 2 (4) do not automatically threaten the security interest of another state in a significant way or reach such an intensity and magnitude in that regard, as to create the conditions of necessity for a response under Article 51"[91].**

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90 Robert Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", A.J.I.L, Vol, 65 , 1971, p 720.

91 Jordan J. Paust and Albert P. Blaustein, "The Arab Oil Weapon- A Threat to International Peace", A.J.I.L, Vol 68, 19 , pp 415-416.

It has been more often stated in the United Nations that not every use of minor force can constitute an aggression. The Iranian delegation to the sixth committee underlined this view by saying:

> **" to constitute aggression the use of force must be sufficiently serious, otherwise the door would be open to dangerous abuses by states claiming to act in self-defence"[92].**

The idea that economic aggression cannot justify resort to force in accordance with Article 51 was illustrated clearly and practically during the Arab oil embargo following the Israel-Arab war in 1973 as a response against the West's support of Israel . This embargo was very serious and had a debilitating effect on western industries and in particular the United States but none of these states resorted to force under Article 51. The U.S Secretary of Defence, James R. Schlesinger in his comment on the issue at that time said the United States was **" not contemplating any military action against the Arab oil producers"[93].** However, the United States Secretary Henry Kissinger stressed the point that military action will not be undertaken unless there is complete strangulation. He said :

> **" I want to make it clear ...that the use of force would be considered only in the gravest emergency"[94].**

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92 See G.A.O.R. 9th session, sixth committee, 405 meeting, p 39.

93 See Times, 26 September 1974, col 2. p 6.

94 See Busniess Week, 13 January, 1975.

It is clear that Article 51 cannot be invoked unless there is an armed attack against the territory of the victim state. However, one has to admit that there is a case for self-defence when the injured state is exposed to a danger which threatens its very existence. Even then, as was illustrated by the statement of the Secretary of State Henry Kissinger, the force will be considered only in the gravest emergency. That is to say, the state using force has to satisfy the conditions of the Caroline test[95]: there must be necessity of self-defence and its should be instant, and overwhelming, leaving no choice of means and no moment for deliberation. The act carried out in the name of self-defence must not be unreasonable or excessive and must be kept within the limits of the necessity[96].

Applying the Caroline test, Iraq's use of force in the name of self-defense in response to Kuwait's increase of its share of oil, assuming that was the case, cannot be viewed under any circumstances as a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for

95 This case arose after a small Canadian force attacked a U.S. vessel called Caroline, accused of aiding a group of Canadian rebels, alongside a dock on the U.S shore, resulting in the death of one American sympathiser and 12 others missing. After a correspondence between the two governments, British and American, although they disagreed about the facts of case, nevertheless they agreed upon the principle applicable to armed intervention in self-defence and force could be used if the above requirements existed. see R.Y. Jennings, A.J.I.L., Vol 32, 1938, pp 82-89.

deliberation. On the contrary, Iraq had plenty of time to settle its dispute with Kuwait, and negotiations were underway when Iraqi forces crossed the border. As to the second condition, Iraq's action was clearly unreasonable and excessive and exceeded the limit of necessity. Iraqi forces crossed the border, occupied Kuwaiti land, overthrew its government and finally claimed the extinction of Kuwait by saying Kuwait was a part of Iraq.

Iraq's use of force against Kuwait, under the above justification is illegal. For a state cannot use force to settle a minor economic issue but it is allowed to use similar measures proportionate in degree and kind. Iraq's claims that its economy was damaged due to the increase in oil production by Kuwait and hence it had the right to use force, cannot be accepted at all. As was said above, the Arab state reduction of exported oil threatens the industrial world and nearly brought havoc to the world economy, and nevertheless the West as a whole did not contemplate force. Yet Iraq alone, without foundation and without recourse to peaceful means, used force in violation of the Charter of the United Nations. It is Iraq and not Kuwait who committed aggression and violated International Law.

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96 Ibid

Conclusion

The use of force in International relations is considered illegal under the Charter of the United Nations. The use of force was one of the major issues that pre-occupied the minds and hearts of those working for peace and security. The world has witnessed many wars and tragedies which could have been avoided at very low cost had there been an effective system to deal with the regulation of force.

Those who drafted the Charter were well aware of the danger of unbridled use of force, and they kept that fact in their minds as a reminder,when they devised of the United Nations. To that end, the Charter has effectively put an end to unilateral use of force and thus what was lawful in the past becomes illegal in the present. Many resolutions later on reiterated this fact, that the use of force is illegal and cannot be condoned except in self-defence.

The use of force by Iraq in response to economic aggression, as has been shown, is illegal. Any reading of the Charter of the United Nations will prove beyond any doubt that economic aggression cannot give rise to the right of self-defence. Self-defence is restricted to armed attack in which the victim state is given the right to respond and until the Security Council takes notice of the issue.

Iraq's claim that it was subjected to economic war of a high magnitude is not sound in legal or factual terms. Legally, even though Iraq was subjected to that danger, it is not permitted for a state to use force in response to economic aggression; but it is allowed to use similar measures in kind and degree. Factually, Iraq was not in reality subjected to economic aggression. All Kuwait did, was to use its resources to support its economy. International Law permits any state to trade the way it likes so long as no obligations point to the contrary. Despite that, records of events show that it was not Kuwait who was the aggressor but Iraq which demanded a lot from Kuwait. Iraq used threat of force to extract money from Kuwait and to force it to write off its debt, as well as making concessions on the border to Iraqi advantage. Moreover, Iraq discarded all peaceful means which the Charter prescribes.

Summing up, Iraqi use of force against Kuwait was illegal under International Law and runs against all the rules and declarations that call for peaceful settlements of disputes.

CHAPTER FOUR

The Legality of the Iraqi Intervention Upon the Request of Kuwaiti Rebels In International Law.

1- Introduction

Iraq's invasion of Kuwait took place at 3.00 a.m.GMT on the second of August 1990 following a secret meeting presided over by President Saddam Hussein. Around 140 thousand Iraqi troops and 1,800 tanks crossed the border into Kuwaiti territory to execute the orders of President Saddam. These forces were spearheaded by two Republican Guard armored divisions. The forces quickly moved toward Kuwait city while special Iraqi forces occupied strategic sites throughout Kuwait[1].

Iraqi airborne forces landed on Kuwaiti beaches near the Emir of Kuwait's Dasman palace and moved to occupy it, after a brief battle,

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[1] Lawrence Freedman and Efraim Karsh, The Gulf Conflict: 1990-1991, London, 1993, p 67.

ending in the death of the Emir of Kuwait's brother Fahad Al Ahmed[2]. These forces met no real resistance due to the factor of surprise and the state of the Kuwaiti army which was no match for the Iraqi forces, though it heroically showed resistance for a couple of days.

It was reported that three hours after the invasion, Crown Prince Sheikh Sa'd Abdullah al-Sabah requested military help from the United States but the latter was unable to respond immediately in such circumstances[3]. Later on, the Emir and Crown Prince, in face of the reality of defeat, were forced to flee their country and seek refuge in the Kingdom of Saudi Arabia.

In the face of such a sweeping invasion, the Iraqi authority tried to shroud its action in the cloth of legitimacy, claiming that its action was legal and its invasion was in response to an appeal for assistance from Kuwaiti rebels in the wake of an indigenous uprising.

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2 Muhammed Ali Aldmakhi, Kuwaiti under Occupation , Dubai. 1991, 29.

3 Ibid, p 67.

11- The Iraqi legal Justification.

On the 2nd of August the Iraqi authority broadcast on local radio that its invasion was in response to an invitation from a revolutionary government who took control after an indigenous uprising against the corrupt regime of Al-Sabah. The Iraqi statement said:

> **" The Iraqi forces moved toward Kuwait and occupied at least two posts on the border. The Iraqi forces moved into Kuwait in response to an appeal from the free people of Kuwait who overthrew their regime. The new Provisional Free Government appealed to Iraq to offer assistance and support to the new regime against any one who might think of interfering in Kuwait's internal affairs".[4]**

Later on, the Iraqi Revolutionary Council issued a statement clarifying its stand and action in Kuwait. The statement said :

> **"The Iraqi forces will withdraw within days or weeks from Kuwait after restoring order and that the Iraqi leadership will leave the Kuwaiti people within days or weeks after**

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4 Abdulaziz.M. Sarhaan, The Iraqi invasion of Kuwait, Cairo, 1991, p 7.

restoring order and will let them decide their internal affairs. In the name of the Iraqi Army and people and all free Arabs, Kuwait will turn to be a cemetery for whoever is tempted to challenge it and commit aggression "[5].

These statements have been echoed differently by The Revolutionary Government which took the seat of power in Kuwait. The Revolutionary Government declared that the Al-Sabah family, a family crowned by colonialist powers, had been removed from power. This family did not hestitate to dissolve the parliament which had tried to uncover its corruption and its policies. In view of that, the Revolutionary Government assumed all legislative and executive powers.[6]

On the 4th of August 1990, the Iraqi government restated its position in Kuwait by saying:

" The events in Kuwait are an internal matter which Iraq has nothing to do with. The Provisional Free Government asked the government of Iraq to extend assistance in

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[5] Ibid and see Ahmed Abdulyunus Shata, " Iraq's responsibility for the occupation of Kuwait in the light of Inernational Law", in Eqypt.Rev.I.L., Vol 46, 1990, p 44.

[6] Ibid, p 8.

maintaining law and order and in offering protection to the Kuwaiti people against any harm or damage"[7].

On the 5th of August 1990, The Provisional Government of Kuwait issued a statement confirming that it:

"asked assistance from Iraq to face the possibilities of foreign intervention in Kuwait and that it asserted that spokesmen for the former government no longer represent the legitimate government"[8].

It is clear from the above statement that Iraq invoked the principle of invitation in International Law to justify its action. This principle is well recognized in International Law and it was used in the past by many governments to justify their military actions. However, Iraq's claim that it was invited by a Kuwaiti revolutionary government presupposed the presence of civil strife in which one faction invited a foreign government to help it in its fight. It is, therefore, necessary before proceeding to discuss the legality of

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7 Ibid, p 9.

8 Refat Saaid Ahmad, The Bitter Harvest of Second Gulf War, Dar Al-Hudda, Cario, 1992, p 9.

such an invitation, to see whether there was a civil war or not in Kuwait and then to consider which faction had the right to issue an invitation and under which conditions in International Law.

111-Definition of Civil war and Iraqi Claim of its Existence

According to the contemporary dictionary the term civil war is indicative of a war between " **...two opposing groups of people from the same country fought within that country"**[9]. On the other hand, legal writers define civil war in more detailed and specific terms but do not differ in content from the definition found in the dictionary.

The prevailing customary definition is that :

> **" when a party is formed which ceases to obey the sovereign and is strong enough to make a stand against it, or when a Republic is divided into two opposition factions and both sides take up arms, there exists a civil war".**[10]

Another definition for civil war introduced by Oppenheim says:

> **" When two opposing parties within a state have recourse to arms for the purpose of obtaining power in the state, or when**

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9 Dictionary of contemporary English, 2ed, 1987, p 176.

10 see Emmerich de vattel, The Law of Nations or The principle of Natural Law, cited in R. Falk, Vietnam war and International Law, Vol 1, 1968, p 19.

> **a large portion of the population of a state rises in arms against the legitimate government".[11]**

Another definition was introduced by Professor Francies Lieber where he identified civil war as:

> **" a war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion when the rebellious province or portion of the state are contiguous to those containing the seat of government".[12]**

It is clear from above definitions that civil war has three common features: (1) it is between the citizens of one country, (2) it takes place within that country (3) it involves the aim of obtaining the seat of power. However, one factor which has not been dealt with by classical writers is the required level of armed conflict (material factor) between the opposing parties. This factor is of great importance since it distinguishes civil war from trivial incidents. Article (1) 2 of Protocol 11, 1977, relating to the protection of the victims of

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[11] L. Oppenhiem, Inernational Law, 8ed, 1955, p 209.

[12] This definition is cited in George Grafton, Inernational Law, 9ed, 1935. App. 2.

non-armed conflict, states that:

> **" This protocol shall not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflict".[13]**

Therefore civil war could be defined as an internal war carried out on a large scale between the people of a country and within it for the purpose of overthrowing the government or altering its legal structure.

The question which one has to ask is: was there a civil war in Kuwait before the Iraqi invasion? Answering this question does not require a great deal of explanation.

In fact, all features required for civil war in Kuwait were non existent; there was no armed conflict between the Kuwaitis for achieving power. On the contrary, all indicators were pointing to the opposite . Kuwaitis as a whole were worried by the Iraqi threats and intimidation following the rejection of their demands by the Kuwaiti government. Any scholar reading the events before the invasion, will certainly come to the conclusion that an armed

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[13] Protocol 11. 1977, protection of the victims of non-armed conflict, see B.A. Wortley, " Observations on the Revision of the 1949 Geneva 'Red Cross' Convention", B.Y.I.L, Vol, LIV, 1983, pp 149-150.

conflict, as required by the definition, was not only absent but was not even contemplated by Kuwaitis, even by those loyal to Iraq.

In fact, there were calls from the opposition to restore the constitution and parliament in addition to some reforms but there was no call to overthrow the ruling Al-Sabah family nor to limit its participation in the political life of Kuwait. Iraqi talk about a revolution which erupted in Kuwait with the aim of overthrowing the ruling Al-Sabah family is groundless[14]. Before the Iraqi invasion, life was more than normal in Kuwait and foreign embassies and journalists had not reported any uprising in Kuwait[15].

It follows that the Iraqi assertion of invitation was meaningless and could be resorted to only as a legal cover to justify its military invasion of Kuwait[16]. However, one can say that the declaration that a new Revolutionary Government was established by Kuwaiti officers and that they invited Iraqi forces to Kuwait deserves more attention. It could be argued that a military coup may have taken place, and a struggle ensued between its followers and

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14 Arab Organization For Human Rights , Humans Rights In The Arab World, Egypt 1990, p.142. " **It was repeated that after the government dissolved the parliament, the majority of Kuwaitis demanded the restoration of constitution. However, the government not allowed any political activities, and arrested leading personalities".**

15 Ibid.

16 Abdulaziz Sarhan Md. The Theory Of The State In The Inernational Law and In The Islamic Sharia Law. Egypt. 1996. p.152.

those supporting the incumbent government. In such a scenario the Military Junta could have invited the Iraqi forces to intervene on its behalf in the struggle for the seat of power. Whatever the circumstances were, one has to ask the following question again: was the invasion of Iraq in response to an invitation from the Revolutionary Government legal in International Law? However before discussing this question, an attempt will be made to briefly review the applicable rules of civil war in International Law.

IV-The Applicable Rules of Civil War in International Law.

Civil war has not attracted the attention of International Law, as the conventional view was that it is an internal matter which International Law has nothing to do with. Many steps were taken to dispel this impression but the prevalent view is that civil war is a domestic matter and has nothing to do with International Law which regulates inter state relations. The question which always occupied the mind of many writers was when does a civil war become the concern of International Law?[17]. This question in particular was dealt with by customary International Law which explains the rights and obligations of a foreign state vis a vis the parties in a civil war.

A foreign state, according to International Law, has no right whatsoever to intervene in a civil war so long as it remains within the domestic jurisdiction of the state in question since it is not the business of a foreign power to pass judgment on the continuing struggle between the warring parties .

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[17] R. Falk," Inernational Law of Internal War" in Legal Order in a Violent World, New Jerse, 1968, p 113.

It is the norm of non-intervention which has enhanced the conviction that civil war falls within the domestic jurisdiction of a state. This norm was first conceived by Grotius who viewed an international society as a body consisting of various sovereign states each one having a domain in which no other state has the right to exercise any power .[18] Wolff also contributed to this principle when he drew an analogy between states and individuals and concluded that:

> **" the moral equality of men has no relation to the size of their bodies and the moral equality of nations has no relation to the number of men of which they are composed".[19]**

Despite the contribution of the said writers, it was Vattel who really defined it precisely by saying:

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18 Hugo Grotius, De Jure Belli ac pacis Libri: Tres: Book 1, 1625, Translated by Francis W.Kelsey, ed. James Brown Scott, 1964, para 17, p 15, and para 18, p16.

19 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum, 1764, Trns, Joseph H.Drake, London, 1934, Para 16, p 15. and see also writers from the positive school who reach the same conclusion but from different perspectives such as G.F V on Martens, James Kent, Henry Wheaton. For a full analysis of their positions see R. J Vincent, Non- Intervention and International Order, 1974, pp 31-43.

> **" each [nation] has the right to govern itself as it thinks proper and that no one of them has the least right to interfere in the government of another. Of all the rights possessed by a nation, that of sovereignty is doubtless the most important and the one which others should most carefully respect if they are desirous not to give cause for offense"[20].**

He continued:

> **" Foreign nations must not interfere in the affairs of an independent state. It is not their part to decide between citizens whose civil discord has driven them to take up arms, nor between sovereign and his subjects".[21]**

Upon these premises customary rules categorized the conflict in a civil war into three stages, each of which has its own features and implications in relation to internal parties and outside states. These stages are rebellion, insurgency and belligerency.

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[20] D.De Vattel, The Law of Nations or The Principle of Inernational Law, 1758, Trans.Charles G. Fenwick, 1916, Book 11, Chapter IV, para 54.

[21] E. Vattel , " The Law of Nation, "cited in Vietnam War and Inernational Law , Vol 1, 1968, p 19

The first stage, rebellion, is defined as "***an uprising against a lawful authority which is lacking in any resemblance to justice***"[22] or this type of violence in **which** "***there is sufficient evidence that the police force of the parent state will reduce the seditious party to respect the municipal law***"[23]. It follows that in such a situation the parent state is still capable of commanding the respect of the rebellious party and of forcing it to respect its authority. Thus, as long as violence remains within these confines, a foreign state has no right whatsoever to intervene between the parent state and its rebellious party.[24]

The second stage commences when the rebellious party manages to resist government forces which seem unable anymore to put down such resistance.

