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THE PRACTICE OF IRAQ AND KUWAIT IN TREATY SUCCESSION:
A SELECTIVE APPROACH BASED ON
THE ISLAMIC LEGAL THEORY

by

MADYOUS FALLAH AL-RASHIDI

A thesis presented for the Degree of Doctor of Philosophy
in the Faculty of Law,
University of Edinburgh
April 1989
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGEMENT</td>
<td>ix</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>x</td>
</tr>
<tr>
<td>ABBREVIATIONS</td>
<td>xi</td>
</tr>
<tr>
<td>INTRODUCTORY REMARKS</td>
<td>xiii</td>
</tr>
</tbody>
</table>

## PART I
**SUCCESSION IN FACT**

## CHAPTER 1: PARTIES

### SECTION 1: THE PREDECESSORS

1. The Pre-Islamic Non-Arab Political Entities
2. The Pre-Islamic Arab Political Entities
   A. Establishment
      (i) The Independent Arab Political Entities
      (ii) The Arab Protected Entities
   B. Arabism as a Geo-Political Link Generating Arab moves Towards Independence

### SECTION 2: THE SUCCESSOR

1. The Emergence of the Islamic State
   A. State Succession
      (i) Effects of the Establishment of the Islamic State on the Pre-Islamic Arab Political Entities
         (a) Establishment of al-Umma (the Islamic Nation)
         (b) The Establishment of the Institution of Dār al-Islam (Islamic Territory)
         (c) Establishment of the Prophetic Government in Yathrib
         (d) Sovereignty
         (e) Establishment of the Institution of Dār al-'Ahd (the Covenant Territory)
      (ii) Succession of the Islamic State to Pre-Islamic Arab Political Entities
   B. Government Succession
      (i) Constitutional Succession
      (ii) Revolutionary Succession
   2. Evolution of the Islamic Legal Order
      A. Decentralisation of the Governmental Administration
      B. The Territorial Disintegration of the Islamic State
      C. The Advent of Foreign Protection
CHAPTER II: SELECTIVE PRACTICE

SECTION 1: THE PRACTICE OF IRAQ TOWARDS ASSUMPTION OF GOVERNORSHIP BY FORCE
1. Replacement of the Islamic State by a Member State of the Covenant Territory in the Conduct of the International Relations of the Territory of Iraq
   A. Establishment of British Mandate over Iraq
   B. Establishment of a Government for Iraq
   C. Recognition
   D. Evolution of the Personality and Treaty-Making Competence of Iraq
2. Replacement of British Mandate over Iraq by Independence
3. The Factual Identity

SECTION 2: THE PRACTICE OF KUWAIT TOWARDS ASSUMPTION OF GOVERNORSHIP BY FORCE
1. Replacement of the Islamic State by a Member State of the Covenant Territory in the Conduct of the International Relations of the Territory of Kuwait
   A. Acquisition of al-Kurayn Territory by the 'Uttubī Tribe
   B. Establishment of Government in the Territory of Kuwait
      (i) The Relationship between the Shaykh of Kuwait and the Ottoman Empire
      (ii) Delegation of the Conduct of the External Affairs of Kuwait to Britain by the 1899 Exclusive Agreement
      (iii) Legality of the Delegation of the Conduct of External Affairs of Kuwait to Britain
   C. Recognition of the Protected State of Kuwait
   D. Evolution of the Personality and Treaty-Making Competence of Kuwait
2. Replacement of British Protection over Kuwait by Independence

PART II
SUCCESSION IN LAW

CHAPTER III: The PRACTICE OF THE SUCCESSOR

SECTION 1: The EFFECTS OF THE EMERGENCE OF THE ISLAMIC STATE
1. State Succession
   A. The Criteria of Identity of the New Community
   B. The Determining Legal Criteria of Succession in the New Legal Order
2. Government Succession
   A. Constitutional Succession
   B. Revolutionary Succession of the Islamic Governments
<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>SECTION 2: THE EFFECTS OF THE EVOLUTION OF THE ISLAMIC LEGAL ORDER</td>
<td></td>
</tr>
<tr>
<td>1. The Effects of the Decentralisation of the Governmental Order</td>
<td>103</td>
</tr>
<tr>
<td>2. Selective Practice in the Delegation of the Conduct of International Relations to Non-Muslim States</td>
<td></td>
</tr>
<tr>
<td>A. The Practice of Kuwait in the Delegation of the Conduct of its International Relations to a Non-Muslim State (Great Britain)</td>
<td></td>
</tr>
<tr>
<td>(i) The Status of the 1899 Exclusive Agreement under Islamic Law</td>
<td>110</td>
</tr>
<tr>
<td>(ii) The Effects of the 1899 Exclusive Agreement</td>
<td></td>
</tr>
<tr>
<td>(a) Effects on the Legal Status of Kuwait</td>
<td>112</td>
</tr>
<tr>
<td>(b) Effects on the Pre-Existing Treaties</td>
<td></td>
</tr>
<tr>
<td>(1) Treaties Concluded by Kuwait</td>
<td>113</td>
</tr>
<tr>
<td>(2) Treaties Concluded by Great Britain</td>
<td>113</td>
</tr>
<tr>
<td>(3) Treaties Concluded by the Islamic State</td>
<td>113</td>
</tr>
<tr>
<td>B. The Practice of Iraq in the Delegation of the Conduct of its International Relations to Non-Muslim State</td>
<td></td>
</tr>
<tr>
<td>(i) The Legal Status of the 1922 Treaty of Alliance under Islamic Law</td>
<td>116</td>
</tr>
<tr>
<td>(ii) The Effects of the 1922 Treaty of Alliance</td>
<td></td>
</tr>
<tr>
<td>(a) On Treaties Concluded by the Mandatory</td>
<td>117</td>
</tr>
<tr>
<td>(b) On Treaties Concluded by the Islamic State</td>
<td>117</td>
</tr>
<tr>
<td>(1) Non-Boundary Treaties</td>
<td>121</td>
</tr>
<tr>
<td>(2) Boundary Treaties</td>
<td></td>
</tr>
<tr>
<td>CHAPTER IV: THE PRACTICE OF IRAQ IN TREATY SUCCESSION</td>
<td>124</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td></td>
</tr>
<tr>
<td>SECTION 1: TREATIES CONCLUDED WITH MEMBER STATES OF THE COVENANT TERRITORY</td>
<td></td>
</tr>
<tr>
<td>1. Treaties Concluded by the Mandatory Power on Behalf of Iraq</td>
<td></td>
</tr>
<tr>
<td>A. Multilateral Treaties</td>
<td>128</td>
</tr>
<tr>
<td>B. Bilateral Treaties</td>
<td>129</td>
</tr>
<tr>
<td>2. Treaties Concluded by Iraq with Member States of the Covenant Territory</td>
<td></td>
</tr>
<tr>
<td>A. Multilateral Treaties</td>
<td>143</td>
</tr>
<tr>
<td>B. Bilateral Treaties Concluded between Iraq and the United Kingdom before the Date of Independence</td>
<td>147</td>
</tr>
<tr>
<td>SECTION 2: THE EFFECTS OF IRAQ'S INDEPENDENCE ON TREATIES CONCLUDED WITH MEMBER STATES OF THE ISLAMIC TERRITORY</td>
<td>154</td>
</tr>
<tr>
<td>1. Treaties Concluded with Muslim States</td>
<td></td>
</tr>
<tr>
<td>A. Multilateral Treaties</td>
<td>154</td>
</tr>
<tr>
<td>B. Bilateral Treaties</td>
<td>159</td>
</tr>
<tr>
<td>2. Treaties Concluded with Arab States</td>
<td>163</td>
</tr>
<tr>
<td>A. Non-Boundary Treaties</td>
<td>163</td>
</tr>
</tbody>
</table>
CHAPTER V: THE PRACTICE OF KUWAIT IN TREATY SUCCESSION

SECTION 1: TREATIES CONCLUDED BY THE PROTECTING STATE ON BEHALF OF KUWAIT

1. Multilateral Treaties Concluded with Member States of the Covenant Territory
   A. Multilateral Treaties of a Non- Constituent Character
      (i) Non- Dispositive Multilateral Treaties
      (ii) Dispositive Multilateral Treaties
   B. Multilateral Treaties of a Constituent Character
      (i) Treaties Establishing International Organisations
      (ii) Treaties Adopted within International Organisations

2. Bilateral Treaties
   A. Treaties Concluded with Member States of the Covenant Territory
   B. Treaties Concluded with Member States of the Islamic Territory

SECTION 2: TREATIES CONCLUDED BY KUWAIT

1. Treaties Concluded with Member States of the Covenant Territory
   A. Multilateral Treaties
      (i) Treaties Establishing International Organisations
      (ii) Treaties Adopted within International Organisations
   B. Bilateral Treaties

2. Treaties Concluded with Member States of the Islamic Territory
   A. Non-Boundary Treaties
      (i) Multilateral Treaties
      (ii) Bilateral Treaties
   B. Boundary Treaties
      (i) Treaties Establishing the Kuwaiti-Saudi Arabian Boundaries
      (ii) Treaties Establishing the Kuwaiti-Iraqi Boundaries

CHAPTER VI: ARE THERE RULES GOVERNING TREATY SUCCESSION IN ISLAMIC LEGAL THEORY?

SECTION 1: THE ISLAMIC CONCEPT OF STATE SUCCESSION

1. Succession in Fact
   A. Factual Identity in Islamic Legal Theory
      (i) The Concept of Dār al-Islām (Islamic Territory)
      (ii) The Concept of Dār al-Ḥarb (Territory of War)
      (iii) The Concept of Dār al-‘Ahd (Covenant Territory)
SUBJECT

B. Definition of Succession in Fact

2. Succession in Law
   A. Legal Identity in Islamic Legal Theory
      (i) Definition of Terms
      (ii) The Criteria of Succession
   B. Definition of Succession in Law

SECTION 2: SELECTIVE LEGAL DOCTRINES

1. The Iraqi Legal Doctrine of Devolution
   A. Devolution of Treaties in the Light of the Iraqi Legal Doctrine
      (i) Substance of the Doctrine
      (ii) Criticism of the Doctrine
   B. The Iraqi Legal Doctrine in the Light of International Law Doctrines
      (i) The Doctrine of Universal Succession
      (ii) The Doctrine of Popular Continuity
      (iii) The Doctrine of Organic Substitution
      (iv) The Doctrine of Self-Abnegation

2. The Kuwaiti Legal Doctrine of Non-Devolution
   A. The Non-Devolution of Treaties in the Light of the Kuwaiti Legal Doctrine
      (i) Substance of the Kuwaiti Doctrine
      (ii) Criticism of the Kuwaiti Legal Doctrine
   B. The Kuwaiti Doctrine of Non-Devolution in the Light of International Law Doctrines

PART III

ARE THE IRAQI AND KUWAITI LEGAL DOCTRINES APPLICABLE ON THE REGIONAL PLANE?

INTRODUCTION

CHAPTER VII: EVOLUTION OF THE ARABIC CONVENTIONAL LAW ON TREATY SUCCESSION

SECTION 1: UNDER THE PROTECTION OF NON-MUSLIM STATES

1. The Practice of Non-Gulf Arab States
   A. Tunisia
   B. Morocco
   C. Egypt

2. The Practice of the Arab Gulf States
   A. The Legal Status of the Exclusive Agreements Under Islamic Law
   B. The Effects of the Exclusive Agreements
      (i) On the Legal Status of the Sheikdoms
      (ii) On Treaties
         (a) Treaties Concluded between Great Britain and Member States of the Covenant Territory
         (b) Treaties Concluded between Great Britain and Member States of the Islamic Territory
SUBJECT

SECTION 2: UNDER THE MANDATE REGIME

1. Establishment of the Mandate System

A. Effect on Treaties
   (i) Treaties Concluded by the Islamic State on Behalf of the Territories of:
       (a) Palestine
       (b) Syria and Lebanon
   (ii) Treaties Concluded by the Mandatory Powers on Behalf of the Arab Territories

B. Termination of the Mandates Over the Arab Territories

2. The Establishment of the Arabic Conventional Law

CHAPTER VIII: FORMATION OF THE ARABIC CUSTOMARY LAW ON TREATY SUCCESSION

INTRODUCTION

SECTION 1: THE MATERIAL REQUIREMENTS OF THE ARABIC CUSTOMARY LAW

1. General Practice of the Arab States in Treaty Succession
   A. The Practice of the Ex-Protected States
      (i) Egypt
      (ii) Tunisia
      (iii) Morocco
      (iv) The Arab Gulf States
   B. The practice of the Ex-Mandated Territories
      (i) The Effects of Independence on Treaties concluded by the Islamic State
       (a) Palestine
       (b) Jordan
       (c) Syria and Lebanon
      (ii) The Effects of Independence on Treaties Concluded by the Mandatory Powers on Behalf of the Arab Territories
       (a) Jordan
       (b) Syria and Lebanon

2. Uniformity and Consistency of the Practice of the Arab States in Treaty Succession

3. Duration of the Practice of the Arab States

SECTION 2: THE OPINIO JURIS OF ARABIC CUSTOMARY LAW ON TREATY SUCCESSION

1. The Concept of and Evidence for the Arabic Opinio Juris
   A. The Concept
   B. The Evidence

2. The Relationship between Arabic Public Law and Islamic Law

3. The Relationship between Arabic Customary Law and International Customary Law
PART IV
EFFORTS OF IRAQ AND KUWAIT IN THE INTEGRATION OF
THE LAW OF STATE SUCCESSION IN RESPECT OF TREATIES
TOWARDS THE CODIFICATION PROCESS

INTRODUCTION

CHAPTER IX: EFFORTS LEADING TO THE 1978 VIENNA CONVENTION

SECTION 1: EFFORTS TOWARDS CODIFICATION IN THE PRE-U.N. ERA
1. The Islamic Law of Nations
   A. Non-Official Attempts at Codification
   B. Official Attempts at Codification
2. The European Law of Nations
   A. Non-Official Attempts at Codification by:
      (1) Private Individuals
      (ii) Private Organisations
   B. Official Attempts at Codification

SECTION 2: EFFORTS TOWARDS CODIFICATION OF STATE SUCCESSION
IN RESPECT OF TREATIES IN THE U.N. ERA
1. Establishment of the U.N.I.L.C.
2. The I.L.C.'s Codification of State Succession in Respect
   of Treaties

CHAPTER X: EFFORTS AT THE 1978 VIENNA CONVENTION TOWARDS
CODIFICATION OF STATE SUCCESSION IN RESPECT OF
TREATIES

SECTION 1: THE 1974 I.L.C.'S DRAFT ARTICLES AS A BASIS FOR
THE PROPOSED CONVENTION
1. Articles Approved by the Overwhelming Majority of the
   Delegations
2. Articles Giving Rise to Heated Debate at the Conference
   A. The Non-Retroactive Application of the Future
      Convention
   B. Boundary and Other Territorial Regimes
   C. The Application of the Doctrine of Non-Devolution to
      Treaties by a New State Formed by means of Separation
      from Another State

SECTION 2: EMERGENCE OF NEW ISSUES AT THE CONFERENCE
1. The Issue of the Settlement of Disputes
2. The Issue of the Final Clauses
<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>CONCLUSIONS</td>
<td>538</td>
</tr>
<tr>
<td>APPENDICES</td>
<td>557</td>
</tr>
<tr>
<td>SELECTED BIBLIOGRAPHY</td>
<td>566</td>
</tr>
</tbody>
</table>
ACKNOWLEDGEMENT

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My thanks also go to many governmental organisations and officials of the Arab states who provided me with necessary information, gave me inspiration, valuable suggestions and assistance during my travel for the purpose of research. Also particularly helpful were the Kuwait Ministry of Foreign Affairs and the Kuwaiti Embassies in London and the Hague, the Ministry of Foreign Affairs of the United Arab Emirates and their Embassy in London, the Bahrain Ministry of Foreign Affairs and their Embassy in London and the Ministry of Foreign Affairs of Saudi Arabia.

Lastly, but not least, I would like to emphasise that I remain solely responsible for the choice of the subject matter and the presentation of the facts and views contained in this thesis. These views are my own and in no way reflect the official view of any Arab state.

M. F. Al-Rashidi
ABSTRACT

The practice of Iraq and Kuwait in treaty succession has significantly contributed to the development of the concept of state succession not only in Islamic law but also in international law; a contribution which advocates the paramount importance of distinguishing between succession in fact and succession in law. Greatest attention is given to the latter in this study which is divided into the following four parts:

Part 1. Survey of the development of the concept of succession in fact under Islamic law and throughout the practice of the Islamic State until the advent of the latter's territorial disintegration into many political entities, whereby various Arab territories developed independent factual identities. The practice of Iraq and Kuwait have been selected from among these entities in order to examine the maturity of certain Islamic legal rules governing succession in fact, upon which the rules governing succession in law are based.

The second, third and fourth parts of this treatise survey the development of the concept of succession in law under Islamic law and its relationship to international law through five stages.

A. Outline of the Islamic legacy in treaty succession according to the primary sources of Islamic law.

B. Analysis of the selective practice of two of the evolving Arab states, namely Iraq and Kuwait, in order to throw some light on the application of the primary sources of Islamic law to treaty succession and the resort to principles embodied in the secondary sources where no provision is found in the former. This will help to explain the practice of these states with regard to certain controversial matters where no precedent existed.

C. Study of the concept of state succession in Islamic legal theory from which the Iraqi doctrine of devolution and the Kuwaiti doctrine of non-devolution evolved. (A, B and C constitute part 2).

D. (Part 3) The adoption of the Iraqi and Kuwaiti legal doctrines on treaty succession by other Arab political entities and the resulting evolution of Arabic public law.

E. (Part 4) Interaction between principles and doctrines that have evolved from the secondary sources of Islamic law, such as Arabic public law, on treaty succession and international law by means of the codification process through the work of the U.N.I.L.C. and the 1978 Vienna Convention on State Succession in Respect of Treaties in which the Arab states made an important contribution to the development of the international legal order. This contribution will be further substantiated in the conclusions.
- xi -

**ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A/...</td>
<td>Numbered documents of the United Nations General Assembly.</td>
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<td>A/PV/...</td>
<td>Numbered procès-verbaux or verbatim records of plenary meetings of the United Nations General Assembly.</td>
</tr>
<tr>
<td>A/AC.10/...</td>
<td>Numbered documents of the Committee on the Progressive Development of International Law and its Codification.</td>
</tr>
<tr>
<td>A/CN.4/...</td>
<td>Numbered documents of the International Law Commission.</td>
</tr>
<tr>
<td>A.C.</td>
<td>Law Reports, Appeal Cases.</td>
</tr>
<tr>
<td>A.D.</td>
<td>Annual Digest of Public International Law Cases.</td>
</tr>
<tr>
<td>A.J.I.L.</td>
<td>American Journal of International Law.</td>
</tr>
<tr>
<td>B.I.S.D.</td>
<td>Basic Instruments and Selected Documents.</td>
</tr>
<tr>
<td>B.Y.I.L.</td>
<td>British Yearbook of International Law.</td>
</tr>
<tr>
<td>Col.</td>
<td>Colonial.</td>
</tr>
<tr>
<td>F.O.</td>
<td>Foreign Office Papers.</td>
</tr>
<tr>
<td>G.B.T.S.</td>
<td>Great Britain Treaty Series</td>
</tr>
<tr>
<td>G.B.P.P.</td>
<td>Great Britain Parliamentary Papers.</td>
</tr>
<tr>
<td>Grotius ST</td>
<td>Transactions of the Grotius Society.</td>
</tr>
<tr>
<td>H.L.R.</td>
<td>Harvard Law Review.</td>
</tr>
<tr>
<td>I.C.</td>
<td>Islamic Culture.</td>
</tr>
<tr>
<td>I.C.A.O.</td>
<td>International Civil Aviation Organisation.</td>
</tr>
<tr>
<td>I.C.J.</td>
<td>International Court of Justice.</td>
</tr>
<tr>
<td>I.C.L.Q.</td>
<td>International and Comparative Law Quarterly.</td>
</tr>
<tr>
<td>I.Con.</td>
<td>International Conciliation.</td>
</tr>
<tr>
<td>I.F.P.D.</td>
<td>India, Foreign and Political Department.</td>
</tr>
<tr>
<td>I.L.R.</td>
<td>International Law Reports.</td>
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<td>I.L.C.</td>
<td>International Law Commission.</td>
</tr>
<tr>
<td>I.L.M.</td>
<td>International Legal Materials.</td>
</tr>
<tr>
<td>I.S.</td>
<td>International Studies.</td>
</tr>
<tr>
<td>J.A.I.L.</td>
<td>Japanese Annual of International Law.</td>
</tr>
</tbody>
</table>
L.N.T.S. League of Nations Treaty Series.
L.Q.R. Law Quarterly Review.
Malloy Treaties, Conventions, etc., between the U.S.A. and Other Powers, 4 vols. (1776-1937).
M.E.E.S. Middle East Economic Survey.
M.E.J. The Middle East Journal.
N.I.L.R. Netherlands International Review.
P.C.I.J. Permanent Court of International Justice.
P.M.C. Permanent Mandate Commission.
Q.B. The Law Reports, Queen's Bench Reports.
R.D.C. Recueil Des Cours.
R.I.A.A. Reports of International Arbitral Awards.
S.I. Statutory Instruments.
S.I.A. Survey of International Affairs.
S.R. Summary Records.
U.S.T.I.A.S. U.S. Treaties and Other International Agreements.
W.L.R. The Law Reports, Weekly Law Reports.
Y.B.W.P. Yearbook of World Policy.
INTRODUCTORY REMARKS

1. On the Selection of the Practice of Iraq and Kuwait:

The practice of Iraq and Kuwait in treaty succession can only be appreciated by understanding the practice of their parent state under various Islamic governments. Specifically, these governments are the Rāshidin Khilāfa in al-Madina and subsequently, the Umayyid Khilāfa in Damascus, the Abbāsid Khilāfa in Iraq and the Ottoman Khilāfa in Istanbul. Latterly, the establishment of many Arab governments, including those of Iraq and Kuwait, in various parts of the Arab territory, and their coming under the protection or mandate of non-Muslim states, facilitated an interaction and reciprocal influence between Islamic and international law. The experiences of Iraq and Kuwait in treaty succession should be examined under Islamic law and Islamic legal theory on the basis of the continuity of their Islamic identity and hence the continuity of the factual and legal connections between these states and Islamic law. Furthermore, this approach should help non-Muslims to understand the Islamic legal heritage with regard to treaty succession and elucidate another channel whereby reciprocal understanding can be achieved in order to establish a positive relationship between Islamic and international law, which will undoubtedly contribute to the development of the international legal order. In this regard Iraq, and Kuwait have played active roles in the Arab solidarity movement (Pan-Arabism), the driving force that has helped establish the Arabic public law, which has evolved through the practical application of the principles of Islamic law in order to govern the inter se relations between
Arab states and their relations with non-Muslim states. It is thus through the Arabic public law that the relationship between Islamic and International law has been established.

2. On the Translations:

The system adopted for rendering Arabic names and terms to English characters is in conformity with that used in the Encyclopaedia of Islam.

3. On the Scheme of the Research:

The nucleus of the issue with which this paper is concerned will be formulated in the form of a main question although subsidiary questions will be investigated in separate chapters. The main question is: to what extent were the Ottoman Empire (the Islamic State) and Great Britain (a member state of the covenant territory) factually and lawfully replaced by Iraq and Kuwait at the date of their independence in respect of treaties that these former powers concluded on their behalf? This issue will be examined in the light of the available historical data and of such implications as arise in Islamic law, but whenever it is relevant, due regard will be paid to a comparative study of the Islamic views on the subject and the corresponding views of the international law jurists in order to clarify their differences and similarities and to help in determining the relationship between Islamic and international law and pointing out any contribution that has been made by the former to the development of the international legal order. For immediate purposes, the related question of the extent to which the pre-Islamic political entities were factually and juridically replaced by the
Islamic State (the parent state of Iraq and Kuwait) in respect of treaties concluded by the former powers will be dealt with. The investigation of this question reveals that for the sake of convenience and in order to answer the main question satisfactorily, succession should generally be divided into succession in fact and succession in law. Succession in fact, therefore, will be the subject matter of the first part while succession in law will be the subject matter of subsequent parts.
PART I

SUCCESSION IN FACT:

PARTIES

SELECTIVE PRACTICE
CHAPTER I
PARTIES

SECTION 1: THE PREDECESSORS:

1. The Pre-Islamic Non-Arab Political Entities:

Territorial changes between various political entities occurred in antiquity and have been repeated in different historical contexts. Thorough investigation reveals that such territorial changes have been based either on the treaty instrument or customary rules depending on the nature of the legal order of the entities concerned.

The Middle East, as the cradle of Islam, was dominated by a particular group of political entities among which the transfer of territory from one entity to another was regulated by certain treaties such as the 3100 B.C. Treaty concluded between Eannatum, the victorious ruler of the Mesopotamian City of Lagash, and the men of Umma, another Mesopotamian city-state by which the latter came under the suzerainty of the former. Subsequently, another Peace and Alliance Treaty of 1279 B.C. was concluded between Rameses II, King of Egypt, and Hattusili II of the Hittites by which the formal independence of the latter was replaced by vassalage. Through these treaties, these small groups of political entities discovered and applied a new mode of the acquisition of a territory among themselves, nevertheless, the ancient customary rule of force remained universally dominant in governing the transfer of territory from one entity to another outside these groups.

Subsequently, this practice became inherent in most ancient legal orders, for example, in the Greek sphere, the city-states developed a notion of 'community' in basing their relations with one another on
treaties such as the 418 B.C. Treaty concluded between Sparta and Argos, but the legal order of the Greek city-state did not apply to the territorial changes between member and non-member entity, an event which remained the exclusive domain of the customary rule of conquest.

With the decline of the Greek city-states and their absorption into the Roman Empire, their ideals and principles influenced the development of the so-called pax Romana which was applied throughout the Roman Empire in order to consolidate many territories acquired through conquest. When the Roman Empire was divided into Western and Eastern (or Byzantine) Empires, the latter (whose rule extended over Syria and Egypt) was more influenced by the legal experience of the Greeks than the former.

Persia, a rival of the Roman Empire, had its own regional community consisting of small political entities, the inter-relationships of which were regulated by a set of customary rules and practices. Each legal order, however, was exclusive to its members and did not recognise any universal rules such as equality and reciprocity between its members and any other rival power or even between its members themselves and hence, the transfer of territory between the two super-powers was determined by the rule of force. Thus depending on the power each empire exerted at any one time, their political boundaries were moved back and forth. Furthermore, the two super powers sometimes individually practised this rule towards the other Arab political entities on the southern boundaries.

2. The Pre-Islamic Arab Political Entities:

   A. Establishment:
(1) The Independent Arab Political Entities:

In Southern Arabia, a group of politically advanced entities had flourished successively, the most ancient being the Kingdoms of Ma'in, Saba' and Himyar. In comparison with the rules regulating the transfer of territory between the aforementioned non-Arab political entities, the Southern Arabs adopted a unified legal order based on a theocratic system in which the distribution of power implied the distribution of the territory of the state whose head was a mukarrīb (priest-king). This legal order developed into a more secular and centralised system under the rule of a strong monarch supported by an assembly of nobles, but this distribution of power in turn led to a less centralised administration, with a much weaker monarchy and greater power in the hands of the tribal kīls (dukes), who were the heads of separate branches of nobility in charge of their own domain known as mikhāl (province) where they ruled the tribes resident there. Each mikhāl consisted of a number of mahfads (a piece of agricultural land) the owner of which was called dhū (landlord). None of the legal rules embodied in this legal order was applicable to the transfer of territory from or to the state concerned which remained the exclusive domain of the customary rule of the time.

Half way between the Southern and Northern Arab political entities lay a community of Arabian city-states composed of Makka, al-Tā'if and Yathrib whose importance to the Arabs centred on their position as stage-posts for commercial caravans travelling from al-Yemen to Egypt and Syria as well as their temples and associated idols. This position influenced the development of a common legal
order based on treaties more liberal than that established between the Greek city-states, since its rules were applicable to the transfer of territory between the parties themselves or between one of them and a non-party.

The rest of this central area was inhabited by the Bedouins, the allegiance of whom was given to the tribal entity rather than to the territory over which the tribe exercised authority. Throughout Arabia, each Bedouin tent represents a family, each group of tents represents a clan (al-‘ayy) and each group of clans constitutes a tribe (al-‘abila). For political and legal reasons many tribes formed federations by ḥilf and, by a gradual process, tribes gave allegiance to the federation itself. Although former tribal identity persisted, it no longer formed an effective focus of group solidarity and common action. Instead, the focus shifted to the belief that the various tribal groups were descended from one common origin, and the tribal federation carried the common name of the person believed to be the ancestor, such as Kuraysh.

The prevailing customary rule governing the transfer of territory from one tribe to another was that of forceable annexation or occupation according to which the territory took the name of the tribe who defended their independence from any foreign occupants. Their remote position in the Arabian Desert, however, enabled these political entities to defend and preserve their independence against the Persian and Roman powers in the North.

(ii) The Arab Protected Entities:

Unlike the southern and central Arab political entities, the Northern Arab political entities came within the sphere of influence
of the Persian and Roman Empires and the absence of any power that could unify them resulted in the loss of their independence when faced with conquest by the imperial powers of Persia and Rome. Through conquest, the Nabataean state and the Kingdom of Tadmor became Roman protectorates and Abyssinia succeeded where the Romans failed in annexing the Himyarite Kingdom.

For defensive purposes, the rules of conquest and annexation were replaced by the rule of consensual vassalage by these powers in recruiting supporters from the other Arab political entities on the borders, such as the Lakhmid Kingdom, whose capital at al-Hira, came under the suzerainty of pagan Persia facilitating the extension of Persian political and religious influence to Central and Southern Arabia; and the Kingdom of Ghassan, which came under the suzerainty of the Byzantine Empire, and defended the frontiers of the Empire against Persia and its vassals. Both kingdoms, however, maintained their Arabic identity, and on certain occasions invoked it as a unifying power against foreign domination.

B. Arabism as Unifying Power of Different Legal Orders:

Their political culture, characterised as it was by jealous loyalty to tribal, political, and religious particularism, led the Arabs into a state of anarchy with numerous different legal orders. A chief cause of this anarchy was the so-called al-‘asabiyya al-Kabaliyya (tribal partisanship), which was the cornerstone of the pre-Islamic Arab communities. With the settlement of many Arab tribes in various Arabian territories, it appears that the geographical element came to predominate over the previous nomadic social norm as the central factor of tribal social life. The Arabic
language, the spoken tongue of all these tribes, developed in response to the new settled life, and the meanings of certain terms - which had previously been used to describe tribal institutions - changed to describe territorial institutions. As many villages and cities became centres of tribal social life, the allegiance of each tribes' members was given not only to their tribe, but also to the territory where they had settled and they came to observe in their inter se relations certain conventional and customary rules peculiar to the Arabs in general.

It could be contended, therefore, that the political entities of Arabia had started a trend that would culminate in the development of a national state, which required a fixed territory and a unified effective legal order as a prerequisite for its establishment. However, their habitual independence, and the competition between each entity to dominate one another, prevented the development of the legal order of such a state. A common culture acted as a substitute for the lack of national unity amongst the Arabs, as language and history formed an effective basis for the claim to ethnic, as well as territorial, unity. Arabs have always adored their common tongue. To them, the Arabic language is more beautiful, more expressive, than any other and it was the means by which the pre-Islamic Arabs expressed and preserved their common heritage of history and culture. Throughout Arabia this became a matter of semi-national prestige, which unified Arabs, at least factually, on certain occasions and opened their eyes to Arabism as a unifying power.

By means of example, two of these occasions should be mentioned. The first was the Abyssinian Abraha's religiously motivated
expedition in 570 A.D.\textsuperscript{21} against Makka, the religious centre of pagan Arabia, which attempted to lay the city to waste. The event had the effect of uniting several Arab tribes to defend their religious centre even though they proved to be too weak to resist the powerful Abyssinian army\textsuperscript{22}.

The second occasion was the so-called Day of \textit{Dhu Kār}\textsuperscript{23} 610 A.D., where the conflict between Arabism and the Persians came to a head. The consequences of this battle were that the Arabs annexed the Euphrates area, and decisively defeated the Persian armies at \textit{Dhu Kār}. These events attest to the formation of an underlying principle of unity, similar in some respects to what is now known as 'Pan-Arabism', the main difference being that the latter has evolved within an Islamic framework. However, Arabism was not sufficiently powerful to unify the existing rules governing the transfer of territory from one political entity to another and to create a new political identity; an event which would have constituted succession in fact. Despite this, Arabism awakened all Arabs and drew their attention to the real links between them. This power was later employed by Islam when it reformulated the existing legal rules and modes of the acquisition of a territory in accordance with Islamic legal criteria and created a new Islamic identity for all Arabs, through the establishment and subsequent practice of the first Islamic political entity in Yathrib.
SECTION 2: THE SUCCESSOR:

1. The Emergence of the Islamic State:

   A. State Succession:

   (i) Effects of the Establishment of the Islamic State on the Pre-Islamic Arab Political Entities:

   (a) Establishment of Al-Umma (the Islamic Nation):

   Arabism was only able to generate the unification of the existing political entities when it coincided with Islam which infused into it a new meaning. The founder members of Al-umma to whom Muhammad delivered the first message of Islam, were gradually recruited from amongst the inhabitants of Arabia by awakening their spiritual conscience and directing it to the universal code of conduct that is embodied in the Qur'ân.

   At the beginning, close relatives of Muhammad and a few individuals in Makka adopted the new code and conducted their daily life according to it. These individuals identified with one another not by partisanship or kinship but faith, according to which they professed their belief in the unity of Allah, and in the mission of his Prophet, Muhammad (peace be upon him), and they were known as Al-Djam'a (the Muslim community). This was the basis of Al-Umma Al-Islamiyya (the Islamic Nation) the head and legislator of which was Allah alone.

   When the new code embodied in the Qur'ân achieved success in converting a significant number of Makkans, the opposition of Makkkan authority towards the faith and those who based their conduct upon it, arose and soon became formidable.
(b) The Establishment of the Institution of Dār al-Islām (Islamic Territory):

The act of Makkan authority emphasised that the new religion was not only a personal code of conduct but also a territorial code, which required a territorial sphere within which it could be enforced by a political authority. It seemed to Muhammad that this requirement could be fulfilled either by the adoption of the Qur'ān by the existing political entity or the establishment of a new entity. The first alternative seemed possible, although the Prophet was mindful that the religious, political and economic influence of the Makkan authority on the surrounding Arab political entities and its strong commercial relations with Persia, Byzantine and Abyssinia could prevent these powers from adopting the Qur'ān. Because of his open mind and knowledge of the new religion, only Negus recognised the new community and allowed emigrants to freely exercise their religion in Abyssinia. However, Prophet Muhammad believed that Abyssinia was not politically stable and, therefore, not a suitable territory for the Muslim community.