International Law categorizes such a situation as 'insurgency'; this is a declaration that the parent government is no longer the supreme power in its

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22 Ibid.

23 Lothar Kotzsch, The Concept of War In Contemporary History And International Law, 1965, p 230.

24 See Resolution of the ,Institute of International Law Dealing with the Law of Nations, 1920, pp 157-161 and particularly Article (10).

land but that other forces (insurgents) are sharing power in certain areas. It is defined as "***an organized body of men within a state pursuing public ends by force of arms and temporarily beyond the control of the established government***"[25]

In other words, such developments oblige other foreign states to follow the events and take notice of it especially if it affects their interest.

Whatever the strength of the insurgents, still they are not regarded by International Law as a group that ought to be treated on an equal footing with the parent government; legally they are not much different from rebels. Having said that, one must recognise that insurgency creates certain facts on the ground; it creates conditions on territory occupied by it with which foreign powers have to deal. Such a situation confers on insurgents some obligations regarding protection of foreign property or nationals where foreign powers have no option but to deal with them without affecting the rights of the incumbent government.

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[25] See B. Talmadge L," Counter Insurgency and Civil War", N.D.L.Rev.Vol.40, 1964, pp263-264.

The incumbent state still enjoys the support of foreign governments which are bound by law to do so[26]. This course of action was clearly adhered to by the State Department of the United States in its decision regarding the Brazilian revolution of 1930. The State Department of United States prohibited all shipment of weapons to Brazil except to the incumbent government on the ground:

> **" ...until belligerency is recognized and the duty of neutrality arises, all the human pre-dispositions towards stability of government, the preservation of international amity and the protection of established intercourse between nations are in favor of the existing government".[27]**

What is noticeable here is that, the incumbent government still has the upper hand over the rebels in dealing with foreign states; it can receive all the necessary help from outside powers where rebels are denied such rights.

In other words, insurgency is defined as:

> **" an international acknowledgment of the existence of internal war, but it leaves each state substantially free to control the consequences of this acknowledgment. It also**

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26 R. Higgins, " Internal War and International War", in R.Falk, The Future of International Legal Order, Vol III, 1971, p 98.

27 R. Falk, The Inernational Law of Civil War, 1971, p 119.

serves as a partial internationalization of the conflict without bringing the status of belligerency into being".[28]

The third stage is belligerency where a government loses its privilege vis `a vis the rebels and becomes equal to them in their relations with outside foreign powers. This stage is very important as it signals the birth of a new group representing the state and hence the incumbent government is no longer the sole representative. However, such a status cannot be acquired unless certain conditions are met. According to Oppenheim these conditions are :

" The existence of civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of national territory by the insurgent forces acting under a responsible authority; the practical necessity for the third state to define their attitude to civil war".[29]

These four conditions set out by Oppenheim are of great importance since they determine the necessary criterion for recognition of the rebels as belligerents where they will enjoy all rights conferred upon the state. However, it is still important to point out that foreign powers are still at liberty

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28 Ibid.

29 Oppenheim, Inernational Law, Ed H. Lauterpacht, 8th ed, Vol II, 1955, p 249.

to subjectively determine the status of belligerency, although it could be violating the rules of International Law, in particular, the norm of non-intervention, if they prematurely grant a recognition of belligerency. Therefore, a foreign government is duty bound by International Law to respect the right of the incumbent government whenever intervening in any civil war. It is clear that a foreign government cannot intervene to support rebels unless they achieve the status of belligerency. Keeping that in mind , one wonders whether or not the Iraqi government adhered to such obligations.

V- The legality of the Iraqi claim under International Law.

The Iraqi claim that their forces intervened in Kuwait upon the request of a revolutionary government cannot be considered legal unless it conforms with the rules of International Law. It is established that an appeal from rebels to a foreign government for intervention, must be from those rebels who successfully managed to occupy territory and exercise effective control over it. For unless the rebels control and defend territory , they cannot be considered as a party on equal footing with the government. Not only that, the rebels are required to gain the status of belligerency before they can legally extend an invitation of help to an outside power.

As far as the revolutionary government in Kuwait is concerned it did not satisfy any of these conditions. No one can affirm or prove that such a revolutionary government was holding territory and fighting, with success, the government forces. On the contrary, such a revolutionary government did not declare its invitation from the territory it held but left it to the Iraqi government to declare it on the Iraqi territory ; it was broadcast from Baghdad Radio only after more than one hundred thousand Iraqi troops crossed the border and approached the capital of Kuwait, and after the new Revolutionary Government declared that it had removed the Emir of Kuwait from power, and dissolved the National Council

and established the Free Kuwaiti Government[30]. Again, the world was taken by surprise, as no country was aware of fighting between rebel forces and government forces in Kuwait.

Thus, it is clear that the status of the Revolutionary Government in Kuwait was no more than rebellion where the government forces could easily destroy and bring the dissenters to heel. It is contrary to International Law, to offer any assistance, not to mention the sending of Iraqi forces to Kuwait, to those rebels. In 1900, the Institute of International Law agreed on a resolution covering foreign intervention and the duties of states. It declared in Article 1 paragraph 2 of the Resolution that states are bound " ***not to furnish the insurgents with either arms, ammunition, military goods or financial aid***"[31].

Iraq's acceptance of an invitation, assuming there was one, was contrary to International Law which gives the incumbent government all the privileges vis a vis the rebels. A state is duty-bound not to recognise such rebels as belligerents and not to extend to them assistance on an equal footing with the incumbent government. This fact was clearly illustrated by Carner when

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30 See The Crime of Iraqi Invasion of Kuwait: Events and Documents, Kuwait Information Centre, Cairo, 1990., p11.

31 Op.cit Note (20)

he said:

> **" There is no rule of International Law which forbids the government of another state from rendering assistance to the established legitimate government of another state with the aim of enabling it to suppress an insurrection against its authority"**[32]

Thus, as long as assistance is accorded to the incumbent government, a foreign state is committing no breach of International Law; but in extending assistance to rebels, such a state is breaching the rules of International Law. According to International Law, an incumbent government is the sole representative of the people so long as it controls the country. This criterion is recognised by states and became one of the basic tenets of International Law. Following the abolition of the monarchy in 1973 in Greece by military Junta and its replacement by a republic , the Foreign Secretary said:

> **" We deplore the fact that the monarchy has been brought to an end by this illegal government...nevertheless, they are a government with whom we have had relations all these years**

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32 J. Carner, " Question of Inernational Law in the Spanish Civil war", A .J.I.L, Vol 31, 1937, p 68.

and the situation has not changed in that respect. They are in control of the country and therefore we recognize them".[33]

In the Tinoco case, the effectiveness of the government was also considered the most important factor in determining the legality of relations with a state. It established the fact that a government which firmly controls its territory, though not recognized by other states, is still the de facto government which has the authority to speak for the state. In the Tinoco case it was ruled that:

" The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is , has it really established itself in such a way that all within its influence recognize its control, and there is no opposing force assuming to be a government in its place"[34]

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33 A.C. Bandu, "Recognition of the ReVolutionary Authorities: Law and Practice of state". I.C.L.Q., Vol 27, 1978, p 30.

34 See Judicial Decisions involving questions of International Law: Arbitration between Britain and Cost Rica, 1923, (Tinoco Case), A. J.I.L., Vol 18, 1924, p.147-155.

According to the White Man, Digest of International Law the test of effectiveness depends upon the existence of the following factors:

1- **Actual possession of supreme power by the government in the district or state over which its jurisdiction extends.**

2- **The acceptance or acknowledgment of its authority by the mass of the people as proved by their general acquiescence in rendering habitual obedience.**

3- **The recognition of the government as de facto or de jure by foreign government.**[35]

Therefore, if a government is in firm control of its territory, no other group has the right to invite another nation to its rescue. Such an invitation is only a prerogative belonging to the incumbent government who alone can exercise it. The revolutionary government in Kuwait was not in firm control, otherwise it would not have invited the Iraqi forces to its aid. Moreover, its authority was not accepted by the mass of the people but on the contrary they resisted the Iraqis in every possible way and available means.[36] As to the condition of recognition, no government recognised the revolutionary regime. On the

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35 M.M White Man, Digest of International Law, Vol I, 1963, p 920.

36 This point will be dealt with extensively under the heading of Iraqi invasion and Kuwaiti right to self -determination.

contrary, all states both in Arab and Western worlds called upon Iraq to withdraw its forces from Kuwait and treated its presence as an illegal occupation and naked aggression.

In fact, the Iraqi claim that an invitation was extended to them by a revolutionary government in Kuwait was false from the start. Every one is aware that an invasion was launched before an invitation was extended to the Iraqi forces. According to Al-Bazaz, an official close to the Iraqi government, a plan to occupy Kuwait was entertained long before the invasion. In mid July, a meeting was convened in Saddam Hussein's palace attended by the President himself, his son-in-law Hussein Kamal and the leader of the Republican Army Ayad Foutiah Alraawi, to discuss a detailed plan to occupy Kuwait or part of it. This plan, by the end of the meeting, was agreed upon with no dissenters[37].

The plan included two options called: plan "**A**" and plan "**B**". Plan **A** was aimed at the occupation of two Kuwaiti Islands, Warba and Boubyan, and a strip of territory extending 50 kilometers from the Kuwaiti border. Plan **B** was to push the Iraqi forces to occupy the whole of Kuwait.[38]

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[37] Saad Al-Bazaz, Generals are the last to Know, Jordan, 1996, p 54-55

[38] Ibid

Indeed, after hesitation Iraq decided to follow plan **B** and preparation was underway. The Iraqi government had already nominated a team of leading journalists, engineers and propagandists which were all relocated on Kuwaiti territory in order to find a convenient location to install advanced equipment for the interception of Kuwaiti broadcasting . However, for several reasons the team failed to find the suitable location[39], and were forced to find an alternative one in order to secure communication between the station in Kuwait and broadcasting equipment established in the south of Iraq.
After twenty four hours, Iraqi forces were ordered to invade, but the technical team failed again in its mission, and so the Iraqi government was forced to broadcast, from the Iraqi station in Baghdad, the invitation and the other statements attributable to revolutionary government.[40]

The most revealing of all statements was the statement of invitation. According to Al-Bazaz, who was very close to the Iraqi leadership, the invitation was written by three high Iraqi officials, Tariak Aziz, Hamad Hamadi and Latif Nassif. He added that when there was no news received from the technical team, the Iraqi information minister suggested that the first statement attributable to a military coup in Kuwait should be broadcast

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[39] Ibid, pp 78- 79.

[40] Ibid. For a full account of Iraqi preparation see pp 90-94.

from the Basra station in the name of Free Kuwait Broadcasting Station.[41] He decided also that there should be a time lapse before broadcasting such a statement[42]. This brief account proves beyond any doubt that there was no invitation from the so called revolutionary government, and that the invitation was just a mere alibi used by Iraq to make its military action appear legitimate. Iraq also tried hard in the beginning to find some leading Kuwaiti figures, who were ready to co-operate with it, but to no avail. It was reported that Iraqi ministers, during the second day of the invasion, contacted Abdulaziz Al-Rashid president of the Medical Association in Kuwait, who was known for his support of Iraq, and asked him to co-operate with Iraqi forces but he declined and so did the Kuwaiti poet Yaqoub Abdulaziz al-Rashid who told the Iraqi minister of Information that he had no knowledge of a revolution in Kuwait[43].

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41 Ibid, p 95. Iraqi authorities contacted other Kuwait leading personalities such as Abdullah Ahmad Hussain, a diplomat and writer, who described what had happened as a disaster, Ahmad Abdulaziz Al- Sadoun and Ahmad Al- Sakaaf. Moreover, a senior Palestinian official failed also to convince Abdulaziz Al- Saqar, a leading figure in Kuwait, to form a Kuwaiti government replacing the legitimate one.

42 Ibid.

43 Ibid, pp 102-103.

In fact the Iraqi officials encountered, in their search for a leading personality to cooperate with them, total rejection from all they contacted. And to their surprise, they were also rejected by those who were heading the branch of the Baath party in Kuwait and who were supposed to be more loyal to Baath than Kuwait[44].

When the Iraqi authorities failed to find any leading personalities who would co-operate with them, it was left with one option which was to resort to an unaccustomed one in the history of illegal invasion. The Iraqi authorities asked a junior officer in the Kuwaiti army, named Al'a Husain, who had co-operated long ago with Iraq when he was studying at the Iraqi university, to form a government. In order to find more Kuwaitis, Hussein Kamil, in charge of the operation conducted by Republican Army in Kuwait, brought all Kuwaiti officers who were taken prisoner in the first two days of the invasion and asked them one question :

> **" Do you want to be a minister in a new revolutionary government in Kuwait?"**[45].

After two hours, the Iraqi government succeeded in choosing six officers who agreed to cooperate with Al'a Hussein.

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[44] Ibid.

[45] Ibid, p 105.

This government was later brought to see Saddam in his palace and to be presented to the world as the new government. Even Saddam himself was not convinced of this, as he was reported saying to his son-in-law who staged this show:

> **" We will give Al'a Hussein a rank of General, the same rank Mua'mar Al-Gadafi holds, it is more than enough for a man ruling a tiny area of Kuwait's size".**[46]

This brief account of facts before and after the invasion, proves unequivocally that the Iraqi intervention and its occupation of Kuwait was illegal and against International Law. This is clear from the fact that the incumbent government encountered no challenge from any rebels and was in total control . The so called 'rebels' were just a mere alibi set up by Iraq to legitimize their invasion. The recognition of the rebel government by Iraq, which lacksed the necessary condition of recognition, is a delicate act committed against the incumbent government of Kuwait[47]. For contemporary International Law completely prohibits the use of force and Article 2 (4) is very clear on this subject[48]. Such

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46 Ibid, pp 105-106.

47 H Lauterpacht, Recognition In International Law, Cambridge, 1947, p283; see op cit. (note 22), p 206.

48 Article 2 (4) says: " **All Member shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".**

a prohibition is absolute and any breach of it is characterized as a war of aggression. Article (1) of the Definition of Aggression reads:

> **"aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition"[49].**

Moreover, Article 6 (a) the Charter of the International Military Tribunal At Nuremberg, which in turn relied on the renunciation of war in the Kellogg-Briand pact, said that the :

> **" Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing are crimes against peace"[50].**

The International Military Tribunal Court ruled in its judgment that:

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[49] General Assembly Resolution No. 3314 (XXIX), 29 (1) R.G.A. 142,144, 1974.

[50] see Charter of the International Military Tribunal, Annexed to the London Agreement for the establishment of an International Military Tribunal, 1945, 9 International Legislation M.O.Hudson ed., 1931-1951., pp 632-637.

"to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".[51]

It is clear that the Iraqi invasion of Kuwait is contrary to International Law, and has no basis in either fact or law, and is a clear illustration of naked aggression against a peaceful member state.

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[51] International Military Tribunal (Nuremberg), Judgment (1946), Trial Of Major War Criminal before the International Military Tribunal, Cited in Yoram Dinstein, War Aggression and Self-Defence, Cambridge, 1988, p 115.

VI Iraqi Invasion And The Right of Kuwaitis to Self-Determination.

1- Iraqi Reference to the principle of Self-Determination.

The Iraqi invasion of Kuwait was referred to in an Iraqi statement as a step towards helping the Kuwaitis realise the principle of self-determination, a principle enshrined in the Charter, Resolutions of General Assembly and many legal documents. On August 2-1990, the Iraqi authorities broadcasted a statement saying, " **The Iraqi forces moved towards Kuwait and occupied at least two posts on the border. The Iraqi forces took such an action in response to an appeal from the free people of Kuwait who overthrew their regime".**[52]

The reliance of Iraq on the principle of self-determination to justify its illegal invasion deserves a thorough examination. For the principle of self-determination itself has not yet been recognised by all writers to have a binding legal concept not to mention its invocation to legitimize illegal activities.

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[52] Op cit note (4), p 7.

Looking into the Iraqi claim one question arises: was the Iraqi regime justified in using this principle as an excuse to invade Kuwait? However, before proceeding to discuss the principle of self-determination and its use to validate the use of force in International Law, it is necessary briefly to review its origin and development and its binding nature in international Law.

2- A Brief account of the History of Self-determination and its current status in Contemporary International Law.

Generally speaking, the principle of self-determination can be traced back to the French Revolution which asserted the right of the people to choose their own political system and government. However, the principle first came to light in the work of many eminent writers such as Ruosseau, John Locke and Thomas Paine. In such writings, the ideas of equality for all men and their right to be governed with their consent developed quickly into a political awareness on the part of people that they themselves are the masters of their destiny. In other words, democracy played a pivotal role in developing the principle in a sense that made people strongly believe that they could improve their position and hence become different from other nations[53].

Writers stressed the fact that both democracy and nationalism were mixed together and paved the way for the emergence of the principle of self-determination. H. Johnson declared that :

> **" Democracy has been significant in respect to nationalist doctrine because it is the basis upon which each nation is formed and it accepts the nation as a unit of self-government**

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[53] Hans Kohn, " Changing Africa In A Changing World", Current History, Vol XL1, October 1961, p 194.

with an inherent right not only to choose its government but to determine its status as a state".[54]

The principle later gained further strength through the American Declaration of Independence,[55] Lenin's declaration[56] in which equal rights and sovereignty of the people of Russia and their right to self-determination were affirmed. The principle, despite being recognized by writers and enshrined in declarations, failed to cross political ground into the legal arena. This fact was fully recognized by the Commission of Jurists in the Aaland Island case[57]. Despite that, the League of Nations, due to opposition from some states, failed to include it in its Charter. This position, however, changed a great deal with the emergence of the United Nations, in the wake of Second World War.

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54 Harold.S. Johnson, Self-Determination Within The Community Of Nations, 1967, Leyden,. p 26.

55 I. Brownlie, " An Essay In The History Of Self-Determination" In Grotian Society Papers 1968; Studies In The History Of The Law Of Nations, Edited by H. Alexandrowicz, 1970, p 92. The American Declaration stressed on the following " **We hold these truth to be self - evident, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty,... that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it and institute a new government**".

56 Djura Ninncic, The Problem Of Sovereignty In The Charter And In The Practice Of The United Nations, 1970, pp 219-220.

57 Ibid, pp 220-221.

The Charter of the United Nations transferred the principle from its moral authority in the political thinking into the legal arena where its legal nature became a subject of debate and controversy. The Charter recognised the principle and enshrined it in Article (1) which enumerated the purposes of the Charter and tied the development of friendly relations to the respect :

> **"For the principle of equal rights and self-determination of peoples".**[58]

The reference to the principle in the Charter was not confined only to this article but is also mentioned Article 55 [59].

Despite the recognition in the Charter, and its application in a colonial context, the principle has yet failed to materialize as a legal principle with a binding nature. This failure is attributed to the ambiguity surrounding the word "self".[60] Thus as far as a colonial context is concerned, the principle

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58 Article 1 (2) of the United Nations Charter, Cited In Basic Documents In Inernational Law, edited by Ian Brownlie, Oxford, 1983, p 3.

59 Ibid, Article 55 reads " **With a view to the creation of conditions of stability and well -being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote the following......**".

60 Michla Pomerance, Self-Determination In Law And Practice: The New Doctrine In The United Nations, London, 1982, pp 14-28.

is fully accepted and recognized. In 1960, the General Assembly passed a Resolution entitled, the Declaration On The Granting Of Independence To Colonial Peoples which reads :

> **" The subjection of people to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, and is contrary to the Charter of the United Nations... and all people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".**[61]

The passing of the resolution, despite the objection of colonial powers, hastened one eminent writer to say ;

> **" self determination is regarded, not as a right enforceable at some future time under indefinite circumstances, but as a legal right enforceable here and now".**[62]

However, such a claim was not widely agreed upon. The majority of states

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61 U.N. G.A. Res. 1514 (XV) 14 December 1960.

62 Rosalyn Higgins, The Development Of Inernational Law Through The Political Organs Of The United Nations, 1960, p 100.

strongly opposed the application of the principle outside the domain of a colonial context especially the Third World Countries which perceived it as an invitation to encourage secession[63].

The experience of the Katanga secession in the Congo (1960-1963) and the Biafrian secession in Nigeria (1967-1970), where Third World countries succeeded in passing a Resolution in the General Assembly calling on the United Nations Forces to end the secession by force if necessary, are clear examples[64]. Later on, the Secretary General of the United Nations asserted this conviction by saying, when a state is admitted to the family of nations, the:

> **" United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its member state".**[65]

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64 Anthony Verrier, International Peace Keeping: United Nations Force In A Troubled World, NewYork, 1980, p 7.

65 A Statement of the Secretary General Of United Nations . Thant in a press conference at Dakar, 4th January 1970, cited in ,U.N Monthly Chronicle(U.N.M.C), No 2. Feb 1970, p 36.

Rosalyn Higgins in a recent article affirmed that view by saying :

> **"..The right of self-determination continues beyond the moment of decolonization, and allows choices as to political and economic systems within the existing boundaries of the state. Of course, it is very desirable that there should be opportunities for free access to each other by members of the same tribe, group or people living on opposite sides of an international boundary. But that is to be achieved by neighbourly relations and open frontiers, not by demands for the redrawing of international boundaries. *Uti possideties* does not prevent states freely agreeing to redraw their frontiers. But self-determination does not require this of them"[66].**

Despite that pledge, the international community accepted the emergence of Bangladesh, but even that cannot be considered to be the rule rather than the exception. More to this fact is the Resolution of the Principles of Friendly Relations among States which in paragraph (7) reads:

> **" Nothing in the foregoing paragraph shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial**

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[66] Rosalyn Higgins , Problems & Process , 1ed,Oxford 1994, p.123-24.

> **integrity or political unity of sovereign and independent states."[67]**

On the other hand, there are some writers who believe that by now, the principle is a legal one and binds all states. Bowett questioned the insistence on territorial equality of states, rather than on the well being of the people in the territory in question. He continued :

> **" in such cases one comes face to face not with arguments of economic and political good sense, but with arguments based upon political pride and a theory of statehood which attaches territory to state rather than to the inhabitants of territory. One is left with the very basic question, what is the purpose of the state? It has at that stage ceased to be the promotion of the well being of the people of the territory according to their freely expressed desire".[68]**

In her authoritative book, The Development Of International Law Through The Political Organ Of The United Nations, Rosalyn Higgins asserted that the resolution of the General Assembly over seventeen years of evolving

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[67] Declaration On The Principle Of Inemational Law Concerning Friendly Relations And Co-operation Among States In Accordance with The Charter Of The United Nations. See G.A. Res. 2625 (XXV).24October 1970 in ,I.L.M.,Vol 9, 1970, p1295.

practice pertaining to the principle of self determination " **provides ample evidence that there now exists a legal right of self - determination**"[69]. Of the same

opinion, Sohn regarded the General Assembly Resolutions as an important component of International Law[70]Sureda[71] and Asamoah have also taken a positive attitude toward the Resolution of the General Assembly as the latter went further by viewing them as state practice.[72] Despite the strength of the above writers' argument, one has to be hesitant in asserting the principle as a legal right, for it lacks, as Fitzmaurice says, the basic element of being easy to define. He said:

> " **A legal principle.....if it is truly one, must be capable of definition and circumscription, and of application in accordance with objective rather than merely subjective criteria..**"[73].

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68 D.W.Bowett, " Self-Determination And Positive Rights In The Developing Countries" in Proc.Am.Soc.I.L. 1966-68,. p 130-132.

69 Op cit note (59), p 104.

70 L.B. Sohn," The Universal Declaration Of Human Rights", J.In't.Comm.Jur, Vol 8, 1967, pp 17-20; see also, S. Prakash," Has Self-Determination Become A Principle Of International Today ", I. J. I.L , Vol.14, 1974,. p 348.

71 see A.R. Sureda, The EVolution Of The Right Of Self -Determination: A Study Of The United Nations Practice. 1973.

72 O.Y. Asamoah, The Legal Significance Of The Declaration Of The General Assembly Of The United Nations, 1966, p 243.

73 Sir Gerald Fitzmaurice " H. Lauterpacht: The Scholar As A Judge Part II", B.Y.B.I.L., Vol 38, 1962, p10.

In fact, it could be said that whatever the logic of those who assert the principle as a legal right, one has to conform with reality which proves that the principle has not yet been universally acknowledged beyond the colonial context. What is meant here is that the principle has not been given the status with which one can legitimize the use of force for its implementation. There is no doubt that the principle acquired a high moral ground in the Charter of United Nations and many other instruments especially in the domain of human rights. However, one can find no ground whatsoever in the Charter or these instruments for its forceful implementation. For to implement that right by force runs against the logic of the ban enshrined in the Charter against the use of force.

3-The legality of the Iraqi invasion to implement the right of the Kuwaiti people to self-determination.

It has already been established that self-determination has not yet acquired a legal status whereby external force could be used for its implementation. To accept that right, would present an awkward dilemma especially in the context of foreign power involvement in the internal affairs of a state. This dilemma was well defined by one writer of International Law when he said:

> **" If intervention on the ground of mere friendship were allowed, it would be idle to speak seriously of the right of independence. Supposing the intervention was to be directed against the existing government, independence is violated by any attempt to prevent the organ of the state from managing the state's affairs in its own way. Supposing it is on the other hand, to be directed against the rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently there is a doubt as to which side would ultimately establish itself as the legal representative of the state. If, again, intervention is based upon an opinion, as to the merit of the question at issue, the intervening state takes upon itself to pass judgment in a matter which, having nothing to do with the**

relations of the states, must be regarded as being for legal purposes beyond the range of its vision".[74]

It is apparent from this statement that intervention on behalf of rebels will eventually prejudice the rights of a state which ought to be respected by others and shows that rebels are unable to defend themselves and impose their views without any outside assistance. This prohibition is based,to some extent, on the assumption that assistance to the government will prejudice the right of people to self-determination[75]and the same right will be affected by assistance to the rebels. However, it is easy for any state to claim that its assistance whether it was for government or rebels is aimed to help people in question to self-determination. This fact was clearly illustrated in the Vietnam war where the United States of America claimed that its support for the incumbent government was to help people to self-determination whereas the Soviet Union and China on the other hand claimed that their assistance to the

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74 William E. Hall, Inernational Law, Ed. Pearce Higgins, 8th ed, 1924, p 347.

75 T.J. Lawrence, The Principle Of Inernational Law, 7th ed., Revised by Percy H.Winfield,1923, pp131-133; C.C Hyde, Inernational Law As Interpreted And Applied By The United States, 2ed, 1945, p235.; Elery E.Stowel, Intervention In Inernational Law, 1921, pp 329-345.; W.Friedman, The Changing Structure Of Inernational Law, 1964, pp262-268.

rebels was for the realization of self-determination. However, the only way to achieve self-determination, in an internal conflict, is to allow people to choose their destiny without any outside intervention. This is clear, as Rohlik says, from the context of Article 2 (4) which acknowledges that :

> **" the people of a territory of a state form one of the constituent elements of that state and their right of self-determination can find its expression only in their right to be left alone to determine for themselves the form of government, the political, social, and economic system, or to dismember the state in question and establish two or more states"**[76]

Taking all this into account, one cannot find any excuse for the Iraqi invasion and occupation of Kuwait. Iraq could not have invoked the principle of self-determination as it is still , as has been shown, surrounded by ambiguity and its legal status has not yet been agreed upon. Moreover, it is clear that a state

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[76] Josef Rohlik, " Some Remarks On Self-Defence And Intervention: A Reaction To Reading Law And Civil War In The Modern World, Ga.J.In't.L. & Comp.L., Vol.6, 1976, p.400.

cannot use force to implement the principle of self-determination. This fact hasbeen enhanced by many Resolutions, amongst them the General Assembly Resolution on the Inadmissibility of Intervention in Domestic Affairs which affirms that states should respect the right of self-determination and independence of the people by not intervening ;

> **" directly or indirectly, for any reason whatsoever in the internal or external affairs of any other states".**[77]

In the Resolutions of Friendly Relations, a phrase was inserted in which those who were denied the right of self-determination are entitled to ;

> **" seek and to receive support in accordance with the purpose and principles of the Charter"**[78].

However, that support is generally agreed to be, despite some objections,

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77 Resolution 213 (XX) On The Inadmissibility Of Intervention In The Domestic Affairs Of States And The Protection Of Their Independence And Sovereignty, 21 December 1965.

78 G. A .Res. . 2625, October 24, 1970. Cited in D.J. Harris, Cases and Materials On International Law, 3rd ed., London, 1983, p783-787. **In this Resolution, there were two views regarding the use of force; the Third World Countries in alliance with Socialist states defended the right of states to give military support to those people who are struggling for achieving self-determination. On the other hand, the western world, rejected this trend and insisted that the use of force is outlawed by the charter and the only support is permissible is the moral support.**

moral support only.[79] The same issue is raised again in the Definition of Aggression[80]. However, any reading of both Resolutions will affirm that using force to help people fight for their right to self-determination is not permitted. In the Friendly Relation Resolution, stress was always directed towards the principle of non-intervention and that the realization of the principle of self-determination of peoples, must be " **in accordance with the provisions of the charter**".[81] Thus, any provisions in the Resolution to be valid must be in accordance with the Charter; and since the Charter outlaws the use of force, one can claim that states are not allowed to intervene by force to support people fighting for self-determination. This fact was clearly illustrated by the American representative to the United Nations, Seymour Finger when he said:

> **" It was not the United States view that people should be denied the right to resort to any means at their disposal, including violence, if armed suppression by a colonial power required it. Indeed, the United States itself was to resort to violence in order to gain independence. The difficulty lay in giving a general endorsement by the United Nations, an**

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79 Ibid.

80 J.Stone, Conflict Through Consensus: United Nations Approach To Aggression, 1977, pp 66-86.

81 Op cit (75).

> **Organization dedicated to peace, to such violence and in employing language which suggests that member states have an obligation to provide material assistance to such violent actions against other member states.**
> **Such action could hardly be reconciled with the requirements of the Charter of the United Nations.**[82]

The Iraqi claim that its action in Kuwait was in response to a call from the free people of Kuwait is filled with ambiguity. For it is not clear what the Iraqi statement meant by the expression, " **Free people of Kuwait**". This expression could either mean a section of the population or the whole of the people of Kuwait. Thus, it is very important for Iraq to show that the all Kuwaitis or the majority of them were against their government and they indeed appealed to Iraq to free them and let them realize their right to self-determination. As far as Iraq is concerned, such proof has never been presented to the world. In fact, Iraq invaded the country not to uphold the principle of self-determinations, rather to suppress it. This was very evident from the resistance that the Iraqi forces encountered during their occupation of Kuwait.

After the initial occupation of Kuwait, the Iraqi authorities tried their best to impose their writ over Kuwait following the fleeing of the Emir of Kuwait

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82 Seymour M.Finger, " A New Approach To Colonial Problem At The United Nations", I.O., Vol 26, 1972, pp 145-46.

with his government. However, the people of Kuwait, who were supposed to welcome the Iraqi forces, resorted to arms to defend their home land. This resistance took many forms the first of which was civil disobedience. The Iraqi authority in Kuwait ordered all Kuwaiti employees to return to their jobs and threatened any one who failed to comply with sacking. However, all Kuwaitis were firm on this issue and refused to answer such a demand[83]. Later on, resistance to occupation extended to involve every Kuwaiti and become more organized. Iraqi forces increased their violent suppression and redeployed forces to prevent the military activities of resistance. Moreover, they started a search campaign across Kuwait, and anyone who was found to have a link with the resistance or carried its secret statements was executed instantly.[84]

In the face of such evidence, it becomes crystal clear that the Iraqi invasion was not to implement the principle of self-determination but rather to occupy a member state and erase it from the map. And this is exactly what happened later, when Iraq announced that the Kuwaiti Free Government asked to be united with Iraq. However, when Iraq failed to convince the world of this excuse, it resorted again to its old claim that Kuwait was a part of Iraq and that

83 Ali Muhammad Al-Dumkhi, Kuwaiti under occupation, Dubai, 1991, pp 199-190.

84 Pierre Salinger and Eric Laurent, The Gulf War, Paris, pp 221-222.

it was the right time now to join the mother land. Iraq later declared Kuwait to be the 19th province of Iraq.[85]

In brief, the Iraqi invasion of Kuwait in the name of self-determination is supported neither by fact nor by law. For there was no call from the people of Kuwait, as Iraq claimed, but on the contrary a total rejection of such an invasion was expressed on the part of Kuwaiti people. As to the law, it is clear that the principle still lacks precise definition and there is total agreement that a state cannot invade another to implement the principle of self-determination. It is clear that the Iraq invasion was solely carried out to occupy Kuwait and exploit its natural resources in defiance of International Law and the international community.

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[85] Peter Rowe, The Gulf War 1990-1991 In International And English Law, 1ed. 1993.London,p.29-34.and see Kuwait waujoud wa hudoud, (Kwait existece as a territory and state), Kuwait liltakakum al almi, Egypt, 1990.p.17.

Conclusion

The invasion of Kuwait represented a clear violation of International Law and revealed the weaknesses of some legal principles which certain states never hesitate to exploit in order to further their interests. The invasion of Kuwait was a clear-cut case of illegal intervention, and yet Iraq has not refrained from using legal principles to justify its illegal action. The issue of invitation in International Law and the principle of self-determination are two clear examples.

International Law recognized the legality of invitation but failed to create a mechanism by which such an invitation could be judged legal or not. In other words, International Law left the issue to the discretion of the state alone. It is accepted that an invitation cannot be accepted unless it is issued by the legitimate authority who has managed to control the country and enjoy the recognition of foreign governments. Such an invitation cannot be issued by rebels or insurgents who are considered unauthorized to do so on the ground that they still lack the necessary requirements set by International Law. According to that law, it is only the belligerents who are entitled to issue an invitation since they are considered on an equal footing with the incumbent government. However, International Law left the interested state free to

determine the status of belligerency. When a state is given this privilege it cannot refrain from using it to its advantage.

This fact was shown very clearly in the Iraqi invasion of Kuwait. The Iraqi government claimed its invasion was in response to an invitation from the new legitimate government. However, after examination, it was clear that such an invitation was never issued by such a government. It was written by senior Iraqi officials and broadcasted from Iraqi territory. Indeed, there was no civil war in Kuwait and no revolution whatsoever, but a complete control by the Kuwaiti state. The so called Revolutionary Government was not in control and was non-existent when Iraqi forces invaded the country. It was formed later by the Iraqi authority and after a tireless search to find Kuwaiti citizens ready to co-operate with the occupying forces. Despite all of these facts, Iraq recognized this puppet government and claimed that its invasion was in response to an invitation recognized by International Law.