The Prophet met, on the pilgrimage, six men of al-Khaṣrāj tribe— one of the ruling tribes of Yathrib—at al-‘Akāba, where they concluded the first bay‘a (covenant), by which the men were converted to Islam and pledged themselves to call the people of Yathrib to it. At the next pilgrimage five of the six returned, bringing with them seven others, including three from the Aws tribe of Yathrib. They met the Prophet at al-‘Akāba and concluded the second bay‘a, by which the twelve men pledged themselves to avoid various sins and obey Muhammad. On the following pilgrimage,
seventy-three men and two women from all the families of Yathrib met the Prophet at al-'Akaba and concluded the third bay'a; in which they swore by oath that if Muhammad and his companions migrated to their territory they would defend them whenever they were so compelled. By virtue of this bay'a Muhammad became one of the Yathrib community, and Yathrib became an Islamic territory. With this, the Kuraysh increased their pressure on the Prophet and his companions, leading Muhammad to direct his companions to migrate to Yathrib where he followed them on 16th July 622 A.D. The existence of the new community in occupation of this territory necessitated the establishment of a single supreme government to conduct its internal and external affairs.

(c) Establishment of the Prophetic Government in Yathrib:

The people of Yathrib supported Muhammad, fully understood al-Qur'an and believed that:

To every people (was sent) an Apostle: when their Apostle comes (before them), the matter will be judged between them with justice, and they will not be wronged.

Thus upon the arrival of the Prophet at Yathrib, he factually became the governor and the Qur'an became the constitution of the new city. The authority of the Prophet was supreme only in the matter of executing the injunctions of the Qur'an, and in matters on which the Qur'an was silent. He became the executive, legislative, and judicial authority of the state. He formulated law in the light of the Qur'an and enforced it; he decided judicial cases; he raised armies and commanded them; and he consulted his chief companions, such as Abu Bakr and 'Umar, on all matters of importance. The
Prophetic government renamed Yathrib as al-Madina; defined the Islamic territory (the territory of al-Madina); built a mosque as the religious centre and place of al-shūra; and established an Islamic army and a public market.

In a practical application and interpretation of the supreme constitution (al-Qur'ān), the Prophet proclaimed 'Ahd al-Madina to be a constitution in which he sought to reconcile the different tribes of Yathrib: the Anṣār (helpers), amongst themselves; the Anṣār and the Muhādjirīn (emigrants); and also the relations between Muslims and non-Muslims - Jews and Christians who were incorporated in the community of the Islamic State. The first part of 'Ahd al-Madīna was drawn up a few months after the arrival of the Prophet at Yathrib, the first year of al-Hidrā (622 A.D.). Later on, the Jews were invited to adhere to this 'Ahd, and a supplementary 'Ahd was drawn up regulating the relations between the Muslim and Jewish contingents of the community. The two texts were then amalgamated to form one 'Ahd, the preamble of which states that:

In the Name of Allah (God)
the Merciful the Compassionate
(1) This is a Kitab (declaration) of Muḥammad the Messenger of God governing the relations between the Muʿminūn (faithful) and the Muslimūn (submissive to God) from amongst the Kuraysh and the people of Yathrib and those who may follow and join them in ḍīḥāḍ (holy war); verily they constitute one umma (nation) distinct from all the other peoples.

The 'Ahd comprises 53 articles, nine of which enumerate the rights and duties of the Arab tribes of the emigrants and the helpers as follows:

(2) The emigrants of the Kuraysh shall be responsible for the security of their quarter or rib'a (ward). They shall pay in mutual
collaboration the ransom for any of their captives, applying the principles of recognised goodness and justice amongst the believers.

(3) The Banu 'Awf [this and the following are branches of the Ansâr (helpers)]. . .

(4) The Banu al-‘Harith . . .

(5) The Banu Sâ‘ida . . .

(6) The Banu Diushâm . . .

(7) The Banu al-Nadjâr . . .

(8) The Banu 'Amr bin 'Awf . . .

(9) The Banu al-Nabi‘ . . .

(10) The Banu al-Aws . . .

(11) The believers shall never leave any poor person suffering because he has no relative to pay for him the wergild or ransom.

(12) The believer shall never ally himself with the mawla (ally) of another believer.

(13) The pious believers shall combine together against anyone who committed crime unjustly or with oppression, even if he were the son of them.

(14) A believer shall not kill another believer, nor should he support an unbeliever against a believer.

Articles 15-24 regulate the conduct of peace and war; about 15 articles deal with the rights and obligations of the Jews as follows:

(25) The Jews shall be responsible for their expenditures as long as the fighting is against them.

(26) The Jews of Banu 'Awf form an umma (nation) with the believers. The Jews shall have their own religion, and the Muslims shall have their own religion; each with their mawlas (allies) and personas.


(28) The Jews of Banu al-‘Harith . . .

(29) The Jews of Banu Sâ‘ida . . .

(30) The Jews of Banu Diushâm . . .

(31) The Jews of Banu al-Aws . . .


(33) The Jews of Banu Dja‘fâna . . .

(34) The Jews of Banu al-Shatbiyya . . .

(35) The partisans of the Tha‘labâ shall be as the Tha‘labâ themselves.

(36) The friend of the Jews shall be treated as the Jews themselves.

(37) None of the Jews shall leave the territorial jurisdiction of the Islamic State without the permission of Muhammad.

(39) Certainly the Jews will be responsible for their outlay as the believers also will be responsible for their outlay. The believers as
well as the Jews have to help each other against any party that intends to commit aggression against those who have been mentioned above.

And the remaining articles 41-53 deal with different aspects of the relations between the members of the new community as follows:

(42) Yathrib shall constitute inviolable Islamic territory for the parties mentioned above.
(43) the protected person shall be treated as the protector himself.
(45) Any dispute which may result in this unity between the parties to this 'Ahd must be referred to God and Muhammad. God certainly will guarantee the protection and the guidance of those who observe the rules embodied in this 'Ahd (covenant).
(47) collective help must be provided by all the parties to this 'Ahd against any aggression or attack of Yathrib.
(49) Each party is responsible for the security, defence and keeping order in their quarter.

None of the articles deal with the sovereignty or the real possessor of it, since this subject is dealt with in the Qur'an.

(d) Sovereignty:

The tribal customary law of the pre-Islamic Arab political entities had never recognised any geographical boundaries for the tribal activities and thus the sułğān (sovereignty) was connected with the customary constitution of each tribe rather than with the territory over which the political entity exercised authority. According to a prevailing customary constitutional law the leader of each tribe usually came to power through election by the members of each tribe. The ordinary Arabian was used to democracy and had never accepted the coercive authority of, for instance, a monarchical authority. Thus sovereignty was personal to the tribe not to its leader, since the tribe could easily propose a leader or dissolve the council according to the constitution.
As many tribes amalgamated in one umma (the Islamic Nation), the
sovereignies of these tribes likewise merged into a single one and
by submission of the umma to Allah, Allah became the only possessor
of sovereignty as the Qur'ān states:

. . . The Command rests with none but God: He
declares the Truth, and He is the best of
judges.47

Accordingly, Allah expresses His sovereign will through His
injunctions and the umma was endowed with the authority of executing
such will on earth. This task ascribes to the umma a distinct
personality embracing all Muslims whether nomadic or town dwellers,
regardless of their geographical location, whether in Dār al-Islam
(the Islamic territory) or in Dār al-‘Ahd (the covenant territory).

(e) Establishment of the Institution of Dār al-‘Ahd (the
Covenant Territory):

It is pertinent to ask whether the existence of territory,
population and government in al-Madina justifies calling that
community a state according to the modern legal sense of the term.
Most Muslim authorities48 fundamentally adopt this view whereas
their opponents reject the statehood of al-Madina and thus it is
necessary to throw some light on the test by which Islamic theory
determines the statehood of an entity.

The term 'Dār al-‘Ahd' (covenant territory) in Islamic legal
theory corresponds with what is known in international law as
'recognition' and the term 'Dār al-Harb' (territory of war)
corresponds similarly, with 'non-recognition'.49 These terms were
employed throughout the period of interaction between the community
of al-Madina and the surrounding powers.
For example, when the Makkan authority prohibited, by every means at its disposal, the practice of Islam in its territory, and prevented other peoples from adopting it, Allah Most High revealed:

> And fight them on until there is no more tumult or oppression, and there prevail justice and faith in God; but if they cease, let there be no hostility except to those who practise oppression.  

From that time the Islamic code divided the world into Dār al-Islam (the territory of Islam) and Dār al-Ḥarb (the territory of war). Dār al-Ḥarb could not possibly attain normal or permanent status unless the states within it either adopted Islam, accepted the status of those states who permitted religious freedom, or entered into 'ahd with the Islamic State.

If the members of Dār al-Ḥarb enter into 'ahd (covenant) with the Islamic State, it becomes Dār al-'Ahd (covenant territory), which implies tacit recognition between Islamic and non-Islamic states. This is illustrated by the practice between the Islamic State and Makka:

When Muhammad and his followers proceeded to Makka with the intention of making a pilgrimage, the Kuraysh were determined to stop them at any cost, in spite of which, the Islamic State resorted to peaceful means and negotiated peace with them. The result was the signing of al-Ḥudaybiya Treaty in 6 A.H. (628 A.D.)

> In thy name, O Allah
> This is what Muhammad bin 'Abdullah [the leader of the Muslim community] has agreed upon peacefully with Suhayl bin 'Amr [the representative of Makkan authority];
> They agreed peacefully to postpone war for a period of ten years. People shall be secured and guaranteed by each other;
If any one from Kuraysh wishes to join Muhammad without the authorisation of his wali [protector] he should be sent back; if any one from Muhammad's followers wishes to join Kuraysh he will not be sent back.

Those [tribes] who want to join Muhammad's alliance and his pact may do so; those who want to join Kuraysh's alliance and its pact may do so.

By virtue of this treaty, Makka tacitly 'recognised' the new community, in the modern sense of the word, and Islam as the official religion of that community. This was a political act, according to modern international law, which was separate from the factual existence of the Islamic community. In return, the Islamic community regarded Makkan territory as Dār al-‘Ahd (the covenant territory).

As regards (what is known now as) collective recognition, Prophet Muhammad took advantage of the Ḥudaybiya truce to declare his foreign policy by means of rasā’il (messages), which were communicated by emissaries to Arab and non-Arab political leaders of the great powers of that time, such as Heroclius of Byzantine, al-Nāṣir of Abyssinia, Kisra of Persia, and al-Mukawkas of Egypt. Only the Emperor of Ethiopia and al-Mukawkas recognised the Islamic community as a state, while the others withheld recognition.

In spite of the non-recognition of the Islamic State by those powers, the Islamic State had exercised authority within a certain territorial sphere and over certain inhabitants and had already entered into binding agreements. In contemporary international law, the subsequent recognition would not be of a constitutive but declaratory nature. Furthermore, recognition may coincide with the
occurrence of the replacement of one political entity by another in respect of a certain territory.

(ii) Succession of the Islamic State to the Pre-Islamic Arab Political Entities:

Islam succeeded in generating the power to change the factual identity of one of the pre-Islamic political entities in the case of Yathrib (now called al-Madina) which Arabism had failed to do in the pre-Islamic era. Arabism and Islam faced their big test when the two powers confronted each other and acted in stable conditions after the Ḥudaybiya truce had been made. With regard to this, on the religious level, the Makkans religion and the Islamic religion existed in Arabia and each was supported by Arab contingents. On the temporal level, the central role of Makka in commercial activity was assumed in fact by al-Madina and in spite of the restriction imposed by the Ḥudaybiya Treaty on the freedom of Makkans to choose between the two religions, many distinguished Makkans supported the policy of the Islamic State or converted to Islam. Consequently, the Makkan authority gradually lost its power and prestige among the Arabs. In seeking to re-establish its position, the Makkan authority violated the Ḥudaybiya Treaty by attacking the Islamic State’s allies. Motivated by the support of her allies and the request of many Makkan Muslims to restore the Holy City to its previously free status, the Islamic State annexed Makka and incorporated the city into Dār al-Islām in 8 A.H. (630 A.D.).

Upon the unification of the commercial and religious centres of Arabia (Makka and al-Madina), most Arabs realised that Islam was the only source which could generate the power needed to unify the Arab
political entities and create a single identity for Arabia as a whole. Thus the heads of the political entities in Arabia increasingly came to see Arabism as subservient to Islam and entered into agreements with the Islamic State either for protection or conversion to Islam in the so-called 'year of delegations' in 9 A.H. (630 A.D.).

In the farewell pilgrimage in 10 A.H. (631 A.D.), delegates from all over unified Arabia gathered at a conference held in Makka under the headship of the Prophet. After showing the Muslims the acts of devoutness, the Prophet delivered a speech in which he said:

O people listen to me, I do not know that I would meet you again after my present year . . . I have two things for you. You will never go astray while holding them firmly: the Book of Allah and the Sunna of his Prophet . . .

This principle was truly implemented in the next year, 11 A.H. (632 A.D.), during which the Prophet's death created an intense crisis for the government of the new state. It raised the issue of succession to the Prophetic government.

B. Government Succession:

(i) Constitutional Succession:

Upon the Prophet's death the people of the Islamic State assembled to consult with one another in order to decide the method by which the state was to be governed. No precise instructions were found in al-Qur'an and the Sunna of the Prophet about the forms and institutions by which the succeeding government should be established and maintained. Al-Angār assembled at a sakīfa (shed) belonging to Bani Sā'id clan supporting the nomination of Sa'd bin 'Ubāda, while
al-Muhādīrin supported the nomination of Abu Bakr with others abstaining from the assembly. Al-Ansār expressed their views to a small group of al-Muhādīrin who came to discuss the issue of succession with them, saying "let there be one Amir among us, and one among you . . .". In their on-going discussion, the assembly questioned the concept of succession to Muhammad's government. Since Muhammad was the Seal of the Prophets, in what way could he have a successor, and what title could be given to his successor?

After extended debate, the assembly overcame the crisis and the unity of the umma triumphed when 'Umar bin al-Khattāb called Abu Bakr, during the time of deliberations, to open his hand for al-bay'a (delegation of authority or affirmation of allegiance). Soon after, Abu Bakr held his hand open and when 'Umar gave him al-bay'a, the whole assembly followed 'Umar's example.

From thence a new source of the Shari'ā emerged, namely al-idjmā (consensus) of Abl al-Hal wa'l 'Akd (consultants), to which Abl al-Hal wa'l 'Akd could resort to decide cases unregulated by the Qur'ān or the Sunna such as the case of succession to the Prophet's temporal position. The principle of 'al-shūra' (consultation) also emerged from the election of Abu Bakr, yet both derived from the Qur'ān, for his election by Abl al-Hal wa'l 'Akd was followed by that of Abl al-Shūra, which resembled the Council of Elders of the pre-Islamic era except that the religious tie replaced the blood tie amongst its members.

The umma, therefore, took the step of establishing a temporal headship or imamate. This did not affect the loyalty of Muslims to Muhammad, to whom Allah on High revealed the teachings of Islam,
since the primary submission was not to Muhammad at all but to Allah and His authority as enshrined in al-Shari'a, the law of al-umma, and to al-umma itself as the political manifestation of the will of Allah for mankind. This meant that the temporal position of power was vested in al-umma and carried out by Muhammad during his life-time, as the Apostle of Allah, and it was for the umma afterwards to decide whom was best suited to it. Muhammad's death, therefore, did not involve any succession to his religious position but only succession to his temporal one.

Ahl al-Hal wa'l 'Akd adopted the term 'Khalifa' from al-Qur'an to designate the successor to the temporal function of the Prophetic government and thus Abu Bakr was not Khalifa of Allah but Khalifa of the Prophet.

As long as the Khalifa was restricted to the Qur'an and the Sunna of the Prophet, he was the 'vicegerent' of the Prophet on earth, charged with the duty of interpreting and enforcing the Shari'a among individuals and applying it in accordance with the Qur'an and the Sunna of the Prophet. The law, however, exists independently from the imām and his will and he is himself subject to it. His personality is also entirely detached from that of the state as a juristic person which is often known as al-djamā'a or al-umma.

The umma is, therefore, under a duty to render him obedient as embodied in the Qur'an. This obedience is based on the principle of al-wilāya (delegation), by which the umma delegated its authority to the imām by means of 'Akd al-bay'a (the contract of the affirmation of allegiance).
These principles were put into practice after Abu Bakr's succession to the Islamic government to prevent secessionist movements and to ensure the continuous integration of Arabia and the unity of al-umma. His chief measure in reaching that goal was the treaty instrument as opposed to war: the liberation of the Arab tribes and towns along the Euphrates from Persian domination began with the conclusion of a Treaty of Protection between the Islamic State and Kubaysa bin Eyās, the chief of al-Wira. In a similar way, the liberation of the Arab tribes and towns on the borders of Syria from Byzantine domination began with the conclusion of treaties of protection.

While these processes were going on, Abu Bakr was concerned to develop a procedure and method of succession to the Khilāfa through which disputes could be prevented. Consequently, upon his illness, he bequeathed the imamate, by testament, to a person who was fitted to it; the dying Khalīfa himself marking out 'Umar as his successor, and securing the consent of the most prominent and influential Ansārs and Muhādjirin in 13 A.H. (634 A.D.). Abu Bakr's act was based on al-wilāya (delegation) by which the umma transferred its authority to the Imām Abu Bakr. Thus Abu Bakr was not obligated to point out the successor to the imamate but, if he did, it was valid and obligatory on the umma to execute his decision. The companions of the Prophet fully understood this fact and unanimously accepted 'Umar's succession to the imamate. From that time the principle of 'al-siyāsa al-shar'iyya' (legislation by the Khalīfa) became known in Islamic constitutional law.
During 'Umar's reign the authority of the Islamic State extended over large parts of Persia, Syria and Egypt, through various treaties of protection. 'Umar also observed his predecessor's practice regarding succession to the Khalīfa, according to which 'Uthmān as the third Rashidin Khalīfa was elected.

Under 'Uthman's rule, the territory of the Islamic State expanded to cover not only Persia, the land beyond the rivers, but also Armenia and North Africa; the inhabitants of which either converted to Islam or entered into 'ahd (covenant) with the Islamic State.

Succession by the principle of al-bay'a became customary law, the enforcement of which was the duty of the umma. Thus upon the assassination of the Khalīfa 'Uthmān, the umma managed to emerge triumphant by electing 'Ali bin Abī Tālim as successor to 'Uthman, by Ahl al-Shūra. All the governors of the provinces affirmed their allegiance to the new Khalīfa except Mu'āwiya, the governor of al-Shām province, until the new Khalīfa took vengeance for the blood of 'Uthman. Subsequently, successive revolutionary changes occurred within the Islamic governmental order.

(ii) Revolutionary Succession:

After a serious defeat in the Saffin battle, Mu'āwiya appealed to al-Qur'ān. In fact, Mu'āwiya's aim was not to apply the Qur'ān since he previously knew the judgement of al-Qur'ān in this matter, the underlying reason was to create chaos among 'Ali's followers in al-'Irāk. Though 'Ali was mindful of Mu'āwiya's plan, his followers decided to apply the Qur'ān with or without 'Ali's acceptance.

In accepting this decision, 'Ali agreed to conclude with Mu'āwiya a treaty of arbitration in 38 A.H. (659 A.D.), according to which
'Ali appointed Abu Mūsa and Muʿāwiya appointed 'Amr bin al-ʿĀq to be arbitrators. The result was that the two arbitrators agreed to depose 'Ali and Muʿāwiya and to leave the matter to al-ṣūrah (popular election) but, when Abu Mūsa officially announced his decision of deposing 'Ali and Muʿāwiya, 'Amr, who followed him, officially announced his own decision of deposing 'Ali but confirming Muʿāwiya as the successor of 'Uthman as the best qualified for this position.

The disagreement between the arbitrators in the decision announced gave 'Ali ample reason to reject it on the grounds that the arbitrators

... had left the rules of al-Qurʾān behind them...
and that each of them had followed his own view

... 77

After that, a faction of 'Ali's šī'a (party) seceded from 'Ali's leadership objecting to his acceptance of the arbitration and its result. The faction was known as al-Khwāridjī (secessionists), who declared that:

... the governorship for nobody except for Allah
the one and the vanquisher... 78

and further stated that they would dispose of both 'Ali and Muʿāwiya by assassination. They succeeded, however, in assassinating only 'Ali and consequently, the umma elected al-Ḥasan, the eldest son of 'Ali, as a successor to the Islamic Khilāfa.

Al-Ḥasan, however, preferred the unity of al-umma, and therefore abdicated the Khilāfa to Muʿāwiya, by which the imamate was transferred from al-Madina to Damascus, where the Umayyid Khilāfa was established by Muʿāwiya in 41 A.H. (662 A.D.) '89. Under the Umayyids, the form of the Rashidin Khilāfa was converted into a new form, instituting the pre-Islamic de facto kinship in the regular
form of the Khalîfa. Nevertheless, the experience of the preceding half-century had clearly shown Mu'awiyah that the best method of appointing a successor was by nomination. The office of Khalîfa continued, in theory, to be elective, with the authority of the Khalîfas based on the homage paid to them by every Muslim: never was the Khalîfa looked upon as hereditary, since the principle of al-shûra, and the main factors of Islam, continued unaltered.

After a short delay, caused by al-fitna (the civil war), Islamic territorial integration, under Umayyid rule, continued, in spite of the gradual downfall of the Umayyid rule accelerated by the inter-dynastic quarrel and the emergence of the Abbasid dynasty, which was backed by the Shi'at movement.

As a consequence, the Umayyid Khalîfa was replaced by the Abbasid Khalîfa, which was backed by a strong movement for the revival of the pure and impartial state of the early Muslims. Therefore, the Abbasids took great care to lay much emphasis on the religious character and dignity of the office of imamate (religious leadership).

In the Abbasid system of government, the Khalîfa was to be elected by all the Muslims through certain procedures: firstly, he was to be nominated by some influential persons, and secondly, the homage of all Muslims was to be secured. This procedure became the established practice of succession for the successive Abbasid governments. The right of the successor in this case was not derived from the nomination of his predecessor but was based upon the homage paid to him by all Muslims. This followed Abu Bakr's principle that he was to be the ruler only as long as he enjoyed the confidence of
the Muslims, which had been recognised in the practice of the Islamic government up to the time of the Abbasid Khalifā. During the Abbasid Khalifā, machinery evolved by which the votes of the Ahl al-Shūra could be taken as often as the Khalifas changed or had to be changed and the Khalifa was obliged to consult his subjects in the form of selected and eminent persons in all matters. All successive Abbasid governments maintained the institution of Ahl al-Shūra which became a regular council of state representing every community under the Abbasid Khalifā. Even when the Abbasid Khalifā broke up into principalities, each amīr (governor) of a principality had a council of his own in imitation of the council of the Khalifa.

The Abbasid Khalifas further instituted the high office of al-wazīr (minister) to whom they delegated certain political functions, though the Khalifas retained final authority on all governmental affairs.

The early Abbasid Khalifas, with the exception of al-Ma'mūn, were persons of great ability and worked hard as the sole officers for the entire administration of the empire. Many of them personally led the armies and acted as the highest court of justice. The boundaries of the Abbasid Khalifā extended from Turkestan in the North to the Arabian Sea and the Indian Ocean in the South; and from al-Sind and al-Binjāb in the East to the Atlantic Ocean and Spain in the West.

The defect of this system, however, lay in the ill-defined hereditary rules which had been adopted from the Umayyid Khalifā and followed by the Abbasid Khalifas with regard to the nomination of a successor. As with the Umayyids, rivalry amongst the members of the dynasty was the destructive result. With the death of al-Wāthik, the
sun of Abbasid glory began to sink and real power passed either to
the amirs of the provinces, who seized power by force, or into the
hands of the Turkish commanders, who monopolised the power to appoint
or depose the Khalifa. Furthermore, the Abbasid revolution,
activated by Arab and non-Arab Muslims, opened the eyes of the non-
Arab Muslims to their nationality and made them realise their
strength.

2. Evolution of the Islamic State Legal Order:

A. Decentralisation of the Governmental Administration:

The Abbasid Khalifa appointed the amirs (governors) of the
provinces and invested them with the Khalifa's wila\ya (delegation of
authority). Depending on the importance of the province and the
loyalty of the amir, the Khalifa would grant either of two types of
wila\ya: limited or full wila\ya. The limited wila\ya was designed
for an amir who was in charge of certain matters, such as military
affairs. Full wila\ya was itself divided into two types: im\mat
istikfa' (authorised im\mat), in which the Khalifa entered into the
contract of al-wila\ya with the amir by his own will, and im\mat
Istil\a (authorised governorship by force), in which the Khalifa
entered into the contract with the amir by necessity. According to
the im\mat al-istikfa', the amir resembled the 'delegated minister',
and was entitled to the same unqualified obedience from his subjects
as was given to the im\m\m. That all acts and decisions of the
deleagated amir were legally valid and binding unless overruled by the
im\m, had emerged from the practice of the prophetic government and
evolved during the Rashidin and the Umayyid Khalifa.
In the first period of the Abbasid Khalifa, the amirs of the provinces remained bound by this rule, but as soon as they realised that the Abbasid Khalifa was a helpless prisoner in his own palace and that the role of government was being exercised by Turkish commanders, they no longer felt constrained. Some of them relied on their military strength, and ruled their provinces independently from the Khalifa while others, particularly the Shi'ats, dominated the Abbasid Khalifa and refused to recognise his claim to the Khalifa. By such means, several separate emirates were created in 324 A.H. (935 A.D.). The establishment of these emirates technically constituted secession, but its illegality was refuted by the device known as imarat al-istila' (assumption of governorship by force), by which the Khalifa conferred the wilaya of the province on the amir. In return, the amir recognised the dignity of the Khalifa by such specific means as including his name in the Friday Khutba (speech) in al-djami' (congregational) mosques, and by recognising the right of the Khalifa to administer all religious affairs. Sometimes the Khalifa made this delegation of authority a hereditary privilege.

B. The Territorial Disintegration of the Islamic State:

The development of political power in these emirates created three rival Khalifas: an Umayyid in al-Andalus (Spain); a Fatimid in Afrikya (Africa); and an Abbasid in Baghdad. The Abbasid Khalifa had been duly contracted before the others, which were therefore subservient to it, and any action by the other Khalifas which threatened to bring the deposition of the Abbasid Khalifa was seen as rebellious. The Shi'at Fatimids maintained that there could not be two 'speaking' imams at one time, but there might be one
'speaking' imām and one 'silent' imām. This practice was followed by the Buwayhid and the Safawid Amīrs - a state of affairs which subsequently led to the complete voiding of the obligations of the Khilāfa.

The Fatimid emirate, however, was abolished by the Ayyūbid leader Salāh al-Dīn in 567 A.H. (1189 A.D.) but the Abbasid Khilāfa was heavily influenced by the Seldūkes and again power was divided between the Khilāfa and the Seldūkes, as sultāns.

After the destruction of Baghdad by the Mongols in 656 A.H. (1258 A.D.) and the re-establishment of the Abbasid Khilāfa in Egypt by the Mamlūks, the imamate was contractually assumed by the Mamlūks by virtue of their military power but when the Ottomans rose and overcame the former by the might of their army, the Mamlūks were deposed and their victors seized the imamate, from which the Khilāfa was to be chosen, and the Khilāfa was transferred from Cairo to Istanbul. The basis of this action was the well-being and unity of Muslims.

C. The Advent of Foreign Protection:

During a succession of incapable Khalīfas, the Ottoman Empire went through a period of weakness and confusion, most particularly in the Arab world. Most of the Eastern part either slipped from Ottoman control or fell under the protection of foreign powers as in the 1853 Treaty between Great Britain and Arab chiefs of the Gulf. The same happened to the Western part of the Arab world and the only Arabic-speaking provinces still under Ottoman authority after 1840 were Iraq, Syria and Palestine.
In an attempt to modernise the decadent system of the Ottoman government, the Khalifa introduced reform measures known as Tanzimat, which were to no avail, because of the overthrow of the Khalifa and the takeover of the Ottoman government by Turkish nationalists. As a reaction against a policy of Turkification adopted by the Nationalist government, the Arabs revolted, aiming to secede from the Ottoman Empire and establish an independent Arab state. The result, facilitated by the support of Great Britain, was indeed the secession of the Arab territory from the Ottoman Empire and its fragmentation into many states – including Iraq and Kuwait – and the replacement of Ottoman sovereignty or suzerainty over Iraq and Kuwait by British responsibility for the conduct of the international relations of these territories.

Finally, Iraq attained independence in 1932 and has continued ever since to maintain a claim to sovereignty over Kuwait based on the principle of historical continuity, since Kuwait is argued to have been a sub-district of the Basra Vilayet at the same time as Iraq was an integral part of the Ottoman Empire. This claim was repeated when Kuwait attained independence in 1961, so causing a delay in the admission of Kuwait to membership of the United Nations.

Two questions may therefore be enquired upon. Firstly, to what extent was the Ottoman Empire factually replaced by Iraq and Kuwait? This question will be investigated in the light of the practice of the Islamic State in succession in fact; beginning with Iraq's assumption of governorship by force and its factual succession to the Ottoman position in Mesopotamia; and following with Kuwait's
assumption of governorship by force and its factual succession to the
Ottoman position in the al-Kurain territory.
CHAPTER II
SELECTIVE PRACTICE

SECTION 1: THE PRACTICE OF IRAQ TOWARDS ASSUMPTION OF GOVERNORSHIP BY FORCE:

1. Replacement of the Islamic State by a Member State of the Covenant Territory in the Conduct of the International Relations of the Territory of Iraq:

As regards Iraq's assumption of governorship by force from the Ottoman Empire, it will be recalled that upon the deposing of Khalifa 'Abdul Hamid by the Turkish nationalists, the Ottoman Empire was directly governed by the Turkish National Party from 1908 to 1918 in the name of a puppet Khalifa and spurred on by popular national support, the National Party embarked upon a policy of Turkification and secularisation. This policy, however, was not only alien to the practice of the Islamic Khalifah but also defied the aspirations of various national groups, including Arabs, within the Empire. Judging by the practice of the Prophet who states that: "No obedience to any creature in the disobedience of the creator" and the most authoritative exponents of the Islamic law, Muslims, both Arabs and non-Arabs, could hardly be denied their demand that, the new Ottoman government should restrict itself to the law and practice of its predecessors failing which it ought to grant some autonomy to the territories wishing to observe such law and practice.

None of these demands were accepted by the Ottoman government and, as a consequence, Arabs began to work out methods by which the Ottoman authority over the Arab territories could be denounced and an
independent Arab state established instead. Because of his religious position in the Arab world, Sharif Hussain took the initiative in this respect. As a result of the outbreak of World War I, the interests of Sharif Hussain and Great Britain coincided and resulted in the so-called Hussain-McMahon Exchange of Notes of 1915-1916. The former was looking for support in order to assume governorship by force over the Arab territory, while the latter was looking to safeguard British interests in Mesopotamia against both the Ottoman Empire and Germany during the war.

As a result of the so-called Sykes-Picot Agreement between Britain and France, Iraq was included in the territorial sphere of British influence. Quick solutions had to be found to problems resulting from this inclusion: firstly, the conferring of the administration of Iraq upon Great Britain by an international body; secondly, the establishment of an internal administrative and political structure for Iraq; thirdly, the determination of the international status of Iraq; and fourthly, the determination and international acceptance of the boundaries of Iraq.

A. Establishment of British Mandate over Iraq:

At the San Remo Conference a compromise was reached which relied upon the principles embodied in the mandate system, founded on Article 22 of the Covenant of the League of Nations, and this formed an integral part of the Treaty of Peace, according to which:

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

When the mandate over Iraq was assigned to Britain, however, the Iraqi people feared that Britain was in the process of consolidating her position as occupant of their country instead of arranging the promised independence and vigorous opposition against the mandate was expressed by the Iraqi people in April 1920, on the grounds that although the mandate system may have been suitable for the administration of other territories, it was not so for more advanced territories like the Arab communities of Iraq, Syria, Lebanon, Palestine and Trans-Jordan which were an integral part of the great Islamic heritage.

Irrespective of these protests, Great Britain applied the principles embodied in Article 22 of the Covenant of the League of Nations to its new mandated territory, which comprised the three Vilayets of Basra, Mosul and Baghdad under the name of Iraq. This mandate was of special character in many respects. It resembled the contract of 'guardianship' in Islamic law but unlike the other Arab mandated territories, the mandate for Iraq was not embodied in an agreement between the mandatory power and the League of Nations but in treaties and subsidiary agreements concluded between the mandatory power (Great Britain) and the new Iraqi government.

B. Establishment of a Government for Iraq:

Under pressure from the Iraqi people, the declared policy of the British Government was not to hold Iraq as a colony or protectorate, but to set up the beginnings of an independent government. Thus a Provisional Council of State was brought into
being, headed by the Nakib of Baghdad. An immediate question centred on which form the new constitution should take. The nationalists and the politically-minded population of the country were unanimously in favour of a monarchical, constitutional government. In response, British policy-makers found in the selection of Faisal an opportunity of combining gratitude with interest. Faisal's position in the Arab world and his valuable services for the Allied Power's cause during World War I gave him an appeal to both the British and to the Iraqi people, and this was made evident at the Arab Conference in 1920 when Faisal was elected to the throne of the short-lived Syrian Kingdom. The British took advantage of the expulsion of Amir Faisal from Syria by the French by giving him the opportunity to accept the Iraqi throne on the condition that he support British Policy in Iraq. In response to his refusal to accept the Iraqi throne under a mandate, the British government promised that the relationship between Iraq and Britain would take the form of a treaty of alliance. Upon his acceptance of this condition, the British government made him head of the first Arab Council of State for Iraq in 1921.

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

C. Recognition:

The starting-point of Iraq's life as a Muslim state as determined by Islamic law and practice governing the relations between Dār al-Islam and Dār al-‘Ahd, and as a modern state as determined by international law, can be claimed to date either
from its attainment of independence or from such time as other states accredited ministers to it, concluded treaties with it or in some other way entered into such relations with it as exist between states alone.

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

Formal recognition of Iraq by the Ottoman Empire is embodied in Article 16 of the Treaty of Lausanne of 1923\textsuperscript{22} which states:

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

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

Moreover, the frontiers of Turkey were restated in the Treaty of Lausanne. Article 3 provided that the:
The Iraqi section of the new Turkish frontier was the subject of a serious dispute in 1925 between Turkey and Great Britain over the exclusion of the Mosul Vilayet from Turkey. With the ultimate settlement of this dispute, the Iraqi-Turkish boundaries were finally delimited by the 1926 Treaty.