As to the principle of self-determination and its use by Iraq to legitimize its invasion, one can say clearly that such an invocation is not sound at all. The principle of self-determination still lacks the required accuracy in its definition especially of the word 'self'. Moreover, its legal binding nature is not widely recognized by prominent writers. However, all international writers agree that the use of force is illegal in international relations and is

not permitted at all except in self-defence. To use force to implement the principle of self-determination is to stretch the legal rule beyond imagination. The Charter of the United Nations and the practice of states have demonstrated that the use of force is illegal and no state is allowed to use it to exercise the principle of self-determination.

The Iraqi government's claim that it responded to the appeal of the Kuwaiti people to self-determination is a contradiction in itself. The Iraqi forces had not received an appeal from the Kuwaiti people but on the contrary the latter condemned the invasion and viewed it as an evil means to deprive them from that right. They resisted that invasion with every available means and the Iraqi forces responded with severe brutality to put down such a resistance. It is impossible to imagine a people inviting a state to come to their aid and then to turn against it. The people of Kuwait appealed to every Muslim nation and foreign state to come to their help and restore their right to freedom and independence.

In general, one can say without hesitation that the Iraqi invasion of Kuwait under the pretext of invitation and self-determination was an excuse contrary to International Law which forbids force and promotes peaceful resolution of conflicts amongst states.

Chapter Five

The Legality of the Iraqi Invasion Under Islamic International Law.

Introduction.

Islamic International Law differs in many respects from modern International Law which commands, nowadays, the respect of the international community. International Islamic Law is based primarily on the Quran (Muslim Holy Book) and the Sunnah (tradition of the Prophet) while modern International Law recognizes none of these sources but relies on that which is defined in Article 38 of the Statute of the International Court of Justice[1]. Both laws have their origins in different concepts. Islamic law owes its existence to the will

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[1] Article 38 says " **The Court, whose function is to decide in accordance with International Law as are submitted to it, shall apply:**

a- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b-international custom, as evidence of a general practice accepted as law;
c-the general principles of law recognized by civilized nations;
d-Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". See Ian Brownlie, Basic Documents In International Law, 3ed, Oxford, 1983, p 397.

of God while the modern International Law is based on a secular concept developed primarily by European cultures. It took many years of development for modern International Law to crystallize in its present form.

By way of contrast, Islamic International Law has never experienced such development, for its rules and concepts were already determined by the will of God and acquired the status of permanence which cannot be altered or canceled. These rules and concepts are found initially in the Quran and the Sunnah which furnishes all necessary rules of conduct and guidance for Muslims[2]. In this respect, Islamic International Law is applicable only to those who believe in Islam and hence it lacks the universality of modern International Law. In his book "the Muslim Community and the State" Gibb underlines the limitation of Islamic law and the extent of its application to the Umma (the community of Muslims), as follows :

> **" At the root of all Islamic political concepts lies the doctrine of the Umma, the community of Muslims. In its internal aspect, the Umma consists of the totality (Jama'a) of individuals bound to one ano ther by ties, not of kinship or race, but of religion, in that all its members profess their belief in one God, Allah, and in their relation to Him, all are equal, without distinctions of rank, class or race...**

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[2] M. Hamidullah, The Muslim Conduct of States, Lahore, Ashraf press, 1977, p60-61.

The head of the Umma is Allah, and Allah alone. His rule is immediate, and His commands, as revealed to Mohammed, embody the Law and Constitution of the Umma. Since God is Himself the sole Legislator, there can be no room in Islamic political theory for legislation or legislative powers, whether enjoyed by a temporal ruler or by any kind of assembly. There can be no "sovereign state", in the sense that the state has the right to exact its own law, though it may have some freedom in determining its constitutional structure. The law precedes the State, both logically and in terms of time; and the State exists for the sole purpose of maintaining and enforcing the Law"[3]

It is noticeable that both International Islamic and modern International Laws are entirely dependent on the concept of peace as an indispensable element in their constitution. Islam is derived from the concept on peace and surrender to the will of God. The stress of peace in Islam is paramount. The word peace and its derivatives are cited in far more than the word of war (Harb) in the

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[3] H.A.R. Gibb, " Constitutional Organization: The Muslim Community and the State" in Law in the Middle East, ed by Majid Khadduri and Herbert J. Lesbesny (Washington D.C.:The Middle East Institute,1955) p 3. It is worth mentioning here that Gibb's comment is not reflecting the true state of facts. Islam is indeed universal and it is the believe of all muslims that such law is applicable to Muslims and non Muslims alike. The universality of such law is based on the fact that it is God's Law and inteded to be universal.

Quran.[4] The importance of peace in Islamic International Law is shown again by the appeal of God to all Muslims, as evident in the following Quranic verse :

> **" O mankind! We created you from a single (pair) of a male and a female and made you into nations and tribes, that ye may know each other (not that ye may despise each other). The most honoured of you in the sight of God is (he who is) the most righteous of you"[5].**

The Prophet of Islam stressed in many Hadith (traditions) the importance of co-operation between all peoples, and here I cite two by way of example : He said :

> **" All of you are the descendants of Adam, and Adam was created from earth; so let no people boast of their forefathers".[6]**

Another Hadith reads:

> **" No Arab superiority over an alien, nor a white man over a Negro, save in piety"[7].**

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4 The Holy Quran, Translated By A.Ysuf Ali, Amana corp, 1983, see S.2:279; 5:33; 64;8:57; 9; 107;47; 4. **The term war in the Quarn means an aggressive war which is initiated for the sake of subjection of other peoples. Such term and its derivative are mentioned six times where the term peace is cited in more than hundred verses of the Quran.**

5 Ibid. S 49, 13.

6 Cited by Abdurrahmman Azzam, in Ar-Rissalah Al-Khalidah (Cairo, 1946), p 143.and for more Details see Abi Ishaq Ibrahem Bin Al-Seare, Maani Al-Quran Wa-Irabouh Li-Azajaj, Vol5 Beirut 1988-1408 A.D.

Similarly, Grotius realized the importance of peace obtaining in a Christian world at a time when war was rampant :

> **" Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human".**[8]

Grotius suggested that the law which ought to regulate relations between states must be based on natural law; the law which treats all states on an equal footing admits no superior[9].

One does not insist here that the two laws under discussion are compatible in every respect. On the contrary, there are some differences between them in methodology and sources, but both of them converge where the importance of peace, sanctity of treaties, and human rights are concerned.

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7 Cited by M.R. Rida, in AL-Wahi al-Mohammedi (Cairo, 5th edit,.1367 A.H) p 226.

8 Hugo Grotius, De Jure Belli; Ac Pacis Libri Tres, Vol II (Trans Francis W. Kelsey)Oxford, p 20.

9 Ibid

The insistence of Iraq that the invasion of Kuwait was consonant with Islamic law and that the international alliance against Iraq violated such law deserves to be looked at thoroughly in this chapter. However, before embarking on this task, it is necessary to give a brief account of the sources of Islamic International Law and its application.

1- Sources of Islamic International Law.

The sources of Islamic International Law are divided into two : primary and secondary sources.

2- *The Primary Sources of Islamic International Law.*

a- The holy book (Quran).

The first source of Islamic International Law is the Quran (holy book) which contains all instructions revealed by God to the Prophet Mohammed. Such instructions are clear and no Muslim disputes their validity and binding nature. Allah says in his holy book :

> **" Verily this is a Revelation from the Lord of the Worlds: With it came the spirit of Faith and Truth to thy heart and mind that thou may admonish in the perspicuous Arabic tongue"**[10].

Muslim Jurists interpreted these verses as evidence that this Quran consists of the words of Allah revealed by Him to his Prophet Mohammed. Thus,

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[10] The Holy Quran, op.cit.(note 4) S 26: 192, 193, .194.

the Quran is regarded by Muslims as their basic religio-political and social constitution and all its commands whether moral or legal must be obeyed and followed. Whilst the validity of the Quran is not disputed there is disagreement as to its interpretation. This disagreement has given rise to the science of Exegesis (ilm al-Tafsir) and Jurisprudence. (Usul- al- Fiqh) .

b- Sunnah (Tradition of the Prophet) .

The second primary source of Islamic International Law is the Sunnah which literally means " **Sunnah a custom sanctioned by tradition; rules of conduct deduced from the words, precepts, actions and decisions of the Prophet Mohammed.** ". It refers to the Prophet's words, endorsements and actions. It primarily serves to explain the Quran or complement it. The importance of the Sunnah is underlined by the Quran, as follows:

> **" O ye who believe! Obey God, and obey the Apostle, And those charged with authority among you . If ye differ in anything among yourselves, refer it to God and His Apostle, If ye do believe in God And the Last Day : That is best, and most suitable for final determination"**[11].

[11] The Holy Quran, op.cit.(note 4) S 4:59.

c- The actions of Rightly Guided Khalifas or (Sahabah).

This is another important source of Islamic International Law where the actions of the Rightful Khalifas were considered binding on all Muslims. This legal strength is derived from the Hadith of the Prophet which reads:

> **" follow my tradition and the tradition of the Rightful Khalifas who will succeed me and never deviate from it".**[12]

It is accepted by all Sunni school of laws who deem the actions of Rightful Khalifas as mandatory when, that is, no rule can be inferred from the Quran or the Sunnah of the Prophet.[13] However, there are others, such as Jafari school, who do not consider the Rightful Khalifas as mandatory.

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12 Narrated by Imam Ahamed , Abo Daoud and Ibn Maja, see Al- Souti,Al-Fatah Al-Kabair, Vol I, p 465.

13 The Ijmaa of the Khalifas (or Sahabah), the third in importance as a source of Islamic Law, was the unanimous opinion of the Sahabah or Khalifas on any point of Law not specified in the Quran or the Sunnah. That is, Ijmaa of the Sahabah or Khalifas was given precedence over the personal opinion of Abu Haneefah and his disciples in their deduction of Islamic Law . The Hanafee (Madh-hab) also recognized the Ijmaa of Muslim Scholars in any age as valid and binding on Muslims.

3- The Secondary Sources of Islamic International Law.

These sources provide the jurists with legal methods by which they might deduce a rule of law. There are occasions where the jurists often encountered difficulties in applying the relevant rule because either an existing rule was considered ambiguous or there was no rule at all[14]. Jurists employed varied methods in order to infer the appropriate rule. If the jurists were unable to infer a rule from the Quran or the Sunnah of the Prophet they referred to Ijmaa (Consensus).

a- Ijmaa (Consensus).

Ijmaa (Consensus) is defined as the unanimous agreement of Muslim jurists in any particular age on questions of law not covered by primary sources. Its authority as a source of law is based on the Quran and the Sunnah of the Prophet.[15] This agreement could be explicit or tacit depending on the relevant

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14 Mohammed Hicham Al-Barhani, Said Al-Zareai fi Al-Sharia al-Islam, Beirut, 1985, p 20-28.

15 It was narrated that the Prophet says:
" **My followers will not agree upon an error or what is wrong**", see Ibn Hazam,Ali ibn Ahmad, Al-Ihkam fi Usul al-Ahkam, Vol 4,Cairo, 1348 A.H.,p 133.

circumstances which obtained on a particular issue.

b- Qiyas (Analogy).

Qiyas (Analogy) is the extension of a Shari'ah value from an original case (asl) to a new case (far') because the latter has the same effective cause ('illah) as the former. Qiyas serves to extend a rule of law from the original text to new issues[16]. One thinks here of the rule regarding the drinking of wine, prohibited in the Quran, extended (through analogy) to that of drinking date wine (nabith).[17]

c- Istihsan, Al-Masalih Al-Mursalah, 'Urf, Istishab, Sadd al-Dhara'i' and Ijtihad.

Istihsan (Equity in Islamic Law) is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law.[18]

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16 Mohammed Abo Zahra, Al-Jarima wal oqubaat Fi Al-fiqh Al-Islami, Cairo,1976,pp 211-217. and see Mohammed Muslehuddin, Philosophy of Islamic Law And Orientalists,Lahore, pp 141-145.

17 Ibid p141.

18 Op.cit (16), Philosophy of Islamic Law And Orientalists, pp 150-151.

Al-Maslahah al-Mursalah (Considerations of Public Interest) is defined as a consideration which is proper and harmonious with the objectives of the Lawgiver. It secures a benefit or prevents a harm.

'Urf (Custom) is defined as recurring practices which are acceptable to the people of sound nature. Custom which does not contravene the principles of the Shari'ah is valid and authoritative; it must be observed and upheld by a court of law. There are two types of Custom, one is verbal, the other practical.[19]

Istishab (Presumption of Continuity) denotes a rational proof which may be employed in the absence of other indications; specifically, those rules of law and reason whose existence has been proven in the past, and which are presumed to remain so for lack of evidence to establish any change.
Istishab in other words presumes the continuation of both the positive and the negative until the contrary is established by evidence.

Sadd al-Dhara'i' (Blocking the Means) denotes the blocking the means (to evil), namely blocking the means to unacceptable end which is likely to materialize if the means towards it is not obstructed.

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19 Mohammed Hicham Al-Barhani , op.cit (14) pp 36-37.

Finally, **Ijtihad (Personal Reasoning).** The essential unity of the Shari'ah lies in the degree of harmony that is achieved between revelation and reason. Ijtihad is the principal instrument of maintaining this harmony. Ijtihad is duly exercised when occasion arises with the absence of Quranic ruling or Haddith regarding certain matter.[20] For example when Ibn Masood was questioned about the inheritance rights of a woman who had been married without a defined dowary, he said :

> **" I am giving my opinion about her. If it is correct, then it is from Allah, but if it is incorrect, then it is from me and Satan".**[21]

All the above mentioned secondary sources may be invoked by jurists where rules cannot be deduced from the Quran, tradition, Ijmaa (Consensus) and Qiyas (Analogy).

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[20] The school of Islamic Law during the era of the Prophet Mohammed , the foundation of (Fiqh) Islamic Law was laid down in the Prophethood's Ijtihads as well as those of his Sahabah(or Khalifas). At that time, divine revelation in the form of the Quran and the Sunnah constituted the only source of Islamic Law. In the following stage, that of the Righteous Khalifas, the Fiqh principle of Ijmaa (decisions by unanimity) evolved and Ijtihad became an independent principle of Fiqh under the name Qiyas.The Madhab (The school of Islamic Law) during this period was, in reality, that of each of the Righteous Khalifas, since the final say in legal matters rested with them. However, all legal decision were subject to alteration on the basis of recorded statements or practices of the Prophet: that is Hadeeth(the Prophet words). Therefore there was no room for rigidity or factionalism.

[21] Abu Ameenah Bilal Philips, The evolution of Fiqh, Saudi Arabia, 1988, pp 39-40.

4- Brief Historical Account of War in Islamic International Law.

The term 'war'(Harb) is mentioned only three times in the Holy Book, [22] then only in conjunction with the term 'Kufr' (non believing). The Quran also employs the term 'Jihad' to mean war[23]. According to Al-Mawdoodi, a prominent Muslim scholar, Islam avoided the reference to war for one reason. Its expansion through conquest was considered morally legitimate for it was perceived to represent the means to achieve happiness and prosperity for all people.[24]

Thus, Jihad is undertaken to propagate and defend Islam, not to wage war arbitrarily.

Islam emphasises peace above all and considers it to be one of its fundamental tenets. The history of Islam is a clear illustration of this fact.

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22 The Holy Quran, op.cit.(note 4) S 2:279; S 5:33; S 8 :57.

23 Caroline Thomas, New States, Sovereignty and Intervention, Gower, 1985, p.77-78; and see Osman Jumma Damiria, Manhaj Al-Islam Fi Al-Harab Wa Al- Silm, Kuwait, 1982, pp 104-109. Jurists have distinguished four different types of Jihad-that of the heart, of the tongue, of the hands, and finally of the sword.

24 Manhaj Al-Islam, Ibid, 108-109.

When God ordained the Prophet Mohammed to spread His word, the Meccans (al-Mushrikun) opposed Mohammed bitterly for he was carrying in God's message the seed of destruction to their social order. Islam called for equality,[25]and an end to oppression and injustice[26]. The Mushrikun tried every effort to persuade Mohammed to abandon his calling but to no avail, when they resorted to violence. Mohammed was forced to flee and seek a secure refuge in Medina, to where he was pursued by the Mushrikun.[27]

This pursuit continued for a considerable time, and lasted until God ordered Mohammed to defend himself:

> **" For those against whom war is made, permission is given (to fight), because they are wronged; and verily God is most powerful for their aid".**[28]

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25 **"O Mankind! We have created you of male and female, and have divided you into peoples and tribes, that you may become mutually acquainted. The most dignified of you, in the sight of God, is the most pious "** see The Holy Quran, op.cit.(note 4) S 49:13.

25 The Prophet said " **All of you are the descendants of Adam, and Adam was created from earth; so let no people boast of their forefathers"** see Suyuti, Jami Saghir, no6368.

27 The tribe of the Prophet(Quraysh) agreed to lay a seige against the Prophet and his family whereby marriage, trade, and social conduct with them were banned. This seige was so hard and merciless and affected every member of the Prophet's family. See for detail Sirat IbnHisham, and Ali Ali Mansour, Sharia and International Law, 1ed,Cairo 1965, pp 252-259.

28 The Holy Quran, op.cit.(note 4) S 22:39.

This verse permitted Muslims to defend themselves as long as they were subject to oppression, as endorsed by Ali Mansour[29]. Allah says in his holy book :

> " **And why should ye not fight in the cause of God. And of those who, being weak, are ill-treated (and oppressed)? Men, Women, and children, whose cry is : our lord! rescue us from this town, whose people are oprssors; and raise for us from thee One who will protect; and raise for us from thee one who will help !"**[30]

In short, Islamic International Law outlawed aggression and legitimised the defence of one's property, lineage and life.

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29 Ali Monsour, op cit (note 27) p 258.

30 The Holy Quran, op.cit.(note 4) S: 4: 75.

5- The Classification of the World And The Rules Of Conduct Under Islamic International Law.

Islamic International Law determines its relations with other states on a basis that differs from that which informs modern International Law. Though it acknowledges peace as the basic factor in such relations, it nevertheless classifies the international system into Muslim states and Non-Muslim states whereby each one is subject to different rules and treatment. Muslim jurists divided the world into two territories : Dar Al-Islam (the land of Islam) and Dar-al-Harb (the land of war). It is worth mentioning here that such classification is not based on Quranic sources or traditions but on juristic interpretation. In fact, there are no agreement amongst jurists on such classification.

a- Dar Al-Islam

Dar Al-Islam represents the territory governed under Islamic law, whether Muslims be in the majority or not, where the population is required to defend

it by all means[31]. Jurists subdivided Dar Al-Islam into two divisions, namely the Holy land and Hijaz remaining Islamic lands. The Holy land[32] and Hijaz[33]are subject to special rules, as justified by their sanctity. According to the prevalent view, Non Muslims are not allowed to pass through the Holy lands and are not permitted to reside in Hijaz[34].

Muslims and non-Muslims may reside in the remaining Islamic territories in peace and harmony. Non-Muslims in such a territory either have the status of Dhimmi nationals[35]or of temporary protected residents. All Muslims and non-Muslims are subject to the same rules and regulations in all matters except religon.

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31 Mohammed Al-Sadiq Afifi, Al-Islam Wa Al-aliaaqat Al- Dawliwa,(Islam and International Relations),Beirut, 1986, pp 127-128.

32 It comprises of The Two Sacred Mosques in Mecca and Medina .

33 It comprises the area situated between Tuhama and Najid and occupies the second place in sacredness.

34 It was narrated that the Prophet said :

"There must not co-exist two religons in the Arab Peninsula".

35 Dhimmi is a term used to describe the Non Muslim national in a Muslim state where he is treated on an equal footing with other Muslims excepts he pays Jizia (protection tax) in return for protection afforded by Muslims, as exempted from the duty of serving in the army to defend the home land.

B- Dar Al-Harb (land of war) and Dar Al-Ahd (land of covenant).

Those territories in which Muslims are engaged either in war (Dar Al-Harb) or in covenant (Dar Al-Ahd)[36]. As to Dar-Al-Harb the relations with their citizens is not based on peace but war. There are two opinions regarding this matter. One, which defines the land of war as land which is not subject to the jurisdiction of Islamic law or governed by a Muslim ruler[37].

The Second opinion has it that a Dar al-Harb is a legitimate territory for attack if it falls under one of the following descriptions:

1- **That it is not ruled by Islamic law.**

2- **That it is adjacent to a Dar Al-Islam territory where there exists the possibility of an attack by the former against the second[38].**

3- **Where Muslims and Dhimmis no longer feel safe on its territory. Other jurists ruled out the existence of Dar Al-Ahd the moment the Dhimmis accept the protection [39].**

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36 Ibn Kiam Al-Jawzia, Ahkam Ahl Al-Dhimma, (the law of people of covenant), Beirut,Vol II, p 475.

37 Wahb Al-Zuhaili, Athar Al-Harb Fi Al- Fiqh Al- Islami, Beirut, pp172-173.

38 Araf Khalil Abu Aid, Al-Alaqaat Al-Khrijia fi Dawlat Al-Khalafa , (International Relations in Islamic State, Kuwati, 1983, p58.

Such a classification as described above was not known during the Prophet's time nor in the reign of his successors. It was laid down by jurists when neighbouring states clashed with Muslims. This clash forced the jurists to create such categories in order to regulate relations with enemy states[40].

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39 Abi Al- Hassan Ali Bin Mohammed Al-Mawardi, Al-Ahkam Al-Sultania , 1966, p 133.

40 Mohammed Abu Zahra," The Theory Of War in Islam", Egyptian Journal of International Law, Vol 14, 1958, p.14.

6- The legality of the Iraqi Invasion Under The Rule Of Dar Al-Islam.

Despite the nature of the Dar al-Islam classification and its impractical function nowadays in international relations, one might use it to examine its principles in order to determine the legality or illegality of the Iraqi invasion under Islamic International Law.

Iraq, like Kuwait, is a Muslim state and hence its action, in attacking Kuwait, might be examined under the rule of Dar Al-Islam. The first question which arises is: could the Iraqi invasion be seen as *compatible with the rule of Dar* Al-Islam?

Islamic International Law deemed war between Muslims to be an abnormal act. Nevertheless, it admits that such a grave act might take place, and hence has laid down rules for avoiding such conflict. It stressed, as a first step, the moral duty of all Muslims to avoid such conflict, and warned them of the consequences of their act. The Quran says:

> " **The believers are but a single brotherhood. So make peace and reconciliation between your two contending brothers and fear God, that ye may receive Mercy".**[41]

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41 The Holy Quran, op.cit.(note 4) S 49: 10.

This is endorsed by the following verse:

"If a man kills a Believer intentionally, his recompense is hell, to abide therein (for ever), and the wrath and the curse of God are upon him and a dreadful penalty is prepared for him".[42]

Al-Bahi, a Muslim scholar, regarded this latter verse as clear evidence that :

"Muslims should discard conflict and seek peaceful resolution to any dispute. In doing so, they would avoid the dreadful punishment promised by God[43]".

Other Muslim jurists viewed this matter as being equal to the crime of non-belief in God.[44]

The Prophet himself warned the believers of the evil of fighting and asked them to desist from it. He said :

" If the people of earth and the sky have participated in killing a believer, Allah will condemn all of them to hell".[45]

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42 The Holy Quran, op.cit.(note 4) S 2: 93.

43 Mohammed Al-Bahi, Al-Salam Wa Al-Harab Fi Al-Islam, Cairo 1960, p 46.

44 Amir Abdulaziz, Al-Insan Fi Al-Islam., Lebanon ,1984.p 239.

45 Cited in Amir Abdulaziz, Ibid, p 240.and see for more information Abi Al-Qassem Jar Allah Al-Zemoukhshari , Al-Kashaf Haqaiq Al-Tanzeel Wa-ayoun Al-Aqaweel Fi-wijouh Al-Taaweel, ed by Al-Dar Al-Alamiah 538- 463A.H, Vol 3.p.563-565.

In another Hadith he relates that:

> **"If two Muslims fight each other by sword, then both of them, the victorious and the dead will rest in Hell"**[46]

Islam, nonetheless, recognized the disposition of human beings to wage war against each other, hence the need for rules to resolve such conflict.

God says in the Quran :

> **" If two parties among the believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye all against the one that transgresses, until it complies with the command of God. But if it complies, then make peace between them with justice, and be fair: for God loves those who are fair (and just)".**[47]

Commenting on this verse Al-Qurtubi argued that :

> **" A dispute between the two Muslims groups should be put to arbitration where the Quran and Hadith will be the sole judges**[48]**.**

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[46] Ibn Tumiah, Al-Fatawa, Vol 35, Morocco, p 52.

[47] The Holy Quran, op.cit.(note 4) S 49:9.

[48] Abdullah Bin Mohammed Bin Ahmad Al-Ansari Al- Qurtubi, Tafsir Al-Qurtubi, Vol 16, Cairo, 1947, pp 315-316. and see also Abdullah Bin Mohammed Bin Ahmad Al- Qurtubi ,Tafser Al-Qurtubi, Abbreviation by Sh Md.Kareem, Vol 5, Lebanon, 1986 p.40.

Such arbitration has been practised before in many disputes in the past involving Muslims, notably the dispute between the fourth Caliph Ali bin Abi Talib and Muawiyah Bin Abi Sufyan. Here the two men agreed to arbitration by the Quran, whose judgment they both accepted.[49]

The Quran insisted that if one of the parties refused to accept the verdict of arbitration, and continued to call for war, then Muslims should stand on the side of the victim and fight the aggressive party[50]. The Quranic injunction, to fight the aggressive party, is asserted by many leading scholars who negated the argument of those who claimed that fighting against the believer is an act of Kufr (rejecting faith).

It was said in this respect that:

> **" if it was the duty of those involved in the dispute between two parties, to escape or remain at home, then no punishment would be meted out and no aggressive act would be committed. For if it was such, then transgressors would have legitimised every prohibition"**[51]

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[49] For full account of such arbitration see Majid Khadduri , The Law of War and Peace In Islam , London, 1940, pp.100-103. and see Mohammed Salim Al-Awa, Fi Al-Nedham Al-Syasee Li-Dawlah Al-Islamih, Cairo 1989,p.94-100.

[50] Al- Imam Abi Al-Fadaa Ismail Ibn Kather, Tafseer Al-Quran Al-Adheem,Vol 4, Beirut ,1987-1407 A.H. p.226. and see Abdulah Shber, Al-Jawhar Al-Thameen Fi Tafseer Al-Ketab Al-Moubeen, Vol 6, Kuwait 1986-1407A.H. p.59.

[51] Tabari cited in Al-Qurtabi, Abdullah Bin Mohammed Bin Ahmad Al-Ansari Al-Qurtubi, Tafsir Al-Qurtubi, Vol 16, Op.cit (note 48) p317. and see Abi Ishaq Ibrahem Bin Al-Seare, Maani Al-Quran Wa-Irabouh Lil-zajaj, Vol5 Beirut.

Islamic International Law prohibited fighting amongst Muslims, but if such prohibition was violated then Islamic law prescribed reconciliation and arbitration to resolve such disputes.

With regard to the above one might suggest that the government of Iraq has failed to abide by such requirements. Iraq accused Kuwait of violating its rights and depriving it of its economic resources. However, Iraq refused to put the matter to arbitration and insisted there would be no peace unless Kuwait submitted to its demands[52]. Such arguments run against the spirit of Islamic International Law. For such law prohibits fighting amongst Muslims and perceives it as a serious act which could amount to Kufr (unbelief). Was Iraq's attack against the Kuwaiti nation legal or illegal under Islamic International Law? This question necessitates first an explanation of the principles of defensive and aggressive war under Islamic International Law.

1988-1408 A.H. and see Abi Al-Qassem Jar Allah Al-Zemoukhshari, Al-Kashaf Haqaiq Al-Tanzeel Wa-ayoun Al-Aqaweel Fi-wijouh Al-Taaweel, edit by Al-Dar Al-Alamiah 538- 463A.H, Vol 3.p.563-565.

52 For further information about the conduct of Iraq before war see the Chapter three.

7- Aggressive and Defensive War In Islamic International Law.

Islam, above all, recognizes the importance of defensive war. Islamic International Law laid down three conditions which justify the use of force as a defensive measure:

A- Self Defence

Defensive war must be initiated in response not to an anticipated attack but to an actual one, and must be proportional. This attack could be against Muslims or their property or religion. Allah says in Holy Book:

> **" And so for all things prohibited, there is law of equality. If then any one transgresses the prohibition against you transgress ye likewise against him"**[53].

Jurists regarded this verse as a clear illustration of the justice of Islamic law as it permits fighting only to repel injustice and aggression and in accordance

[53] The Holy Quran, op.cit.(note 4) S 2:194.

with the principle of proportionality[54].

Contrary to modern International Law, Islamic law does not restrict self-defence to attack on territory and does not provide a criterion by which such right could be exercised. However, Muslim jurists argue that the legitimate attack is the actual attack and not the pre-emptive attack[55].

Mohammed Abduh argued that Muslims are obliged to respond to force with force and with proportionality[56]. The practice of the Prophet reveals that self-defence was exercised only when Muslims were exposed to a real attack[57].

On the other hand, there are some writers who are of the view that Islam legitimises attack even though undertaken not in self-defence.[58] They

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54 See Mohammed Rashid Ridha, Tafsir Al-Manar, Vol 2, 2ed, Dar Al-Faker pp.212-213. for the original copy see the Egyptian edition of the Al-Manar ,1931-1349 A.H.

55 Ali Ali Mansour , op cit note (27) ,pp 83, 297.

56 Al-Manar, Vol 2, op Cite note (54), p 212.

57 Abi Abdullah Mohammed. Ibin Qaeem Al-Jawzeeh , Zad Al-Maad, Vol 2 Egypt 1369. A.H.p.58.and Ali Ali Mansour, op cite note (27), pp 258-263. and for more details see Mahmuod Shaltut , Al-Islam Wa-Al-Ilaqat Al-Dawalih Fi Al-Selm Wa-Al-harb, (The Islam And The International Relation During The Peace And War). Egypt 1960.

58 Said Mohammed Banajh , Al Mabada Al -Asasyah Lil Ilaqat Al-Dwliah Wa- Waqt Al-Harb Wa-Selm,(The Principles of the International Relations During The War And Peace) , Beirut 1985,p.38-112.and seeAli Ali Mansour op.cit note (27), pp 257-258.

justify their view by referring to certain battles led by the Prophet, which were undertaken to counter the attacks of the unbelievers in the peninsula[59].

B-Violation of peace treaty

War is permitted as a response to violation of a peace treaty with a Muslim state. Allah says in his Holy Book:

> **" But if they violate their oaths after their covenants, and taunt you for your faith (for their oaths are nothing to them) that thus they may be restrained"[60].**

This verse permits Muslims to use force against those who fail to respect their obligation in a treaty. Muslim jurists cite the example of a treaty signed with

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59 See Majmuat Al-Rasaill Al-Najdeayh Li,Ibin Taimeah , "Rsalat Al-Qetal ", (The War Message). ed, by Al- Al-Muhamadeah, Cairo 1368. p.118-126. and more details see Mohammed Abu Zahrah, The Egyptian International Law Journal, Vol,14, Egypt,1958. p.9-11. It is fair to say that Modern International Law has accepted war in order to rescue citizen of a state abroad. However,such war must be limited and confined to the aim of rescuing only. For more details see, Natalino Ronsitii, Rescuing National Abroad Through Military Coercion And Intervention On The Ground Of Humanity, Martinis Nijhoff, 1985.

60 The Holy Quran, Op.cit.(note 4) S 9: 13.

the Prophet (Al-Hudaybiyyah) in which the unbelievers agreed with the Prophet on a ten year period of peace[61]. However, the non-believers failed to respect this treaty, since they allied with the Banu Bakr and with them initiated a conflict against the Khuza'ah, a tribe in alliance with the Prophet. In this respect the Hanafi and Shafi'ite schools of law permit the ruler to use force against others if there exists evidence of their cooperation with the enemy, or evidence of preparation of war against him.[62]

Islamic International Law recognizes three types of treaties:

a-Treaty of Neighbourhood : This type of treaty is known to have existed between the Prophet Mohammed and the Jewish community. It was agreed between the two parties that the Prophet would afford them protection, freedom of religion and recognition as a tribe in religious terms. In return, the

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[61] One prominent writer, Mohammed Abu Zahara, commented that a permanent peace treaty with unbelievers is valid, contrary to some writers who see the opposite and restrict it to a period of ten years. Cited in the Introduction of the Al- Syar Al-Kabeer, for Mohammed Abu Zahara, edition of the University of Cairo. and see Najeeb Armnaze, Al-Shara Al-Dawly Fi Al-Islam, Syria 1930, p.113. and also see Ali Mansour, Op.cit note (27), p377-378.

[62] Mohammed Mohammed Al-Tantawi, Al-Slam wa Al-Harab fi Al-Sharia al-Islamia(peace and war in Islamic law),Thesis, submitted for Professor degree at Cairo University, 1962, p87.

Jewish community pledged to support the Muslims in times of conflict[63].

b-Treaty of protection: This treaty allows non-Muslims to remain in Dar Al-Islam through the permission of the Imam (Muslim ruler)[64] This is called an *Aman* treaty (treaty of security).[65] This is afforded to enemy soldiers who surrender to Muslims before the battle reaches its conclusion. In this case they have the right to live in peace in Dar Al-Islam or are given permission to leave to their country[66]. *Aman* could be granted to the whole

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63 see Siar Ibn Hicham, Sirat Al Rasoul (Prophet Tradition) Cairo Vol 2,1962, p 348. and see Hamed Sultan , Ahkam Al-qanon Al-Dawaly Fi Al-Shareah Al-Islameah, Cairo 1974, p.206-208.

64 This is given by virtue of *muwadaah* and *aman* (truce) or (treaty of security) and could be given by Imam representative, for full details see, Al-Mawardi, Kutab Al-Ahkam al-Sultaniyah, Cairo,1298, p48.

65 see Khadduri op.cit, note (49),p 78-79.

66 see Mohammed Al-Sadiq Afifi, Islam and International Relations, op.cit (note 31), pp273-274. Allah says in his Holy Book that :

> **" If one amongst the Pagans ask thee for asylum, grant it to him,so he may hear the word of God, and then escort him to where he can be secure. That is because they are men without knowledge ",**
>
> Holy Quran op.cit , note (4), S 9: 6.

territory, a city or a few unbelievers.[67] However, the Imam has the right to withdraw the Aman if the interests of Muslim security requires it, providing he gives prior notice of his intention.[68]

c-Protection of Religion

In Islamic International Law a war is not envisaged against others unless the Muslim is prevented from spreading the message of Islam or upholding his belief. There exists no verse in the whole of the Quran which legitimises the use of force in spreading Islam[69]. Force can only be resorted to in order to protect the Muslim and safeguard his rights to practice his religion. Thus, Islamic International Law appears to outlaw aggressive war. On this point the

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[67] Different views of another School of Islamic Law ,they are allowed to live in peace in Dar Al-Islam for a period not exceeding one year. If exceeded then they have to live under the conditions of the Dhimmi . Ibid See Mohammed Sadiq Afifi, Al-Islam wa Al-Alaqaat al-Dawlia (Islam and International Relations),op.cit, note(31), Beirut, p328-329.