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

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

In reply the Iraqi government sent a Telegram stating that:

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

In a similar manner, recognition was extended to Iraq by many non-Islamic states.

In the international context of such recognition, for a treaty to be binding upon a Muslim state, it must have been made by an authority competent to do so both under Islamic and international law.

D. Evolution of the Personality and Treaty-Making Competence of Iraq:

In international law, the term 'treaty-making-competence' implies a recognition of the personality of an entity as being competent to conclude treaties. In a similar way, the term 'personality' denotes the recognition in international law of an entity as possessing the ability to enjoy rights and to bear obligations by way of the conclusion of treaties in the community of states. The logical conclusion, therefore, is that the capacity of an entity, which possesses certain factual elements, to make treaties provides valuable evidence of that entity's statehood.

The concept of legal personality has been recognised by Muslim jurists according to whom the obligations imposed by treaties were inflicted on the Islamic State as a legal personality, and consequently on the individual Muslims who collectively composed the umma (Islamic nation) or the Islamic State. An individual Muslim, however, was not responsible for any obligations arising from these treaties.
The personality and treaty-making competence of Iraq did not derive from the personality of the mandatory power but was a continuation of the personality of the umma which was original, unadulterated and derived directly from Islamic law.

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

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

It must be stressed, however, that this personality and treaty-making competence were not the same as those of a fully-fledged independent state, because Iraq was excluded by the 1922 Treaty of Alliance (agency) from entering into political treaties without the previous consent, expressed through the British High Commissioner, of Great Britain (agent). Thus it may be concluded that under the terms of Article 22 para. (4) of the Covenant of the League of Nations, together with the terms of the 1922 Treaty of Alliance, Iraq had a limited international personality and treaty-making competence, which was similar to that of a protected state. The only difference between the status of a protected state and that of the mandated
territory of Iraq was that the international limitations on Iraq's personality and treaty-making competence (by means of the supervision exercised by the mandatory power over the said territory), was of a temporary nature, the authority of the mandatory power being limited only to necessary administrative advice and assistance to Iraq, as contemplated in Article 22 of the Covenant of the League of Nations, under the supervision of the League itself, until Iraq was able to stand alone as an independent state. These strictly temporary limitations on Iraq's personality and treaty-making competence raised several questions. These included the criteria by which the progress of Iraq towards independence should be judged; the provision of a definite time-limit for the mandate; and the methods by which the mandate over Iraq could be terminated. The methods and provisions that were formed in answering these questions were to provide an important safeguard against the assertion of undue authority by the mandatory power.

2. Replacement of British Mandate over Iraq by Independence:

The rise of Iraq to full independence came through a long series of legal changes, starting with the Treaty of Alliance between Great Britain and Iraq of the 10th October 1922\textsuperscript{40}, by which Great Britain recognised the Kingdom of Iraq as a sovereign state (Article 1). In Article 18 of this treaty, provision was made for its termination and for the complete independence of Iraq within 20 years. However, before the Treaty was ratified and accepted by the League of Nations Council, this Article was modified by the Protocol of 30th April 1923\textsuperscript{41}, reducing Iraq's period of dependence to 4 years from the date of the ratification of the Treaty of Peace with Turkey. After
the ratification of the Treaty of 1922 on 19th December 1924, the League of Nations Council eventually adopted the draft as it stood. It was only thereafter that the League Council, by a Resolution of 27th September 1924, officially conferred an 'A' Mandate upon Great Britain's role in Iraq. Four subsidiary agreements of the 2nd March 1924 were subsequently concluded between Great Britain and Iraq. After the settlement of the controversy over the Mosul Vilayet by the League Council's Resolution of 16th December 1925, the League accepted a new amendment to this treaty, in the form of a treaty between Great Britain and Iraq of 13th January 1926 extending the period to elapse before the expiry of the Treaty of 1922 and Iraq's independence from 20 to 25 years, unless Iraq should previously be admitted to the League of Nations. The British government once again attempted to replace the Treaty of 1922 with a new one drafted on 14th December 1927, but this new treaty was later withdrawn. Finally, the Treaty of 1922 was superseded by a formal Treaty of Alliance of 30th June 1930.

Before the conclusion of the 1930 Treaty, however, and on the 14th November 1929, the British government expressed its intention to recommend Iraq for admission to membership of the League of Nations in 1932. Consequently, on 13th January 1930 the League Council requested the Permanent Mandate Commission to submit any suggestions that could assist the Council in coming to a conclusion as to what general conditions must be fulfilled before the mandatory regime could be brought to an end in respect of any country placed under such a regime. Because of the great differences between the various mandates and their subjects, the Commission asked the Council
whether it did not wish to confine the Commission's observations only to the case of Iraq.

After careful examination the Commission suggested the following:

(1) Procedure for termination: (a) a unanimous decision of the League Council to free Great Britain from its responsibility; (b) a decision of the Assembly by a two-thirds majority to admit Iraq to membership of the League of Nations; (c) the necessity of obtaining the agreement of the mandatory authority before terminating the mandate. 49

The fulfilment of the mandate was declared by Article 6 of the decision of the Council of the League of Nations of 27 December 1924 49, which stated that:

In the event of Iraq being admitted to the League of Nations, the obligations hereby assumed by His Britannic Majesty's Government shall terminate and by Article 7 which stated that the Council of the League was to be invited to decide what further measures are required to give effect to Article 22 of the Covenant only "if Iraq has not been admitted to the League". These provisions contemplated the automatic termination of the mandate over Iraq when Iraq was in fact able to stand alone, her admission to the League being referred to as cogent evidence of that fact. 50

From the foregoing analysis, it is not clear that the consent of the mandatory power was essential to the termination of the mandate over Iraq, though the League Assembly would have been unlikely to admit Iraq to membership of the League of Nations without a previous recommendation from the mandatory power. Furthermore, it was difficult to decide whether or not the territory in question was able
to stand alone if the mandatory refused to clarify the position in its report and refused to give up its position.

By a two-thirds majority, however, the League Assembly decided to admit Iraq to membership of the League after which Iraq was considered to be independent whether or not the mandatory power wished to give up its position.

(ii) Certain conditions were required before the mandate was terminated. According to Article 1 of the Covenant of the League of Nations and the report of the Permanent Mandates Commission, the independence of Iraq required: (a) certain guarantees to be furnished by Iraq to the satisfaction of the League, in whose name the mandate was conferred and exercised by Great Britain; (b) a settled government; (c) the capability of maintaining its territorial integrity and political independence; (d) an ability to maintain public peace; (e) adequate financial resources; and (f) laws and a judicial system offering equal and regular justice to all.

(iii) The Commission suggested that before Iraq was released from the mandate it should make a declaration regarding the following points:

- protection of minorities;
- privileges and immunities of foreigners in the Near Eastern territories, including consular jurisdiction and protection;
- interests of foreigners in judicial, civil and criminal cases not guaranteed by capitulations;
- freedom of religion and exercise of religious, educational and medical activities;
- financial obligations regularly assumed by the former mandatory power;
- rights legally acquired under the mandate system; and
- maintenance in force of international conventions to which the mandatory power acceded on behalf of Iraq.
After being satisfied by the Permanent Mandates Commission's report, the Council of the League of Nations, on the 28th January 1932, adopted a Resolution declaring itself "prepared, in principle, to pronounce the termination of the regime in Iraq" at which point Iraq had to give undertakings to the Council in conformity with the suggestions contained in the Permanent Mandate Commission's report. The declaration of the termination of the mandate was to be made after an examination of the undertakings given by Iraq and was not to be effective until the date of admission of Iraq into the League of Nations. On the 19th May 1932 the League Council approved the declaration of guarantees given by her and Iraq was formally admitted to the League of Nations on 3rd October 1932, and subsequently the factual identity of Iraq became an issue.

3. The Factual Identity:

After Iraq became a member of the League of Nations, her separate identity became a reality on the international plane. As far as Iraq's regional political relationships are concerned, besides her geographical links with other Arab states she is also related to them ethnically. Each Arab state is contiguous to, or an historical continuation of, the others. These links have created several territorial claims between the neighbouring Arab states, one of which was Iraq's claim that Kuwait constituted a part of her territory on the grounds that Kuwait had been a part of the Ottoman Empire (the parent state of Iraq). The Kuwaiti government, however, considered this claim to be untenable since Kuwait had never been subjected to Ottoman sovereignty.
The onus seemed to be on the Iraqi government to prove that Kuwait was legally an integral part of the Ottoman Empire, and that upon her independence, Iraq succeeded to Ottoman territorial sovereignty or suzerainty over Kuwait because the State of Iraq was factually identical with the Ottoman Iraq. If this was so, Kuwait was not a new state that had acquired territorial sovereignty, personality and treaty-making competence, independence and a separate factual identity by recognised means under both Islamic and international law. These issues will be examined in the following section.
SECTION 2: THE PRACTICE OF KUWAIT TOWARDS ASSUMPTION OF
GOVERNORSHIP BY FORCE:

1. Replacement of the Islamic State by a Member State of the
Covenant Territory in the Conduct of the International Relations
of the Territory of Kuwait:

As with Iraq, the assumption of governorship by force over the
territory of Kuwait and the development of a separate factual
identity has occurred through various legal stages.

A. Acquisition of al-Kurayn Territory by the 'Uttûbi Tribe:

In traditional international law, a distinction must be made
between the acquisition of territory by an existing state and the
acquisition of territory by an individual or a tribe. The former
constitutes an acquisition of territorial sovereignty unlike the
latter, unless the individual or the tribe have acquired the
territory on behalf of a national state. For this reason, none
of the traditional modes of the transfer of territorial
sovereignty fit a description of how the transfer of territory
from the Islamic State to the newly-independent State of Kuwait
occurred since they all assume the transfer of territory from one
state to an already-existing one, or at least that there were some
activities towards acquiring the territory in question by a
recognised state. Moreover, because Kuwait was born by an
evolutionary process within the sphere of constitutional law,
traditional international law saw this as a matter belonging solely
within the domestic sphere until the moment when recognition, in one
form or another, came into question.
In resolving this drawback, it is necessary to go back to the early development of title to territory by the State of Kuwait, under the law and practice of the Islamic State, in order to discover the mode by which the 'Uttubi tribe acquired the territory of al-Kurayn. In interpreting this issue, the Hanafid jurists have maintained that every individual owner of land has authority on that land and the authority of the Islamic State is a manifestation of the collective authority of all owners\(^{67}\). Thus, unlike international law, in Islamic law no distinction has ever existed between the modes of acquisition of territory\(^{68}\) by an individual, tribe or state.

As far as the territory of 'al-Kurayn' or 'Kút'\(^{69}\) is concerned, the inhabitants of Eastern Arabia, though nomadic, were socially organised into political entities, such as tribes, confederations of tribes and emirates under the leadership of \textit{shaykhs} who separately exercised authority over the area which included what is now known as Kuwait. When the Ottomans took over the Islamic \textit{Khilâfa} in 923 A.H. (1517 A.D.), the \textit{shaykhs} and the area itself came under the political and spiritual suzerainty of the \textit{Khalîfa}. This was later on transformed into territorial sovereignty when the Ottoman Empire annexed Baghdad in 941 A.H. (1534 A.D.), Basra in 953 A.H. (1546 A.D.), and al-Ihsâ', the homeland of the Bani Khalid tribe, in 963 A.H. (1555 A.D.) as security measures against foreign powers. The Bani Khalid \textit{shaykh} rose up and took power in al-Ihsâ' in 1081 A.H. (1670 A.D.), subsequently extending their sheikhdom from Qatar in the South to Kuwait in the North.
With the permission of the Bani Khalid ruler, a federation of three Arabian tribes by the name of 'al-‘Uttüb' settled in Kuwait. The position of the al-‘Uttüb in that territory became enhanced and they achieved a measure of independence when the authority of the Bani Khalid was weakened by internal disputes and as a result of the rise in Central Arabia of their bitter enemies, the Wahhābis. Thereafter, the al-‘Uttüb agreed, inter alia, to divide the affairs of their new territory (Kuwait) as follows: al-Djalāhima (later to be the ruling family of Qatar) were to conduct maritime affairs; Al Khalīfa (later to become the ruling family of Bahrain) were responsible for commercial affairs; and Al Sabāḥ (the present ruling family of Kuwait) were to conduct governmental affairs.

B. Establishment of Government in the Territory of Kuwait:

Crucially linked with the position of the al-‘Uttüb in their new territory was their ability to exercise effective control over that territory since there was no strong, centralised Islamic authority in the area to protect the Eastern boundaries of Dār al-Islam. In such a case it is required by the Sunna of the Prophet that any group of individuals travelling or living in a territory remote from the central authority should appoint one amongst them as an amīr.

According to al-shūra (consultation), a principle required by al-Qur'ān and subsequently developed through practice, in 1170 A.H. (1756 A.D.) the 'Uttūbis elected Sabāḥ bin Dībār, from the Al Sabāḥ family, as the first ruling Shaykh in Kuwait from among the 'Uttūbis. In the same manner, circa 1176 A.H. (1762 A.D.), he was succeeded by his youngest son, 'Abdullah, under whose reign Kuwait was to emerge as an important sheikhdom among competing forces such as the
- 51 -

Rashidis, the Wahhābis and the Bani Khalid. The new government in Kuwait was only able to maintain its position among these forces by seeking the protection of one or other of them. The main threat came from the previous occupants of the territory of Kuwait - the Bani Khalid - by whom the new 'Uttūbi government of Kuwait agreed to be protected in return for their being accorded recognition. When the Bani Khalid finally lost their authority to the Wahhābis and Kuwait consequently lost its protector, Kuwait turned towards the Ottoman authority in Baghdad to fill this role.

In 1288 A.H. (1871 A.D.) the Turkish governor of Baghdad, Midhat Basha, conferred the title of Kā'īmākām (deputy governor) on the Shaykh of Kuwait. It has been claimed that from that time Kuwait gradually became an administrative unit of Mesopotamia and its ruler became subordinate to the governor of the Baghdad province, a claim which has always been denied by Kuwait.

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

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

Although it is true that the Ottoman authority over Kuwait was more nominal than real, Kuwait's independence cannot thereby be presumed and neither can the view that Kuwait at that time enjoyed legal personality in international law, if the meaning of the title of 'Kā'imakām', accepted by the shaykh, is taken into consideration. Though this title does not provide conclusive evidence of the legal status of Kuwait in international law it does under Islamic law, according to which, it denotes either the governor of a kādā' (province) appointed by the sultan, or a governor who assumed his governorship by force. In order to ensure the governor's allegiance, the sultan usually conferred such title upon him, as in the case of the Shaykh of Kuwait. The evidence therefore, tends to emphasise that the government of Kuwait had the status of 'imāra' (governorship) under the spiritual suzerainty of the Ottoman Khalifa, who was regarded by all Muslims as the protector of Dār al-Islam (the Islamic territory).

The good relationship between Kuwait and the Ottoman Empire, however, was disturbed by the attempts of the Ottoman Empire to annexe Kuwait, attempts which compelled Shaykh Mubarak to repent his
acceptance of the office of kā'imākām in 1897, and in 1898 led to his request for British protection.

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

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

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

and further,

not to cede, sell, lease, mortgage, or give for occupation or for any other purpose any portion of his territory to the government or subjects of any other power without the previous consent of Her Majesty's Government for these purposes.

Subsequently, in 1904 a British Political Agent was sent to Kuwait where he became advisor to the Ruler of Kuwait on foreign affairs.

By virtue of this agreement Kuwait came under the direct protection of Britain even though the legality of this was disputed by the Ottoman authority.

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

With regard to the legality of the delegation of the conduct of the external affairs of Kuwait to Great Britain and not the Ottoman Empire, the first question to arise is whether the Shaykh of Kuwait, as a spiritual vassal of the Ottoman Khālīfa, possessed a treaty-making competence which entitled him to enter into treaties with non-Muslim states?
It was true that the Shaykh of Kuwait had a strong religious tie
with the Khalifa and recognised him as his spiritual suzerain. The Khalifa also recognised each race as comprising a separate nation which was self-governed or represented by more than one government. One such was the Arab nation represented by separate governments, one of which was Kuwait under Shaykh Mubarak. The relationship between the Khalifa and Shaykh Mubarak had never been defined by a treaty but by existing practice.

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

An examination shows that the 1899 Exclusive Agreement should be classified as a 'political treaty' under general international law since it restricted the treaty-making competence of the shaykh in entering into any commitment with any power, even with the Khalifa himself, without the previous consent of the British government.

If measured against the accepted norms of vassal - suzerain relations, the instrument of protection which Shaykh Mubarak secretly signed with the British government, without the consent of the Khalifa, was highly questionable, if not illegal. Consequently, the
British government was keen on gaining some legal respectability for the agreement in order that Kuwait should come under its de jure protection. For this reason Britain concluded with the Ottoman Empire the so-called 'Anglo-Ottoman Draft Convention of 1913', and by virtue of Article 1 Kuwait was transformed into an autonomous Kaza of the Ottoman Empire.

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

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

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

... although it is now a generally recognised customary rule of international law that treaties regularly require ratification, even if this is not expressly stipulated ...

Other international law jurists, however, such as McNair and Fitzmaurice maintain that the absence of a ratification clause in
a treaty should be taken as indicative of an implied understanding between the contracting parties that the treaty will become binding upon signature. During the codification of the law of treaties these conflicting views were reflected in the I.L.C. in the discussion regarding the incorporation in the proposed codification of a residual rule in favour of either signature or of ratification when a treaty was silent as to how consent to be bound should be expressed. At the beginning, the I.L.C. adopted in the Draft Articles the formula that:

Treaties in principle require ratification unless they fall within one of the exceptions ... below,

but this was criticised by a number of states including the U.K. who suggested that the general formula should be reversed. Other states suggested that the I.L.C. should not adopt any position towards such a doctrinal issue. In the light of these arguments the I.L.C. reformulated the rule so as:

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

and

to leave the question of ratification as a matter of intention of the negotiating states without recourse to a statement of a controversial residual rule.

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

C. Recognition of the Protected State of Kuwait:

The formation of an entity possessing some elements of statehood within the territory of Kuwait was a matter of fact, not of law, and it was not until the recognition accorded Kuwait in the Anglo-Ottoman Draft Convention of 1913 that Kuwait became a subject of international law. This simultaneously implied the recognition by the Ottoman government of Kuwait's title to her own territory and it was irrelevant how this title was acquired, whether it was regarded as having arisen from the fact of the emergence of the new entity or as having been constituted by recognition.

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

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

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

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

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

D. Evolution of the Personality and Treaty-Making Competence of Kuwait:

The question that now presents itself is whether Kuwait, despite its special treaty relations with Britain, had a legal personality and treaty-making competence.

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

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

The second of the views cited above seems to provide little or no help because evidence appears to prove that the shaykh already had treaty-making competence that enabled him to conclude the 1899 Exclusive Agreement. However, this Agreement, despite its delegation of the conduct of the foreign affairs of Kuwait to Britain, did not define exactly the legal nature of the relations between Kuwait and Britain, nor did it expressly prohibit the shaykh from entering into treaties with non-British governments or subjects although implicitly, the treaty-making competence of the shaykh was suspended without destroying such capacity in toto. The Shaykh of Kuwait was still the sole authority in which the right to conclude treaties was vested, albeit subject to the previous sanction of the British government. The result of this situation was that if the shaykh
concluded a treaty without the previous sanction of the British government it might not have been binding under international law. However, this is not the case under Islamic law.

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

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

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

2. Replacement of British Protection over Kuwait by Independence:

This state of affairs continued until the formal termination of the 1899 Exclusive Agreement and its subsequent instruments in the treaty entitled 'Exchange of Notes Regarding Relations between the United Kingdom of Great Britain and Northern Ireland and the State of Kuwait, June 19, 1961' between Britain and the Ruler of Kuwait, Shaykh 'Abdullah al-Sabah. By this treaty the Shaykh of Kuwait became solely responsible for the conduct of both the internal and external affairs of Kuwait. Also, the treaty established a common understanding dealing with the future relations of the two countries as follows:

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

Furthermore, the Treaty:

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

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

Iraq believed that the secret Exclusive Agreement of 1899, concluded between the Ruler of Kuwait, Shaykh Mubarak, and Great Britain, was invalid because the Shaykh of Kuwait had at that time no competence to conclude such agreements without the consent of the Ottoman Porte. Therefore, what was in the past a territorial unit of
Ottoman Iraq should persist under the sovereignty of the new State of Iraq.\footnote{106}

The Kuwaiti government reacted swiftly to the Iraqi claim by issuing a statement on the following day stating that Kuwait was never subjected to the Ottoman sovereignty and that the title of ٍكَيْمَاكِم . . . was never used in Kuwait and never influenced the course of life or the independence of Kuwait from the Turkish Empire.

With regard to the 1899 Exclusive Agreement, the statement continued, it was terminated on 19 June 1961 and consequently Kuwait became a fully independent state\footnote{106}. Following the Iraqi military threat, the Kuwaiti government requested on 2 July 1961 that the U.N. Security Council consider the Iraqi "threat of intervention in Kuwait" together with the formal application of Kuwait to membership of the U.N.\footnote{107}. Supporting the Iraqi claim, the Soviet Union vetoed a U.N. Resolution that recognised the independence of Kuwait\footnote{108}.

On 8 February 1963 in Iraq, Kassem's government was overthrown by a military revolution and the new government declared their intention to ease the tension between their state and Kuwait and renounce the Iraqi claim to Kuwait. Kuwait's application for membership of the U.N. was approved by the Security Council on May 7, 1963, making Kuwait the 111th member of the U.N.\footnote{109}.

The merits and demerits of the above claim will now be investigated on the basis of the rules governing state identity under both international and Islamic law. Practically speaking, the determination of the identities of Iraq and Kuwait is of great importance since the issue not only concerns the particular interests
of these two states but may also define treaty succession for other states. This investigation will initially only examine the factual identity of the two states rather than their legal identity which will be examined in subsequent chapters.

Under contemporary international law many criteria have been developed in order to determine the factual identity of successor states one of which is the criteria of statehood according to which a new state comes into existence if the following conditions are fulfilled: firstly, the existence of an organised and effective legal order; secondly and thirdly, that this order is valid for certain territory and population; fourthly, that this legal order must be exclusively and immediately subject not to municipal law but to international law. Both Iraq and Kuwait satisfy these conditions. However, are the statehoods of the two countries recognised by Islamic law? An attempt to answer this question requires an examination of the identity of the parent state, namely the Ottoman Empire, in order to determine the effects of the territorial truncation that she underwent after World War I on her factual identity and subsequently, on the identity of Iraq and Kuwait.

After her admission to the Concert of Europe in 1856, it may be presumed that the Ottoman Empire satisfied the criteria of statehood under international law, which rules that the disappearance of one of the aforementioned four elements of statehood has a legal consequence tantamount to the extinction of the state although normal changes to one or more of the elements leaves the identity of the entity concerned intact.

But what normal and abnormal changes are there which may affect the identity of a state? Would a change of population do this - through increase such as when the Islamic Khilāfa was assumed by the Ottomans and all Muslims came under the spiritual suzerainty of the Ottoman government, or through decrease such as when all Arabs renounced the suzerainty of the Ottoman government in 1916? What about territorial change by minor or total loss, as when all Arab territories seceded from the Ottoman Empire during World War I? And what about a change of governmental organisation through a change in government or through social revolution such as the replacement of the Khilāfa by a secular government in the Ottoman Empire etc?

In seeking answers to questions such as these, some international law jurists such as Kunz,14 maintain that customary international law and international judicial decisions have not created a standard test to elucidate the means by which these questions may be determined and this has characterised the area as one of long-standing confusion. Other international law jurists such as Marek15 have dismiss the physical elements of statehood as criteria for identifying a state. Hence, the use of such criteria may not be particularly helpful in identifying whether or not the Ottoman Empire, after its separation from many of its territorial parts, retains its factual identity, or whether Iraq and Kuwait are a continuation of the Ottoman Empire.

To answer these questions recourse to Islamic law may be necessary in order to determine not only the factual identity of the Ottoman Empire but also that of Iraq and Kuwait. As far as the Ottoman Empire is concerned, the view of the founder of the Hanafid
School of Iraq which became the official school of the Ottoman Empire, Abu Hanifa stated that:

All parts of the Islamic territory are under the authority of the Khalifa and the authority of the Khalifa is the collective authority of the umma [Islamic nation].

This means that Dar al-Islam is the property of the umma and by 'akd al-wilāya (the contract of delegation of authority) the umma delegated its authority over Dar al-Islam to the Khalifa. Accordingly, once a territory acquires an Islamic identity it cannot lose it except by the consent of the Khalifa or any legally delegated authority of the umma by a treaty of cession or suchlike. Under this principle of Islamic law, the great truncation of the Ottoman Empire's territory and the transforming of the Islamic Khalīfa into a secular government did not change the Islamic identity of the Ottoman Empire as a part of Dar al-Islam.

It remains to examine the factual identities of Iraq and Kuwait under Islamic law and the emerging principles of Arab public law. According to Arab public law as declared by the 1945 Pact of the Arab League and various treaties and declarations, a distinction must be made between the factual and legal identity of an Arab state. As regards their factual identity in general, the Arab states comprise a distinct community in which every state constitutes a competent unit. Indeed Arabic public consciousness and the feeling of solidarity and obligation are unequivocally expressed in the constitutions of each state, including those of Iraq and Kuwait which emphasise that their people and territory are part of the Arab world. This implies that not only are Iraq and Kuwait...
factually related to each other, but that also all Arab states are a continuation of one another because of their common religion, language, culture and geographical contiguity.

This legal consciousness has created distinct Arabic legal rules governing states' factual identity analogous to the rules of international law in terms of their extent of application and their substantive contents. Furthermore, Arabic public consciousness has undoubtedly had an effect on the political and legal implications of the concept of state sovereignty under international law which is accepted where it applies to inter-Arab states relations only as a juridical fiction. Arab unity as reflected in the Arabic public consciousness increasingly minimises the importance of the concept of sovereignty in its Arabic context since such unity points towards the eventual fusion of these sovereignties. This is emphasised by the 1945 Pact of the Arab League which states in its preamble that:

in order to affirm the close connections and numerous ties which link the Arab states, and being desirous of maintaining and establishing these connections on the foundations of respect for the independence and sovereignty of those states, and in order to direct their efforts towards the general good of the Arab states, the improvement of their circumstances, the security of their future, and the realisation of their hopes and aspirations, and in response to the Arabic public opinion in all quarters of the Arab world.

Have agreed to enter into a covenant for this object.

It is therefore, unreasonable that the concept of sovereign equality between Arab states should be given the same meaning as when it is applied between Arab and non-Arab states.

It follows that the concern of one Arab state in the internal affairs of another cannot be regarded as intervention in the
traditional meaning of the word, such as the concern of the Syrian Arab Republic about the internal affairs of Lebanon and the Decisions of the 1976 Arab Summit Conference regarding the settlement of the Lebanese crisis. Conversely, the interference of any non-Arab state in the internal affairs of an Arab state can be condemned even though it may have been a consequence of the express consent of the state concerned.

From what has been said above, succession in fact occurs under Islamic law only in two cases, the first of which is where the Islamic State, by treaty, became a successor to various political entities in respect of their territories and populations. Their populations were converted to Islam and Islamic law became dominant, thereby generating a new Islamic identity. The second case concerns the Islamic State as predecessor. The assumption of governorship by force by rulers in various parts of Dār al-Islam did not alter their Islamic identity and thus no succession in fact occurred. However, upon the delegation of the conduct of the international relations of these territories to non-Muslim states by treaties, their external identity was put into suspense with regard to succession in fact although their internal identity remained intact. In such cases the Islamic State was regarded as the parent state of the territories and the predecessor state to the non-Muslim states.

Insofar as the legal identity of Iraq and Kuwait is concerned, the question to be examined in the following chapters concerns the extent to which the Islamic State was legally replaced by Iraq and Kuwait.
PART I
FOOTNOTES
CHAPTER I
FOOTNOTES


9. The Saba'nean call a piece of agricultural land Maḥfād and its owner ḏhu. If a number of Maḥfāds came into the hands of one ḏhu they constituted Maḵḥāf, the owner of which was named kil.


16. ibid, vol.1, p.627.


23. Dhu Kār was the name of a well near al-Kūfa in Iraq owned by the tribe of Banu Bakr bin Wā'il, al-Ḥamawi, *Mu‘jam al-Buldān, Dār Ilyā‘ al-Turāth al-‘Arabi*, Beirut, (1979), vol.4, at p.293.


27. Al-Qur‘ān.XLIX, 10.


35. Al-Qur‘ān.X, 47.


37. Al-Ḥamawi, *op.cit.*, vol.5, p.82.


40. Hamidullah, op.cit., p.57.
41. Ibn Hisham, op.cit., p.504.
42. Al-Wakidi. Kitab al-Maghazi, p.177.
43. Hamidullah, op.cit.
44. Al-Shami, Dr Ahmad. Fi Tariikh al-'Arab wa'l Islâm, (1985), p.44.
54. Ibid.
58. Al-Qur'an.CX.
60. Ibid, p.656.
62. The principal companions who usually held their meetings at the mosque of the Prophet: Abu Bakr was given al-bay'a by five of them. Al-Mawardi, Abu al-Hasan. Al-Ahkām al-Sūfāniyya, al-Ma'ba'a al-Muhammadiyya, Cairo, p.7.


64. It was composed of Abl al-Hal wa'l 'Akd, the notables of al-Madina and the tribal chiefs of Bedouin, and anybody assembled in the mosque, al-Anṣāri, Abu Yusuf. Kitāb al-Kharādzi, Dār al-Ma'rifā, Beirut, p.14.


68. ibid, p.120.


71. Many peace treaties were concluded under 'Umar's rule between the Islamic State and non-Islamic states, al-Balādhuri, op.cit., p.127.

72. Under the instructions of 'Umar, the candidates for the succession were designated by a group of names from amongst which the consultative committee made their selection. The Muslims assembled, therefore, at the main mosque of al-Madina in order to discuss and to elect the successor in accordance with al-Qur'ān - the constitution of the Islamic State, al-Qur'ān XLII, 38; III, 159. After lengthy deliberations 'Uthman was elected as the third Rashīdīn Khalīfa, al-Ṭabarī, op.cit., vol.4, p.229.

73. Al-Balādhuri, op.cit., p.360.

74. ibid.


76. Al-Ṭabarī, op.cit., vol.5, p.53.

77. ibid, p.77.


83. With the enlargement of the Islamic Empire, each province had its own *Ahl al-Ḥal waʾl Ḥād*, with which the *amīr* of the province discussed matters and reported back to the *Khālīfa*.


88. Shākir, *op.cit.*, vol.6, p.19.


93. On the second question, see Part II, Chapter III, Section 2.
CHAPTER II
FOOTNOTES


4. Sharīf Hussain regarded himself as a descendant from the Prophet’s family and the trustee of the religious places of the Muslims.


7. B.F.S.P., 1919, vol.112, p.21, Article 22 of the Covenant; on the concept of the mandate regime see Chapter VII, Section 2, 1.


11. It should be noted, however, that according to al-Qur’ān there can be no wīlāya (guardianship) by a non-Muslim of a Muslim, al-Qur’ān.IV, 144.


16. ibid.


19. ibid, pp.195-199.


29. ibid, p.121.


31. ibid.


35. Such as territory, permanent population and government.


37. Art.10, Cmd.2370.


40. Cmd.2370.


42. League of Nations, Minutes of the 30th Session of the Council, pp.1345-1347; and see also decision of 11 March 1926, ibid, Minutes of the 39th Session of the Council, p.502.


44. Cmd.2662.

45. Cmd.2998.


47. Cmd.3440.

48. P.M.C., Minutes of the 16th session, p.20; Minutes of the 19th session, p.175.

49. Cmd.3833.

50. P.M.C., Minutes of the 19th session, p.176.


53. ibid, pp.1212-6.


59. The name 'Kuwait' is a diminutive form of fort.
60. Warden, Frances, Member of Council at Bombay under Uttoabee Arabs, *Extracts from brief notes relative to the rise and progress of the Arab tribes of the (Persian) Gulf*: Prepared in August 1819, (Bahrain) I.S.Bo. vol.xxiv, pp.362-372.


62. Al-ʿQurʿān.XLII.


71. An Egyptian authority. Was the General-Secretary of the Arab League, Azzam, op.cit., p.43.


73. See Encyclopaedia of Island, under the word Ḥāʾimāḥām.


75. Azzam, op.cit., p.44.


77. Altug, op.cit., p.127.

78. Such as the Government of Egypt, the Governments of the North African Arabs, and the Arab chiefs of Eastern Arabia.
79. One of these restrictions is the obligation placed on the amir to take into account the general interest of Muslims since the treaty will be binding on all Muslims, see generally Chapter III.


81. ibid, p.270.


89. Islamic law does not recognise the constitutive theory of recognition and it has been relied upon here only for the sake of argument.


91. Aitchison, op.cit., vol.XI, XLIII.

92. L.M.T.S., 1924, vol.xxviii, p.11, Articles 16, p.23 and 27, p.27.


100. ibid, p.56.

101. The Times, 30 September, 2 October 1959.

102. Cmd.6380.


104. U.K.T.S., 1961, No. 1; Cmd.1409.


106. The Kuwaiti Government. The Kuwaiti-Iraqi Crisis, op.cit., p.3.


112. The Ottoman Empire was recognised by the European states and thus admitted to the Concert of Europe in 1856, G.B.P.P., 1856, vol.61, pp.19-34.


119. The difference between Islamic law and Arabic public law is not a difference in nature but in degree. See part III.
120. Arabic public law may be defined as conventional and customary rules and principles, doctrines and theories governing the international relations of the Arab states, see part III.


124. This fact is further evidenced by a survey of the constitutions of the Arab states, see Khalil, op.cit., vol.I.

125. See Article 2, of the 1958 Provisional Constitution of the Republic of Iraq.

126. See Article 1, of the 1962 Constitution.


129. The concept of Arabism as the criterion of the identity of an Arab state has been globally recognised since the Hussain-McMahon Exchange of Notes, G.B.P.P., 1939, Mics. No.3, Cmd.5957, onwards.


131. Cf. the concept of intervention in international law, Crawford, op.cit., p.114.


PART II
SUCCESSION IN LAW:

THE PRACTICE OF THE SUCCESSOR

THE PRACTICE OF IRAQ IN TREATY SUCCESSION

THE PRACTICE OF KUWAIT IN TREATY SUCCESSION

ARE THERE RULES GOVERNING TREATY SUCCESSION

IN ISLAMIC LEGAL THEORY?
CHAPTER III

THE PRACTICE OF THE SUCCESSOR

SECTION 1: THE EFFECTS OF THE EMERGENCE OF THE ISLAMIC STATE:

1. State Succession:

Now the issue to be examined concerns the extent to which the pre-Islamic political entities were replaced by the Islamic political entity in matters of identity and succession to treaties.