[68] For details and a different view on this point see Said Mohamed Banajh,(Al-Mabada Al-Asasyh lil Alaqat Al-Dawlyah fi al harb waseelm) The Principles of International Relations During The Peace And War , 1ed, Lebanon 1985.p.55-77.

[69] Mohammed Shaltout, Islam and Interntional Relations in Peace and War (in Arabic), Cairo,pp 37-38.

Quran states :

" And let not the hatred of some people , in (once) shutting you out of the scared Mosque , lead you to transgression (and hostility on your part). Help ye one another in righteousness and piety, but help ye not one another in sin and rancour .[70]

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[70] Holy Quran op.cit (note 4). S 5:2. In this verse, Islam has clearly defined its position vis-`a-vis aggressive war by calling on the believer to refrain from the use of force even though the non-believer prevented them from performing their religious rituals in the sacred Mosque. Moreover , Islam perceived aggressive war as a destruction to the earth and enjoined the believers to take account of this fact. Allah says in another verse :

> **"Do not mischief on the earth, after it hath been set in order"**. S7: 56.

Islam also called on Muslims to seek peace if the other party, the aggressor, also called for peace. Allah says:

> **" But if the enemy incline towards peace , do thou (also) incline towards peace"**. S 8:61.

A thorough reading of the Quran and the tradition of Prophet and the practice of righteous Khalifas will illustrate more clearly the importance of peace in Islamic International Law and its restriction . War in Islamic International Law is not permitted unless by reasons of necessity otherwise it is considered illegal and against the ordinance of God. For more detail see Md. Rashid Ridha,Tafsir Al-Manar, Vol 2,2ed, pp.218,232. and see Mohammed Sadiq Afifi, Al- Islam Wa Al-Alaqaat Al-Dawalih(Islamand International Relation) Beirut,1986,p160.

8-*The Iraqi Invasion And Its Legitimacy Under the Principle of Self-Defence In Islamic International Law.*

Islamic International Law clearly determines the circumstances under which a state can resort to self-defence. The Iraqi invasion of Kuwait, conducted under the banner of self-defence, however, can hardly be justified. That Iraq resorted to force in order to protect its interest, falls short of the requirements of such a right. For Islam did not recognize such justification at all.

Islamic International Law requires that such a right of self-defence cannot be utilized unless there is an actual attack from the aggressive state. In this regard, Kuwait did not mount any attack; on the contrary its intention was to avoid an armed conflict[71].

The Iraqi government maintained that Kuwait initiated harm against it in the guise of an economic war[72], considering it to be as harmful as an actual armed attack[73]. However, this interpretation is not accepted by the majority of

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71 See The Iraqi News Paper, Al-Thawrah, Baghdad, 22-July to 1-August1990 and see Jarimat Gazoou Al-Iraqi lil Kuwiat,(The Crime of Iraqi Invasion of Kuwait),Kuwait Media Center, Cairo,1990. p.5-15. and see Ahmed Abdull Wnees Shata, "Iraq's responsibility for the occupation of Kuwait in the light of International Law", in Revue Egyptienne De Droit International,Vol 46, 1990 p.44 -59.

72 Ibid.

73 Ibid .and for full details, see chapter three.

Islamic jurists and scholars, for Islamic law clearly determines that self-defence is not valid unless an armed attack materialises.

Some Islamic writers considered a pre-emptive attack to be valid when there existed clear evidence of an imminent attack against the Muslim state. In the case of Kuwait, one can affirm that it was in no position to launch a war against Iraq, for two reasons: firstly, Kuwait's weakness in comparison with the might of Iraq. It was not Kuwait who moved its forces to the border but vice versa [74]. Secondly, Kuwait, concerned with Iraqi threats, made substantial diplomatic efforts to prevent an Iraqi attack. It requested the assistance of Arab states to intervene in the dispute and settle it without recourse to arms[75]. Iraq, for its part, insisted that no settlement could be reached unless Kuwait accepted all its conditions[76].

In addition the Iraqi invasion of Kuwait violated one important condition of Islamic law, that of the concept of proportionality. The Quran says on this point:

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[74] Op.cit not (71). and see the Qatari News Paper Al- Sharq and Al- Rayah News Paper , Qatar,from,23,July to 2-August-1990 . Also see the Kuwaiti News Paper Al Syash & Al -Qabas News Paper.from 23-July to1-August-1990.

[75] Ibid. and see Ch 3 and Ch,4.

[76] Ibid. As such Iraq was the state preparing for war and not Kuwait, giving the right to the latter not the former. Thus Iraq was the aggressive party with no right to claim that its invasion was undertaken in self defense.

"If then any one transgresses the prohibition against you transgress ye likewise against him ".

Islamic law insisted that such a concept should be adhered to in an armed attack for the sake of fairness and to prevent unnecessary harm and damages.

If one accepts Iraq's claim that Kuwait initiated a war against its economy, then Iraq is obliged to respond in kind and proportionally. Iraq appeared to circumvent this obligation by launching an attack against Kuwait that was not in proportion to the supposed initial aggression on Kuwait's part. In this respect the Iraqi invasion of Kuwait cannot be accepted as legally valid in Islamic International Law.

Another point of interest here is the stipulation that, under Islamic International Law, any armed attack must be preceded by a declaration of war. The Prophet stipulated that a war cannot be undertaken unless a warning is given to the other party informing them of such an attack, thus allowing them the opportunity to avert it. It was narrated that the Prophet, whenever he dispatched a military mission, would order the commander to present the enemy with a choice of two alternatives to war[77]: either to pay the Jizya (poll tax) in return for their protection or convert to Islam. In another Hadith the Prophet stressed that ;

[77] Ali Ali Mansour op.cit. Not (27) pp. 296-297.

> **"war cannot be launched unless the enemy is first called to embrace Islam. However, if the enemy launched an attack and killed a Muslim then Muslims must show them the victim and ask them again to consider believing in God as it is better for them".**

These two Hadith, illustrate how serious and grave it is considered in Islamic law to instigate a war without declaration. According to the Shafi'ite school of law, if Muslims launched an attack without prior warning then they were obliged to pay compensation[78].

The great jurist, Al- Sarkhasi, stressed the importance of this concept, saying;

> **'it is better for Muslims not to fight the enemy straight after giving them the warning but to wait for one night so the enemy could think of what is good for them[79]".**

This concept was practiced by Amr Ibn Al-Aas, when he gave the Byzantines warning on three occasions, finally heeding their request for a cessation in the conflict [80].

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78 Ibid.

79 See Al- SarKhasi, Al - Mabsoodh, Vol 6 , p10.

80 Ibid..

The declaration of war is, as such, a legally binding principle. Another example is the occupation of Samarkand by Amr Ibn al-As, the Muslim commander who entered the city without a prior warning of attack. Amr, in response to the protests of the people, wrote to the ruler of the neighbouring territory and asked for a leading jurist to pass judgment on the matter. The latter duly judged the occupation to be illegal as it violated the principle of the declaration of war[81].

In the light of the above argument one must view the Iraqi invasion of Kuwait as being in defiance of Islamic International Law. Iraq gave many promises that it would not attack Kuwait, stipulating that the movement of its army to the Iraqi-Kuwait border was military routine[82]. Moreover, the Egyptian president referred to Saddam Hussein's assurance, that he had no intention of attacking Kuwait[83]. The Kuwaiti government were of the view that Iraq would

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81 Ibn Al-Atheer ,(Al-Tareekh Al- Kamel)The Complete History .Vol 5 p.22.

82 See,The Kuwaiti News Paper Al - Qabas & Al-Watan News Paper, Kuwait,26,July 1990, and see The Qatari News Paper Al-Rayah , 27-July 1990 -also see for more more Information, see the Chapters , 3 and 4.

83 See the Qatari News Paper Al- Sharq and Al- Rayah News Paper , Qatar,23,July & 26-July & 27 July1990. Also see the Kuwaiti News Paper Al Syash & Al -Qabas News Paper.From 23-29-1990.and see Jarimat Al-Gazoou Al-Iraqi lil Kuwiat (The Crime of Iraqi Invasion of Kuwait), Kuwait Media Center, Cairo,1990.p. 10.

not attack its territory, a fellow Muslim state, particularly after she had supported the Iraqi government against Iran during the Iraq-Iran war[84].

The invasion of Kuwait by Iraq resulted in many civilian and military casualties and in substantial destruction to property and infrastructure[85].

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[84] Ibid.p.5-10. and see Kuwait News Agency (Kuna) The Information & Researcher Department, The Treachery , Al-Qabas Press December 1990.p. 5-23 & p.35-37. also see Ahamed Yousef." The Gulf Crisis and The Arab System ".The Lawyer Union of The Arabs,Cairo 1990 p.16-32. Despite this Iraq chose to attack Kuwait without warning , intending to reach the capital quickly and arrest the rulers of the country.

[85] Ibid. and see Jarimat Ghazoou Al - Iraqi lil Kuwait, op.cit (not 83)p.5-25.

9- Iraqi Violations of Peace Treaties with Kuwait.

Islamic International Law stresses the sacredness of peace treaties in Islam. On this point the Quran states:

> **"Fulfill the covenant of God when ye have entered into it and break not your oaths after ye have confirmed them"**[86].

Muslim Jurists agree that this verse makes it obligatory on all Muslims to uphold alliances made between each other.

With reference to modern International Law, Iraq signed three peace treaties, though not directly with Kuwait. These peace treaties are as follows: The Charter of the United Nations, the Charter of the Arab League and the Charter of Organization of the Islamic Conference.

Iraq and Kuwait, who are active members of the COIC, agreed that:

> **"they must solve any dispute that arises between them through peaceful of means negotiation, such as mediation, compromise and arbitration"[87].**

Article 5 of the Covenant of the League of Arab States states that:

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86 Holy Quran ,(note 4)op.cit S 61: 91.

87 , see Charter of the Organisation of Islamic Conference, cited in Abdullah Al-Ahsian, Organization of Islamic Conference,Kingdom of Saudi Arabia .1990, p 266.

" Recourse to force to resolve disputes between two or more League States is inadmissible. If differences should arise between them, not pertaining to the independence, sovereignty or territorial integrity of (any of the) states (concerned), and the contending parties have recourse to the Council to settle it, then its decision is executive and obligatory"[88].

The Charter of the United Nations assumes that all states who are members are accepted on the assumption that they abide by the Charter. There are articles contained therein that forbid resort to force, obliging states to settle their disputes in a peaceful manner. Article 2 (4) states that:

" All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations". [89]

Moreover, Article 2 (3) states also :

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88 Charter of the Arab League, see Mohammed Khalil khalil, The Arab States And The Arab League: A Documentary Record, Vol 11, Beirut, 1962, 58.

89 . Malcolm D. Evans. Blackstone's , International Documents, 2nd Edt, London 1994.p.8-9.

" All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"[90].

Iraq, also, was party to the treaty of Joint Defence and Economic Co-operation among states of the Arab League. Iraq signed this treaty on February 2, 1951. Article 1 of this treaty states that :

"Being anxious to maintain and stabilize security and peace, the contracting states hereby confirm their determination to settle all their international disputes by peaceful means, whether in their mutual relations or in their relations with other states".[91]

These treaties, though not in full conformity with the principles of Islamic law, yet still bind Iraq, as Islamic International Law requires strict observance of (secular) pledges made by any Muslim party. In this respect, it is said that the Prophet asked the Muslim, Huzafia bin al-Yaman, Companion of the Prophet (who could not migrate to Medina with the rest of Muslims) to desist from conflict, for he had entered into a contract with his enemy (the Quraysh) that he would not fight against them if left free in Mecca[92].

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90 Ibid.

91 Ibid , pp 101-102.

92 Abdul Rahman I. Doi, Shariah: The Islamic Law, London, 1984, pp 423-24.

This illustrates Islam's respect for pledges made in a treaty or contract as sacrosanct, which should not be deviated from. In the Quran it is stated:

> **'But if they seek your aid in religion, it is your duty to help them, except against a people with whom you have a treaty".**[93]

It was narrated also that the Prophet said ;

> **" whoever has an agreement between him and a group of people he must not annul it nor breach it as long as it remains valid"**[94].

It was argued by several leading jurists, especially Mohammed Ibn al-Hassan al-Shaybani, that it is obligatory on the ruler of a Muslim state to inform his enemy that, upon a conflict instigated by the latter, the treaty between them becomes invalid. Whenever it is breached by the latter then the treaty between them becomes invalid. A war, in short, cannot be initiated unless the enemy is informed thus. By such action Muslims would not be able to take the enemy by surprise[95].

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93 The Holy Quran, op.cit, (note 4), S 8: 72.

94 See statement issued by Fatwa department in Egypt, 21-August 1990. Jarimat Al-Gazoou Al- Iraqi lil Kuwait, op.cit, (not 83), p.144. For more information see Mohamed Bin Abdullah Al-Khateeb, Mishkaat Al-Msabeeh, Tahqiq (Realization by Mohamed bin Nasser Al-Albani).Vol.1, Syria 1961,p.586.

95 Al-Siar Al-Kabir, p 284.

It was said that Muawiyyah, the Muslim ruler, negotiated a peace agreement with the Byzantines . However, when the treaty became invalid he decided to attack them, but one of his soldiers reminded him of the Prophet's warning, that he should inform the enemy of his intention. Muawiyyah accepted his advice and refrained from attack.[96] If an agreement is breached by another party, then Islamic law stipulates that Muslims must inform the enemy that the agreement is no longer valid and therefore a state of war exists. Thus it is regarded as a serious breach of Islamic law unilaterally to annul a treaty without valid reason.

Iraq by ignoring all these obligations, violated its treaties as endorsed by and under the rules of Islamic International Law which require that a treaty must not be violated and that whenever it becomes invalid it must be made known to other contracting parties before a declaration of war.

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96 Mohamed Bin Ahmed Al-Shaibani,composition by,Mohamed Bin Ahmed Al-Soursekhy, Shareh Ketab Al-Siar Al-Kabeer,.Tahqeq..(Edit by Salah Al Mounjed) Vol 1, Egypt 1957,p265.

Part 11

The Legality of the International Military Alliance Against Iraq In Islamic International Law.

Introduction.

The Iraqi invasion of Kuwait was a clear violation of Islamic International Law which forbids the use of force except in certain cases. Iraq viewed its the U.S.A alliance against it a war between believers and non-believers.
The president of Iraq, Saddam Hussein , presented his country as representing the believers on one side, and the Western alliance as non-believers on the other. Saddam, asserted :

> **"Muslim states, by allowing the non-believer troops, to station in Mecca and Medina, to defend Saudi Arabia and evict Iraqi forces from Kuwait, were challenging God himself [97]".**

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[97] See the appeal of Saddam Hussein ,cited in Sa'ad Al-Bazzaz ,War And The One After , The Secret History of The Gulf War .3ed, Jordan 1993,p127-132. and see the Iraqi News Paper Bapel, and Al-Thawrah News Paper, 19 &20-August 1990. It is worth mentioning that American soldiers and their allies did not set foot in Meccan and Medina as was proclaimed by Iraq. In fact, Iraq's claim was a mere propaganda to incite Muslims against allied forces.

And that :

> " **Iraqi forces decided to fight a holy war (Jihad) without fear or hesitation until it gained victory or paradise**"[98].

This appeal demonstrates that Iraq's attempt to invoke Islamic International Law to justify its war and depict the international alliance against it. It is the purpose of the following section to look into the Iraqi claim and examine its legality in the light of Islamic International Law. However, before proceeding to discuss the Iraqi claim and counter claim, it is important to define the concept of alliance in Islamic International Law, and explain its forms and describe the circumstances that give rise to its creation..

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98 Ibid.

1- Alliance in Islamic International Law .

The concept of 'Alliance' is not new in Arab history. Alliances were formed between Arab tribes before the message of Islam. However, many of these alliances had a socio-economic rather than a religious base. Islam did not accept many forms of these pre-Islamic alliances as the Prophet unequivocally asserted "**no alliances in Islam**"[99]. However, if such alliance promoted good and provided protection and aided the oppressed, then it is considered bona fide. Such alliances, the Prophet maintained, would 'enhance' Islam[100].

It is acknowledged that Arab tribes in the pre- Islamic era made alliances to aid the oppressed people so that, if not heeded by particular party, that party would be treated with disrespect[101].

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99 AL-Souhah lil Jawahrjiaree,Exploration by Ahmed Abdul Ghafour Al-Atar,Vol 4, p.1346.and see Al-Bukhari Chapter, Al-Akhaa Wil-Helf ,(The Brother Of The Alliance) Vol,8, ed,Dar Al- Shaab.

100 Al-Imam Ahmad , Musnad Al-Imam Ahmed, Vol,1 p.323, and see Sunan Al Tirmithi, Al- Siar ,Chapter,30 Vol 4, 1ed, Al-Halabee,1382. p.146.

101 Munir Mohamed Ghadhban , Al- Tahalif Al- Siasi Fil Islam,(The Political Alliance In Islam), Cairo 1988,p.9-10.

Of those pre-Islamic alliances accepted by Islam, we enumerate three by way of exemplifying the concept of alliance under Islamic law, namely the Alliance of the Mutayiben, The Alliance of the Fudul and The Abu Talib Alliance.

a- The Alliance of Al-Muttayyibeen (Alliance Perfumed)

This alliance was formed following the tribe of Banu Abd al-Dar's contestaion of the rights of another tribe, Banu Abd al-manaf, to administer the office of the pilgrims and the Holy Mosque (Mecca). Other surrounding tribes were called on to ally with one of the two contesting tribes. The Tribe of Abd al-manaf won the day by placing a jar full of perfume within reach of those tribes who might place their hands into it and pledge to defend it[102]. For this reason the alliance is called the Alliance Perfumed.

b- Al-Fudul Alliance.