A. The Criteria of Identity of the New Community:

With the territorial changes that occurred with the emergence of the Islamic political entity in al-Madina and the subsequent reorganisation of the pre-Islamic Arab political entities into an Islamic community, the question arises as to whether it continued the identity of the former Arab political entities which had been extinguished. Certainly, their identity and their melding together into a single community was based on the religious tie between them rather than the tie of al-asabiyya al-kabaliyya (partisanship) of the pre-Islamic Arab tribes.

The key to the identity of the new community lies in the heart of the word 'Islam' which defines the real possession of 'sovereignty' and the distinction between the Islamic and non-Islamic communities. 'Islam' denotes the peaceful and total submission to God alone as the absolute sovereign over all human beings, and constitutes a complete system of life having the effect of transforming its adherents, whatever their race or colour, into a political community distinct from those that preceded it.
The constitution of the new community recognised this fact when it employed the title of 'umma' (Islamic nation) to the new community, using the term al-djebiliyya (ignorant) to describe the pre-Islamic Arab communities. The real differences between the legal orders of the two communities lay in the fact that the nature of the group solidarity of the pre-Islamic communities was based on a tribal partisanship whereby every member supported each other regardless of whether he was oppressed or an oppressor, and the blood-tie prevailed over any moral, religious or even national consideration.

Conversely, the nature of the solidarity of the new community was based on the religious tie. Islam propounds the oneness of Allah and submission to his might. This solidarity could not be achieved except by uniting the community by the bond of religion and abolishing the system of so-called aristocratic descent and the social classes which ensued from it. On this basis, the constitution of the new community declared that various Islamic groups had been fused into one homogeneous community which was based on a certain ideology, language and historical heritage and was governed in accordance with a legal order effective within the territorial sphere of Dār al-Islam (Islamic territory). Thus the new community established a distinct factual and legal identity completely new and separate from the pre-existing political entities. However, the creation of this Islamic identity emerged not only from theoretical observation but from practice as well, since the existence of the Islamic political entity in Arabia was at the expense of the factual and legal identities of the pre-Islamic political entities and the
new legal order employed certain criteria to determine the effects of this replacement.

B. The Determining Legal Criteria of Succession in the New Legal Order:

For the Islamic State, the Qur'ān is the furgān (criteria) which distinguishes good conduct from bad. Moreover, it provides a code of conduct for every Muslim. An explanation to how such criteria worked in dealing with treaty succession to the pre-Islamic political entities is necessary. According to al-Siyūṭi there are 500 legal injunctions in the Qur'ān dealing with both private and public relations, established by treaties or other instruments.

If the Qur'ānic injunction exists to regulate the conclusion of treaties between Muslims and non-Muslims, it is directly legislated by Allah:

(But the treaties are) not dissolved with those Pagans with whom ye have entered into alliance and who have not subsequently failed you in aught, nor aided any one against you. So fulfil your engagements with them to the end of their term: for God loveth the righteous.

The tafsīr (to make clear and to show the objective) of the legal injunctions was the primary task of the Prophet during his lifetime and of the umma afterwards.

The task of the Sunna (tradition of Prophet Muhammad) is to interpret the injunction, and to put it into effect. In the absence of any Qur'ānic injunction the Prophetic Sunna regulates the conclusion of treaties, (as hidden revelations from Allah) which are themselves regarded as an integral part of the Sunna, but if the nasṣ (provision) is not sound, as for example, in the case of weak hadīth (tradition), or if it is not explicit in stating the
harām (unlawful), the asl (origin)²¹ of permissibility in concluding treaties applies. Any treaty, however, must not comprise a derogation of Ḥukūk Allah, (Rights of God)²², which constitute the rules of Jus cogens in the legal order of the Islamic State²².

This basic condition had a significant effect on the succession practice of the Islamic State to the treaties of the pre-Islamic political entities. Before analysing this effect it is necessary to explain certain terms employed by the new legal order relating to the concept of mu‘āhada (treaty). The term 'al-ı́l‘ means 'al-‘ahd (the covenant), 'al-‘akd (the contract) and 'al-hilf (the alliance)²⁴. Al-‘ahd (the covenant) signifies an agreement concluded between two or more parties to regulate their mutual interests; when the parties guarantee the enforcement of al-‘ahd it becomes mithāk (charter) which is literally derived from al-witāk (the tie). The term 'al-hilf, (the alliance) is literally derived from the Arabic word 'al-hilf (the oath)²⁶. The term 'al-mu‘āhada (the treaty) means 'akd (to contract) 'al-‘ahd (the covenant) between two or more parties on a certain act which has the object of creating legal consequences²⁶. Thus the mu‘āhada (treaty) is a kind of al-‘ahd (covenant) and there is a common factor between a mu‘āhada (treaty) and ‘akd (contract) in that they both create binding obligations and require compliance. Furthermore, they both stress mutual agreement or a meeting of minds as an essential element, regardless of the form or procedure. When consent is arrived at by one party or parties making idjāb (offer) and kabul (acceptance) by the other party or parties the meeting of minds is achieved and the mu‘āhada or ‘akd is regarded as legally binding²⁷.
In its dealing with the pre-Islamic law of contract, the Qur'ān makes interchangeable use of the terms 'ākd (contract) and 'ahd (covenant), which signifies the fact that in Islamic legal theory there is no difference between rules governing private contract and those governing al-mu‘ahadāt (treaties). As a criterion in defining identity, the Qur'ān also uses the term ‘al-djahiliyya’ (the ignorant) in order to distinguish the pre-Islamic communities from the Muslim community and the Prophet used the same terminology on several occasions. Accordingly, treaties may be divided into the treaties of the ignorant Arabs (the pre-Islamic Arabs) and treaties of the Muslim Arabs. The latter consist of all treaties concluded by the Prophet. As regards the treaties of the ignorant Arabs, they are further divided, according to their nature, into treaties regulating the inter-tribal relations of protection, alliance and termination of hostilities, and treaties codifying the customary law of Arabia with regard to forbidding fighting during the ḥarām (sacred) months as well as those regulating the rights of passage of commercial caravans through various cities and those regulations of the holy place in Makka City, such as Hilf (alliance) of al-Mutayyabūn (the perfumed), which are regarded as constituting Hukūk Irtifā‘ (territorial or usufructory rights). There remains a question regarding the effects on these treaties of the factual replacement of the preceding political entities by the Islamic State in the responsibility for the international relations of the territories to which these treaties were applicable before the date of this replacement. Workable criteria have evolved to deal with this question.
The new legal order dealt with the pre-Islamic treaties (contract) and drew up a framework within which subsequent treaties had to be confined. Before succession to any one of the pre-Islamic treaties, the *idjab* (offer) of the other party or parties to the treaty had to be unambiguous, and the *kubul* (acceptance) of the predecessor political entities of the Islamic State also needed to be unequivocal. This framework, in the language of the Qur'an is *waf'a* (fulfilment). The Qur'an says: "O ye who believe! fulfil (all) obligations", and infuses a new spirit into this legal formality designed for the purpose of 'fulfilment':

O ye who believe! when ye deal with each other, in transactions involving future obligations in a fixed period of time reduce them to writing...

In general, the new legal order permitted not only the devolution of the pre-Islamic treaties to the Islamic State but also the power to conclude any treaty it desired, these being binding upon all parties provided they were clean from defects of form and substance, or embodied conditions that were contrary to the purposes and ends of the Shari'a. In explaining this principle, the Prophet said:

The believers are restricted by their contractual obligations except those which permit *harâm* (unlawful) things or prohibit *halâl* (lawful) things.

According to these criteria, any treaty of the pre-Islamic era involving *riba* (usury) runs counter to the aims and purposes of the Shari'a and the welfare of the community of the Islamic State and is regarded as *haram* (unlawful). Therefore, the new legal order established the rule of non-devolution according to which this type of treaty was abolished and prohibited.
Further investigation also reveals that according to the aforementioned criteria, the practice of the Islamic State in treaty succession was governed by the rules of devolution and non-devolution. By applying these rules to treaties of the pre-Islamic political entities it appears that the political treaties of the pre-Islamic era fall into two categories. The first comprises treaties concluded by political entities among themselves and the second consists of those concluded between individuals supporting one another in time of peace and in time of war. The former persisted under the new legal order, whereas the latter factually ceased to exist when they were superseded by the new legal order which provided further protections, save for any contract of *tabannī* (adoption) which the Qur'ān nullified, including that made by the Prophet himself.39

The constitutional treaties consisted of those treaties that regulated the customs of Arabia such as the immunities of diplomatic representatives40 and the prohibition of war in the sacred months41. The Islamic State respected all such treaties which were designed to regulate relations in these communities whether they were between individuals, between an individual and the state or between states. This is essentially the purpose of the creation of the Islamic State as an instrument of enforcing the *Shari'a* (Islamic law) and order:

Fulfil the Covenant of God when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made God your surety; for God knoweth all that ye do.
The word 'oaths' mentioned in the above verse is interpreted to include treaties of the pre-Islamic era. Accordingly, the Treaty of Ḥilf al-Fudūl (alliance of ḍīṭhiliyya) devolved to the Islamic State.

The new legal order also dealt with the treaties of ḥukūk al-irtifāk (usufructory rights) in the following terms:

Serve God and join not any partners with Him; and do good - to parents, kinsfolk, orphans, those in need, neighbours who are near, neighbours who are strangers, the companion by your side...

Allah in this verse combined the order to worship him with doing good to parents, neighbours and the 'companion by your side'. Such a neighbour or companion may be an individual or a state since such a distinction is unthinkable in the Shari‘a. The Prophet emphasised that such treaties survived territorial changes and he implemented this principle upon the incorporation of Makka into Dār al-Islam (Islamic territory) when 'Ali bin Abi Ṭālib asked the Prophet to combine in his hand, the right of al-hidāba (the custodianship) and the right of al-sīkāya (giving water to pilgrims) which the Treaty of Ḥilf al-Muṭayyabūn had constituted. Immediately, the Prophet called 'Uthmān bin Ṭalhā, the custodian of al-Ka‘ba, and gave him the keys saying: "Today is a day of yielding and fulfilment."

It seems that treaty succession in the new legal order was governed by the general rule of ḥalāl (lawful) devolution unless ḥarām (unlawful) devolution was specifically provided for in the Qur‘ān or the Sunna. For the purpose of succession, therefore, such a treaty could on no account harm the public interest of the Islamic State. They continued to be binding as long as they were consistent
with the interests\(^4\) which the Prophet established when he said: "no damage nor mischief"\(^5\).

These juristic principles, however, may not be applicable with equal force to government succession\(^6\). This raises an important question: if Allah expressed these juristic principles through the Prophetic government of the Islamic State and since this government - the Prophet - was no more than a human being who could die or be slain\(^7\), how could Allah continue to express his law-making power through the non-Prophetic succeeding governments? Furthermore, what were the effects of the replacement of the Prophetic government by a temporal one on the identity of the Islamic State and existing treaties?

2. Government Succession:

A. Constitutional Succession:

The personality of \textit{Muhammad} is separate from that of the \textit{umma}\(^8\): Muhammad is no more than a Prophet sent by Allah to establish the rules governing the relations between individuals and Allah and between the individuals themselves. The real possessor of the rights and duties ensuing from any treaty concluded by \textit{Muhammad} is not \textit{Muhammad} but the \textit{umma} of \textit{Muhammad}. \textit{Muhammad} only set up the rules governing treaties which the subsequent treaties must follow. During his life time the Prophet frequently delegated the treaty-making power to the \textit{amirs} (governors)\(^9\) who had been empowered to negotiate and sign treaties with non-Muslims, subject to the approval of the Prophet. The Prophet said: "My \textit{umma} shall never be unanimous in error"\(^10\) and the Qur'\textacute{a}n states:
O ye who believe! obey God and obey the Apostle, and those charged with authority among you ... 56.

Hence, the final sanction for the employment of those intellectual activities facilitating the development of the rules governing the delegation of treaty-making competence and treaty succession comes from the Qur'ān and the authenticated Sunna.

Before his death, the Prophet trained his companions to use their intellectual capabilities when faced by cases not regulated by the Qur'ān and the Sunna 57 and subsequently, the problem of succession to the Prophetic government led to these mental capabilities being used to develop two secondary sources, namely the idjmā' (consensus) and iditihād (independent reasoning) 58.

It may be asked here as to whom the Qur'ān and the Sunna delegate the authority of idjmā' and iditihād from amongst the members of the umma. It is not difficult to find an answer to this question in the Qur'ān and the Sunna: the Qur'ān states in clear terms: "... and consult them in affairs (of moment)..." 59 and "... who (conduct) their affairs by mutual consultation..." 60. Moreover, the Prophet said: "The learneds are the heirs of the Prophets" 61. The 'learneds' may be identified further as the persons who are elected 62 from amongst the members of the umma, through which Allah continues his law-making power since their consensus on certain matters which have not been regulated by the Qur'ān and by the Sunna is based on these same sources by way of analogical deduction.

By virtue of 'akd al-bay'a (contract of the delegation of authority), the law-making power was put into practice by the Khalifa (imām) as the representative of the umma 63. In this case, the
treaty making-power of the umma rested in the Khalifa (imām), and any treaty concluded by him constituted an idlimā' of the umma which itself had to obey and be guided by the Prophetic treaties because they form a part of Hukūk Allah (Rights of Allah) which are regarded as the Islamic rules of Jus Cogens. The non-Prophetic treaties are expressly considered to be law-making treaties in the sense that they were drawn up by the idlimā' of the umma in accordance with the Prophetic Sunna, and contain rules derived from the Qur'ān and the Sunna by the parties who used their idjitihād (independent reasoning) in reaching a conclusion. Therefore, the treaties are no more than an indicative source of law at the same level as idjitihād.

The idlimā' played a decisive role in solving the problem of the effects of the succession of the Rashidin Khalīfa to the Prophetic government raised by the so-called ridda (apostasy) movement, which disputed the distinction between state succession and that of government and signalled the beginning of these Arab chiefs' secession from the Islamic State on the ground that their agreements were concluded with Muhammad personally and therefore were automatically terminated by the death of one of the parties. Furthermore, since they did not participate in the idlimā' of the umma regarding the election of Abu Bakr as Khalīfa and his succession to the Prophet's temporal function, they regarded that event as a private affair in al-Madīna and did not feel themselves in any way bound by it. They insisted on negotiating a new agreement with Abu Bakr based on different conditions. Abu Bakr supported by the idlimā' of the umma strongly rejected any further negotiations and insisted on exacting in full, the terms of the agreements they had
entered into with his predecessor, saying: "if they refuse to give hobbling-cord from al-zakāh I would fight them for it".  

It is possible to clarify this problem by considering the relevant rules of Islam. The Islamic State is a government exercising an effective authority over a certain territory and population. According to the Hanafid School, these three elements of government, territory and population must immediately and exclusively fall under Islamic Law. The disappearance of one or more of these elements could cause the extinction of the identity and, subsequently, the disappearance of the Islamic State in certain circumstances. However, other changes in these elements need not have the effects of extinguishing the Islamic State and could leave its identity intact.

A total change from Islam to a non-Islamic religion by the population of a part of Dār al-Islam could not affect its Islamic identity as such, so long as the government continues to exercise effective authority over the area in accordance with Islamic Law. On the other hand, the total loss of Dār al-Islam, that is to say the complete transfer of Dār al-Islam into Dār al-Harb (territory of war), brings the identity of the Islamic State to an end.

The changes of the government of the Islamic State, whether they involve substantial changes in the form of the constitutional structure, do not affect the identity and continuity of the Islamic State so long as the principles of the Qur'ān and Sunna are observed. Thus, the Rashidin Khilāfa, under the leadership of Abu Bakr, succeeded to the benefits and burdens of its predecessor's treaties. Similarly, the other parties could not deny the binding
force of the treaties by simply claiming that the disappearance of one government ended this binding force since it had not entered into these treaties personally, on its own behalf, but as the representative of an Islamic State which was still in existence. Islamic law did not regard as legitimate the revolution of the *ridda* movements which claimed the termination of existing treaty rights and obligations. Such movements were regarded as involving *Ahl al-Baghi* (people of dissension) who were condemned as outlaws, denied recognition and cut off from the Muslim community.

The disputes which arose between Imām ‘Ali and Mu‘awiya created subsequent dissenting movements and sharp opinions emerged not only on the question of the *Khilāfa* but also on succession to treaties. Therefore, it is necessary to examine the succession of the Umayyid to the Rashidin *Khilāfa*, the succession of the Abbasid to the Umayyid *Khilāfa*, and finally the succession of the Ottoman to the Abbasid *Khilāfa* and their effects on the emergence of Islamic jurisprudence on succession to treaties.

**B. Revolutionary Succession of the Islamic Governments:**

As a result of the forcible seizure of the Islamic government by Mu‘awiya, al-Hasan, the son of the Khalīfa ‘Ali, abandoned the office of the *Khilāfa*, in 41 A.H. (663 A.D.), in favour of Mu‘awiya and this was followed by the acquiescence of the Islamic community to Mu‘awiya’s assumption of that office. However, acquiescence was not unanimous because some Muslims refused to accept the Umayyid’s claim to the *Khilāfa*. These included the Shi‘ats and Khawāridj, each of them later developing into schools of thought. The Shi‘‘ school began to interpret the provisions of the Qur‘ān and Sunna to serve
their own concepts of government succession which led to their refusing to acknowledge as authentic hadiths those which are related by non-Shi'i jurists. They recognise idlima' (consensus) and kiyas (analogical deduction) as sources of the law in matters where there is no mase (provision) from the Qur'an and the Sunna as in the case of succession to the Prophet's position. In the Sunni schools idlima' is the consensus of Ahl al-Hal wa'l 'Akd (learned Islamic jurists), where as the Shi'a consider idlima' only to express the unanimity of the views of the Shi'i jurists on certain subjects through which the opinions of the imam (one of the Prophet's family) may be discovered. Many of these jurists were close companions of the imam and knew exactly the imams' opinions with regard to succession in respect of the Prophet's position, and thus were competent to make idtitibad (independent reasoning) in this case.

Conversely, the concept of government succession advocated by the Khawāridjī (secessionists) was more democratic and succession to the Prophet's temporal, not religious, position was believed to be the right of any competent Muslim by general election. However, the Khawāridjī became restrictive and narrow-minded in recognising only the legality of the Khalīfa of Abu Bakr and Umar and refuting the legality of subsequent Khalifas. Moreover, with regard to the Prophet's hadith (tradition) on succession, they only recognise hadith related by a Khāridjī consequently regarding few hadiths as authenticated Sunna.

In contrast with the above mentioned schools, the rest of the Muslim community were dominated by the opinion of the Prophet's companions and their followers. Two distinct and separate trends
emerged yet both are derived from the Qur'ān and Sunna as primary sources of legislation. The main difference between these trends is that one does not favour the ra'\textsuperscript{y} (personal opinion) except in cases of necessity such as succession to the Prophet's temporal position, while the other relies upon the ra'\textsuperscript{y} and restricts the use of the \textit{Hadith} (tradition) since they fear they may misinterpret and thus tell mistruths about the Prophet. The first trend found most of its adherents in al-\textit{Hijāz} (now constituting the South-West part of Saudi Arabia), where the Sunna was predominant and where the companions of the Prophet were still living\textsuperscript{30}. The adherents of the second trend lived mainly in Iraq, where religion, culture and civilisation were intermixed and distant from the original place of the Prophet's teaching. This school of thought was the main foundation from which the Hanafīs have developed their jurisprudence\textsuperscript{31}.

Subsequently, the views of these schools will be examined against the official view of the Umayyid government in respect of the effect of a change of government on treaties. According to the Khāridjī and Shi'ī schools, \textit{mutatis mutandis}, changes in the constitutional form of the Islamic State are of no legal significance as long as they are carried out by constitutional instruments in accordance with the preceding governmental practice. It is only in the case of the forcible seizure of the governmental machinery that the question of the Islamic identity of the new regime can arise. The Umayyid regime came to power in violation of the prescribed constitutional procedure for government succession or change and accordingly, none of them considered themselves to have any obligation towards the new government. All treaties concluded between the predecessor
government and the political entities of Arabia, al-`Irāk (Mesopotamia) and al-Shām (Syria) remained untouched although the new régime had not been a party to these treaties. They based their argument on the distinction between legal and illegal changes of the government. According to their view, the Khalīfa who comes to power by legal means relies for his legitimacy upon the Islamic constitution (Qur'ān and the Sunna) and therefore, he is legally delegated by the umma to replace his predecessor. On the other hand, a person who seizes the governmental machinery by force has abrogated the constitution and, therefore, does not have the basis of authority to qualify for legitimacy. For this reason, the rule 'al-`aḵd shari`at al-muta`akhirin' (pacta sunt servanda) is not applicable since the so-called Khalīfa is a stranger to the agreements and the stranger cannot accede to any agreement unless the other party to the agreement admits his accession.

Even if the seizure of the Khalīfa by force did not change the identity of the Islamic State, it changed the identity of its government since the new regime tended towards a secular approach to government. This constituted a vital change in the circumstances and had the effect of releasing the Khawāridj and Shi`āts from obligations of amity and cooperation with the new government. Similarly, at the beginning of the assumption of the Umayyid authority, some Sunnis objected to the new government on the same grounds although most Sunnis made concessions in attempting to unify Muslims.

The question, therefore, of the internal identity of the Islamic State can only be determined in accordance with the criterion
employed by the Islamic legal order in such a case. Since this legal order is based on monism and international rules have supremacy over municipal rules, the problem of Islamic identity, at this stage of development of the Islamic legal order, possessed only external aspects. The factual identity of the Islamic State concerns its territory and the government only has the function of serving the state. Similarly, the legal identity of the Islamic State comprises rights and obligations created by treaties concluded by the Islamic government as the agent of the state with foreign political entities and not those concluded between internal governmental administrations. This is the case despite the fact that such entities later persisted under the Islamic state and became a part of Dār al-Islam and the Islamic nation.

As a matter of practice, a practice now sufficient to qualify as custom, Islamic revolutionary régimes have not affected prior treaties as a matter of doctrine, except those which are inconsistent with the main principles of Islam. This conclusion is based on the arguments that the state and not the government is the subject of Islamic Law⁹⁷, which means the treaties to which the state was a party remain, despite any change in government. If the election of a new government or a change in the form of the existing government terminated the treaties, they could not be a means of establishing stable expectations. Each obligation would die with the statesman. On the other hand, if the claim that all pre-existing treaties lapse upon the seizure of the Khilāfa by force is accepted, then the door is opened for any government to escape from its obligations.
Judging by the preceding practice, despite the fact that the Prophet Muhammad's revolution was genuine, it abrogated only those treaties which ran contrary to the principles of the Shari' a. In addition, al-Husain bin 'Ali (the Imam of the Shi'ats), adhered to the practice of his grandfather (the Prophet, peace be upon him) when he threatened the Umayyid Wali that he would invoke the Hilf al-Fudul (an alliance of the pre-Islamic era) against him if he did not repay him his money.

The official view of the succeeding governments with regard to the effects of government succession on treaties may be compared with former practices. The Umayyid Khalifa did not fail to consult the jurists about the effects of the change of the Islamic government on the constitutional treaties of the Islamic State and also on those treaties concluded with a state member of the Dar al-'Ahd (covenant territory). One of the problems that arose in this connection was the treaty with Ethiopia but upon consultation with Malik (the founder of the Malikid School), the Umayyid government refrained from launching djibad against it. Similarly, the binding force of the treaty concluded between the Rashidin Khalifa and Nubia in 31 H. (652 A.D.) continued under the Umayyid rule and that of their successors (the Abbasids). It was renewed from time to time for over six hundred years until the coming of the Fatimid rule in Egypt. Another example of treaties considered binding upon the successor government was that concluded between Khalifa 'Uthman and the people of Cyprus, in which the Cypriots agreed to pay a tribute to the Islamic State. When the Umayyids took over the Islamic government,
most jurists advised the new government about the established practice of succession with regard to this treaty.\textsuperscript{103}

Upon the overthrow of the Umayyid government and the taking over of the Islamic government by the Abbasids, who were backed by the Shi'a movement,\textsuperscript{104} and the transfer of the Islamic Khalifā from Damascus to al-'Irāq (Iraq), the Abbasid Khalifā shortly abandoned the Shi'a school of jurisprudence and instead relied on the Sunni school, specifically the Hanafid jurists. He consulted specialists such as Abu Yūsuf and Muhammad bin al-Ḥasan al-Shaybānī\textsuperscript{105} about any legal problems that may have come within his competence. In accordance with such consultation, Khalifā Abu Dja'far al-Mansūr, the second Abbasid Khalifā (754-775), emphasised the succession of his government to the treaty concluded between the Umayyid Khalifā and the people of Cyprus by reducing the annual tribute which had been increased several times under his predecessor.\textsuperscript{106}

In a conflict with the Byzantines, Khalifā Hārūn al-Rashīd attempted to revoke the covenant granted by Khalifā 'Umar bin al-Khattāb to the Arabian tribe of Banu Taghlab\textsuperscript{107} but the Hanafid jurist al-Shaybānī advised the Khalifā that the practice had been established since 'Umar's time and his successors had continued it, so the dhimmi treaty was irrevocable.\textsuperscript{108}

The practice of Islamic governments suggests a division of Islamic treaties into permanent and temporary treaties, which depended on the parties with whom the Islamic government was negotiating in addition to the content of the treaties. The treaties of Ahl al-Kitāb (People of the Book) were perpetual and those with Dār al-Harb were temporary. The Hanafid\textsuperscript{110}, Shāfi'i\textsuperscript{111} and
Hanbalid Schools\*\*\#2 held that a peace treaty with one of the member states of the Dār al-Ḥarb (territory of war) should not exceed a period of ten years. They based their argument on the precedent of the Hudaybiya Treaty which stipulated that the peace between al-Madina and Makka would last for ten years. Other jurists, like Abu Hanifa, Ahmad bin Hanbal\*\#3 and the Hanbali al-Hadidjawi\*\#4 advised the Imam to conclude peace treaties for more than ten years if the Islamic State was weak and unable to resume war against the enemy. The treaties concluded during the Crusade were designated to last for ten years and ten or eleven months, but for no longer\*\#5, so that after this date, the succeeding government was free from any obligations established by treaties concluded between its predecessor and governments of the member states of Dār al-Ḥarb.

Therefore, as was emphasised at the beginning of this investigation the question of the identity of a political entity can only arise as a result of an event such as the emergence of the Islamic State which interferes with the political entity's factual and legal existence. Two legal rules emerging from the practice of the Islamic government have been established namely, that constitutional and revolutionary changes do not cause a break in the Islamic State's identity and legal continuity and do not subsequently generate state succession.

The duration and categorisation of the Islamic treaties and the rules governing devolution of the predecessor's treaties had undergone revolutionary changes when the Abbasid Khalifa endowed each provincial governor with treaty-making power and the decentralised administration replaced the centralised one.
SECTION 2: THE EFFECTS OF THE EVOLUTION OF THE ISLAMIC LEGAL ORDER:

1. The Effects of the Decentralisation of the Governmental Order:

The Abbasid Khalifa divided the empire into provinces\(^{11}\) which sometimes numbered 36\(^{12}\) and sometimes 24\(^{13}\). Each major unit, like Egypt and Khurāsān, had a complete set of provincial officers and diwāns. Sometimes several provinces united and were placed under one amīr (governor).

The evolution of these entities have created a problem of state succession in respect of treaties. Even though under Islamic law the question of identity is separable from that of state succession in respect of treaties, within Dār al-Islām they are inseparable. State succession implies an interruption in the continuity of the identity of an entity\(^{14}\). Thus the grant of imāra khāssa (limited governorship)\(^{15}\) with certain tasks such as the leadership of the Muslim army in the field but without the authority to conclude treaties of amān, dhimma, sullāh etc. or imārat istikfā (delegated governorship)\(^{16}\) according to which the amīr possesses treaty-making competence as that of the Khalīfa himself, does not involve a break in the legal continuity of the Islamic identity of the imāra\(^{17}\). Imāra khāssa (limited governorship) may be transferred into imāra 'āmma (full governorship) as a matter of Islamic law. For example, the right to participate in the negotiation, ratification or even signature of treaties only constitutes imāra 'āmma if it receives the sanction of the Khalīfa\(^{18}\). If such imāra is assumed by an amīr without having obtained imāra 'āamma from the Khalīfa prior to this assumption or the amīr obtained imāra khāssa from the Khalīfa and subsequently transferred it by his might into imāra 'āmma, it is
known in Islamic law as *imārat al-istilā⁰* (assumption of governorship by force).

Although the latter situation was irregular in the Abbasid Khilāfa it is impossible to describe it as rebellious. In the Sunni theory in such *imārat al-istilā⁰* (the assumption of governorship by force), the Khalifa recognises the governor's treaty making power and civil administration. In return, the governor recognises the dignity of the Khalifa, and his right of administration in religious affairs. Such practice, however, opened the door to more independent political entities within the dominion of the Abbasid Khalifa, some of which claimed not only the non-devolution of the Khilāfa treaties but also claimed the Khilāfa itself.

It is a well-established principle under Islamic law that changes in the governmental legal order of one of the contracting parties to a treaty have no influence whatsoever on the binding force of the treaties. Similarly, changes in the territorial domain of the Khilāfa either by the annexation of a new territory or the loss of some of its territory as in the case of *imārat al-istilā⁰* does not as such release the Islamic State from its obligations or deprive it of its rights constituted under the treaties. Thus by virtue of the rule of *'al-‘akd shari‘at al-muta‘ālidin* (pacta sunt servanda) treaty rights and obligations devolve to the amir assuming governorship by force, since no break in the Islamic identity of the territory has occurred, unless these treaties violate the provisions of the Qur'ān or the Sunna or contradict the basic principles of Islam.
The evolution of these political entities into those with a more advanced legal status with separate and distinct legal personalities and claims to the Islamic Khilāfa, such as the secession of Spain under 'Abdul Rahman al-Dākhil and the establishment of a new Umayyid Khilāfa there, did affect the rule of devolution of the treaties of the Khalīfa to newly emerging imāra and the right of the Khalīfa to represent Muslims in the conclusion of treaties with non-Muslim powers. Most of these rival powers refused to succeed to the Khalīfa's treaties, such refusal being based not on the legal sense of the rule of non-devolution but on political or sectarian grounds.

For the claimants to the Islamic Khilāfa, the problem arose of how to regulate treaty succession not only among themselves but also with non-Muslim states. This problem was at least temporarily solved by the re-integration and reunification of the Islamic State's territory and legal order in 1517 when the Ottomans reunited the Islamic world and assumed the Khilāfa. The remaining Muslim emirates, except the Safawid (Shi'i) imāra in Persia, recognised the new Khalīfa as the guard of Islam and the protector of Dār al-Islam (Islamic territory). Thus, thereafter, no problem of succession to treaties arose between Muslim and non-Muslim political entities in the sense that the Ottoman Empire (Islamic State) represented the members of Dār al-Islam on the international plane either for the conclusion of or succession to treaties.

At the time of this legal reformation and territorial integration movement in the Islamic world, the spiritual unity of the Holy (Western) Roman Empire was declining. The unity of the Holy Roman
Empire greatly depended on the maintainance of co-operation between temporal and spiritual authorities as did its rival power (the Islamic State). The Roman system of colonial administration was replaced by the feudal system which practically divided the empire into several political authorities, each one of them possessing sovereignty over a portion of the inhabitants and territory of the empire in the same way as the amirs in the Islamic legal order. Gradually, as a result of national movements, each authority assumed complete sovereignty by force and territorial sovereignty replaced the feudal system. Subsequently, several independent city-states arose such as Genoa and Venice which bordered the Islamic State in the Mediterranean. Parallel with the national movements which ended the middle ages was the separation between religion and state and thus the Roman Empire lost the spiritual bond that connected all parts of her territory.

This event marked a new stage in the development of the European public legal order, since the old legal order had died and there was no other to regulate treaty succession among the newly emerging states who did not identify themselves with their predecessor (the Roman Empire). Claiming absolute sovereignty, they regarded themselves as free from any obligations concluded by their predecessor.

Such practice was in contradiction with the views of European jurists of the time. For example, Grotius regarded a state as no more than the total of the individuals who are members of it and certainly not identical with the prince who rules over it. The state is a rather artificial creature. The individuals within it
constitute an essential single character and thus are the substance of the state while the governmental organisation merely constitutes its form. Change in the form does not involve change in the identity of the state and thus does not affect its contractual obligations whereas changes in its substance (territory and population) do constitute a break in its legal identity and release the successor state from its predecessor's contractual obligations. Accordingly, none of these emerging states were regarded by the European jurisprudence of the time as new states, rather they were seen as a continuation of the Roman Empire and thus under obligation to be bound by its contracts. The impact of this legal doctrine was subsequently realised at the conferences of Osnabrück and of Münster and embodied in the 1648 Peace Treaty of Westphalia. In the Peace Treaty the law governing treaty succession was determined according to which the emerging German princes became responsible for the predecessor's public obligations in accordance with the German law. The new legal order, however, soon proved ineffective because of the lack of an external organ to give effect to the common will expressed in the Peace Treaty. The 1815 Vienna Congress enhanced the principles embodied in the 1648 Peace Treaty and restored the balance of power.

In spite of the geographical location of the Ottoman Empire as a part of Europe, because European law was personal and thus not binding on non-Christian states she was not considered to be a part of the European new legal order and therefore not subject to its law. This contrasts with Islamic law which is regarded as being applicable to Muslims and non-Muslims alike with minor
exceptions\textsuperscript{149}. Such a state of affairs prevented the development of any international legal rules governing treaty succession between Muslim and non-Muslim states.

It is true that Islam endorses the division of the world into nations (states)\textsuperscript{149}, basing this however, on legal equality and peaceful relations\textsuperscript{150}. The Qur'an demands of the Islamic State: "Say: O People of the Book! come to common terms as between us and you..."\textsuperscript{151}. Thus the Islamic State initiated a plan to transfer various members of Dār al-Ḥarb (territory of war) into the category of 'Ahd (covenant), a plan implemented by means of a series of bilateral treaties which led to comparable mutual recognition in modern international law\textsuperscript{152}. These started with the 1535 Treaty as initiated by the Islamic State and ended with the acceptance of the peace movement of the European states culminating in the 1856 Paris Peace Treaty by which the Islamic State (Ottoman Empire) was admitted to the Concert of Europe\textsuperscript{153}.

Subsequently, the Islamic legal order was integrated with that of Europe and the European club was transferred into a community of nations, one of its members being the Islamic State (Ottoman Empire) including the Arab territories.

As far as the Ottoman Empire with its new legal status was concerned, the influence of the European legal order was greater than that of Islamic law for various reasons which included the close relations of the European states with the Ottoman Empire and the pressure exerted by them on the latter contending that all Ottoman subjects were not treated equally, Muslims enjoyed privileges denied to non-Muslims. This contention did not take into account the
privileges granted to the Ottoman non-Muslim subjects in various treaties. In addition, the Porte adopted a secular approach in regulating the internal and external affairs of the Empire. As regards internal affairs, the reaction of Muslims against the new policy of the Porte may be found in Altug's comment in which he states that:

... later the corruption of the parent government in its domestic relations brought inconsistent policies and oppression upon the dependencies ...

Thus on one hand, Muslim jurists tolerated the disintegration of Dar al-Islam only from necessity because of problems like the lack of communication caused by the immensity of Dar al-Islam (Islamic territory), and on the other, they abrogated the idjma upon which the unity of the khilafah was based by another idjma calling for the multiplicity of the leadership of Muslims. This division of Dar al-Islam into several political entities had nothing to do with their Islamic identity or the application and effectiveness of Islamic law. The amirs of various Islamic political entities came to possess semi-international representation in the Ottoman Parliament and it was declared at the time that

... their status was much better than that of many of today's protectorates...

Thereafter, the legal status of the Arab dependencies varied from one to the other. Accordingly, three possibilities arise, namely that they were sovereign, protected or vassal entities. An examination of these terms shows that at the beginning, the Arab dependencies were not sovereign in the sense of international or Islamic law. Islamic law only ascribes 'sovereignty' to God
besides which the term 'sovereignty' was never used in Ottoman diplomatic documents until the 19th century. Thus the terms 'vassal' and 'protectorate' have been used instead of the term 'semi-sovereign'. Such relations, however, changed upon the delegation of the conduct of the external relations of some of these entities to non-Muslim states either by the consent of the Ottoman government or without it, and the problem of succession arose not only in respect of treaties concluded by the Islamic State (the Ottoman Empire) but also those concluded by non-Muslim states.

2. Selective Practice in the Delegation of the Conduct of International Relations to Non-Muslim States:

A. The Practice of Kuwait in the Delegation of the Conduct of its International Relations to a Non-Muslim State (Great Britain):

(i) The Status of the 1899 Exclusive Agreement under Islamic Law:

The legality of the 1899 Exclusive Agreement may be established by the fact that Shaykh Mubarak as muwakkil (principal) vested the British government as wakil (agent) with authority to conduct the international relations of the territory. The agreement was based on an offer presented by Shaykh Mubarak to the British government when Turkey attempted to annex Kuwait and the acceptance of the British government to place Kuwait under its protection. The considerations of the contracting parties may be concluded from the agreement itself and from the surrounding circumstances. Shaykh Mubarak had a restriction placed on his competence, his heirs and his successors and although nothing is evident in the agreement
regarding the consideration of the British government, it may be concluded that in return for the restrictions imposed on the Shaykh the British government undertook to protect and conduct the international relations of Kuwait.

As regards the relationships between Shaykh Mubarak (principal), the British government (agent) and third parties, the general assumption under Islamic law is that the agent concludes treaties in their own name and not in the name of the principal. Generally speaking, as regards treaties concluded by the agent, a distinction must be made between hukm al-‘akd (effect of the contract) and hukuk al-‘akd (the rights and obligations created by the contract). According to the Hanafid and Malikid jurists the effects of the agreement are referred to the principal while the rights and obligations are referred to the agent.

(ii) The Effects of the 1899 Exclusive Agreement:

(a) Effects on the Legal Status of Kuwait:

The effect of the extension of British treaties to Kuwait, governed by British and not Islamic law, depends on the determination of the legal status of Kuwait under the 1899 Exclusive Agreement. What is governed by Islamic law is the succession of Kuwait to any of the predecessor's treaties.

The term 'protectorate', when used to refer to a territory under British administration, was synonymous with a colonial territory that had not been incorporated into the metropolitan territory and in this sense a British protectorate should not be regarded as a real protectorate but as a less intensively colonised territory. Thereafter, British practice started to distinguish between these
two types. In the British Nationality Act of 1948 a distinction was made between 'protectorates' which resemble 'colonial territories' and those resembling 'protected states'.

If the British government recognised and admitted that the Sheikhdom of Kuwait was "an independent government under British protection" then the status of Kuwait was no more than that of a protected state, which was preferable to that of a protectorate since the protected state at least possesses the authority to conduct its internal relations.

The decisive factor in the difference between a protected state such as Kuwait and a 'colonial protectorate' was the means by which each of them arrived at their condition. Kuwait was a state prior to its coming under British protection whereas any colonial protectorate would not have been. The establishment of British protection over Kuwait, however, did not affect the separateness and the legal personality of Kuwait. Acts performed by Great Britain - the protecting state - were carried out on behalf of the protected state - Kuwait. Thus state succession comes into question only because Kuwait had delegated 'the responsibility for the conduct of its international relations' to a non-Muslim state (Great Britain), while she continued to conduct her own internal relations.

(b) Effects on the Pre-Existing Treaties:

(1) Treaties Concluded by Kuwait:

There was no legitimate reason to discontinue those pre-protection treaties of Kuwait such as the Treaties of Maritime Truce which had been concluded between Great Britain and the Arab Shaykhs of the Gulf, for these were the treaties of Kuwait in fact and in
law even though one of the contracting parties (Great Britain) had assumed protection over the other party (Kuwait).

(2) Treaties Concluded by Great Britain:

As far as British law is concerned, imperial legislation did not extend automatically to a protected state such as Kuwait unless it was expressly intended that it should do so.76

In this connection, as Stewart77 states, treaties may be part of British law but still not apply automatically to the protected state any more than any legislation does.78

In Islamic law however, treaties of the Islamic State do not apply automatically to non-Muslim states. Islamic law does not recognise the so-called 'protectorate' or 'protected state' unless the protected government adopts Islam. As long as a state enters into treaty relations with the Islamic State, it is regarded as a member of Dār al-'Ahd (covenant territory)79 and thus remains outside Dār al-Islam and the bale of Islamic law without being under any subjection or protection.

(3) Treaties Concluded by the Islamic State:

The issue to be considered is the extent to which the pre-protection treaties of the Ottoman Empire with Britain continued to be applicable to Kuwait after she came under British protection.

Most of the Anglo-Ottoman treaties contained capitulatory privileges80, the granting of which were based on the Qur'anic provision that non-Muslims must have special guarantees otherwise they would be regarded as members of Dār al-Harb (territory of war)81. Accordingly, English citizens could enter Dār al-Islam with the permission of the Islamic government with the status of amān
with the aim of establishing good relationships between Muslims and non-Muslims.  

The status and the effects on the capitulations of the delegation of the conduct of the international relations of some parts of the Islamic State to non-Muslim states has been a universal issue. Some non-Muslim jurists have maintained that the Ottoman capitulations constituted treaties which attached to the land more than to the personality of the signatories in establishing an international rule of conduct between the West and the Levant in order to protect non-Muslims from the inequality and rigidness of the Islamic law. This claim, however, does not stand up to the fact that capitulations had not only been designed to regulate the relations between Muslims and non-Muslims but also the relations between Christians themselves. The majority view of Muslim and non-Muslim jurists has regarded capitulations as unilateral obligations established by a grant or concession which thus do not survive a change of the government that decreed them.

After the assumption of British protection over Kuwait, none of the beneficiaries to the Ottoman capitulations claimed the continuing in force of these capitulations in Kuwait, despite the fact that the judicial system of Kuwait resembled that of the Ottoman Empire. The reason behind this was that the capitulations had never been extended to Kuwait by either party because she had always reserved an autonomous judicial system within Dār al-Islam.

It may be contended that Kuwait came under the protection of a state which could for the future guarantee adequate judicial protection to non-Muslims, and thus none of the beneficiaries needed
to claim the continuous application of the Ottoman capitulations to Kuwait. If this contention is correct, then the beneficiaries usually did not accept a prompt abrogation but rather the suspension of the capitulations until such time as they agreed to a subsequent abrogation or modification thereof.

Leaving aside capitulations, the examination of the Ottoman treaties shows that they could be divided into bilateral and multilateral treaties, but could not be divided into 'personal' and 'dispositive' treaties since none of them was of dispositive character.

With regard to personal treaties, non-Muslim jurists maintained that personal treaties are not attached to the land, as are dispositive treaties, but to the personality of the contracting parties, this being the key to the devolution or non-devolution of these treaties to the successor state. Accordingly, under international law such treaties only devolve to the predecessor state as long as it preserves its personality and legal identity and do not devolve to a territory affected by a change of sovereignty through a fortiori succession. This resembles under Islamic law the so-called imārat al-istilā' (assumption of governorship by force) as in the case of Kuwait.

Similarly, Muslim jurists have emphasised that a personal treaty, whether bilateral or multilateral, constitutes a contract and depends on the continuity of the personality and legal identity of the contracting parties.

In spite of the assumption by Kuwait of governorship by force from the Ottoman Empire, she preserved her Islamic identity.
Thus it might be argued that due to the legal nexus between these treaties and the territory of Kuwait and the continuity of the identity of Kuwait these treaties devolved *ipso jure* to her. Such an argument contains some of the facts but also misses some. These treaties lacked the physical connection with the territory of Kuwait and rather than being connected with the personality of Kuwait they were linked with that of the Ottoman Empire which continued to preserve its Islamic identity in spite of the fragmentation of its territory into many Arab states, some of which not only came under British protection but also became British mandates.

B. The Practice of Iraq in the Delegation of the Conduct of its International Relations to a Non-Muslim State:

(i) The Legal Status of the 1922 Treaty of Alliance under Islamic Law:

The Iraqi opposition to the mandate and its reflection in the attitude of the British officials made it impossible to apply this system in Iraq. King Faisal refused the throne of Iraq unless Britain promised him that he would not be the ruler of a country under a mandate. In addition, the continuity of the Islamic identity of Iraq, as emphasised by Article 13 of the 1925 Constitution, and her neutrality enabled her to reformulate the mandate in a bilateral treaty of alliance concluded in 1922 between the mandatory and Iraq, not between the mandatory and the League of Nations as in the typical mandate agreement.

The examination of the 1922 Treaty of Alliance between Britain and Iraq shows that it is no more than an advanced form of the so-called 'exclusive agreement' in which the treaty recognised
the King of Iraq (principal) as the constitutional ruler and the British (agent) undertook "at the request of his majesty the King of Iraq" to provide Iraq with advice and assistance "without prejudice to her national sovereignty."

(ii) The Effects of the 1922 Treaty of Alliance:

(a) On Treaties Concluded by the Mandatory:

Article 10 of the Treaty provides that:

The High Contracting Parties agreed to conclude separate agreements to secure the extension of any treaties, agreements or undertakings which his Britanic Majesty is under obligation to see carried out in respect of Iraq. His Majesty the King of Iraq undertakes to bring in any legislation necessary to ensure the extension of these agreements.

And Article 2 of the 1925 Resolution of the League of Nations provides that:

The Government of His Britanic Majesty, in consultation with his Majesty the King of Iraq, will take such steps as may be necessary for the conclusion of special extradition agreements on behalf of Iraq.

As far as the extradition treaty is concerned, no records have been traced regarding an extension or conclusion of the Extradition Treaty by Great Britain for Iraq. Iraq herself concluded a series of extradition treaties in 1931 with some of the Arab states and with Great Britain on May 2, 1932. The mandatory power, however, concluded various bilateral treaties with the neighbouring Arab states and extended various international conventions and agreements to Iraq.

(b) On Treaties Concluded by the Islamic State:

(1) Non-Boundary Treaties:
It may be presumed that all Ottoman bilateral treaties such as extradition, capitulatory, commercial and alliance treaties are no longer applicable to Iraq as can be concluded from the wording of Article 10 of the 1922 Treaty of Alliance and from Article 2 of the 1925 Decision of the League Council. Such a presumption, however, is contradicted by the fact that the acceptance of the devolution of the Ottoman capitulatory privileges held by many European powers was necessary in order to secure the latter's approval of the terms of a mandate for Iraq or at least the recognition of the status of Britain as a mandatory. An example is provided by the position of the United States according to which she argued in favour of the devolution of not only the Ottoman Extradition Treaty of 1874 but also to all the Ottoman treaties including capitulations to Iraq.

The United States' view was in conformity with the principles of Islamic law in that Iraq's assumption of governorship by force from the Ottoman Empire did not affect the Islamic identity of Iraq which was thus bound by its predecessor's treaties. However, such a view does not stand firmly in the face of the fact that the Ottoman capitulations were not regarded as treaties but unilateral acts which the guarantor can withdraw at any time. This occurred when the Ottoman government abrogated all the capitulations on 2 August 1914.

It may be contended that although it is legitimate to abrogate the capitulations, it is not legitimate to abrogate treaties containing them and thus these treaties devolve to Iraq since the Ottoman treaties with the European powers contained not only
capitulations but also most-favoured-nation-treatment clauses in addition to those commercial treaties which embodied similar clauses. It should be noted in this regard that at the time of the separation of the Arab territories during World War I, all the Ottoman commercial treaties with the European powers had been renegotiated and subsequently replaced by new treaties, hence in respect of the Ottoman Empire, no pre-1873 treaties remained in force and the Ottoman government granted by Firman treaty-making competence in commercial matters to various dependencies such as Egypt. In addition, most of the post-1873 Ottoman commercial treaties were personal treaties, yet even though these treaties were connected with the personality of the umma they were more linked with the identity of the contracting parties than with the newly developing identities of the Arab territories.

As regards the Ottoman multilateral treaties, it is well established in practice that a territory which secedes from the Islamic State is bound by all its predecessors' multilateral treaties as long as these treaties are deduced from and based on the model set up by the Prophet and his successors. The case of Iraq is no more than an advanced form of imārat al-istilā' (assumption of governorship by force) in which the governor is bound by all Muslim multilateral treaties except those which violate the provisions of the Qur'ān and the Prophetic Sunna or the basic principles of Islam. This principle is based not only on the condition that there must be a legal nexus between the treaty in question and the Iraqi territory (as a part of the Islamic territory), but also on the condition that there must be a physical connection; that is to say,
the treaty in question must have been performed in whole, or in part, on Iraqi territory.

An examination of the Ottoman multilateral treaties shows that some of them are purely political (personal) and have no connection with Iraqi territory. Examples include the Convention for Pacification of the Levant of September 1840 between Great Britain, Austria and Russia on one side and the Ottoman Empire on the other; the Convention on Measures for Pacifying Syria of September 1860 between Great Britain, France, Austria, Russia and Prussia on one side and the Ottoman Empire on the other; and the Treaty of Berlin of July 1878 by which the definitive conditions of the Russo-Ottoman settlement were laid down and later formally endorsed by the two powers in a separate bilateral instrument in the same year.

Notwithstanding the legal nexus between these treaties and Iraq prior to its separation from the Ottoman Empire, they lacked any physical connection thereafter. It was, therefore, the right of Iraq, not the obligation, to participate in any one of the predecessors' multilateral treaties after notifying the other signatories, and this notification did not have to be final but subject to rejection or approval by the signatories. Iraq however, preferred not to participate in these treaties, basing such non-participation on the principle that they were the reason behind the weakness of the Ottoman Empire and its division into areas with artificial boundaries within which European states maintained a strong influence. These treaties, therefore, contradicted the
basic principle of the unity of Islamic territory as established by the *Shari‘a* and practised by the Islamic State.

(2) Boundary*\textsuperscript{a} Treaties:

It will be recalled that upon the incorporation of Makka into the Islamic State, the latter succeeded to the *Djāhiliyya* Customary Agreement defining the *Harām* (sacred) nature of the Holy City of Makka*\textsuperscript{b}*. The treaty (*Sunna*) set up by the Prophet defining these boundaries was succeeded to by the Rashidin, the Umayyid, the Abbasid and the Ottoman *Khilāfāt* and created religious *hudūd* (boundaries) within one indivisible Islamic State. Only within these boundaries could *manāṣib* (acts of devotion for the pilgrimage) be practised.

Other than these, there were no boundaries established by treaties except those between *Dār al-Islam* (Islamic territory) and *Dār al-‘Ahd* (covenant territory). The problem, however, arose upon the partition of the Islamic State into two portions; one was governed by the Safawid (*Shi‘i*) state, while the other remained under the authority of the Ottoman (*Sunni*) State. Since then, *de facto* boundaries were established between the two portions of the Islamic State which were subsequently defined by the Treaty of Zahab of 1639 between the Ottoman Empire and Persia*\textsuperscript{a}*, the Treaty of Peace (*Kurdan*) of September 1746 between the Ottoman Empire and Persia*\textsuperscript{a}*, which was confirmed by the Treaty of Erzerum of 1823*\textsuperscript{a}*, and in the second Treaty of Erzurum of 1847 between the two rival powers*\textsuperscript{a}*. It was claimed by the Ottoman government and subsequently by the government of the mandated territory of Iraq that the whole of the Shatt al-Arab was allocated to the Ottoman Empire by
this treaty and by the Teheran Protocol of 1913 and this was subsequently re-affirmed by the Constantinople Protocol of 1914.  

This claim, however, was always rejected by the Persian government on the grounds that all preceding instruments defined the Median line (thalweg) as the boundary between the two states. This question, insofar as it relates to succession of boundary treaties, will be examined at the end of section 2 of the following chapter.

Finally, this practice reveals that succession in law in Islamic legal theory occurs in two cases, the first of which is where the Islamic State became a successor with its emergence in al-Madina with a new legal order and the rights and obligations it instituted by treaties interfered with the normal existence of the surrounding political entities thus creating succession in law. Through these processes the transfer of treaty rights and obligations to the successor depended on the rules governing lawful and unlawful contracts that were determined by the new legal order. Since this legal order depended on monism it determined that three events cannot affect the identity of the Islamic State and of Dār al-Islam. These are government changes through constitutional or revolutionary means, territorial changes by gain or loss, and the evolution of treaty-making competence of a part of Dār al-Islam as long as it preserves Islamic law. The second case concerns the Islamic State as predecessor, whereupon the assumption of forcible governorship by some amirs (governors) in various parts of Dār al-Islam did not cause a break in the Islamic identity of these territories and thus no succession in law occurred. However, upon the delegation of the conduct of the international relations of these countries to non-
Muslim states by treaties, their external identity was put into suspense as a result of the domination of international law rather than Islamic law in governing their external relations while their internal Islamic identity remained intact. This interaction between Muslim and non-Muslim states raised the question of treaty succession between the non-Muslim state and either the parent state (Ottoman Empire) or the newly-evolving Muslim entities. Iraq and Kuwait have been selected for examination in order to identify the rules emerging from their treaty-succession practice, the development of their independent legal identity based on certain legal doctrines and the relationship between these doctrines and Islamic and international law theories.
INTRODUCTION:

Upon the Ratification of the 1922 Treaty of Alliance between Britain and Iraq on 19 December 1924, the 'treaty-making power', was shared between Iraq and the United Kingdom. The treaty did not vest the sovereignty of Iraq in the hands of Great Britain but responsibility for the conduct of the external (including treaty-making) affairs of Iraq were subject to the supervision of the League of Nations. Article 1 states that:

...His Britannic Majesty undertakes, subject to the provisions of this treaty, to provide the state of Iraq with such advice and assistance as may be required during the period of the present treaty, without prejudice to her national sovereignty. ...2.

With regard to the treaty making competence of Great Britain (agent), Article 10 declares that:

...the High Contracting Parties agree to conclude separate agreements to secure the execution of any treaties, agreements or undertakings which his Britannic Majesty is under obligation to see carried out with respect to Iraq. ...3.

With regard to the treaty making competence of Iraq (principal) the same Article states that:

His Majesty the King of Iraq undertakes to bring in any legislation necessary to ensure the extension of these agreements. ...

Consequently, the mandated territory of Iraq could either participate in already existing treaties, or enter into a fresh one under the supervision of the United Kingdom. The United Kingdom
could conclude a new treaty on behalf of Iraq and/or extend its treaties to her. The exercise of this power on the part of the United Kingdom however, was also subject to the terms of the Treaty of Alliance and to the supervision of the League of Nations as contemplated in Article 10 which concludes that:

\[\ldots\text{such agreements shall be communicated to the Council of the League of Nations.}\]

It may be concluded that according to the 1922 Treaty of Alliance (the contract of agency) the law applicable to the conduct of the international relations of Iraq was not Islamic but international law insofar as it did not contradict the basic principles of Islamic law, such as those prohibiting certain conduct or contracts or those upon which the majority of the Iraqi people conducted their daily life from the time of the incorporation of Iraq into the Islamic State until the conclusion of the 1922 Treaty. The peace conference never intended to change the Islamic identity of the Iraqi people, its main purpose being to facilitate the development of a mature and independent identity for Iraq. As a matter of international law, the task of the mandatory power as contemplated in Article 22 of the Covenant of the League of Nations was: "\ldots\text{the rendering of administrative advice and assistance}\ldots\text{.}" provided that such 'administrative advice and assistance' did not contradict Iraq's 'national sovereignty' as stipulated in Article 1 of the 1922 Treaty of Alliance. The enforcement of the law, of course, was an essential part of that 'national sovereignty'. No law other than Islamic law could be enforced by the new government of Iraq as was further emphasised not only by Article 13 of the 1925 Organic Law which was
enacted in accordance with the consent of the parties to the 1922 Treaty, but also by the annual reports of 1920-1931 submitted by the mandatory power to the League of Nations. It was true that under the new government Islamic law underwent modernisation and several laws were reconstructed in a modern form, but the main principles of Islamic law were preserved.

If any dispute arose between international law and Islamic law it was required not only by Article 14 of the Covenant of the League of Nations but also by Article 17 of the 1922 Treaty of Alliance to submit such dispute to the P.C.I.J. for peaceful settlement. Failure to do so, however, by either party to the 1922 Treaty of Alliance could result in the other party demanding the revision of the treaty in accordance with Article 18 in order to remove the conflict.

Moreover, there was a certain similarity between the legal status of a protected state such as Kuwait and that of an A-mandated territory such as Iraq in that they both delegated the conduct of their external relations to a non-Muslim state by treaties. The main difference was that in the case of an A-mandated territory the mandatory power's right of representation was derived from the international community, in the case of Iraq from the 1922 Treaty of Alliance (agency), while the same right for the protecting state was derived from the Treaty of Protection. Therefore, it could be contended that treaties concluded by the mandatory power on behalf of Iraq could be considered to be automatically binding on the latter at the date of independence, while those that were concluded on behalf of Kuwait were not. This investigation will examine this contention in the light of the actual practice of the ex-A-mandated territories.
and ex-protected states. The A-mandated territories will be dealt with and highlighted by the practice of Iraq in this chapter and Kuwait, as an example of a protected state will be dealt with in the following chapter.
SECTION 1: TREATIES CONCLUDED WITH MEMBER STATES OF THE COVENANT TERRITORY:

1. Treaties Concluded by the Mandatory Power on Behalf of Iraq:

   A. Multilateral Treaties:

   The replacement of non-Islamic political entities by the Islamic State in respect of a given territory and the subsequent devolution of treaties is determined by criteria employed by the Islamic legal order. However, when the Islamic State was replaced by a non-Islamic state in the conduct of its international relations in a part of Dar al-Islam such as Iraq, the devolution of treaties was governed by criteria employed by international law in that the territorial application of a convention forms the criteria for its being susceptible to devolution. Such criteria were stipulated in the devolution agreements as will be elaborated but it should be noted that it is not always easy to prove with absolute accuracy the application or non-application of a convention.

   The international agreements and conventions extended by the United Kingdom to Iraq varied from non-dispositive to dispositive multilateral conventions. As far as Iraq's succession to the non-dispositive multilateral treaties is concerned, an examination must begin with the initial action taken by depositaries, for the practice of Iraq in treaty succession depended upon whether League of Nations multilateral treaties were amended by United Nations protocols or not, and whether or not these treaties contained a 'colonial clause'.

   Further investigation of these treaties extended to Iraq, shows that they contained three types of 'colonial clause'. The first
type required a special declaration by the contracting parties to make the conventions applicable to the mandated territory of Iraq, as is found in the 1910 Agreement for the Suppression of Circulation of Obscene Publications; the second type made the convention automatically applicable to Iraq unless the mandatory power made a declaration to the contrary as did the 1921 International Convention for the Suppression of the Traffic in Women and Children; and the third type provided for the application of the convention to Iraq as in the Geneva Humanitarian Conventions. Thus the application of any convention to Iraq can easily be determined by examining the declaration of the mandatory power upon signature, ratification, acceptance or approval of any convention or in the case of the silence of the convention, by examining the Annual Report of the Mandatory Power to the League Council.

During the League period, the United Kingdom signed multilateral conventions on behalf of Iraq, such as the 1912 International Opium Convention, or extended them to her, such as the 1910 Agreement for the Suppression of the Circulation of Obscene Publications. Upon the assumption of the depositary function of the Secretary-General of the League of Nations by the Secretary-General of the United Nations and the amendment of the treaties concluded under the auspices of the League of Nations by the U.N. Protocols, the Secretary-General is stated to have satisfied himself that Iraq considered herself bound by the treaties which had formerly been applied to her territory and to have treated her as party to the League of Nations Conventions by sending to her a copy of the Amending Protocol. Iraq however, became party to the Protocol,
thereby confirming herself as party through the procedure of succession to some of these conventions\(^7\), while signing the other United Nations Amending Protocols and becoming a party to some of these treaties through the procedure of accession\(^9\).

However, no workable criteria could determine whether a certain convention was applicable to the mandated territory of Iraq if it lacked a 'colonial clause' and the issue became problematic. Theory and practice with regard to this case have not become sufficiently crystallized to determine whether a convention only applies to the territory of the United Kingdom or to that of Iraq as well. As far as the general practice of the Secretary-General of the United Nations is concerned, he has supported the thesis that the treaty in question is automatically applicable to all the dependent territories of the contracting parties despite the absence of the 'territorial application clauses', basing this view on a statement made in the General Assembly\(^9\). This view was based on the fact that certain conventions such as the 1947 Convention on Privileges and Immunities of the United Nations and the 1961 Convention on Privileges and Immunities of the Specialised Agencies were only open to member states, thus newly-independent states were unable to accede to these conventions between the dates of their independence and their accession to U.N. membership. After their admission to membership of the United Nations the new states were consulted by the Secretary-General about succession to the obligations of these conventions who propounded the view that they were internationally applicable to their territory at the date of independence by virtue of the ratification of the predecessor state. The depositaries, namely the
United States and Swiss governments, always avoided similar conclusions. Such generalised statements cannot be made without qualification and this applies not only to the practice of Iraq in succession to multilateral conventions but also to that of newly independent states. The succession of Iraq to multilateral conventions is, of course, impossible when such conventions are operative in a certain part of the world with which only the United Kingdom is connected; a situation that could result from an express provision, embodied in the conventions such as the Treaty signed at Vienna in 1815 establishing the Permanent Neutralisation of Switzerland. It could also result from the succession or accession of Iraq to multilateral conventions which are incompatible with the foreign policy of Iraq or with the purpose and scope of the treaty, as in the 1856 Convention between France and Great Britain on the one hand, and Russia on the other, by which the latter agreed to the demilitarisation of the Aaland Islands. In the case of Iraq, the only means by which the applicability of a treaty can be determined is the report made by the mandatory power to the League of Nations on the administration of Iraq. An examination of the 1928 Report, for example, shows that the United Kingdom applied certain multilateral treaties to Iraq such as the 1875 International Telegraph Convention, by their being made part of Iraqi municipal law without there having been any express declaration. With regard to treaties succeeded to by Iraq, a vital question may be put forward as to whether the replacement of the mandatory power by Iraq in respect of these treaties occurred as a result of an
obligation imposed by certain legal rules or because of rights confirmed by other rules for any successor state. In answering this question it is necessary to distinguish between the so-called al-
mu'āhadat al-shāri'a (law-making) treaties and al-mu'āhadat al-
'Ayniyya (dispositive) treaties. As regards 'law-making' treaties\(^2\), Jenks in his leading study on this subject\(^3\), and Keith\(^4\), adopt the view that the 'law-making' treaties devolve to a successor state. In contradiction, Lester ignores this category in his discussion of succession to bilateral treaties in the Commonwealth. He bases his argument on the principle of res inter alios acta\(^5\) and argues that with regard to a treaty concluded between the original parties, the successor state is a third party which has no rights or obligations under the treaty according to the doctrine of pacta tertiis nec nocent nec prosunt. O'Connell\(^6\) takes a middle course between the two conflicting views, by stating that the term 'law-making' treaties,

... is inexact. A treaty is sometimes said to be 'law-making' when it binds not only its parties but also non-signatories: it is not the treaty itself which creates the law, for a treaty is never more than a contract, but the transformation of its essential provisions into a normative custom.

In following the juristic argument above, it is essential to distinguish between the effects of treaties on Iraq as a third state and those imposed by international customary law. Treaties affecting a third state may be divided into those which do not impose any obligations or confer certain rights and those that do impose obligations or confer rights upon third states. With regard to the former case, the third state has no right to redress even if the
treaty affects it detrimentally\textsuperscript{29}, such as the effects on Iraq of treaties concluded between Turkey and Syria on the utilisation of the water of the Euphrates. There is a duty incumbent upon Iraq under general international law that derives from the principle of non-intervention whereby she must not hinder the execution of such treaties as long they do not infringe her rights or impose obligations upon her. In the latter case a distinction must be made between treaties which impose obligations and those which confer rights. As regards the former, the rule as laid down in Article 34 of the 1969 Vienna Convention on the law of treaties states that

A treaty does not create either obligations or rights for a third State without its consent.

This principle has been confirmed, before its codification, by the PICJ in the Free Zones Case\textsuperscript{30} and by the Island of Palmas Case\textsuperscript{31}. With regard to the latter case, a treaty does not confer a right on a third state such as Iraq as emphasised by the I.C.J. in the North Sea Continental Shelf Cases. The Court rejected the contention that the Federal Republic of Germany, although not a party to the 1958 Continental Shelf Convention, had, by means of her conduct, declared her acceptance of the convention, by stating that:

\ldots it should simply be told that, not having become a party to the convention, it could not claim any right under it until the professed willingness and acceptance had been manifested in the prescribed form\textsuperscript{32}.

Insofar as the obligations are concerned, the rule set forth contains no exception that could prejudice its binding force, but with regard to the rights, some jurists have admitted that a treaty may confer a benefit on a third state\textsuperscript{33}. 

As regards the effects of an international customary rule on a third state such as Iraq, in its commentary to draft Article 34 in 1966 the International Law Commission took note regarding the role played by custom which sometimes extends the rules embodied in a treaty to non-contracting parties. The Commission, however, emphasised that it is customary rules as opposed to those created by the treaty which bind a non-contracting party or parties. In the 1969 Vienna Conference on the Law of Treaties, some delegations criticised draft Article 34 on the ground that such rules have nothing to do with the law of treaties, but the majority view favoured the retention of the I.L.C.'s draft of Article 34.

It is to be noted that whatever term, 'legislative' or 'law-making', is used to describe the United Kingdom's multilateral treaties, the principle of _res inter alios acta_ governed their effects on Iraq after independence as long as they did not contain territorial obligation clauses or were specifically concluded on behalf of Iraq. It is not the treaties _per se_ which bind the non-signatory but the international customary rules that are embodied in them which were either created before the treaties or after they came into existence. Whatever the case, a state may dissent from the inception of a customary rule onwards or after its formulation has been completed. A state in the first case is termed a persistent objector which can apply to a newly independent state, such as Iraq, provided she raises her objection within a reasonable period of time after her independence and consistently maintains her position.

With regard to treaties embodying such customary rules, it is true that international law has developed more through multilateral
treaties than bilateral treaties in regulating and protecting the interests of the international community. Thus the succession of Iraq to multilateral treaties was more possible when the subject and purpose of these treaties were consistent with the common interests of Iraq, creating more likelihood of its succession to multilateral treaties embodying rules of international customary law. However, if the two interests conflict with each other, the private interest prevails and must be protected on the grounds of the prevailing principles in international law that there is sovereign equality between states and that an independent state commences its sovereign life unencumbered by the treaties of its predecessor. The presumption therefore, tends towards the non-devolution of multilateral treaties, but the question which must be answered is: does Iraq have any right to participate, by its own free will, in multilateral treaties that were applicable to its territory before its independence?

A multilateral treaty may provide for the right of a third state to become a party by signature, ratification or notification. Iraq however, as a successor state, is not a third state with regard to the predecessor’s multilateral treaties because of the existence of the legal nexus between the treaties and the Iraqi territory prior to independence. This legal nexus does not prevent Iraq from exercising this right but facilitates it subject to any procedure prescribed by the treaties. There is no obligation on the part of Iraq to exercise this right unless she expresses the intention of doing so by a written notification to the other contracting parties to the treaties.
For example, the Netherlands government, as a depositary of the 1899 and 1907 Hague Conventions on the peaceful settlement of international disputes\textsuperscript{39} invited any member of the United Nations to become a party to the conventions either by succession or accession\textsuperscript{40}. Iraq as a successor was under no obligation to succeed to the said conventions but had a right to do so. If Iraq however, were to declare by notification to the depositary that she considered herself bound by the conventions, the declaration would take effect not from the date of the independence of Iraq or from the date of the declaration, but from the date of the ratification of the conventions by the mandatory power\textsuperscript{41}. Iraq, however, applied to these treaties the formula of non-devolution as an exercise of her independence on the ground that these conventions were not included in the treaties contained in her general declaration and thus succession or accession to them would be determined in accordance with Iraq's regional commitments. If the evidence deriving from the practice of Iraq shows she was under no obligation to consider herself bound \textit{ipso jure} by a general multilateral treaty of a 'law-making' or 'legislative' character that had been applicable to her territory prior to independence, it remains to ask whether Iraq is completely clear of any of her predecessor's treaties or if there are other categories of multilateral treaties whereby international law imposed an obligation upon independent Iraq to consider herself bound by other multilateral treaties of the mandatory power.

The principle \textit{res transit cum suo onere} has been used to differentiate between 'real' and 'personal' treaties. The former have been variously defined in terms\textsuperscript{42} which infer that they follow the
destiny of the territory and so an examination of the mandatory power's treaties claimed to be of this type is necessary.

In connection with the obligation imposed in renunciation clauses by the mandatory power, in the Treaty of Sèvres of 1920 between Turkey and the Allied Powers, Turkey renounced:

all rights of suzerainty or jurisdiction of any kind over Muslims who are subject to the sovereignty or protectorate of any other states and the frontiers of Syria and Mesopotamia were determined by a commission and by the principal Allied Powers. Due to the taking over of the Ottoman government by the Turkish nationalists, the Treaty of Sèvres was not ratified and the Allied Powers were forced to negotiate a fresh treaty at Lausanne in 1923. A version of these renunciation clauses was incorporated in the Lausanne Treaty.