This alliance was made initially to protect a man who journeyed to Mecca for the purpose of the trade with a certain merchant. The latter refused to pay the man the agreed price for a product. The injured party resorted for help to the Holy Mosque where his injustice was righted. As a result the office of the

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[102] Al-Imam Ahmed Ibn Hanbel, Fi-Mousnadeh,Vol1,pp.190-193.and Maunir Mohammed Ghadban, Al-Tahalif Asyase Fi-Il Islam,(The Political Alliance in Islam) Cairo,1988, pp9-10.

Holy Mosque pledged to establish an alliance to help those cheated in a similar manner[103].

c- The Alliance of the Abu Talib Bani Hashim.

This alliance came into existence after the Quraysh demanded from Abu Talib, the Prophet 's uncle, that he hand over the Prophet Mohammed to them, as he was preaching a new religion that undermined their very existence. In response to this threat Abu Talib formed an alliance with the Prophet's tribe, the Banu Hashim. Under this alliance Mohammed was free to preach his message until his uncle died[104], after which the alliance became invalid.

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[103] Ibn Saad, Al-Tabaqat Al-Kubra, Vol 1, Cairo,p 82.

[104] Al-Syra Al-Halabia, Vol 10, p.458-59

2- Alliances During and After the establishment of the Islamic State.

With the advent of Islam, and the success of the Prophet in establishing his authority in Medina, new forms of alliance emerged. These alliances were not different from the pre-Islamic period where the object of alliance was to prevent aggression and offer help to whoever needed it.[105]

In particular, the Prophet made several alliances not solely between Muslims but also between Muslims and non-Muslims. In Medina he made a pact of fraternity between the Muslims and Jewish community. However, the Prophet extended the concept of alliance to include non-believers. In the first year of emigration (Hijra), the Prophet made an alliance with the chief of the Mutim Ibn Umair tribe. The purpose of this pact with a non-believer tribe was mutual self-defence where each party pledged to help and defend the other if one of them was subjected to an attack. Other alliances such as alliance with Bani Mudlij and Bani al-Nadir were concluded for similar purposes.[106]

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105 See Senan, Al-Termidhe, Vol, 6 p.137.and see Al- Maqrese, Imta Al-asma, Vol 1p.51- 54.

106 Ibid. and see Ibin Kather , Al-Beedaih W-Al-Nehaih, Vol 3,p.151.

It is noticeable that these alliances were either established between Muslims themselves or between Muslims and non-believers. No alliances were made between Muslims and non-believers against Muslims as was the case with the Iraqi-Kuwait conflict. Contemporary Muslim jurists maintained in this respect that the Western Alliance with Muslim states was not illegal. They cited many Hadith to illustrate their point of view. Other jurists doubted the legality of such as alliance and never endorsed it wholeheartedly. In order to establish the legality or illegality of the Iraqi claim, one has to define the circumstances that gave rise to such an alliance and second regard the view of the jurists vis-`a-vis its legality or illegality[107].

[107] It was said earlier that alliances made prior to Islam were drawn up to prevent oppression and provide help to those who suffered unjustly. Jurists acknowledged that when a group of Muslims deviated from the rule of Islam and perpetrated an aggressive act other Muslims were obliged to check or prevent an evil. The Prophet in this respect asserted in his last sermon (al-Wada') that fighting between Muslims was forbidden in Islam and amounted to Kufr (rejection of faith). It is narrated in this respect by Abu Bakr who said, 'I have heard the Prophet saying that if people let the oppressor free and condoned(his actions) Allah was to send down on them a punishment' If at this stage the aggressive party persisted in their action then resort to arms is unavoidable, as sanctioned by God who ordered the believers to fight the aggressive party.

3-The legality of an alliance between Muslims and non-Believers.

Muslims jurists disagreed as to the legality of such an alliance. Some deemed it legal while others rejected it. Those who considered an alliance with non-believers legal, resorted to the practice of the Prophet to support their view. It was narrated by Aishah (Prophet's wife) that when the Prophet was marching to war, a man, who was known for his courage and skills, pursued him and asked for his permission to join his army. The followers of the Prophet were very pleased about this. However, the Prophet asked him whether he believed in God and his Prophet. The man replied that he did not, so the Prophet rejected him. He would not accept the help of a non-believer. The man later followed the Prophet and repeated his wish, but the Prophet once again plied him with the same question. The man answered in the affirmative and was permitted to join the Muslim army.[108]

In another Hadith the Prophet rejected the help of non-believers. This is the view of the Hanbali School of Law, namely, that such a union between

[108] Al-Imam Mohammed Ismael Al- Sanani, Shareh Balough Al-Maram, Lebnan 1987. p.97.and see Mohammed Bin Ali Al-Shoukani,Neel Al-Adhwar ,Vol7 , 1ed ,1357 A.H.p. 223.

muslims and a non-believers, was illegal so long as the latter did not believe in Islam[109] .

The Abu Hanifa School of Law adopt the view that it is legal to accept help from non-believers and they cited the practice of the Prophet, condoning such alliance. Namely, it was narrated that the Prophet accepted assistance from the Jewish community in Khaybar and allocated to them a share of spoils of war [110]. The Hadith relates that :

> **"I have heard the Prophet saying that you will reach a peace with the Byzantines after which you will fight together an enemy behind you"[111].**

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[109] Mohammed Bin Ali Al-Shoukani, Neel Al-Adhwar , Vol7, 1ed , 1357A.H., p.223d.

[110] Cited by Ahmed and AbuDaoud, Ibid.

[111] Ibid. Al-Hafidh Ibn Hajar Al-Asqalanee , Soubel Al-Salam, Vol 7,3ed,1369 .A.H. p .72. The proponent of this view cited many examples, in one of which a non-believer called Kazman joined the Prophet in the battle of Ahad and managed to kill three non-believers.

This School acknowledged the contradiction in Hadith but tried to interpret it in a way so as to remove the contradiction by saying that, the two previous Hadith which indicated the illegality of alliance with non-believers, were true, but that the Prophet rejected non-believers because he wanted them to accept the message of Islam. Thus he rejected him in the hope he would come again and convert to Islam, which he eventually did. Al-Imam Mohammed Ismael Al-Sanani, Shareh Boalough Al-Maram, Lebanon 1987. p.97. and see Mohammed Bin Ali Al- Shoukani , Neel Al-Adhwar, Vol 7, 1ed, 1357A.H. p.223.

Thus, according to the Abu Hanifa School, alliance with non-believers is permissible.

The Shafi'ite School of Law, however, do not permit such alliances unless there is an extreme necessity. In this case, this School consider the alliance legal if there is benefit in it for Muslims. Ibn Hazim regards alliance ;

> **" alliance with non-believers as acceptable where Muslims in such an alliance were sure that harm would not be brought upon fellow Muslims or on those under the protection of Muslims[112]".**

In general, disagreement among Jurists was common as their opinions were motivated by the circumstances of each case. There is no doubt that all of them built their decisions on the Quran and Hadith but they gave different interpretations. Such differences reflect the flexibility of Islamic rules and its conformity with events and different times[113].

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112 Ali Ibin Ahmed Ibin Hazem , Al-Mahaly, Vol 7, 1ed, Beirut 1349, A.H. p.335., died in the year (456.A.H - 1064.A.D.).

113 Jamal Udeen Al-zyalaee,Nasab Al-Rayat ,Vol3 ,2ed, Lebanon 1393.A.H. p.421-424 . and see Ibin Hajar Al-Asqalany ,Fateh Al-Baree,Vol 6,ed by, Al-Salafeah ,1380 A.H. p.179-180.

Contemporary View of Jurists On The Legality of Alliance With Non-Believers Against Iraq.

Contemporary Jurists dealt with the issue of the legality of an alliance with the non-believers in the wake of Iraqi invasion of Kuwait.

Many contemporary jurists supported the western alliance with Muslim states formed to evict Iraq from Kuwait. Such Jurists were not confined to one country in particular but hailed from different parts of the Islamic world. Mana Al-Kutaan, in a book entitled 'The Gulf war in the Balance of Islamic Jurisprudence', justified the alliance on the grounds that :

> **"Iraq was an aggressor and refused to settle the dispute peacefully. Citing the Quran he said an aggressor must not be condoned in his action and must be vigorously opposed according to the principles of Islamic Law[114]".**

Another prominent Jurist, Yusuf Al-Qaradawi, justified the alliance on the grounds of *maslahah* (consideration of public interest);

> **"since Iraq as an aggressor could not be checked by Muslims**

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114 . Mana Al-Kutaan,(Harb Al-Khalij Fi Al-Mezan),The Gulf War In The Balance of Islamic Law, Cairo 1990,p.10.

alone. Thus, out of necessity, an alliance with Western powers is permissible for this purpose[115]".

Agreeing with him, Mohammed Al-Ghazali defended the legitimacy of the alliance on the ground of necessity (*Dharorh*) ;

> **"exception for what is forbidden and it is, unlike *maslahah,* not a source of Islamic law. As an example, it is forbidden to eact pork but such restriction is not applicable if one's life is threatned). It Muslims, as he sees it, were not strong enough to counter the hostile actions of Iraq and thus help from Western powers is unavoidable[116]".**

Mohammed al-Awa, Saif Al-Islam Hassan al-Banna, and Ahmad Al-Katan;

> **"all of them respected Islamic scholars, agreed that Iraq, by its invasion, had breached Islamic Law, and hence must be repelled. Again, they relied on the concept of necessity[117]".**

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115 Fahmee Hwaidy,"Bian Al-Omah", (The Declaration of the Islamic Jurist Community), Cited In, Al-Ahram, News Paper, 21-Augest 1990. and See Al-muslimon International News Paper, 20-Feb-1990 & 23.

116 Mohammed Al Qazali " Hatha dinuna" (This Is Our Religion) The Egyptian News Paper Alshab .11and 18- Sep-1990.

117 . See Wakadh News Paper And Al-Riyadh News Paper Saudia Arabia , Review no 8275. 19-Feb-1990.

As for Sheikh Mohammed Mitwalli Al-Sharawi ;

> **" he regretted the invasion, and cited in support of the alliance a verse from the Quran which called on all Muslims to settle their disputes by peaceful means, otherwise the aggressor must be checked in his hostile actions, as in the case of Iraq. The alliance of Al-Fadual was invoked by the Ulama as a precedent to repel aggression, to justify the alliance against Iraq[118]".**

In fact, such justification is not very sound, for the alliance of Al-Fadual was formed between two non-believers and not between Muslims and non believers against Muslims.

The Imam of Al-Azhar, Jaad al-Haq, after citing the impermissibity of Muslims killing Muslims or attacking their properties, concluded that :

> **" the Iraqi invasion of Kuwait was a grave error in the balance of Islamic law, and the aggressor must be brought to reason by force".**

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[118] Sheikh Mohammed Matawli Al-Sharawi, Interview in Cairo Television, 5-Sep1990, Cited in "Maqalat Wlama Al-Islam" The Islamic Scholar Reviews,Cairo 1990 p.237-241.

The Imam of the Holy Mosque in Mecca, Mohammed bin Sabial, and Ibn Baz, the president of the Fatwa Institute in Saudi Arabia, regarded the ruler of Iraq as an aggressor who, by his act, had violated the rule of Islamic law:

> **"In consequence a holy war launched against him by Muslims only, was not capable of defeating the aggressor, so Muslims needed to ally with non-Muslims in order to acheive this end[119]".**

On the other hand, there are some jurists who did not conform to the above view, and regarded the alliance against of Iraq as a grave violation of Islamic law. These jurists considered the assistance of western power illegal since it was directed against Muslims. To them, non-believers must not be allowed to fight and kill Muslims. Mohammed Ummara, a Muslim writer, argued against the alliance on the grounds that such an alliance concerned solely the interests of Kuwait. For this reason the eviction of Iraq must be undertaken by Muslim and Arab states alone .

Another Muslim political organisation, the Muslim Brotherhood, issued a statement demanding both the withdrawal of Iraq from Kuwait and the western forces from the Gulf region.

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[119] The great Imam of Holy Mosque in Mecca, Mohammed bin Sabial "lata Ghtarow Bidyat AL-Ada" Al-Muslimon News Paper , op.cit.and see Al-Jihad Conference, at University of Al-Imam Md. Bin Saud , 22-Feb-1990 Saudi Arabia Review no.3and 4.

The issue of the alliance with non-believers against Muslims presents Islam with a substantial dilemma. All jurists have at their disposal numerous Hadith, in which precedents can be found to legitimise their point of view.

The concept of necessity (Dharorh) and maslahah (consideration of public interest), endorsed by the Shafi'ite school of law, constituted a legal precedent by which means they were able to obtain the aid of Western powers to evict Iraq.

There were also those also who cited Hadith which prohibited Muslims from making an alliance with non believers against Muslims.

It is my view that the alliance welcomed by Muslim states did not so much constitute an alliance with the non - believers as rather an alliance with friendly states, defined in Islamic Law as the 'People of the Book' whose relations with Muslims states have been conducted historically on a friendly basis.

Therefore, Muslim states confronted with an inflexible Iraq and faced with an inherent weakness in their military powers, were forced to seek the support of Western powers to prevent an injustice against the people of Kuwait. By adopting such an approach, Muslim states were acting within the scope of Islamic International Law which permits them to seek alliance with such powers to maintain justice and security.

Conclusion

The Iraqi occupation and annexation of Kuwait constituted an unprecedented event in the history of Modern Islamic states. A Muslim state invaded another without any prior warning or without regard for the sanctity of Islamic International Law.

Islamic International Law is perceived by all Muslims as binding on every member and state and no deviation is permitted at all.

This law differs in both form and procedures from Modern International Law, but agrees with it in its condemnation of war, its declaration that treaties are sacred and its insistence that human rights must be upheld.

According to Islamic International Law, the world in theory is divided into Dar Al-Islam and Dar Al-Harb where in the former the rule of peace is prominent and where in the latter the rule of war prevails.

In practice, however, relations between the two worlds were regulated through certain modes and forms of agreement.

The Iraqi invasion was a clear violation of the rules of Dar Al-Islam where war should not be resorted to unless in certain exceptional cases, such as self-defence. Under the principle of self-defence Islamic International Law permits force to be used to repel aggression or in response to treaty violation

in order to protect the religion of Islam. Iraq failed to prove that its invasion was undertaken in self-defence, for Kuwait did not instigate an actual armed attack which would have necessitated the action of self defence on Iraq's part. It was Kuwait which was invaded and not Iraq and yet Iraq claims that it was acting in self-defence.

Islamic International Law has clearly banned what is called anticipatory self-defence. Moreover, Islamic International Law stipulated that whenever war is contemplated, a state cannot initiate it without a prior warning. The practices of Muslim states in the past have proved that if a war is fought without any declaration, the attacking state must amend its actions and pay adequate compensation to the afflicted party.

Again, Iraq initiated its war without any regard for this principle. For it is documented that Iraq, while negotiating with Kuwait, was busy preparing plans for invasion.

In addition, Iraq, by its aggressive action, violated its peace treaties with Kuwait. These treaties, though signed within the framework of modern International Law, are valid by Islamic International Law. Violation of a treaty in Islamic Law is not permitted at all unless the treaty has expired or has been breached by another party to it. Even where the treaty is breached war cannot be conducted instantly; a Muslim state is obliged to communicate its intention to the (potential) violator in order that negotiations may prevent it occurring.

As to Iraq's challenge to the legality of the alliance of the Western powers with Kuwait, Iraq interpreted Islamic International Law as forbidding such an alliance with non-Muslim against a Muslim state. In fact, Islamic International Law appears to recognise such alliances.

The issue of alliance with non-Muslim states occupies an important chapter in the literature of Islamic International Law. Views on the subject were and continue to be diverse but a common stand was possible. Jurists were divided into two camps; pro-alliance and anti-alliance. Both of the camps, however, agreed that an alliance with non-believers is permissible when Muslims are weak and cannot combat aggression with their own resources.

The pro-alliance jurists justified force against a Muslim state by invoking the Holy Book which affirms that if two groups of believers fight each other, then peaceful settlement must be the rule. As Iraq rejected the peaceful settlement, and in the view of the Muslim states' weakness, an alliance with Western powers became permissible.

The argument of those jurists who rejected the alliance was not based on the illegality of war against Iraq, as such, but on the alliance itself. They called for war against Iraq but with Muslim and not Western forces. However, due to the weakness of Muslim states, an alliance with Western powers became a

necessity, otherwise Kuwait, and possibly other Gulf states afterwards, would have succumbed to Iraqi rule.

Therefore, in conclusion, the Iraqi invasion of Kuwait was contrary to Islamic International Law, and the alliance of Kuwaiti-Western powers was legal. Such an alliance is based on the principle of necessity (Dharorh)and *maslahah* (consideration of public interest) which is recognised by the majority of jurists.

Chapter Six

General Conclusion

The dispute between Iraq and Kuwait is as old as the two countries. History has brought the two states together in geography, religion and people but circumstances have conspired to set them apart. Both of them harboured contradictory views of each other. Kuwait, in Iraq's view, was part of its state. Kuwait, however, has always viewed itself as an independent state and has never accepted that it has been at any time part of Iraq. According to Kuwait, Iraq's claim is baseless and faulty.

Dispute between these two neighbouring states has increased in intensity with passing time, though witnessing on occasions cordial relations between leaders of both countries. However, the dispute intensified on the 2nd of August1990, and culminated in a surprise invasion of Kuwait by Iraqi forces whose military elite entered the capital and endeavored to arrest the Kuwaiti leadership.