Since these renunciation clauses resulted from the application of Article 22 of the Covenant of the League of Nations, only the obligation imposed by these clauses was dispositive. In the Status of South West Africa Case of 1950, Judge McNair, in his dissenting opinion, regarded the obligations imposed by the Covenant of the League of Nations upon a mandatory power, with respect to the mandated territory, as dispositive. When the mandated territory under such obligations is ceded to another state, it bears these obligation which go with it by virtue of the rules of customary international law. It is not the treaty nor is it the right created by the treaty but the obligation created by the treaty which is running with the land since the treaty has passed into a conveyance. Any right created by the treaty lapses with the disappearance of the
beneficiary, i.e. the mandatory power. The problem with this approach is that a treaty of this kind may contain dispositive and non-dispositive provisions so that the treaty will not devolve to a successor state except by the severance of the dispositive from the non-dispositive provisions, which is almost impossible if the treaty regulates a single subject matter or the non-dispositive provisions depend on the dispositive provisions.

A close examination of the Sévres and Lausanne Treaties shows that they contain various dispositive and non-dispositive provisions which are inseparable from those of territorial character, as for example in Article 18 regarding public debt and in Article 30 regarding the nationality of the inhabitants of the ceded territory.

Another theoretical difficulty with the existence of 'real' or 'dispositive' treaties is that it seems impossible to differentiate with accuracy between this category and those so-called 'political' or 'personal' treaties of the mandatory power which did not devolve to Iraq upon independence. A 'dispositive' treaty seems to be 'personal' to the United Kingdom but 'real' to the Ottoman Empire and if it is only the obligation of the treaty that survives upon succession then Iraq as a successor to the mandatory power succeeds to nothing. Dispositive rights of the predecessor state-mandatory power are not usually considered as devolving to its successor because in international law they do not contain principles such as *res transit cum suo beneficio*.

Article 10 of the Treaty of Alliance concluded between Iraq and the United Kingdom played a decisive role, not only in the extension
of multilateral treaties concluded by the mandatory power but also in the extension of the bilateral treaties to Iraq.

B. Bilateral Treaties:

The United Kingdom undertook to conclude a series of bilateral treaties dealing with various matters on behalf of Iraq. In postal matters, it may be worth mentioning here that the evolution of the acquisition of competence by the British Dominions to participate in treaty-making had gradually begun to take place in the field of so-called technical questions, such as the participation of the Dominions in the International Congress of the Universal Postal Union. Subsequent to this natural development, the Dominions had wholly possessed separate postal systems under the exclusive control of their own governments. As far as the Universal Postal Union is concerned, since the postal conventions are documents in international law and since the Postal Union is established by conventional international law, the admission of British colonies to membership may be regarded as recognition of their international personalities and their treaty-making competence. In fact the Postal Conventions are agreements of a purely technical nature concluded between the different Postal Administrations of the Dominions and neither require ratification or presentation to parliament nor registration in the British Treaty Series.

As regards the mandated territory of Iraq, the Postal Administration of the mandated territory which was composed of British and Iraqi officials, concluded several agreements with India, namely the Exchange of Money Orders of 1921, the Exchange of Parcels of 1922, the Exchange of Value Payable Parcels of 1923,
and the Exchange of Insured Parcels of 1926. Although these agreements did not require ratification or presentation to Parliament, they were nevertheless registered in the L.N.T.S. and in the B.T.S.

After the independence of Iraq, the Iraqi-Indian Agreement of 1923 on Exchange of Value Payable Parcels was renewed by the 1933 Agreement which excluded Kuwait from its application. The Iraqi-Indian Agreement of 1921 on Exchange of Money Orders was superseded by the 1933 Agreement which also excluded Kuwait from its application although the other agreements remained unaffected by the independence of Iraq.

The mandatory power excluded Iraq from the application of the Agreements on Tonnage with Finland of 1924 and Greece in 1926 unless the Iraqi government were to request otherwise. In fact, shortly after the signing of the U.K.-Greece Agreement, the Iraqi government, through H. M. Secretary of State For Foreign Affairs in Great Britain, on 6 November 1929, expressed the desire that it should be applicable to Iraq.

In economic matters, the United States concluded with Great Britain, as mandatory power for Iraq, a Convention and Protocol of 1930, defining the rights of the United States of America and its nationals in Iraq. The consent of the United States was required by Article 6 of this convention regarding any modification to the definition of her rights in case of the termination of the special relationship created between the United Kingdom and Iraq by the 1922 Treaty of Alliance and the 1926 Treaty. Article 7 stated that the convention would cease to have effect upon the termination of the
special relationship between the United Kingdom and Iraq, which was terminated on October 3 1932 as a result of the entry into force of the superseding Treaty of Alliance of June 30 1930. As a result of negotiation stipulated by Article 7 of the convention, a Treaty of Commerce and Navigation between the United States of America and Iraq was concluded on 3 December 1938 which replaced the convention.

On 10 October 1932 a Protocol was signed between Iraq, the United Kingdom and France transferring to Iraq the United Kingdom's obligations under the Anglo-French San Remo Oil Agreement of the 25 April 1920 and the Anglo-French Convention of 23 December 1920 Concerning the Mandate for Syria and Lebanon, Palestine and Mesopotamia.

In general, as regards bilateral treaties of the United Kingdom which were extended to or concluded on behalf of Iraq, a legal nexus was created between these treaties and the territory of Iraq at the date of independence. This legal nexus created the right for the independent State of Iraq to become a party to these treaties upon the consent of the other party, emphasising the fact that the identity of the contracting parties is an essential element in their bilateral treaty relations. Most of these bilateral treaties concluded between the United Kingdom and the other states were concerned with regulating their mutual rights and interests in the mandated territories; as in the Anglo-French San Remo Oil Agreement of the 25 April 1920 and the Anglo-French Convention of 23 December 1920 Concerning the Mandate for Syria and Lebanon, Palestine and Mesopotamia. If these treaties continued between the other party and Iraq, new bilateral treaties were created between the two of them
which were independent from the British bilateral treaties. These new bilateral treaties could not be enforceable between Iraq and its predecessor, the mandatory power, even though they regulated the same subject matter as that of the predecessor's bilateral treaties, such as oil or even mandates. For this reason, by the 1932 Protocol, the United Kingdom transferred to Iraq its obligations to France under the Anglo-French San Remo Oil Agreement of the 25 April 1920 and the Anglo-French Convention of 23 December 1920 Concerning the Mandate for Syria and Lebanon, Palestine and Mesopotamia.

If the other parties to the British bilateral treaties agreed with the United Kingdom to extend their bilateral treaties to Iraq, they usually stipulated that the treaties or treaty ceased to have effect at the date of the independence of Iraq, and the conclusion of a new treaty with the independent government was necessary, as in the 1930 Convention between the United States and the United Kingdom regarding the rights and interests of United States nationals in Iraq. This manifested a recognition by the state concerned, of the principles of sovereign equality, permanent sovereignty and the right to self-determination of the Iraqi people.

A multilateral treaty of the mandatory power such as the 1923 Lausanne Treaty, could be applied bilaterally on a reciprocal basis between the mandated territory of Iraq and any party, without notifying the other parties to the treaty, whether or not the treaty provided for such an application. The Treaty of Lausanne of 1923\(^{61}\), to which the United Kingdom was a party, provides in Article 16 that:

\[\ldots\text{the provisions of the present article do not prejudice any special arrangements arising from neighbourly relations which have been, or may be,}\]
concluded between Turkey and any limitrophe countries.

The treaty however, left open the frontier delimitation between Turkey and Iraq. Subsequently, the Turkish government maintained its claim to the Mosul Vilayet which was already incorporated in the mandated territory. Article 3 of the treaty provided that if Britain and Turkey failed to conclude an amicable arrangement within 9 months, the dispute should be referred to the Council of the League of Nations. After many failures, the League Council appointed an investigative commission whose recommendation that Iraq should retain the Mosul Vilayet was endorsed by the League Council on 16 December 1925. The Turkish government assented to the decision in the Treaty of 1926 between the United Kingdom acting on behalf of Iraq on one side, and Turkey on the other.

On the date the treaty came into force, the Turkish treaties ceased to have effect in the Mosul Vilayet save those connected with the new territory, such as oil concession agreements and boundary agreements. On the other hand, all those treaties of Iraq designed to operate in the Iraqi territory as a whole, automatically embraced the new territory.

Until this stage Iraq had developed a semi-independent treaty-making competence which by entering into multilateral and bilateral treaties with member states of the covenant territory, created an independent international identity.

2. Treaties Concluded by Iraq with Member States of the Covenant Territory:

A. Multilateral Treaties:
During the period which extended from 1921 to 1932, Iraq, by virtue of Article 22 of the Covenant of the League of Nations and Article 10 of the 1922 Treaty of Alliance, gained a different facet of treaty-making competence. At the beginning, competence was restricted to bilateral treaties concluded between her and the mandatory power. Later it was extended to bilateral and multilateral treaties concluded between her and neighbouring countries under the supervision of the mandatory power and finally, treaty-making competence extended to all treaties save those which contradicted British interests in Iraq. As regards multilateral treaties of a non-constituent character which were concluded under the auspices of the League of Nations and subsequently amended by the United Nations Protocols, Iraq acceded in 1924 to the International Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications of 1923. After her independence, Iraq failed to confirm the continuing in force of the convention by refraining from signing the 1947 Amending Protocol. Likewise, Iraq acceded in 1931 to the Opium Convention of 1925 and after her independence confirmed the continuous application of the convention by accepting the 1946 Amending Protocol. This demonstrated the right of a mandated territory after independence to decide which treaties amongst those acceded to under the direction of the mandatory power were consistent with independent status and changed circumstances.

No systematic attempt has been made by the Secretary-General to ascertain which states have become parties by succession to the other League of Nations Treaties. Nevertheless, it is not difficult
to follow the practice of Iraq in various treaties concluded under the auspices of the League of Nations. Some of these treaties are those of a non-political character to which Iraq acceded under the advice of the mandatory power, such as the 1921 Convention and Statute on Freedom of Transit\textsuperscript{59}, the 1923 Protocol on Arbitration Clauses\textsuperscript{70} and the 1923 Convention and Statute on the International Regime of Maritime Ports\textsuperscript{71}.

Owing to the dissolution of the League of Nations, these became closed treaties. Thus the General Assembly in its Resolution 1903 (xviii) of 18 November 1963 invited the member states to accede and place on record their assent to these treaties\textsuperscript{72}. In replying to this invitation, the Iraqi government based its view on the existing circumstances of the time. Thus the conclusion was drawn that the Convention and Statute on Freedom of Transit and the Convention and Statute on the International Regime of Maritime Ports were still in force and had not been superseded although they required some adaptation to contemporary conditions\textsuperscript{73}. The government of Iraq ratified them but had no observation to make on their status\textsuperscript{74}, while those other treaties ratified before its independence, had lapsed\textsuperscript{75}.

With regard to the practice of Iraq in respect of multilateral treaties of a constituent character, a distinction must be made between succession to membership of international organisations and succession to instruments adopted within these organisations. At the outset, however, it is important, firstly, to know whether or not Iraq participated in the organisation in question before her
independence, and secondly, whether or not the constitution of the
organisation provided for her succession upon independence.

The earliest international organisation in which Iraq participated, was the Universal Postal Union. The 1874 Treaty of
Berne establishing this organisation refers to the members in
general terms without specifying whether they are states or non-state
entities. Moreover, although the adhesion of a new member to the
Union was a diplomatic act, it was the Postal Administration that was
admitted to the Union as opposed to the government of the new
member. For this reason, even when Iraq as a part of the Ottoman
Empire had no separate international personality and treaty-making
competence, the Universal Postal Union Convention was applied to
her and ceased to have effect upon Iraq's separation but it was
again applied to her when she came under the British mandate.
Since then, the evolution of Iraq's personality and treaty-making
competence has enabled her to transfer the mere application of the
convention into full membership of the Union. No question or
objection was raised to this membership which continued to be
unaffected by Iraq's independence.

With regard to the membership of the International Labour
Organisation, in spite of the United Kingdom's ratification of
several labour conventions, she did not apply them to the labour
conditions in Iraq during her mandate. In any case, the I.L.O is
one of those organisations whose constitution does not provide for
the succession upon independence of a state which had been a
dependent territory for whose international relations a member state
had been responsible. As a consequence of the admission of Iraq to
membership of the League of Nations, she became a de jure member of the International Labour Organisation. The devolution of the Labour Conventions or any other conventions to Iraq after her independence may be based on the declaration made by her before her admission to the League of Nations to that effect.

The continuous application of such multilateral treaties may be claimed to have occurred on other legal grounds that were embodied in the bilateral treaties concluded between Iraq herself and the United Kingdom. To find out if this is the case, these bilateral treaties must be scrutinised.

B. Bilateral Treaties Concluded between Iraq and the United Kingdom before the Date of Independence:

The recognition of the independence of Iraq under the British mandate in Article 22 para.4 of the League Covenant could be taken to imply the recognition of her personality and treaty-making competence. At the time of the application of Article 22 of the League Covenant to Iraq most of the Ottoman treaties had lapsed creating a legal vacuum within Iraq. This vacuum could not be filled by the mere extension of the treaties of the mandatory power and required the putting into effect of Article 10 of the 1922 Treaty of Alliance regarding the conclusion of new agreements. When concluded, essentially these agreements could not be distinguished from any other Islamic or international agreements. In fact, they were registered with the League of Nations and implemented as treaties between independent states. Most of them related to postal matters between the United Kingdom and the mandated territory of Iraq, and unlike the early agreements which were only signed by
the British Director of Post and Telegraph of Iraq, they were signed jointly by the British Advisor and the appropriate Local Official. Their wording was exactly the same as if it had been concluded between two independent states. For example, in extradition matters, just five months before her independence, Iraq and Great Britain signed an extradition treaty in 1932 that replaced British extradition treaties applicable to Iraq.

As Iraq progressed towards complete independence, the status of the treaties extended to or concluded on behalf of her became an issue. None of the U.K.-Iraqi bilateral treaties dealt with the issue of succession and the need to regulate the issue induced the mandatory power and Iraq to conclude the 1930 Treaty of Alliance which superseded all the previous treaties of alliance.

Article 8 of this Treaty states that:

The High Contracting Parties recognise that upon the entry into force of this treaty, all responsibilities devolving under the treaties and agreements referred to in Article 7 (the Treaties of Alliance between U.K. and Iraq of 1922 and 1926 and agreements subsidiary thereto) Hereof upon His Britannic Majesty in respect of Iraq will, insofar as his Britannic Majesty is concerned, then automatically and completely come to an end, and that such responsibilities, insofar as they continue at all, will devolve upon His Majesty the King of Iraq alone. It is also recognised that all responsibility devolving upon His Britannic Majesty in respect of Iraq under any other international instruments, insofar as they continue at all, should similarly devolve upon his Majesty the King of Iraq alone and the High Contracting Parties shall immediately take such steps as may be necessary to secure the transference to His Majesty the King of Iraq of these responsibilities.
With the inclusion of this Article in the Treaty of Alliance of 1930 between U.K. and Iraq, it became known jurisprudentially as a 'devolution agreement'.

The appearance of this Article for the first time, in the U.K.-Iraq Treaty of Alliance of 1930, created a legal issue at the diplomatic and jurisprudential levels regarding the real effects of the devolution agreement on the pre-independence treaties, although later on, the conclusion of such agreements between predecessor and successor states became a common practice. Thus it is necessary to examine the effects of the devolution agreement not only on treaty relations between Iraq and the U.K. but also on treaty relations between Iraq and the other parties to the U.K. treaties in order to show whether or not the devolution agreement constitutes a criteria governing the succession of Iraq to the pre-independence treaties.

The validity and the legal significance of the devolution agreement has been seriously challenged by many authorities. As regards its validity, it has been regarded as the price Iraq had to pay for accession to independence being imposed upon the Iraqi people without their consent. Therefore, it should be viewed as an instance of an unequal treaty and should be voidable either in whole or in part. Taking into account the circumstances of the conclusion of the devolution agreement between Iraq and the U.K., the pre-conditions for granting independence to Iraq as advised by the mandatory power certainly constituted a form of duress on Iraq and this made the agreement one-sided and advantageous to the United Kingdom and to the parties to its treaties. If the devolution agreement survives, it serves only as an indication of Iraq's intention to secure the
continuing in force of the U.K. treaties, but it does not have any 
legal force that prohibits Iraq from terminating it as an exercise of 
her sovereignty. Actually, the devolution agreement was invented to 
provide a certain flexibility to enable the successor state to 
interpret and to decide which treaties would be succeeded to.

In the view of the British government, the aim of any devolution 
agreement was to disengage itself from any responsibilities towards 
the parties of her treaties, but was this attitude acceptable to 
these parties?

Theory and practice can ascertain the legal effects of the 
devolution agreement on the other parties to the U.K. treaties. 
Lauterpacht holds that the devolution agreement did not have any 
binding legal force, O’Connell states that the devolution 
agreement is:

intended mainly to put other parties on notice of 
the successor state’s affirmative policy

and Cotran has expressed a similar view. In a slightly different 
interpretation, McNair states that a devolution agreement is "an 
attempted novation".

In Iraqi practice, while some parties to the United Kingdom 
treaties ignored the devolution agreement and informed the Iraqi 
government about those treaties which were applicable to the Iraqi 
territory prior to her independence, others entered into fresh 
treaties that replaced the old ones. The devolution agreement 
however, did not provide a complete solution to the problem of 
succession to either multilateral or bilateral treaties. This seems 
typical of British legal opinion.
Quite apart from the legal effects of the devolution agreement embodied in it, the whole U.K.-Iraq Treaty of Alliance of 1930 itself is questionable. It is obvious from the negotiation of the treaty that the contracting parties (U.K., Iraq) differed in political power and its conclusion may have included some elements of inequality which derogated from the sovereignty of the weaker (Iraq) while providing advantages for the stronger (U.K.). The Annexe of the 1930 Treaty of Alliance between the U.K. and Iraq provided that Britain had the right to use railways, rivers, ports and airfields and also station its troops in certain places and use air-bases in times of peace and war. The element of inequality in the treaty was clearly emphasised by the attitude of the Iraqi people shortly after its conclusion. The leader of the opposition party, Yasin al-Hāšimi, stated that:

Iraq did not acquire anything but increased isolation from the other Arab countries, it (the 1930 Treaty) alienated Iraq from its neighbours and constructed provisions for our occupation.

Nadjī al-Siwidi, the previous Prime Minister of Iraq, rejected the inequality expressed in Article 3 of the Treaty which gave the United Kingdom the right of intervention to settle any dispute arising between Iraq and other states. Similar opposition was expressed by Rashīd Alī al-Kaylānī and other eminent politicians, who in order to carry their views to the international stage, submitted a communique to the Secretary-General of the League of Nations.
These Iraqi politicians expressed their opposition to the Iraqi government who had concluded the treaty and this led them to withdraw from participating in the 1930 General Election. This was proof that the Iraqi people, despite government oppression, reserved their right to determine Iraq's future political and economic life unhindered by any supervision or intervention by any foreign power.

Before the era of decolonisation, the provisions regarding military bases were considered to be dispositive in that they created real rights that could not be destroyed by a change of sovereignty or even the lapse of the treaty that created them. Iraq seriously challenged the idea of military servitudes and regarded the provisions relating to it as contractual as evidenced by British practice.

It is proper to say that the Treaty concluded between the U.K. and Iraq relating to their military interests "created...political rights and obligations of purely personal nature," the rights created by the Treaty being more connected with the foreign policy of the dominant state (mandatory power) than that of the dominated one (Iraq). What was connected with the personality of the dominated state was the obligations created by the Treaty. Thus upon the independence of Iraq it was valid to end her corollary-obligations, despite the fact that they had been created by a treaty, on the grounds that she did not intend to follow the policy of the mandatory power.

Until this stage, two legal rules had emerged from the practice of Iraq in treaty succession. The first is the rule governing the
devolution of treaties from the parent state (the Islamic State) to the evolving Islamic political entity when the parent state has been replaced in the conduct of the latter's international relations by a non-Muslim state, the criteria determining the rule being exclusively derived from the Islamic legal order, its definition of lawful and unlawful contracts and the unity of the umma (Islamic nation) and its legal identity. The second rule governs the devolution of treaties from the predecessor state to the successor state when an evolving Islamic political entity assumes the conduct of its international relations from a non-Muslim state. The criteria governing this rule exclusively derived from international law with its definition of the applicability of treaties to the territory of the successor state at the date of succession and its determination of the treaty-making competence of that territory before independence. However, since Iraq delegated the conduct of her international relations to a non-Muslim state by consent, the devolution of treaties at the date of her independence were not absolute but conditioned by certain principles of Islamic law relating to legal and illegal contract. Thus, as a general rule, the practice of Iraq in succession to treaties extended to or concluded on her behalf by the mandatory power was governed by the principle of contracting out. However, in compliance with the limitation imposed by Islamic law on such devolution, Iraq effectively employed the principle of pick and choose, which was in conformity with the principles of sovereign equality between states, save in those treaties concluded between Iraq and Muslim states.
SECTION 2: THE EFFECTS OF IRAQ'S INDEPENDENCE ON TREATIES CONCLUDED WITH MEMBER STATES OF THE ISLAMIC TERRITORY:

1. Treaties Concluded with Muslim States:

   A. Multilateral Treaties:

   The issue arose again, though in a different form, as to whether the assumption of independence from the British mandate by Iraq had the same effects on treaties concluded with Muslim states as on those concluded with non-Muslim states. At the outset, the rules which have emerged from the preceding practice governing state succession when a non-Islamic state is replaced by an Islamic state in respect of a given territory are exclusively governed by Islamic law because of the religious nature of the replacement, which is complete in the internal and international relations of the territory concerned. In the opposite case, when the Islamic State is replaced by a non-Islamic State in respect of a certain part of Dār al-Islam, because of the observance of Islamic law by the population of the territory, the replacement only concerns its international relations. Subsequently, because this replacement caused a temporary break in the external identity of that part, treaty succession was exclusively governed by international law.

   When Iraq as a Muslim state replaced Great Britain in the conduct of her international relations, it resembled the replacement of non-Islamic political entities by the Islamic State although in this case only as far as Iraq's international relations were concerned. Therefore, this replacement was governed exclusively by international law insofar as the treaties with member states of the covenant territory were concerned and exclusively by Islamic law insofar as
treaties concluded between Iraq and other emerging Muslim states were concerned. As far as the Arab territories are concerned, differences in the rules governing treaty succession resulted from the creation of a legal vacuum due to the dissolution of the Islamic State which had represented these territories on the international plane. This was not the case with regard to Muslim inter-state treaty relations, since it was evident that a legal consciousness had existed between these states which had led to the creation of distinct separate rules that were analogous to the rules of public international law as regards the extent of their application or their substantive contents. These rules were contained in Islamic law as distinct from Arabic public law which governs only certain specific treaty relations of the Arab states.

The evolution of this autonomous Islamic identity within Ddr al-Islam began with the growth of the so-called imara (power) and subsequently, the development of the concept of nationality which was influenced by non-Muslim states.

As far as nationality is concerned, from the establishment of the first government of the Islamic State in al-Madina up to its takeover by the 1908 nationalistic government in Istanbul, the diinsiyya (nationality) of the inhabitants of the Islamic State was based on the ipso facto principle. This principle manifests itself in the Qur'an which states that: "The Believers are but a single Brotherhood . . ."', which means that Islamic nationality encompassed all Muslims regardless of their race or origin as well as Dhimmis (the People of the Book, who were habitually domiciled in the Islamic territory) by virtue of 'Akd al-Dhimma (contract of guarantee).
Imitating Western state practice, the Turkish government that replaced the Islamic Khilâfa in 1909 professed nationalism to be the basis of the state rather than the Şari‘a (Islamic law), and consequently the Ottoman Empire was changed in character from an Islamic to a national state. This change, occurring as it did in a composite society proved to be a disintegrative force. Nationalism, as adopted by the Turkish government was pursued by other constituent states which speeded the break-up of the Ottoman Empire into several national states which the Ottoman government was forced to recognise by the Lausanne Peace Treaty. Subsequently, the issues of the nationality and the treaty-making faculties of the emergent Arab states arose. Articles 30-36 of the Treaty of Lausanne dealt with the nationality of the persons in the territories which had become detached from the Ottoman Empire. As regards Iraq, Article 3 of her 1922 Treaty of Alliance with Britain stipulated that His Majesty the King of Iraq agreed to frame an Organic Law which should not contain anything contrary to the provisions of the present treaty and would take into account the rights and wishes of the whole of Iraq's population. Article 10 of the Organic Law (Iraqi Constitution) states that: "Islam is the official religion of the state . . .". Article 5 states that: "Iraqi nationality and the rules governing it shall be prescribed by law."

These articles, together with those of the Lausanne Treaty, gave effect to the Iraqi nationality law. The guiding principle adopted was that the Ottoman subjects habitually resident in Iraq should become ipso facto nationals of Iraq. Subsequently, a serious problem arose regarding the substantial portion of Iraqi inhabitants who
derived from either Persian or Turkish origin. A non-Arabic person was given a period of two years from the coming into force of the Treaty of Lausanne, to opt for one of the nationalities of the aforementioned states, subject to their consent, where the majority of the population was of the same race. Any Arabian person who was permanently resident in a non-Arab state was able to acquire the nationality of Iraq, Syria or Palestine if the government concerned accepted their application and as long as there was no agreement with the non-Arab state that restricted this right of option.

The natural and gradual evolution of the Arab territories under the Islamic State was speeded up by the Lausanne Treaty. The status of Iraq under the treaty was similar to that of Belgium under the 1814 Paris Peace Treaty regarding the frontier fortresses. The understanding of the powerful European states was that the independence of Belgium should be within the framework of the European security settlement. The view of the European jurists towards this case was that the settlement had been contracted in the interests of European security and thus had devolved upon the newly-independent states. Although such a rationale may not have been convincing to the newly-independent states the concept of adherence to the international legal order of the time was regarded as the determining criteria of succession to such treaties and this is still the case.

By analogy then, the Lausanne Treaty was imposed by the victorious powers on Turkey, compelling her to recognise the newly evolving Arab states in the interests of European security. However,
the question to be asked is whether the Lausanne Treaty was concluded in the interests of the Islamic or Arabic states.

With regard to the legality of the Lausanne Treaty, it is a well established principle in Islam that the peace-treaty concluded legally by the Islamic State is binding upon all Muslims and it is illegal for any Muslim to enter into a peace treaty with a non-Muslim state without the consent of all other Muslims. This principle is emphasised by the Qur'ān^{20}, and by an authoritative Sunna (tradition of the Prophet) which states that:

The mu'minin (believers) make peace together, no believer should conclude peace, after a battle in the sābil (path) of Allah, accept with the others on the basis of equality and justice among the believers.'^{21}

The Lausanne Peace Treaty was signed by a representative of only one Islamic state - Turkey - which was no longer representative, at least from Hussain's point of view, of the Islamic world. The Peace Conference did not invite any other Muslim authority to participate in the conclusion of the Peace Treaty except Hussain's son Amir Faisal, who was equally unrepresentative of the whole Eastern part of the Arab world. Representatives from Muslim Africa and India were not invited. Thus from the point of view of international law, the Lausanne Peace Treaty was no more than a law imposed by the victorious powers to settle certain problematic territorial issues and stabilise the relations between some members of the international community.'^{22} From the point of view of Islamic law, however, this stability was at the expense of the unity of the Arab states and the Islamic world.'^{23}
B. Bilateral Treaties:

The evolution of many political entities as a result of the de facto effects of the Lausanne Peace Treaty raises a question regarding the effects of the independence of Iraq on the treaties she made with any of them.

The legal identity of Iraq had not changed, in that historically, despite her representation in various political forms throughout the practice of the Islamic State, such as in the 'imārat al-istilā' (assumption of governorship by force), her Islamic identity never disappeared. If this is correct then Iraq's continuity involves no interruption of legal identity from the time when she was the capital of the Islamic State and residence of the Islamic Khilāfa, to the time after the capital and the Islamic Khilāfa were transferred to the Ottoman territory. Furthermore, no Muslim authority has attempted to postulate that she lost her Islamic identity upon her integration into the Ottoman Empire or upon her coming under the British mandate.²⁴

Neither partial nor total succession can apply to the case of the independence of Iraq and its effects on treaties concluded with Muslim states, since the word 'istiKhilāfa' (succession) implies in siyar (Islamic international law)²⁵, an interruption of the identity and legal continuity of a state, and Iraq continued to reserve its identity and its treaty-making competence throughout the mandate period. Under the mandate system, Iraq began once more to conclude multilateral treaties in her own name with other Muslim states as early as 1926 when she entered, along with Turkey and others, into the International Agreement creating an international
office for information regarding Locusts. Furthermore, Muslim states recognised Iraq's treaty making faculty and her continued identity by extending to her invitations to participate in the discussion of the affairs of the Muslim Khilîfa at the First Islamic Conference of 1926, the Second Islamic Conference of 1926 and the Third Islamic Conference of 1931, in which the Conference reached an agreement to create an international Muslim organisation. Ten seats out of 20 were reserved for the representatives of the Arab Mashrek (Iraq, Palestine, Syria, Saudi Arabia).

At the beginning of the 20th century, there was a wide variation amongst Muslim states in Asia and Africa, although general practice was in favour of the retention of bilateral treaties of Islamic character, in spite of the disappearance of one of the original contracting parties. Since then, the basis of such continuity has been a challenging issue and has yet to be resolved.

It might be argued that such continuity was based on the ipso jure principle of state succession. However, it has just been mentioned that the occurrence of state succession requires that there be an interruption of the identity and legal continuity of a state and, according to the general rules of Islamic Law, the evolving Islamic political entity is regarded as continuing its predecessor's identity and legal continuity. It might also be argued that the continuity of Muslim bilateral treaties upon the independence of a Muslim state from foreign domination occurs as a result of the Muslim state, prior to her independence, regaining some competence in international intercourse. However, the continuity of the bilateral treaties was secured even in the absence of such competence.
The discontinuing of Muslim bilateral treaty relations in order to free the newly independent Muslim states and establish their right to self-determination was unprecedented in Islamic State practice. The Islamic State was never regarded by any Muslim group as a colonial power and besides this, the right to self-determination is inapplicable with regard to Dār al-Islām (Islamic territory), which is defined by the Islamic rules of jus cogens from which derogation is not permitted except by those rules which have a similar character\[30\].

A newly independent Muslim state can only free itself from such bilateral treaties by presenting incontestable proof that the treaty in question is inconsistent with the constitutional position established by an Islamic instrument or with general Islamic constitutional law\[31\].

Each Islamic government, when negotiating a bilateral treaty with the other Muslim state responsible for its continuity during the process of the changes in administration (and therefore law and practice) of the Islamic State, supported the transfer of treaty rights and obligations from the Islamic State to the evolving Islamic political entities upon the dissolution of the former.

The evolution and progress of Iraq toward complete independence from the British mandate provides cogent evidence pertaining to the foregoing argument. Iraq entered into several agreements with neighbouring Muslim states regulating the rights of their nationals\[32\]. The Persian government claimed for her nationals in Iraq\[33\] the privileges of the Ottoman capitulations, which were secured under the Anglo-Iraqi judicial agreement of the 25 of March
1924\(^{134}\) to nationals of states which had capitulations with the Ottoman government at the time when Iraq was an integral part of the Ottoman Empire. The Iraqi government rejected this claim on the grounds that at the time of the Ottoman Empire's embracing of Iraq, Persia was not a capitulatory power because of her unity of religion with the Ottoman Empire, and there was no binding rule of Islam that justified Persia's claim. The unfounded basis of the Persian argument was further emphasised by the fact that Iraqi subjects in Persia were not granted capitulatory privileges.

Upon the abolition of the Anglo-Iraqi Judicial Agreement of 1924 and consequently the above-mentioned capitulatory privileges in Iraq, the Persian government was warmly supportive in the Council of the League of Nations, and in 1929 Persia recognised Iraq and exchanged diplomatic relations with her\(^{135}\). The two Muslim countries signed an agreement that secured for the subjects of either government on each others' territory a most-favoured-nation-treatment, pending the negotiation of a definitive agreement to place the relations between the two countries on a permanent and friendly basis\(^{136}\). The agreement between Persia and Iraq was renewed on 19 October 1930\(^{137}\) and thereafter\(^{138}\), so that the agreement continued and was unaffected by the independence of Iraq in 1932. Furthermore, the two countries concluded the 1937 Treaty for the Pacific Settlement of any Disputes arising from the aforementioned instrument\(^{139}\).

Likewise, Iraq concluded with her ex-mother state, Turkey, several bilateral treaties regulating various matters in order to stabilise the relationship between the two Muslim states. These included the Treaty of 9 January 1932 on Residence\(^{140}\), the Treaty of
10 January 1932 on Commerce and the Treaty of 9 January 1932 on Extradition.

Neither of the two countries claimed that the continuity of any one of these treaties was based on state succession. It was, rather, based on Islamic law from which the rule 'al-`a`d al-shari`at al-muta`adidin' (pacta sunt servanda) is derived; a law which governs not only Iraq's treaty relations with other Muslim states but also her treaty relations with particular Arab states.

2. Treaties Concluded with Arab States:

A. Non-Boundary Treaties:

(i) Multilateral Treaties:

Notwithstanding the British mandate over her, Iraq was an integral part of the Arab territory as defined in the Hussain-McMahon Correspondence, which was no more than a confirmatory agreement of the boundaries of a territory of which every part was connected to another by common culture, language and religion.

Unlike international law, Islamic Law proceeds from the birth of the Islamic State and serves as a legal criteria for determining the internal as well as external changes of the Islamic State. Prior to the international recognition of Iraq as a state, it was only the Islamic Law which governed the evolutionary legal process of Iraq towards statehood. Thus it is important to distinguish those changes of Islamic legal significance from those of which international law takes cognisance, in order that the evolutionary process of Iraq towards statehood and its effects on a certain category of treaties concluded prior to her complete attainment of statehood can be understood.
Until the establishment of various Arab governments, relations among various parts of the Arab world were governed by the doctrine of ‘al-hukm bima anzala Allah’\(^{149}\), which is, apart from its religious nature, similar to the old inter se doctrine of Commonwealth constitutional law\(^{149}\), while the relations between the mandatory power and the mandated territory of Iraq was not governed by the inter se doctrine but by general international law as laid down in Article 22 of the Covenant of the League of Nations. Thus if the view of the British government according to this doctrine was that changes in the governmental institutions within the Commonwealth were of significance only in municipal law\(^{150}\), then so were the changes in the governmental institutions of Iraq. In order to give the treaty an international character, the British representatives, from the time of the occupation of Iraq until the conclusion of the Treaty of Alliance of 1930 between Britain and Iraq, associated with the Iraqi representatives in an ad hoc capacity in negotiating treaties\(^{151}\), as in the case of the conclusion of the International Agreement for the Establishment at Damascus of an International Locust Intelligence Bureau in 1926\(^{152}\) and the Agreement at the Beirut Conference of Near Eastern States for the Regulation of the Pilgrim Traffic from these states to Makka in 1929\(^{153}\).

(ii) Bilateral Treaties:

As a result of the abolition of the Ottoman treaties applicable to the Eastern part of the Arab world and the establishment of a British mandate over Iraq, British officials negotiated bilateral treaties with the neighbouring states. These treaties, therefore, were of an international nature. In the al-Muhammarah Agreement of
1922 concluded with the Government of Nadjd, a statute was set up to regulate the tribal affairs on the borders, and in the Second Protocol of the al-'Uqair Convention of the 2nd of December 1922 and the Bahrā Agreement of 1925 concluded between Nadjd and Iraq, an attempt was made to conclude an extradition agreement, but because of the undefined boundaries between these two Arab territories, no agreement was reached. However, the contracting parties undertook to continue negotiations towards the conclusion of an extradition agreement in the near future, namely within a period not exceeding one year from the date of the ratification of the Bahrā Agreement by the Government of Iraq (Article 10).

In 1926, the French and British mandatory authorities arrived at comprehensive agreements regulating the relations between Iraq and Syria. As a result of this, agreements on the treatment of frontier tribes, the extradition of offenders, traffic in antiquities and the regulation of motor traffic between Iraq and Syria were provisionally drafted and formed the basis of subsequent negotiation for the 1926 Agreement on the Prevention of Illicit Traffic in Antiquities.

As a result of the conclusion of the 1930 Treaty of Alliance between Great Britain and Iraq, before the admission of Iraq to membership to the League of Nations, the treaty-making competence in respect of Iraq was gradually transferred to the Iraqi government in late 1931. Thereafter, in a spirit of friendship and cooperation, the Governments of Trans-Jordan and Iraq signed a Treaty of Friendship at 'Ammān on 26 March 1931. After the signing of this treaty, Nūrī al-Sa'īd paid a visit to Makka to sign an Extradition
Treaty of 7 April 1931\(^{162}\) and a Bon Voisinage Treaty of the 8 April. Furthermore, the Iraqi mission to al-\Hijaz concluded two more bilateral treaties. Taha al-Hāshimi, the Chief of the Iraqi General Staff, concluded a Treaty of Friendship with the Yemeni government of 11 May 1931 at San‘ā\(^{163}\) and an Extradition Treaty was concluded with Egypt on 20 April 1931\(^{164}\).

Prior to 1932, most Islamic authorities regarded Iraq's evolution as having significance only in Islamic Law\(^{166}\). The question to be asked then, is to what extent and on what basis was Iraq bound by these treaties at the date of her independence?

First of all, we must determine the position of Iraq with regard to treaties concluded by British representatives with other Arab chiefs which limited or withheld the participation of Iraqi representatives. To explore this issue more adequately, the views of non-Muslim jurists may be of significant assistance. O'Connell states that:

> In the case of the emergence to full statehood of a self-governing territory, where treaties are contracted for such community by its suzerain, protector or constitutional superior acting as its agent, such treaties are properly personal to the autonomous or semi-autonomous region, and there is no reason why they should not continue to bind it after the agent's disappearance\(^{166}\).

This is fully recognised in Islamic Law with regard to the binding force of the agent's contracts or treaties on the principal\(^{167}\) as long as the agent did not exceed its authority\(^{168}\). Thus upon the independence of Iraq, the continuity of these treaties was not based on the so-called *ipso jure* continuity rule of state succession since no alteration of the legal identity of Iraq had occurred and if it
had, that is to say if Iraq had been transferred outside the Islamic territory, it was a well established principle in Islamic and international law that Iraq should start its life with a clean slate, and this was negated by the fact of the continuing in force of these treaties.

As regards the treaties concluded by Iraq herself without any British representation, the determination of the type and the continuing in force of these treaties upon the independence of Iraq depended mainly on whether a treaty embodied the rules of idjitibād (independent reasoning) in which their binding force was separate from that of the treaty.

Where a treaty embodied rules derived by multilateral idjitibād (independent reasoning), it was regarded as djamā'iyya (multilateral) even if it was concluded between two Arabian parties, as long as they legally represented Arabs. Though this type of treaty appears similar to those concluded between more than two parties in international law, it is different in the sense that it is not declaratory of some customary rules as is the so-called 'law-making' treaty of international law where a third state is bound by the customary rules embodied in a treaty independently from the treaty itself. On the contrary, the rules embodied in the Arabian treaties are legislative and the treaties themselves operate in codifying and performing the rules concerned.

In case of those treaties embodying unilateral idjitibād (independent reasoning), they are regarded as bilateral, and the binding force of the rules of idjitibād are limited to the parties and overlap with the rules of the treaties themselves.
The practice of Iraq reviewed above emphasises several factors which compelled or at least suggested the continuity of certain treaties after independence. The treaties, insofar as they related to the Iraqi territory, were very often obligatory in fact and under the law of the Government of Iraq. The Iraqi legislators often enacted the necessary legislation for implementing these treaties. The right of the Iraqi people to self-determination stressed their identity as a part of the Arab world, as formulated in accordance with Islamic Law before independence. Thus these treaties continued for the simple reason that the relations between Iraq and any other part of the Arab world are those between two parts of an original unit. International Law supports the view that these pre-independence treaties should not have continued since they were imposed upon Iraq during the colonial era without her consent.

As we have seen, Iraq's path to independence was a gradual one and had been developing over a long period of time through the process of division in the territorial authority of the Arab world.

Authority within the Arab territory had been indivisible, even immediately after Iraq's integration into the Ottoman Empire. With the establishment of various Arab governments in different parts of the Arab territory, the procedure of fixing the limits of each one's authority began, that is to say, the right to exercise the authority of statehood within each one's respective territory to the exclusion of other governments, i.e., they delimited the scope of their territorial independence as a first step by treaties, and subsequently by physical boundaries. Upon the independence of Iraq, succession to these treaties became an issue.
B. Boundary Treaties:

Succession to boundaries and boundary treaties within Dār al-Islam has never been contemplated by Muslim jurists since the establishment of political boundaries within Dār al-Islam is prohibited by the Islamic rules of *jus cogens*. However, through the mechanisms developed by Muslim jurists such as *al-kiyās* (analogical deduction), *al-idtiḥād* (independent reasoning), *al-istiḥāsān* (juristic preference) and *al-magālīh al-mursala* (general interests), it is not difficult to find legal rules in general Islamic legal theory governing similar subjects.

In addition, since Iraq was the first part of the Eastern Arab territory to establish territorial boundaries by treaties under the supervision of the mandatory power, rules justifying the establishment of these boundaries and the rules governing the effects of independence on these treaties began to take shape from 1932 onwards with the independence of Iraq.

Therefore, the effects of the independence of Iraq on boundary treaties may be examined in accordance with international law and subsequently with Islamic law. According to international law, the territory of Iraq was not *terra nullius* and therefore there must have been a sovereignty possessed by some authority over it. If this is correct, then the question as to whether it is sovereignty rather than other factors such as treaty-making competence that regulates the ultimate validity of boundary treaties is directed primarily towards Iraqi municipal law and her international commitments. For a treaty to be binding upon Iraq, it must have been made by an
authority competent to do so under the Iraqi municipal law as established by Article 26 (4) of the 1925 Constitution which reads:

The King concludes treaties but may not ratify them without the consent of parliament.¹⁷⁶

As regards Iraqi international commitments, Article 10 of the 1922 Treaty of Alliance (the contract of agency)¹⁷⁷ distributed the treaty-making competence between Iraq and Great Britain in order to give effect to Article 3 (2) of the 1923 Lausanne Peace Treaty¹⁷⁸ regarding the definition of the Iraqi-Turkish frontiers. When disputes arose between Iraq and Turkey regarding the allocation of the Mosul Vilayet, Great Britain represented Iraq at the League Council¹⁷⁹ and the Permanent Court of International Justice¹⁸⁰ and acted in accordance with Article 8 of the 1922 Treaty of Alliance which prohibited any one of the contracting parties from ceding any part of the Iraqi territory¹⁸¹.

An analysis, therefore, of the effects of Iraq's independence on boundary treaties, must begin with the question of where the sovereignty of the Arab lands, after their separation from the Ottoman Empire, was actually vested. Was it vested in the League of Nations, in the principal Allied Powers, in the mandatory power acting with the consent of the League Council or in the Arab people of the mandated areas?

As regards the first alternative, many authorities have attributed sovereignty over the mandated territory to 'the League of Nations'¹⁸². For example, Lauterpacht¹⁸³ concludes that there is an increasing tendency to agree with the theory that the League of Nations had sovereignty over the mandated areas. It is doubtful,
however, whether the League of Nations was competent in possessing the sovereignty of a territory, although it could be argued that it was a temporary trustee. The Treaty of Sévres made it clear that although Turkey renounced "all rights and titles" to the territories in favour of the principal Allied Powers by Article 132, Articles 94 and 95 also provided that

Syria and Mesopotamia shall in accordance with the fourth paragraph of Article 22 part I (Covenant of the League of Nations) be provisionally recognised as independent states, subject to the rendering of administrative advice and assistance by a mandatory, until such time as they are able to stand alone.

The Treaty of Sévres was never ratified, but these clauses were affirmed by the Lausanne Treaty (Article 16).

With regard to the second alternative (the principal Allied Powers), some authorities have argued in favour of attributing sovereignty to a condominium of the principal Allied Powers on the strength of the aforementioned clauses. This has been refuted by most theorists on the grounds that annexation of the mandated territories by the principal Allied Powers runs contrary to the basic principles of the Peace Conference and the treaties made thereby and is also in opposition to Article 22 and the Mandate Agreement.

As far as the third alternative (mandatory power acting with the consent of the League Council) is concerned, a number of English writers regarded the mandatory as a trustee and pointed out that under the Anglo-American law of trust, the trustee had title to the property, though his use of it was limited by the terms of the trust. On these grounds, together with the 1922 Treaty of Alliance (the contract of agency), Britain concluded the 1922
Treaty with Nadj_d, the Treaty of 1926 with Turkey, a series of treaties with France as the mandatory power in Syria, and Exchanged Notes of 1923 with Kuwait defining Iraq's boundaries with these states. However, this theory was strongly opposed by the Permanent Mandate Commission, the League Council, and some Arabic authorities, and in most cases the mandatories acquiesced to their demands. It contradicted the accepted principles of the Peace Conference and was not supported by Article 22 (4) of the League Covenant or the terms of the 1922 Treaty of Alliance between Britain and Iraq.

The only remaining choice as to where the sovereignty of the Arab lands rested was within the mandated communities. Even a majority of those authorities who advocated the aforementioned alternative theories believed that in the case of an A-mandated territory, eventual sovereignty, and perhaps a part of or share in the current sovereignty, was vested in the mandated community. This conclusion seems to be based on the doctrine of the right to self-determination as contemplated in para. 4 of Article 22 of the League Covenant and has been extended by Western and Arabic writers. Even though the exercise of full sovereign power was in suspense, the right to sovereignty was recognised as belonging to the people of the mandated territories, and the British government, with the approval of the Mandate Commission, asserted this as the basis of its policy in Iraq. In fact, the King of Iraq did exercise some sovereign authority. Just prior to Iraq's independence, he concluded with Kuwait in 1932 and with the Government of Trans-Jordan in July 1932, treaties establishing boundaries with the two states.
These are the theories and principles on the location of sovereignty of the mandated territories, and it remains now to examine the location of sovereignty of the mandated territories in accordance with the Islamic law. In Islamic law, Allah is the real sovereign of the whole universe, and man is His vicegerent on earth. Accordingly, Muslims are ordered by the Islamic supreme constitution (Qur'an) and by the Sunna (the tradition of the Prophet) always to obey the authorities. In a well quoted tradition, the Prophet stated that:

Every one of you is a shepherd and every one of you is responsible for those under his care. So that the ruler is a shepherd and responsible for his subjects; a man is a shepherd and is responsible for his family; a woman is a shepherdess and is responsible for her house and family.

This territorial authority was defined by Ibn Khaldun:

Royal authority, in reality, belongs only to those who dominate subjects, collect taxes, send out (military) expeditions, protect the frontier regions, and have no one over them (of course, except God) who is stronger than them, and whether this authority is an Arab or a negro is irrelevant.

Thus if the prevailing view in international law attributed sovereignty to the mandated communities then that sovereignty according to Islamic law was authority. This may explain why the division of the Arab territory among various governments does not affect the unity of God's sovereignty as long as the basic principles of Islam are respected. The Prophet made it clear that there should be: "No obedience of any creature in disobedience of the creator." A question based on these principles arises about the extent to which Iraq was bound by boundary treaties concluded by the
mandatory power on her behalf prior to her independence and on what basis they continued, if at all?

The specific characteristics of boundary treaties have been recognised in international law for a long time. With regard to succession to boundaries treaties, two schools of literature in international law have developed. The first school of thought is advocated by Oppenheim and Lauterpacht who stated that:

According to the principle res transit cum suo onere, treaties of the extinct state concerning boundary lines, . . . remain valid, and all rights and duties arising from such treaties of the extinct states devolve on the absorbing state.\(^{214}\)

In principle, succession to boundary treaties is often regarded as an exception to the clean slate rule and this is why this school of thought described succession to local rights and duties as 'a genuine succession.'\(^{215}\) Hershey\(^{216}\) and De Mural\(^{217}\) share this opinion. The Iraqi (Hanafid) School of Jurisprudence recognises succession as an acquisitive means of ownership where an heir steps exactly into the position of the deceased as far as the property contract is concerned\(^{218}\), but it differs from the aforementioned views within international law by not having postulated any rules governing succession to boundary treaties other than by analogy or by the fact that Islamic law adopts monism. Thus it may be concluded that succession to treaties is the same as succession to a private contract with the result that both this school of thought within international law and the Hanafid school adopt the principle of the devolution of boundary treaties to a newly independent state at the date of independence. At this point, the Iraqi School makes no distinction between succession to contract of private property and
succession to rights and obligations arising from the contract itself as does this particular school within international law\textsuperscript{219} regarding a boundary treaty.

A second school of thought in international law is advocated by Keith\textsuperscript{220}, Lester\textsuperscript{221}, O'Connell\textsuperscript{222} and Okoye\textsuperscript{223} who base their opinion on the concept that once a boundary treaty has been implemented, it cannot be subject to succession. The subject of succession is the situation that the treaty has created, i.e., a territory within defined boundaries or merely a boundary.

Once boundary provisions are executed they lose their contractual character and can be severed from the other treaty provisions\textsuperscript{224}, so what is succeeded to is not the treaty but the territorial extent of sovereignty\textsuperscript{226}. A difficulty which may arise is when the boundary of the territorial sovereignty of an area is a river which changes its course from time to time such as the Shatt al-'Arab or the Euphrates. By means of using an analogy between international boundaries and those of private property, Muslim jurists recognise that water will be an appurtenance to adjoining land and not vice versa\textsuperscript{226}. If the natural accretion has occurred at the expense of another state - as for instance, through a change in a river's course - Muslim law says that the accretion must go to the party in whose territory it has occurred, who must pay compensation to the losing party in proportion to their gain\textsuperscript{227}. This is based on the principle that: 'gain accompanies sufferance' and 'injury must be removed'\textsuperscript{228}. Muslim jurists apply the same rule to disputes regarding the effects of independence on boundary treaties under the principle of al-darūra (necessity).
A problem arises, however, when a treaty defines boundaries in general terms, leaving their actual delimitation to a boundary commission, and this delimitation has not been achieved at the date of independence. This was the case with Iraq's treaties defining her boundary with Persia. Likewise, treaties defining the Iraqi-Syrian boundaries contained provisions for future action and reciprocal rights.

The question of the devolution of boundary treaties to Iraq cannot be resolved on the basis which exists in international law since not only does this concept not exist in Islamic law but also no succession occurred which legitimised the succession of Iraq to treaties establishing her boundaries with another Muslim or Arab state. The problem can only be resolved in accordance with those principles of Islamic law that prove to be relevant such as 'la darara wa la dirār' (no harm nor mischief) as long as the provisions containing the reciprocal rights and obligations can be severed from the dispositive provisions in the treaty and one of the parties disputes the existing boundaries.

As stated above, the division of the Arab territory among various Arab states and the development of the independent Islamic identity of each of them does not affect the unity of God's sovereignty and the unity of the umma as long as they preserve the enforcement of the Islamic law. Moreover, since this division did not affect the continuity of the legal identity of these states, it must be asserted that the independence of Iraq from the British mandate did not constitute a case of state succession so far as boundaries and boundary treaties were concerned. This opinion is based not only on
the official opinion of each Arab state but also on the opinion of Arabic jurists and the public.

According to the viewpoint taken by the newly independent Arab states, the mandatory powers had never exercised sovereignty over the Arab territory and consequently had no authority to establish boundaries in this region\textsuperscript{233}, and the obligation of the Arab states to respect the existing boundaries was imposed by themselves ensuing from an act of their own will. It had no connection with the so-called colonial \textit{Uti possidetis} principle\textsuperscript{234}.

Any Arab state may invoke the doctrine of revindication to reclaim the indivisible territorial sovereignty of the Arab land which she once possessed as a matter of right\textsuperscript{235} and which is supported by geographical, ethnic, linguistic and religious factors. Examples of such claims include Saudi Arabia's claim to sovereignty over a part of the Trucial States territory, Bahrain's claim to sovereignty over a part of Qatari territory and Iraq's claim to sovereignty over the whole territory of Kuwait. These claims may or may not have some foundation. It is necessary, therefore, to examine the issue of succession, not only to boundaries and boundary treaties, but also to treaties in general, and more specifically, the effects of the assumption of the governorship by Kuwait on treaties, in order to determine the rules ensuing therefrom, to ascertain whether Kuwait has developed as mature a legal identity as that of Iraq and to assess the development of these rules in other instances within the framework of Islamic legal theory.

Before this, from what has already been discussed we will attempt to tentatively point out the following rules. Up to the present, two
different bodies of rules have emerged from the practice of Iraq in treaty succession. The first consists of Islamic rules governing the devolution of treaties from the parent state (the Islamic State) to Iraq when the parent state was replaced by the mandatory power in the conduct of the international relations of Iraq. The criteria for these rules were exclusively derived from Islamic law, its definition of the lawful and unlawful contracts and the attachment of all treaties of the Islamic State to the identity of the umma. The second body of rules comprised those rules of international law governing devolution of treaties from the predecessor state to the successor state, when an evolving Islamic political entity assumes the conduct of its international relations from a non-Muslim state, the criteria of which are exclusively derived from international law, its definition of the applicability of treaties to the territory of the successor state at the date of succession and its definition of the treaty-making competence of that territory before independence (which might have participated in the conclusion of the treaties in question). However, since Iraq delegated the conduct of her international relations to a non-Muslim state by her own consent, the devolution of treaties at the date of her independence were not absolute but conditioned by certain principles of Islamic law relating to legal and illegal contract. Thus as a general rule the practice of Iraq in succession to treaties extended by or concluded on her behalf by the mandatory power was governed by the principle of contracting out, but in compliance with the limitation imposed by Islamic law on devolution, Iraq effectively employed the principle of pick and choose in conformity with the principle of sovereign
equality between states, except in those treaties she had concluded with Muslim states.

If this is the case then the continuous application of Islamic law to the Iraqi territory implies the continuity of the Islamic identity of that territory and thus the effect of Iraq's independence on treaties with Muslim states is not governed by rules of treaty succession but by the rules of Islamic law governing treaty relations between Muslim states.

At the date of independence of Iraq the rules governing the establishment of political boundaries and the devolution of treaties establishing them in international and Islamic law were in their formative stage at this time and their crystallisation into international or regional rules would evolve through the subsequent practice of the Arab states practice and the emerging principles of Arabic public law.
CHAPTER V

THE PRACTICE OF KUWAIT IN TREATY SUCESSION

SECTION 1: TREATIES CONCLUDED BY THE PROTECTING STATE ON BEHALF OF KUWAIT:

1. Multilateral Treaties Concluded with Member States of the Covenant Territory:

A. Multilateral Treaties of a Non-Constituent Character:

(i) Non-Dispositive Multilateral Treaties:

It has been claimed that the application of the mandatory or protecting state's treaties to the ex-mandated territories and ex-protected states under international law comprises a major criterion justifying the automatic or mandatory subrogation to such treaties by these entities upon their becoming independent states. The validity of this criterion can be examined in the light of Kuwait's practice towards succession to different types of treaties which were claimed to have been applied to her territory during the British protection by various means.

Firstly, there are those treaties which were regarded as automatically applicable to the dependent territories by virtue of the signature of Great Britain, such as treaties of peace, extradition and alliance¹. However, it should be borne in mind that in such cases, according to British practice, protected states (protectorates) such as Kuwait are only affected by express provision². Secondly, there are those treaties of Great Britain which are regarded as applicable to dependent territories by virtue of special provisions commonly known as 'territorial application clauses' or 'colonial clauses'³. The aim of the insertion of a
'territorial application clause' in a treaty is either to extend the application of the treaty to the dependent territories of the contracting parties or to exclude such territories from the territorial application of the treaty. This device was used throughout British practice, especially during the twentieth century, in order to deal with the application of British treaties to her growing number of dependent territories. In order to implement these treaties in the local sphere, it was necessary to obtain legislation by acts of Parliament since they were not locally self-executing. The freedom to make a decision is granted to Great Britain (the contracting party) through the 'territorial application clause' in such a way as to make it possible for her either to extend or exclude the application of her treaties to her dependent territories.

Unlike Iraq upon independence, Kuwait did not enter into a devolution agreement with Great Britain nor did she make any express unilateral declaration regarding succession to treaties concluded on her behalf or extended to her by Great Britain during the protection period. This should not, however, be taken to imply that the number of such treaties was not substantial nor that Kuwait failed to base her practice towards treaty succession on a particular theory. The attitude of Kuwait, upon her independence, towards British treaties embodying such clauses will now be examined.

An example of the first type of territorial application clause was the United Kingdom's Ratification of the International Convention for the Suppression of Counterfeiting Currency on 28 July 1959, which she declared to be applicable to the United Kingdom dependent
territories. This declaration gave Kuwait the choice upon independence either to notify the Secretary-General of the United Nations about her succession to the United Kingdom's ratification of the convention or to establish herself as a new party by simple accession to the convention in her own name. Because Kuwait did not enter into a devolution agreement with Great Britain upon independence, she adopted the second alternative, acceding to the convention on 9 December 1968. It was implemented in accordance with Articles 65 and 70 of the Kuwaiti Constitution by law No. 34 for the year 1968. The United Kingdom applied the Geneva Humanitarian Conventions of 1949 to Kuwait in 1957. Kuwait became a party to these conventions by her own accession and a consistent practice in treaty succession became established in respect of such treaties embodying this type of territorial application clause.

The second type of territorial application clause was where Great Britain excluded Kuwait simply by failing to make a declaration of the application of British treaties to Kuwait despite the fact that they embodied territorial application clauses as exemplified by the 1930 International Load Line Convention, and the 1948 International Convention for the Safety of Life at Sea.

Since the territory of Kuwait was neither an integral part of the British Empire nor a contracting party to the above-mentioned treaties, the practical significance of the so-called 'territorial application clause' to Kuwait is that the provisions of British treaties were either applicable or not applicable to Kuwait while she was under British protection and upon her independence she certainly became a de facto 'beneficiary' only to those treaties which were
applicable at that date. However, the rule that emerged from Iraq's practice was that the succession or accession to these treaties was regarded as a voluntary act exercised as a matter of right and not an obligation, as was further recognised by non-Muslim courts. In the case of *Czechoslovak Co-operative Society v. Otten* of 1924, the District Court of Rotterdam held that the Austro-Hungarian Empire's signature attached to the 1905 Convention on Civil Procedure did not bind the newly independent state of Czechoslovakia. Thus, as an exercise of her right, Kuwait preferred to follow the procedure of accession to that of succession in the 1930 International Load Line Convention in accordance with Article 23 on 12 April 1959 pursuant to a certified statement registered at the request of the United Kingdom on 23 March 1959.

The exercise of this right by Kuwait signified her evolving legal personality and treaty-making competence, which was further demonstrated in the conclusion of the International Convention for the Safety of Life at Sea where she was an original party alongside the United Kingdom on 17 June 1960. This replaced the International Convention for the Safety of Life at Sea of 1948. After the independence of Kuwait, the continuity of this convention was achieved by the application of law number 17 for the year 1965 which took effect from 31 March 1965.

In exercising her right upon independence, Kuwait did not wish to succeed to the United Kingdom's Ratification of the 1954 International Convention for the Prevention of Pollution of the Sea by Oil and of the 1959 Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention). If
the United Kingdom's Ratification was a substitute in itself for an express declaration and constituted a legal nexus between the conventions and the territory of Kuwait prior to her complete independence, it was insufficient to satisfy the Government of Kuwait to continue the convention. This attitude was based on a widely recognised principle that was also espoused by non-Islamic law, emphasised in the Case of Feldman & Feldman v. Polish State Treasury of 1921. The Supreme Court of Poland held that although the Austrian monarchy had been a party to the Berne Convention relating to the 1890 International Transport of Goods, the convention did not continue in force with regard to territories which were formerly Austrian but at that time (1921) under the sovereignty of a state not a party to that convention. Therefore, Kuwait found it necessary upon independence to establish herself as a new party to the 1954 Convention by acceptance in accordance with Article XIV on 27 February 1962 and to the 1959 Convention by accession on 26 May 1977. By law number 71 for the year 1977, the accession was implemented and the convention became a part of Kuwaiti municipal law.

Those British treaties which originally did not contain a territorial application clause later on were made applicable to Kuwait by virtue of additional agreements, normally in the form of an 'Exchange of Notes' between the interested states or a 'procès-verbal' as in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and the 1949 Geneva Humanitarian Conventions. After her independence, the Secretary-General of the United Nations invited...
Kuwait on 21 December 1962 to sign or accede to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others which was opened for signature at Lake Success, New York on 21 March 1950[^29] and contained and replaced the previous conventions on this subject.

Observing the Qur'an, which has established since its promulgation 14 centuries ago a systematic means for abolishing all types of slavery[^30], and having regard to Article 29[^31] and Article 30[^32] of the Kuwaiti Constitution of 1962[^33], Kuwait seems to have preferred to become a party to pre-independence slavery conventions not by 'succession' but by 'accession'[^34], which was implemented by law number 36 for the year 1968[^35]. This was because succession to the predecessor's treaties dealing with this subject may not have included the suppression of all types of such inhuman practices, practices which contradict the basic principles of Islam.

Similarly, since the rules governing the conduct of war in Islamic law evolved not only through conventional law[^36] but also through customary law ensuing from the practice of the Islamic state[^37], and since before and after her independence Kuwait has adhered to such law in practice and by promulgation as stated in Article 57[^38] of the 1962 Constitution, she has practised her 'right of participation' in the predecessor's general multilateral treaties, as established under international law, in order to enhance certain humanitarian principles in the international community. 'Accession' not 'succession' to the 1949 Geneva Humanitarian Conventions[^39] enables Kuwait to freely practise these principles because succession to Great Britain's treaties or ratifications on these subjects could
have imposed certain restrictions in the form of reservations or other mechanisms, such as certain interpretations of the terms sick, wounded, shipwreck, prisoners of war, civilians etc, which would have limited the full application of these conventions.

Another type of case whereby Great Britain could claim that certain of her treaties were applicable to the territory of Kuwait prior to the latter's independence is where they were concluded by Great Britain exclusively for the Gulf area or the treaties were of a dispositive or law-making nature.

(ii) Dispositive Multilateral Treaties:

The issue here is related to the previous one, i.e., the effects of the existence of a legal nexus between British treaties and the territory of Kuwait, in which the focus is on an examination of the assumption that there are certain categories of British treaties which are regarded as exceptions to the Kuwaiti practice of the non-devolution of British treaties.

This examination reveals that Muslim and non-Muslim jurists have concurred in the opinion that treaties may be divided into 'personal or political' and 'non-personal or non-political' treaties and although they agree that the former do not devolve upon state succession they differ with regard to the latter. Non-political treaties are divided in Arabic terminology into mu'āhadāt irtifā'īyya (treaties containing usufructuary rights) or in the modern Arabic sense into mu'āhadāt 'ayniyya (dispositive treaties) and al-mu'āhadāt al-shārī'а (law-making treaties).

As regards dispositive multilateral treaties, in recent times British authorities such as Keith and McNair have maintained
that since dispositive treaties are less contractual in nature and are attached to the soil they devolve to the successor state. This is also the view of Muslim jurists provided such devolution is not detrimental to the successor state, and this was further emphasised by the I.C.J. in the case concerning Rights of Passage over Indian Territory of 1960 between Portugal and India.

Treaties of cession and peace such as the 1916 Sykes-Picot Agreement between Britain, France and Russia for the partition of the Ottoman Empire, the 1920 Sévres Agreement between Britain, France and Italy and the 1923 Lausanne Treaty of Peace between the British Empire, France, Japan, Greece, Bulgaria, Romania and Turkey are given as examples of the so-called 'dispositive' treaties and thus claimed to devolve automatically to Kuwait.

Another group of European jurists including Jenks, McNair, Keith and O'Connell maintain that there are certain multilateral treaties which are of a legislative character (or non-contractual character) and should be regarded as sources of customary international law. These treaties are valid erga omnes and thus devolve to the successor state at the date of succession. Similarly, Muslim jurists have defined certain categories of Islamic treaties as muḥadāt shari'a (legislative or law-making) treaties which are binding on all Muslims and thus devolve automatically to any government assuming governorship by force. Such treaties, however, are only those treaties defined by al-Qur'an, the Sunna, the idimg (consensus) or by al-kiyās (analogical deduction). Analogous treaties concluded by Islamic authorities other than the
Prophet are not legislative or law-making but constitute sources that interpret the former.

Under international law, treaties concerning slavery, the protection in time of war of the wounded, sick, and shipwrecked persons and of civilians, the suppression of counterfeiting currency and others are given as examples of the so-called 'law-making' treaties, which devolve automatically to any new member of the international community, such as Kuwait. Thus the principle of the non-devolution of treaties has no application to the 'law-making' treaties.

Therefore, the issues of the devolution of 'dispositive' and 'law-making' treaties to Kuwait upon her independence are interrelated legal assumptions whose legitimacy should be investigated. Examination is required to discover whether international or Islamic law provide valid criteria by which a predecessor's treaties can be categorised into 'political or personal' and 'non-political or non-personal' treaties, 'non-localised' and 'localised' treaties or 'dispositive' and 'law-making' treaties.

International law does not provide valid, generally accepted criteria for the categorisation of a predecessor's treaties or those treaties which do and do not devolve upon the occurrence of state succession. Islamic law, however, distinguishes between treaties said to embody Hukuk Allah (Rights of God), which devolve to the successor state upon the occurrence of succession, and those constituting Hukuk al-‘ibad (rights of individuals) which may not devolve. According to this criterion, Muslim jurists divided the
predecessor's treaties embodying *hūkūk al-irtifāk* (usufructory rights) into these two categories, whereas non-Muslim jurists, despite admitting the existence of the category of the so-called 'dispositive' treaties, have not admitted that any valid and generally accepted criteria for such a category exists. The reason behind the non-existence of generally accepted legal criteria for such distinctions is the overlapping nature of treaties. In the absence of generally accepted legal criteria it could be contended that such categorisation is unsound and unsupported in practice.

Non-Muslim jurists have based their assumption that the so-called dispositive treaties devolve to the successor state on the contention that the rights and obligations embodied in such treaties are *in rem*, an expression borrowed from Roman law, but other non-Muslim jurists, such as Brierly and Keith have disputed this, maintaining that the rights and obligations of a state arising from a treaty are attached not to the territory of the state but to its personality, and thus the expression *'in rem'* should be dismissed as being of no valid legal significance in determining the devolution or non-devolution of the predecessor's treaties.

Closely associated with the so-called 'dispositive' treaties are those treaties creating the so-called 'servitude' or in Arabic terminology *'hūkūk al-irtifāk'* (usufructory rights). Upon the occurrence of state succession the question of the devolution of such treaties to the successor state has been claimed to be an obligation under contemporary international law. This deserves examination. In international law, servitudes are either domestic or international while in Islamic law such a distinction does not
exist\textsuperscript{79}. Thus this distinction or non-distinction determines the rules governing the devolution of the predecessor's treaties embodying 'servitudes' or '\textit{hukūk al-irtifāk}', since unlike Islamic law, in international law domestic servitudes cannot be subject to state succession\textsuperscript{80}. However, both international law\textsuperscript{81} and Islamic law\textsuperscript{82} define servitudes according to their nature either as multilateral or bilateral or as positive or negative\textsuperscript{83}. Again, in international law the term 'servitude' is borrowed from Roman law\textsuperscript{84} while in Islamic law, since no distinction exists between municipal and international rules, the term 'irtifāk' is used in both cases\textsuperscript{86}. Furthermore, in international law\textsuperscript{86} and in Islamic law\textsuperscript{87} servitudes and \textit{hukūk al-irtifāk} may be created by treaties or by unilateral acts\textsuperscript{88}. This study is concerned with servitudes established by treaties and it must be determined whether the servitudes or the treaties establishing them devolved to Kuwait at the date of independence, if at all.

It may be recalled that in international law a predecessor's multilateral treaties do not devolve automatically to the successor state without its consent\textsuperscript{89} while in Islamic law such treaties devolve automatically only if they are established by the Qur'ān or the Sunna\textsuperscript{90} or embody \textit{Huḳūḳ Allah} (Rights of God)\textsuperscript{91}. Thus in order for a servitude to be subject to state succession in respect of treaties, uncontested proof must be presented by the claimant that the servitude was established by one of the predecessor's treaties. Also, proof is needed that there exist universally accepted rules of international law that oblige a state who, by its own consent, has given certain international grants to another state or states to
respect such rights permanently, or that such rights are regarded in Islamic constitutional law as constituting *Hukūk Allah* (Rights of God).

Turning to the issue of the automatic devolution of 'law-making' treaties to the successor state, as in the so-called 'dispositive' treaties, no generally accepted legal criteria or basis can be found in international law to support this categorisation, while in Islamic law the only criteria by which this category can be defined is that of sources, that is to say the establishment of uncontested proof that such treaties are defined directly by the Qur'ān or constitute *Sunna* (tradition). This, however, does not cover the so-called multilateral treaties of a constituent character which demand further investigation.

B. Multilateral Treaties of a Constituent Character:

(i) Treaties Establishing International Organisations:

As in the case of British dispositive multilateral treaties, the focus of investigation here is directed to the devolution or non-devolution of British treaties that established Kuwait's membership of international organisations at the date of her independence.