Iraq attempted to justify its invasion. As far as Iraq was concerned Kuwait constituted a province of Basrah, that British had dose their utmost damage to Iraq integrity, through their co-operation with the Emir of Kuwait who acceded to every British demand. The Emir in the course of his collaboration with the British signed the protectorate agreement with British government. Though the Iraqis did not acknowledge the validity of this agreement which the Ottomans, the ultimate sovereign before the twentieth century, accepted. Legally, such agreement was considered important as it signifie the independent legal status of Kuwait and described the relationship between the Ottoman authorities and Kuwaiti leaders. It was believed that the agreement of protection was not valid as Kuwait, being a vassal state at the time, had no legal personality to sign the agreement. It only had such right with the prior authorization of the suzerain state. However, there were some legal precedents where a special relations between the suzerain and its vassal state permitted the latter to conclude an international treaty, as was the case with Egypt in 1517. On this occasion, all agreements concluded by Egypt were of commercial nature which could not compare with Kuwait's protection agreement with the British government where the Emir bound himself and his successor " 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 consent of Her Majesty's government for these purposes". Therefore, the protection agreement cannot be considered valid as

it clearly ran against the established rule that a vassal state cannot sign an international treaty without the permission of its suzerain.

The agreement became valid, however (post facto), due to its recognition by Ottoman authorities in the Agreement of 29 July 1913 between the British government and Ottoman authority. In this agreement it was established that Kuwait was a territory independent from the Ottoman Empire and had the right to raise its flag and conduct its affairs without the intervention of the Ottomans. It acknowledged in its article (3) that the agreement of 1899 is valid. One legal question raised against the 29 July agreement held that it was not ratified by Turkey.

The legal argument was that ratification was not necessary at that time, and such a view was held by many eminent writers such as Hall and Fitzmaurice, and also Oppenheim who says " Government acts, as a rule, on the view that a treaty is concluded as soon as their mutual consent is clearly apparent".

The outcome of such discussion points to the fact that Iraq's claim, that Kuwait was part of Iraq under the Ottoman Empire, is not sound at all. Kuwait was acting in a semi independent manner and its relations with Britain and conduct with Ottoman Empire prove this point strongly. Moreover, Ottoman authority, in the wake of its defeat in World War 1 signed in 1920 the treaty of Seffre with the Allied powers by which it renounced all its suzerainty or jurisdiction and all its rights over Syria and Iraq. Therefore, Iraq's claim to be the successor of the Ottomans runs against the tide of logical argument. Iraq

cannot be considered the successor as was itself a mere province under Ottoman rule but with less power than Kuwait. How such a province with little independence could claim the right of title over more advanced in self-government territory is quite puzzling. It is clear that Iraq accepted in the past the independence of Kuwait. Thus, its claim to Kuwaiti territory is contradictory.

The second claim of Iraq that Kuwait waged economic aggression against it proved also to be false and baseless in law and fact. The factual record of conduct before the invasion proved that Kuwait was not waging economic aggression but adopting a policy which every state can pursue for national interest. the Kuwaiti policy of producing more oil was necessitated by its need to support its economy and welfare of its citizens. However, Iraq perceived such policy as aggressive and harmful to its economy. Iraq's demand that Kuwait should write off its debts and provide it with thirty billion dollars, raised the level of tension between the two states. The level of tension reached its climax when the president of Iraq declared that war of economic means can only be combated with (military) force.

The accusation of Iraq that Kuwait waged economic aggression failed to meet the legal test. To define legally an act as economic aggression is very difficult. There are differences of definition between both Western and Third world countries. The latter naturally extend the criterion of definition to include as many activities which by themselves or in combination could produce harmful

effect on the victim state. On the other hand, Western countries tend to restrict it. Economic aggression is defined as coercion employed by a state against another in order to submit it to its will and deprive it of its economic resources and jeopardize its security.

Applying that definition in the Iraqi context, it becomes clear that Iraq is the state which committed aggression. Iraq refused all peaceful means and attempts to solve the problem amicably, and insisted that no peaceful agreement could be reached unless Kuwait accept all its claims. Kuwait did not respond to such blackmail, and hence Iraq carried out its threat.

This aggression presented an interesting case in legal literature, where a state argued that an economic aggression, non coercive in nature, could permit it to launch a war against the so called aggressor. Such Justification is not accepted at all in the literature of International Law. For the Charter of the United Nations in many of its Articles, in particular article 2 (4) and (3), outlaw the resort to force to solve international dispute between states. The use of force is permitted only in case of self-defence by the virtue of article 51 of the Charter. Such permission is confined to the case of actual armed attack and not anticipatory one; unless such attack take place no state would be allowed to resort to force. This conclusion is affirmed by the International Court of Justice in its ruling in the Nicaragua case and in any reading to Article 51 in conjunction with another article of the Charter. And since

Kuwait did not initiate an armed attack against Iraq, the latter action would be illegal and against the rules of International Law.

The third claim of Iraq concerned itself with the issue of invitation. The issue of invitation in International Law is very sensitive and complicated. For intervening in a state in response to an invitation pre-supposes the existence of civil war. Civil war itself must be clarified clearly to differentiate a mere uprising from the seizure of a state.

Iraq's claim, that its invasion was in response to an invitation of dissidents to intervene in Kuwait's affairs, pre-supposes the existence of civil strife in Kuwait. In fact, no such strife was ever observed in Kuwait before the invasion. Moreover, the supposed invitation by dissidents to Iraq cannot be accepted unless those dissidents, in their action, reach the stage of belligerency. The reputed dissidents did not, in fact, reach such stage nor even reach the stage of insurgency, but could be attributed to Iraqi propaganda broadcast from Iraqi territory after their failure to establish a broadcasting station on Kuwaiti soil.

The Iraqi invocation of the concept of 'invitation' highlighted the inefficiency of the rule of International Law in this regard. For according to such law, a state has the prerogative of recognizing subjectively the rebels as belligerents. If it did so then, according to the rules, it has the right to treat them on equal footing with the incumbent government. The state by doing so, disregarded the

criteria that were laid down for proper recognition and acted in a self-interest fashion which is characteristic of states in their international relations. International Law recognises that such an act was delicate but never outlawed it. The law accepted that a state has full right to use recognition the way it sees fit. As such the law has to be looked at and an attempt must be made to bridge the gap.

Furthermore, the invitation raises the issue of self-determination. For any acceptance of invitation from a foreign state to help dissidents will be against the incumbent government which enjoys the full protection and recognition of International Law. Equally, responding to an invitation from the government against the rebels raises the issue of principle of self-determination. The intervening state would be in this case hindering the principle of self-determination.

The Iraqi government claimed that its invasion was also in response to appeal from the Kuwaiti people to help them realize their self-determination. The discussion above showed that this principle to be legal in operation. It is recognized in the Charter of the United Nations and many international documents. Such a principle, however, cannot be considered binding on states. It is accepted that states can use their influence and diplomatic means to help the process of self-determination but not by force. The argument between the Western view and that of the Third world in this case is well known. Third world countries actively strive for self-determination, even if attained through

military means. The western view was that such support must be confined to moral support and nothing else. However, the prevalent view is that the use of force to realize this principle contradicts the value of the Charter and its provisions. Thus the Iraqi claim, that its invasion was conducted for the realization of this principle, is not valid. For force is not accepted for that purpose. Moreover, the Kuwaiti people have never invited the Iraqis to assist them in the defense of their state, and view the Iraqi invasion as an attempt to deprive them of their independence which they have enjoyed for so long.

Further, the claim that the invasion was legal under Islamic International Law failed to withstand the test of legality. Islamic International Law differs from modern International Law, but converges with it in regard to the outlawing of aggressive war, in the respect for human rights and the peaceful resolution of conflicts. Sources of Islamic International Law are based on the Quran and Hadith and any deviation from them, with regard to legislation of the law in Islam and its application, is not permitted at all. According to these sources, Muslim jurists divided the world into the land of peace (Dar Al-Islam) and land of war (Dar Al-Harb), each subjected to its own code of rules. Accordingly, the Iraqi invasion is looked at from the legal perspective of Dar Al-Islam.

Dar Al-Islam requires that peace must prevail and war be prohibited unless undertaken in self-defence. Self-defence is permitted to counter an attack or as

a response to breach of peace treaty or protection of religion. As far as self-defence is concerned, force must be actual and not anticipatory and must be proportional. In Iraq's case, invasion was not undertaken in self-defence as Kuwait's act did not mount to an attack against Iraq nor did violate any peace treaty with Iraq.

According to the rule of Dar Al-Islam, Iraq must not use force at all against a fellow Muslim state. It is obligatory on Iraq to seek peaceful resolution to its dispute with Kuwait. There are numerous calls in the Quran and Hadith to Muslims to reject war and seek peace as a means of solving disputes. Again Iraq, by launching its invasion, breached all peaceful treaties made with Kuwait, treaties which Islamic law insists that all parties respect.

Finally, the claim of Iraq that the International Alliance, invoked against its forces in Kuwait, was against the rules of Islamic International Law: according to Iraq, such an Alliance was formed of non-believers against a fellow Muslim state. The concept of 'alliance' in Islamic International Law has received comprehensive attention. Muslims Jurists have argued in the past that such an alliance with non believers is possible if Muslims are considered too weak to counter aggression. They relied on the concept of necessity *(maslahah al-Daruriyyah)* to legitimise such alliances. Contemporary Muslim jurists argued the case, the majority agreeing that an alliance with the West was permissible

as long as it limited itself to evicting Iraq from Kuwait. Others insisted force could be used, gut only Muslim force alone. However, it was argued, the Western forces were not so much to be classified as non-believers as 'people of the book' and that relying on their help constituted a necessary step on the part of the Muslim states to defend themselves.

The Iraqi invasion of Kuwait challenged the international system. The choice of the world was to defeat aggression. Such a choice was motivated not only by legal motives but by political self-interest also. Western powers conceived the Iraqi invasion as a threat to their interest, as did the Gulf states. Other Arab states insisted that such a precedent could not be permitted as it carried within it the seed of Arab destruction. Every state must respect the sovereignty and independence of others and abstain from the use of force. The alliance demonstrated the political will of states to guarantee and respect the rule of law. The reaction to the Iraqi invasion demonstrates irrespective of political and self-interest considerations, the triumph of justice over the law of the jungle. This by itself is good news for International Law and peace loving people wherever they are.

Appendix

Document No1

23rd January 1899 by Shaikh Mubarak on behalf of Kuwait and by Colonel Mead on behalf of Britain. It did not bear any witness signatures from any of Mubarak's family members. It only had the witness signature of one of Mubarak's friends from Bahrain in order to maintain full secrecy. Mubarak also feared the opposition from his family members and the possibility of their encroaching on his properties in Ottoman territory. The text of the Agreement was as follows :
'The purpose of signing this legal Agreement is that it has been duly agreed and consented by Colonel Malcolm John Mead on behalf of Her Majesty, The Queen of Great Britain as the First Party and His Highness Sheikh Mubarak bin Subah, Emir of Kuwait as the Second Party that His Highness Sheikh Mubarak bin Subah agrees of his own volition and desire to not to accept any agent or Qayim Maqam on behalf of any other government or state in Kuwait or in any other part within his territory without the permission of the Kingdom of Great Britain. He shall also not authorise, sell lease, mortgage or transfer through any other method. He shall also not grant any part of his lands for purposes of habitation within his territory without the consent of the Government of Her Majesty the Queen of Great Britain. This shall include those lands of the Sheikh which are under the possession of subjects of other countries. In confirmation of the above this Agreement has been duly signed by Colonel Malcolm John Mead Representative of Her Majesty the Queen of Great Britain in the Persian Gulf and His Highness Sheikh Mubarak on his own behalf and on behalf of his heirs and successors. Signed on the 10th of Holy Ramadan 1316 A.H. corresponding to 23rd January 1899."

Document No2

According to the agreement signed between Her Majesty's Political Resident in the Arabian Gulf and His Highness the Ruler of Kuwait. The terms of the treaty were as follow:

(a) The Agreement of the 23rd of January 1899, shall be terminated as being inconsistent with the sovereignty and independence of Kuwait.

(b) The relation 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 request such assistance .

In an exchange of letters between Sheikh Abdullah and the British political Resident in the Gulf , Sir William Luce, the British declared their continued readiness to assist the Government of Kuwait if the latter requested such assistance.[1] For full text see U.K.T.S.1(1961), Cmnd. 1409. and see Kessing's Contemporary Archives, (1961-62).

Document No3

For full text see *the Arab League Document* (the Secretary General report to the Arab League Council) Cairo, 1961, Appendix.2. It reads as follow:

(1)Kuwait shall be committed to the withdrawal of the British forces as soon as possible.

(2) The Government of Iraq shall be committed to the non-use of force in annexing Kuwait .

(3) Supporting every Kuwaiti desire to unite or confederate with its charter.

(4) Welcoming Kuwait as a member of the Arab League.

(5) Arab State members of Arab League are committed to offer effective assistance to safeguard its independence provided that this be at Kuwait's request.

Document No 4

4 October 1963

Ahmed Hassan Al Bakr the Iraqi Prime Minister and the Head of the Kuwaiti delegation, Sabah Al Salem Al Sabah was issued. The statement emphasized that:

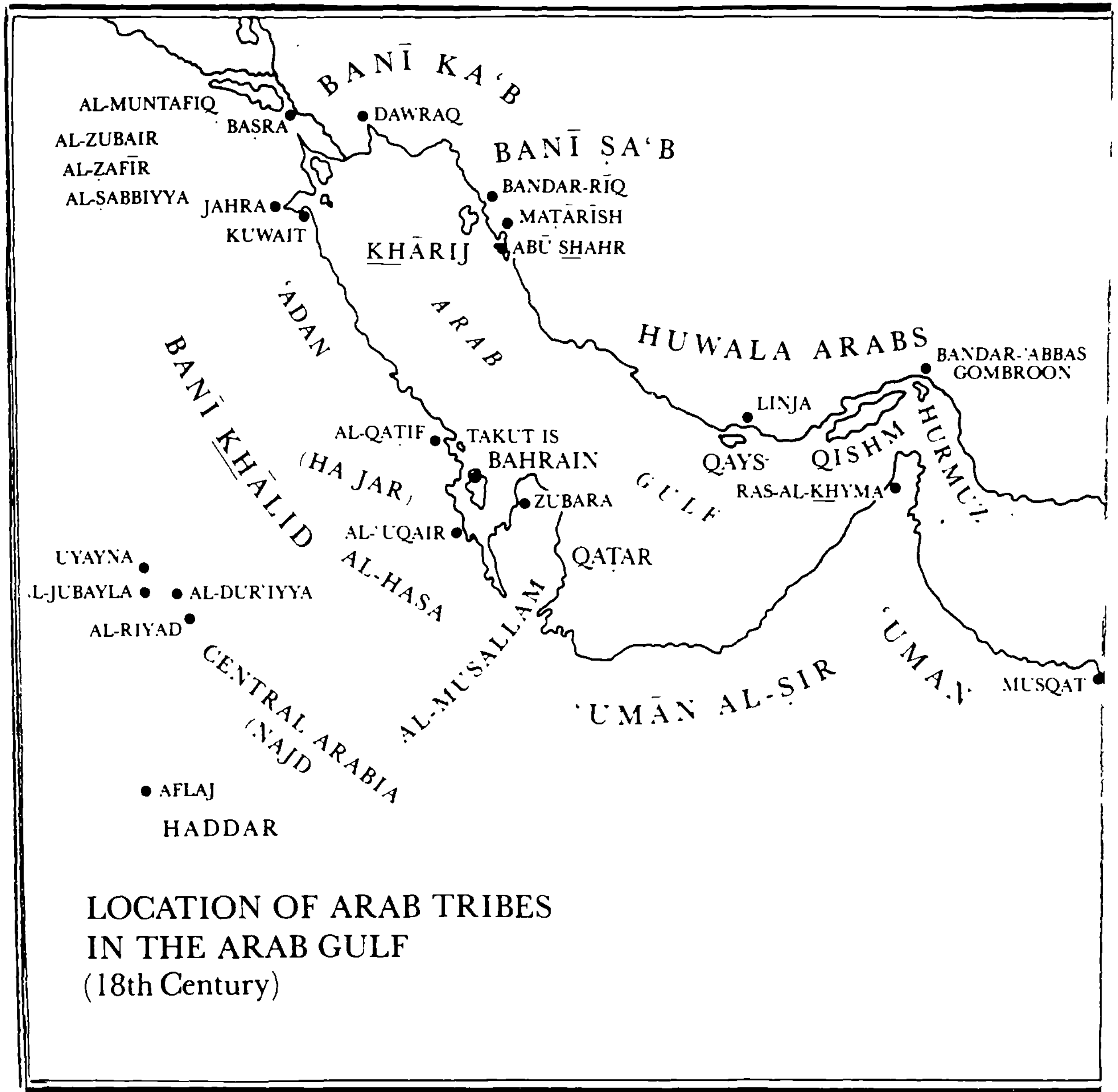
1st: The Republic of Iraq acknowledges the independence and sovereignty of Kuwait within its borders as specified in the letter of the prime Minister of Iraq on 21/7/1932 which was approved by the Governor of Kuwait in his letter dated 10/8/1932.

2nd: Both governments shall work to reinforce the brotherly relations between the two brother Countries guided by the national duty, mutual interests and the aspiration of comprehensive Arab Unity.

3rd: Both governments shall endeavor to create cultural, commercial, and economic cooperation between the two countries, and to exchange technical information, towards which objective diplomatic representation on the ambassadorial level between the two countries shall begin promptly.

General Ahmed H. Al-Bakr.	Sabah Salem Al-Sabah
Head of Iraqi delegation	Head of Kuwaiti delegation

Location Of Kuwait and the Arab Tribes in The Arab Gulf



Map

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