It may be recalled that within international organisations, the question of succession to membership was raised during the League of Nations era by Muslim states such as Iraq and non-Muslim states such as the Irish Free State and during the United Nations era by Muslim states like Pakistan in 1947, and non-Muslim states such as the Federation of Mali. However, all were denied any right of succession to the predecessor's membership and had to be admitted as new members of these organisations. Great Britain as the predecessor
not only of Iraq but also of Kuwait, is a member of such major international organisations as the International Civil Aviation Organisation (ICAO), the International Monetary Fund (IMF), the International Bank of Reconstruction and Development (IBRD), the International Labour Organisation (ILO), the General Agreement on Tariffs and Trade (GATT) and the United Nations (U.N.). Thus the issue to be examined is whether Kuwait in her treaty succession practice followed the rules that had ensued from Iraq's practice and to what extent.

Since Great Britain was a party to the Chicago Convention while Kuwait was under her protection, it might be contended that upon the independence of Kuwait, British rights and obligations established under such conventions in respect of the territory of Kuwait should devolve to the latter at the date of independence because they were locally connected with her territory. The rights and obligations arising from the Chicago Convention on International Civil Aviation contain the constitution of the I.C.A.O. which does not provide for succession upon independence (Articles 91, 92). The non-devolutionary nature of the convention was demonstrated by the legal advisor of the I.C.A.O. according to whom the restrictions on the rights of a sovereign state as established by the International Aviation Code contained in the Chicago Convention and the obligations attached to the membership of the organisation are of such a nature that they cannot bind a new state without her express consent. Furthermore, the opposite view, namely the automatic devolution of the British obligations arising from the convention,
runs contrary to the meaning attributed to the term 'independence' \(^{101}\) in Islamic and international law according to which a state dominates its internal and external affairs. Therefore, this independence would be infringed by the automatic subrogation of the new state to the obligations arising from these treaties without her consent. Hence, the rule of non-devolution as adopted by the convention was strictly adhered to by Kuwait upon her independence and Great Britain's obligations and rights as stated in Article 5 of the Chicago Convention ceased to have effect in the territory of Kuwait pending her adherence to the convention, which was formally declared by the competent authority on 18 May 1960\(^{102}\).

As far as the International Monetary Fund (I.M.F.) and the International Bank for Reconstruction and Development (I.B.R.D.) are concerned, according to Article XX (2) (g) of the I.M.F. and Article XI (2) (g) of the I.B.R.D.\(^{103}\), upon the signature and acceptance of the United Kingdom to these agreements, the United Kingdom accepted them both on .. [.her] ... own behalf and in respect of .. [.her] ... colonies, overseas territories, all territories under .. [.her] ... protection, suzerainty or authority ...

Thus upon the United Kingdom's acceptance of the agreements, they extended automatically to Kuwait as a state under the former's protection. Accordingly, Kuwait was until 1961 regarded by the Fund as a territory "under the authority" of Great Britain. Upon her independence, Kuwait ceased to be a territory "under the authority" of Great Britain in the sense of Article XX, 2 (g) of the Fund Agreement. This event, however, did not affect Great Britain's membership of the I.M.F. although it affected the question of her
quota and borrowing rights and number of votes allotted to her. The article refers to the obligations of members with respect to territories "under their authority" and the I.M.F. is called upon to notice that upon independence Kuwait ceases to come under the authority of Great Britain.

Kuwait followed the same practice with regard to the I.B.R.D., which works in close collaboration with the I.M.F. Under Article II (1) (b) of the I.B.R.D. Agreement, membership of the I.B.R.D. is limited to the members of the I.M.F. and thus the membership resolution taken by the Board of Governors of the I.M.F. decides the question of the obligations of the loan agreements upon state succession. Thus, by law No. 22 for the year 1962, on 13 September 1962 Kuwait formally accepted the articles of the two agreements in her own right.

Unlike the organisations discussed above, the attitude of Kuwait towards G.A.T.T. was substantially different. Under Article XXVI, 5, (a), the United Kingdom applied the General Agreement to Kuwait. Article XXVI (5) and Article XXXIII provide alternative formulae for any successor state such as Kuwait to participate in G.A.T.T. Article XXVI, 5 (c) of the General Agreement states that:

If any of the customs territories, in respect of which a contracting party has accepted this agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this agreement, such territory shall, upon sponsorship through a declaration by the responsible Contracting Party establishing the above-mentioned fact, be deemed to be a contracting party.

Since the date of the acquisition of full autonomy in external commercial relations almost coincided with the date of acquiring full
independence, this article provided a convenient formula, a flexible application that facilitated the voluntary (not the mandatory) devolution of Great Britain's membership in G.A.T.T. to Kuwait. Alternatively, Kuwait upon independence could become a member of G.A.T.T. through the accession procedure provided by Article XXXIII of the General Agreement. Since she was a developing state, Kuwait may have needed to take some time to review her commercial policy before choosing between the two alternatives. For this reason, in 1957 the contracting parties employed a procedure of de facto application to G.A.T.T. according to which the contracting parties, after consulting with the United Kingdom and Kuwait, established a reasonable period of time during which Kuwait or any other newly independent state should continue to apply de facto the agreement in her relations with the contracting parties provided that they reciprocated.

In November 1961, a few months after Kuwait attained full independence and became responsible for her external commercial relations, the United Kingdom, in accordance with the 1957 Procedure of de facto Application, informed the Executive Secretary of G.A.T.T. that Kuwait had acquired full autonomy in her external commercial relations, and that it was for her to decide her future position vis-à-vis the agreement.

As Kuwait wished to become a contracting party to G.A.T.T. in her own name, she had the choice of following either the succession or accession procedure. As regards the succession procedure as illustrated in Article XXVI, 5 (c), Kuwait could become a contracting party "immediately and automatically" by virtue of the sponsorship of
the United Kingdom which had been responsible for the international relations of Kuwait. Kuwait, however, could instead request that the contracting parties should, for a period of two years, apply G.A.T.T. to Kuwait on a *de facto* basis provided she continued to apply the same agreement *de facto* to them. As regards the accession procedure, Kuwait could apply for accession in her own name as a new member after or without *de facto* application, under Article XXXIII, and negotiate the agreement with the contracting parties, "with a view to exchanging tariff concessions on a reciprocal and mutually advantageous basis". After consideration, Kuwait decided to gain as much benefit as possible from the two alternatives and in November 1962, she applied the agreement on a *de facto* basis for a period of two years, from 19 June 1961 (the date of independence), to 3 May 1963.

After the expiry of this period, Kuwait opted to join G.A.T.T. in accordance with Article XXVI, 5 (c), and became a contracting party through the sponsorship of the United Kingdom. Accordingly, she acquired the rights and obligations which had been undertaken on her behalf by the United Kingdom under the relative G.A.T.T. instruments as from 19 June 1961 (the date of independence).

Kuwait, however, followed the accession procedure of Article XXVI, 5 (c) not that of Article XXXIII, with regard to the other subsidiary agreement to G.A.T.T. by which the United Kingdom had been a contracting party. For this reason, the accession of Kuwait to the 1955 Protocol and to the 5th, 6th, 7th, 8th, and 9th Protocols on the rectifications and modifications to the text of the schedules to G.A.T.T., after
approximately two years of de facto application of these subsidiary agreements, became retroactive as from 19 June 1961 (the date of independence) not from the date of notification of succession. Accession through Article XXXIII does not have such retroactive effects.

The I.L.O. \(^{123}\) and U.N. \(^{124}\) do not provide special procedures comparable to those of G.A.T.T. through which Kuwait or any newly independent state could express its consent to become members. This is because the identity and personality of the contracting parties is of paramount importance since the constitution of each organisation regulates the action of the member states, the budgetary shares of its members, and the procedures by which a new member state should be admitted to the membership. These regulations do not, however, prejudge the rules governing the effects of the independence of Kuwait on treaties adopted within these organisations and made applicable to Kuwait by Great Britain in the pre-independence era.

(ii) Treaties Adopted within International Organisations:

An unrestricted application of the rules evolving from the non-devolution treaty practice of Kuwait, more specifically the non-devolution of Great Britain's membership of international organisations, could lead to the collapse of the legal regime adopted within these organisations in respect of the territory of Kuwait, and the occurrence of ruptures in all similar cases could give rise to a fear for the collapse of human relationships. Thus this issue can be examined in the light of the practice of succession of Kuwait in respect of treaties adopted within certain international organisations, namely the I.C.A.O, the I.L.O. and the U.N.
Great Britain was a member of the I.C.A.O.\textsuperscript{125} which embodied the 1929 Warsaw Convention for the unification of certain rules relating to International Carriage by Air, to which Great Britain was a contracting party\textsuperscript{126}. According to Article 40\textsuperscript{127}, any contracting party can extend or exclude the application of the convention to all or any of its dependent territories by means of a declaration at the time of signature, ratification or accession to the convention. Great Britain, however, neither extended the application of the convention to Kuwait nor excluded her from it by express declaration. Thus the convention remained inapplicable to the territory of Kuwait while under British protection until it was amended by Article XXV of the 1955 Amending Protocol to the Warsaw Convention\textsuperscript{128}. According to the new amendment the Warsaw Convention and its subsidiary agreements applied not only to Great Britain but also to her dependent territories, including Kuwait. Subsequently the substantive rules of the convention were incorporated into British municipal law by enacting the additional legislation required by British constitutional law\textsuperscript{129} or by the convention itself\textsuperscript{130}. Upon meeting this constitutional requirement, the convention became not only a part of British municipal law but also part of the municipal law of Kuwait.

Upon her independence, Kuwait continued the application of the Warsaw Convention to her territory until the promulgation of the 1962 Kuwaiti Constitution, when a conflict arose between constitutional provision and the continuous application of the convention since Article 70 of the Constitution states that:

\textit{A treaty shall have the force of law after it is signed, ratified and published in the official}
Gazette. However, treaties of . . . commerce, navigation . . . shall come into force only when made by a law.

Accordingly, only a treaty ratified in accordance with the Kuwaiti constitutional law has the force of law. Thus Kuwait denounced the convention in accordance with Article XXIV of the 1955 Amending Protocol 131 and Article 39 of the 1929 Warsaw Convention 132 and acceded to the Warsaw Convention after enacting law number 20 of 1975 133.

As was the case with Iraq, despite the fact that Great Britain was an original member of the I.L.O. 134 she did not extend any of the conventions adopted within that organisation 135 to the territory of Kuwait.

Great Britain was also a contracting party of the U.N. Charter as well as to many international conventions that had been adopted within the U.N. such as the Convention on the Privileges and Immunities of the United Nations 136 and the Convention on the Privileges and Immunities of the Specialised Agencies 137. Although the conventions do not contain territorial application clauses, the Secretary-General of the United Nations regarded them as internationally applicable to all the dependent territories of the contracting parties 138, including Kuwait prior to her independence.

The criteria of the devolution of such conventions as formulated by the Secretary-General is the existence of a 'legal nexus' between the conventions and the territory of Kuwait as created by Great Britain's accession or ratification 139.

In contradiction, Kuwait did not recognise the conventions as being applicable to her territory unless they provided this expressly
or they had been incorporated into Kuwaiti municipal law. Thus Kuwait established herself as a new party to the Convention on Privileges and Immunities of the Specialised Agencies of 1947, first by limited accession in respect of the I.T.U. on 13 November 1961\textsuperscript{140} and then by another accession to the Convention on Privileges and Immunities of the United Nations on 13 December 1963\textsuperscript{141} which was implemented by Law Number 25 for the year 1963 by which the convention became a part of the municipal law\textsuperscript{142}. Subsequently, Kuwait fully accepted the Convention on Privileges and Immunities of the Specialised Agencies and its amendments\textsuperscript{143} on 29 August 1966\textsuperscript{144}. This practice may be justified simply by the fact that rules or conventions adopted within an international organisation bind no one except the members of that organisation.

It is important to distinguish between multilateral treaties of non-constituent and constituent character in order to identify the rules governing their devolution upon independence. Moreover, such a distinction may be valid between multilateral and bilateral treaties.

2. Bilateral Treaties:

In examining the practice of Kuwait in succession to British treaties, it is convenient and also necessary to make a distinction between multilateral and bilateral treaties since a special legal status associated with each category emerged from the practice of Iraq. Great Britain concluded bilateral treaties on behalf of Kuwait not only with member states of an international organisation but sometimes with the organisation itself in the case of multilateral treaties. It is important to show whether Kuwait upon her independence embarked upon the rules of non-devolution, mandatory
devolution or optional devolution of the predecessor's bilateral treaties.

A. Treaties Concluded with Member States of the Covenant Territory:

Unlike her practice towards her other dependent territories\textsuperscript{146}, Great Britain applied more multilateral treaties than bilateral treaties to Iraq\textsuperscript{146} and Kuwait. She extended the application of various consular conventions\textsuperscript{147} and concluded a series of bilateral treaties with various specialised agencies of the United Nations on behalf of Kuwait\textsuperscript{148}. The legal status of these treaties must be determined at the date of the independence of Kuwait, but it is necessary to examine which criteria and in accordance with which law (international or Islamic) such legal status was determined.

It will be recalled that the legal status of the 1899 Exclusive Agreement under Islamic law was no more than a contract of agency through which Kuwait delegated the conduct of her international relations including the conclusion of treaties to Great Britain. Treaties concluded by the agent on behalf of the principle were not governed by British law because they were concluded between independent states. Similarly, they were not governed by Islamic law, because upon the delegation of the conduct of the international relations of Kuwait to Great Britain by the 1899 Exclusive Agreement Islamic law was replaced by international law in governing these relations including the conclusion of treaties. Unlike Iraq\textsuperscript{149}, Kuwait did not enter into a devolution agreement with Britain and neither did she make any express unilateral declaration before her independence as other newly independent states had done\textsuperscript{150}. At the
date of independence, Islamic law regained its pre-eminence in
governing the external relations of Kuwait and accordingly it was for
Kuwait, not Great Britain, and for Islamic law, not international
law, to determine the legal status of these treaties. A viewpoint
opposing this practice would contend that the general rule of
international law is that a predecessor's bilateral treaties do not
devolve to the successor state at the date of independence whether or not they entered into a devolution agreement or made a
unilateral declaration. Since bilateral treaties are connected with
the identity of the contracting parties and personal to them.
However, since Kuwait based her treaty succession practice on Islamic
legal theory, the mandatory devolution or non-devolution of the
predecessor's treaties was predetermined by certain criteria derived from Islamic constitutional law.

The application of these criteria to bilateral treaties concluded
by Great Britain on behalf of Kuwait with member states of the
covenant territory was justified by the argument that the treaties
were concluded by an agent (Great Britain) on behalf of a principal (Kuwait) and therefore they devolve to Kuwait upon her
independence, not by succession, but as her own treaties in fact and
in law as exemplified by the 1952 Consular Convention concluded
between U.K. and U.S.A., which was extended to Kuwait, and devolved upon her at the date of independence. However, treaties
concluded by Great Britain on behalf of Kuwait with a member state of
the Islamic territory may devolve to the latter in accordance with
different legal rules.
B. Treaties Concluded with Member States of the Islamic Territory:

Unlike British treaties with member states of the covenant territory, those with member states of the Islamic territory are of a multilateral nature despite being bilateral in form in that they were concluded by two contracting parties on behalf of others. They may be divided into dispositive and non-dispositive treaties.

The 1913 unratified Anglo-Ottoman Draft Convention defining the legal status of Kuwait (Part I, Articles 1-2, 5), recognises the validity of all previous treaties which the Shaykh of Kuwait concluded with Great Britain (Part I, Article 3), and defines the boundaries of Kuwait with the neighbouring Arab territories (Part I, Articles 5-7). The convention, however, was not ratified and it might be contended that it thereby lost its binding force, although this may not hold if it can be concluded from the convention itself that the contracting parties intended to make it binding upon signature. Such a conclusion may be derived from the attitude of one of the contracting parties, namely Great Britain, which reaffirmed in 1923 the binding force of the convention upon the receipt of a letter from the Shaykh of Kuwait in which he claimed certain frontiers as defined by the convention. This may be taken as evidence that the convention was signed by an agent on behalf of Kuwait and despite the successive changes in her legal status, the situation created by the convention continued unaffected.

The continuation, however, of the positive effects of the convention is not by virtue of the rules governing succession to 'dispositive' treaties as established in international law but in the rules governing the transfer of rights and obligations from the agent
to the principal in Islamic law. Some of these treaties are regarded in International law as 'political' treaties such as the 1915 treaty between Great Britain and Saudi Arabia and the 1927 Jidda Treaty on Friendship and Good Neighbourly Relationship, yet upon the independence of Kuwait, these treaties continued without modification of their terms or even the requirement of a notification between Kuwait and Saudi Arabia, exactly as if they had been concluded by Kuwait herself.

It is useful to distinguish between those treaties extended by Britain as protecting state and those treaties concluded by Britain as an agent of Kuwait in identifying the rules governing the devolution of treaties to Kuwait at the date of independence. Moreover, the investigation will entail a further distinction between the above-mentioned treaties and those concluded by Kuwait herself.
SECTION 2: TREATIES CONCLUDED BY KUWAIT:

1. Treaties Concluded with Member States of the Covenant Territory:

A. Multilateral Treaties:

(1) Treaties Establishing International Organisations:

The practice of Kuwait towards succession in respect of multilateral treaties which are constituent instruments of international organisations is closely connected with the question of admittance into the organisations themselves. As a multilateral treaty, the constitution of each international organisation defines the procedures by which new member states are admitted. In most organisations, their constitutional provisions exclude succession to membership although in a few international organisations such succession may occur as a result of the interpretation of the relevant constitutional provisions. Consequently, for the purpose of our investigation it is necessary to examine the succession practice of Kuwait in respect of certain international organisations, namely the Universal Postal Union (U.P.U.); the World Health Organisation (W.H.O.); the United Nations Educational Scientific and Cultural Organisation (U.N.E.S.C.O.); the International Labour Organisation (I.L.O.); and the United Nations (U.N.).

Articles 3 and 4 of the U.P.U. Constitution lay down in clear terms the only procedures through which a new member should be admitted, excluding any possibility of succession to membership as a result of the independence of one of the dependent territories of a member state. The constitution, however, does not exclude the application of the convention, as a whole, to a state that has recently come under the protection of a member state, such as the
succession of Kuwait as a result of coming under the protection of Great Britain, in accordance with Articles 4 and 5\textsuperscript{164}. Hence, on 1 April 1948, Great Britain applied the Convention to Kuwait\textsuperscript{165}, but as a result of the evolution of her personality and treaty making competence while under British protection, Kuwait acceded to the Universal Postal Union on 16 February 1960\textsuperscript{166}, which was implemented by Law Number 28 for the year 1967\textsuperscript{167}.

Unlike the Postal Union Constitution, according to the W.H.O. Constitution of 1948, membership in the W.H.O. is open to non-member states of the United Nations (Articles 3, 6) whether dependent territories of a member state (Article 8) or not (Article 6)\textsuperscript{168} as well as the member states of the United Nations (Articles 4, 5)\textsuperscript{169}. According to the Constitution of the W.H.O. there is no constitutional means other than the admission procedures through which a new state can become a member\textsuperscript{170}.

Since Kuwait upon her application to the membership of the W.H.O. was not a member state of the United Nations and was under British protection she followed the procedures laid down by Article 6 of the W.H.O. Constitution which provides for the membership of a state not a member of the United Nations and by Article 8 which provides for associate membership for territories not responsible for the conduct of their international relations. Under Article 8, Kuwait herself applied for associate membership of the W.H.O. on 1 June 1960 and included in her application her acceptance of the Constitution of the organisation\textsuperscript{171}. Subsequently, by Resolution 11 of 9 May 1960, it was decided that: "... the 13th W.H.O. admits Kuwait as a member of the W.H.O., subject to the deposit of a formal instrument..."\textsuperscript{172}
and the instrument of acceptance was deposited with the Secretary-General of the United Nations.

The Constitution of the International Maritime Organisation (I.M.O.) sets up procedures for admission to the membership similar to those in the Constitution of the W.H.O. Great Britain, however, did not declare the application of the I.M.O.'s Constitution to Kuwait or her participation in it in accordance with Articles 9 and 58 of that constitution and consequently, upon the independence of Kuwait the question of succession could not arise. As a result of the non-application of the Constitution of the I.M.O., Kuwait had no choice but to apply for full membership even before her formal independence, in accordance with Article 8 of the I.M.O.'s Constitution and subsequently, she deposited her acceptance of the Constitution with the Secretary-General of the United Nations on 5 July 1960.

According to Article II of the U.N.E.S.C.O. Constitution, membership is open to member and non-member states of the United Nations. As a non-member of the United Nations and under British protection, Kuwait on 25 April 1960 submitted an application for admission to the membership of U.N.E.S.C.O. in accordance with Article II para.2 of the Constitution. In support of that application and in accordance with Article II, para.3 a note was sent on 23 May 1960 from the United Kingdom's Foreign Office to the Director-General of U.N.E.S.C.O. stating,

... I am to state in this connection that Her Majesty's Government regard Kuwait as responsible for the conduct of her international relations.
According to the provision of Article II of the Agreement between the United Nations and U.N.E.S.C.O., the Director-General of U.N.E.S.C.O. transmitted this application to the Economic and Social Council of the United Nations on 2 June 1960. The Social Council decided at its 30th session to inform the Director-General of U.N.E.S.C.O. that it had no objection to the admission of Kuwait to the membership of that organisation. At its 57th session the executive board of U.N.E.S.C.O. adopted a resolution embodying a recommendation to the General Conference that Kuwait should be admitted as a member. Following this, the General Conference in its 11th session decided to admit Kuwait to membership of the organisation.

As regards the I.L.O., under its Constitution Kuwait could neither succeed to Great Britain's membership nor obtain associate membership since Britain did not apply the I.L.O.'s constitution to Kuwait before the latter's independence. Under the new revision of the I.L.O.'s constitution when Kuwait attempted to join the I.L.O. on 21 November 1960, the only constitutional procedures available at that time provided for member states of the United Nations (Article 1, para.3) - Kuwait at that time was not a member of the United Nations - and for the admission of a state not a member of the United Nations (Article 1, para.4). Thus under Article 1, para.4 of the I.L.O. Constitution, the Government of Kuwait informed the Director-General of the International Labour Office of Kuwait's acceptance of the obligations embodied in the I.L.O.'s Constitution. Furthermore, the Government requested that its application for
membership of the I.L.O. be placed before the International Labour Conference at the appropriate time\(^{166}\).

In accordance with para.4 of Article 1 of the I.L.O.'s Constitution, the President of the Conference put the resolution submitted by the selection committee regarding the admission of Kuwait to I.L.O. membership to the vote. In order for Kuwait to be admitted to membership the resolution had to obtain a two-thirds majority of the delegates present and voting. The resolution was unanimously adopted on 13 June 1961\(^{167}\), just six days before the formal independence of Kuwait.

After expressing his gratitude and his thanks to all delegates attending the session, the government delegate of Kuwait declared that:

\[\ldots\text{Kuwait is taking the necessary steps to ratify 7 International Labour Conventions,}\ldots\text{before the end of this conference}^{168}.\]

The distinction between member and non-member states of the United Nations in the constitutional procedures of admission to the membership of the above-mentioned international organisations was articulated in the terms of Article 3 and 4 of the U.N. Charter between "original members" (Article 3) and

\[\ldots\text{all other peace-loving states which accept the obligations contained in the present charter and, in the judgement of the organisation, are able and willing to carry out these obligations}^{169}.\]

\(^{186}\) After her independence on 19 June 1961\(^{190}\) Kuwait applied for membership of the United Nations in accordance with Article 4 of the Charter, but her application was delayed by the U.S.S.R veto\(^{191}\). On 20 April 1963 the following declaration was
presented to the Secretary-General of the United Nations by the Minister for Foreign Affairs of Kuwait:

In connection with the application by the State of Kuwait for membership of the United Nations, I have the honour, on behalf of the government of Kuwait, to declare that the State of Kuwait accepts the obligations contained in the Charter of the United Nations and solemnly undertakes to fulfil them.

Subsequently, at its 1203rd plenary meeting of 14 May 1963 the General Assembly of the United Nations adopted Resolution 1872 (S-IV) admitting Kuwait to membership of the United Nations.

Kuwait's associate membership in the W.H.O. and U.N.E.S.C.O. contained certain rights and obligations that could only be possessed by an international personality which in turn was limited within the scope of these rights and obligations. This personality gradually evolved with Kuwait's admission to full membership in other international organisations such as the I.M.O. and the I.L.O. with the acquisition of more rights and obligations before she attained full independence. Upon Kuwait's admission to membership of the United Nations she possessed an unconstrained personality identical with her pre-independence stature and her associate membership matured, as it had in other international organisations, into a full one. Subsequently, unlike her practice towards Great Britain's membership in international organisations and treaties adopted within these organisations, she followed a different practice towards membership of those organisations entered into by herself. However, the question remains as to whether or not this applies to treaties adopted within these organisations.

(ii) Treaties Adopted within International Organisations:
The practice of Kuwait seems clear towards those treaties concluded under the auspices of international organisations since the constitutional procedures of admission regulate the position of the new member in respect of these treaties and lay down the conditions which must be taken into account in any application of the organisation's membership. Such constitutional procedures, however, do not provide any guidance with regard to the effects of the changing of membership from associate into a full one, i.e. the effects of the change in legal status of a member from dependent into an independent state.

The examination of some of the constitutions of these organisations demonstrates this fact. For example, the W.H.O. is the depositary and administrator of many International Sanitary Instruments, some of which came into force in respect of Kuwait before her admission to associate membership of the W.H.O. or before her independence. These included the Additional Regulations Amending the International Sanitary Regulations No.2.

As regards treaties adopted within the I.L.O., it will be recalled that Great Britain did not apply any of these treaties to Kuwait and thus under Article 1, para.4, of the I.L.O.'s Constitution, Kuwait, in her application for membership of the I.L.O., accepted the obligations embodied in the Constitution, including the Labour Conventions.

As far as treaties concluded within the U.N. are concerned, unlike the Labour Convention, the participation of a new state is subject to the conditions laid down by these treaties according to which the treaties are only open for accession by a member state of
the United Nations, one of the specialised agencies, a party to the statute of the International Court of Justice, etc, or any other state not a member of the United Nations which the General Assembly may invite specifically to participate in these treaties. With regard to the participation of a non-member state of the United Nations in these treaties, the practice of the U.N. Secretary-General\(^{197}\) has been to request a declaration of recognition by a state of the continuity of treaties of which he is a depositary in accordance with certain criteria\(^{198}\). The Secretary-General of the United Nations did not invite Kuwait, unlike Iraq\(^{199}\), to participate in any of these treaties on the grounds that Kuwait was an advocate of the formula of the non-devolution of the predecessor's treaties which did not accord with the Secretary-General's criteria for treaty succession. The continuity, however, of treaties adopted within the other international organisations upon the independence of Kuwait is not only based on the prevailing practice of these organisations, such as the W.H.O.\(^{200}\), but also on the observance by Kuwait of her duties arising from her acceptance of the obligations embodied in their constitutions and her ratification of these treaties as a mature international personality. This negative attitude of Kuwait has characterised her practice not only towards multilateral treaties but also towards bilateral treaties concluded with member states of the covenant territory.

B. Bilateral Treaties:

The attitude of Kuwait will be reviewed with regard to treaties concluded with member states of the covenant territory and with international organisations.
According to the terms of the 1899 Exclusive Agreement between Great Britain and Kuwait, the Shaykh of Kuwait was not prohibited from entering into any agreement with a foreign power even if he failed to obtain the prior consent of the British government. By tacit consent, however, he gradually shared his treaty making competence with the British government. At the beginning, most bilateral agreements and undertakings concluded between Kuwait (the protected state) and Great Britain (the protecting state) regulated the relations between the two parties. These instruments, though, were not registered with the League of Nations in accordance with Article 18 of the Covenant nor with the United Nations in accordance with Article 102 of the Charter and thus were not governed by international law but by the laws of the contracting parties, namely British and Islamic law. At the date of independence, however, and the subsequent pre-eminence of Islamic law in the internal and external relations of Kuwait, these agreements and undertakings were in clear conflict not only with the concept of independence but also with the new legal order of Kuwait. Thus some agreements came to an end on 1 February 1959 as a consequence of the conclusion of another agreement between the British and Kuwaiti governments.

The replacement of one agreement by another which would be consistent with the newly established legal order and independence resulted also from the evolution of Kuwait's treaty-making competence in the pre-independence era, as exemplified by the conclusion of the 1960 Agreement for Air Services between Kuwait and Great Britain. Kuwait also negotiated and signed treaties with international
organisations and independent states besides Great Britain. These treaties cannot be distinguished from international treaties and are registered in the British Treaty Series and in the United Nations Treaty Series. For example, Kuwait and the United State of America concluded an Agreement by an Exchange of Notes of 11 and 27 of December 1960 Relating to Visas and on 29 June 1960 Kuwait concluded an agreement with the United Nations Special Fund concerning the assistance to Kuwait of the latter.

Each successive ruler of Kuwait maintained the 1899 Exclusive Agreement and other agreements and undertakings which had not been registered by international publication until they were finally superseded by the Exchange of Notes of 19 June 1961 between the late Shaykh 'Abdullah al-Sālim al-Sabāh and Her Majesty's Political Resident in the Gulf. This heralded the United Kingdom's recognition of Kuwait as a sovereign independent state and accepted His Highness the Shaykh of Kuwait as having "the sole responsibility for the conduct of Kuwait's internal and external affairs". One result of the agreement was the continuing of assistance by the British government to the Government of Kuwait should the latter request it. This treaty was terminated by the Exchange of Notes between the Kuwaiti Minister of Foreign Affairs and the British Ambassador to Kuwait on 13 May 1968.

The result of the independence of Kuwait on the subsidiary agreements and engagements undertaken, including those relating to the exploitation of natural resources, was their formal abrogation by an Exchange of Notes between the Kuwaiti Ministry of Foreign Affairs and the British Embassy in 1962. However, the other
treaties concluded with Great Britain, the United States of America and international organisations continued to be unaffected since it was impossible to conclude from the construction of the treaties that the intention of the contracting parties had been that they would lapse within a few months of their signature as a result of the independence of Kuwait on 19 June 1961. Therefore, the argument presented by Kuwait in respect of treaties concluded by Great Britain in extension of the limits of the contract of agency, was that Kuwait was a third party to those treaties, *pacta tertiiis nec nocent nec prosunt*, and so was not bound by treaties concluded with the protecting state or any other state. However, this argument is inapplicable to those treaties concluded by Kuwait herself, and moreover, the treaties are couched in the same terms as those treaties in which both parties are independent and there is no reference to the protecting or protected state. The lack of independence, therefore, appears completely irrelevant to the execution of these treaties by Kuwait.

If this argument is valid in respect of treaties concluded by Kuwait with a member state of the covenant territory it must be determined whether it applies to treaties concluded with a member state of the Islamic territory.

2. Treaties Concluded with Member States of the Islamic Territory:

   A. Non-Boundary Treaties:

      (1) Multilateral Treaties:

      As a matter of British practice, the process of the acquisition of treaty making competence by Kuwait began in the early 1920s. Until 1922, most treaties were concluded by Great Britain on
behalf of Kuwait or concluded between Kuwait and Great Britain but thereafter, representatives of the Kuwaiti government began to participate, under British supervision, in the negotiation of those bilateral treaties that were exclusively with the neighbouring Arab states, such as Saudi Arabia in the 1922 Boundary Agreement and the 1942 Trade and Extradition Agreements. Later on, this treaty making capacity was extended to the negotiation and conclusion of more politicised economic and multilateral treaties in late 1960.

In the field of Arab treaty relations, since 1956 Kuwait has taken part in various political and economic activities alongside other independent Arab states, attending, for instance, the Arab Social Experts Conference convened in Cairo on 10 March 1956, and the Arab Social Studies Conference convened in Amman on 25 April 1956. As a full participant, Kuwait attended the first Arab Oil Conference convened in Beirut on 16 October 1960. Furthermore, she attended the first conference of the Oil Producing Countries which held its first session at Baghdad in 1960, where the Organisation of Petroleum Exporting Countries (O.P.E.C.) was established and the decisive role of Kuwait in that event was portrayed clearly by The Times in the following words:

> It may seem anomalous that Britain should still conduct the Sheikh of Kuwait's foreign relations for him, though this arrangement has never prevented him from playing his own important and enterprising role in the Arab world...

As a full member Kuwait attended the second Session of O.P.E.C. which convened in Venezuela on 21 January 1961. In the Baghdad Session...

> ... the Conference decides to form a permanent Organisation called the Organisation of Petroleum Exporting Countries...
The purpose of the creation of this organisation was:

(4) . . . the unification of petroleum policies for the Member Countries and the determination of the best means for safeguarding the interests of the Member Countries individually and collectively.\(^2\)

The said organisation came into existence as a result of the conclusion of a multilateral treaty to which Kuwait was an original contracting party, in spite of the continuation of the binding force of the 1899 Exclusive Agreement. Regarding the situation The Financial Times commented that:

The situation is altered by the announcement that as of January 23, Kuwait took over from Britain control of its foreign relations and is proceeding directly with training Kuwaitis for the diplomatic service.\(^2\)

The factual independence of Kuwait did not raise any question with regard to the continuing in force of these treaties until she attained her formal independence in 1961.

The answer to this question, depends on whether a multilateral treaty has a restrictive nature or not, the numbers of participating states and the object and purpose of the treaty in question. Thus, although the personality of parties to multilateral treaties of a non-constituent character concluded by Kuwait with member states of the covenant territory is not crucial, it often is with regard to Kuwait's multilateral treaties with several states, all or some of which are members of the Islamic territory, in the same way as are bilateral treaties in international law. Examples of such restrictive multilateral treaties are the 1945 Pact of the Arab League and the treaties establishing O.P.E.C. Since the multilateral treaty creating O.P.E.C. is regarded as the constitution
of that organisation, the practice of Kuwait in respect of the predecessor's treaties of a similar type supports the view of non-devolution, in the sense that the personality of the parties is of the essence in these treaties. The constitution of the organisation usually defines its object and purpose and the political orientation of its members. This is equally true with regard to similar treaties to which Kuwait became a member state by herself before independence, with the reservation that if Kuwait was admitted to associate membership, this would mature into full membership following independence.

(ii) Bilateral Treaties:

During British protection, Kuwait concluded bilateral treaties only with Arab states, namely Saudi Arabia and Iraq. The treaties were published in national and international treaty series and implemented in the same manner as treaties between two sovereign states.

The bilateral treaties negotiated and signed by Kuwait with Saudi Arabia relate to extradition, friendship and trade. Article 9 of the Extradition Agreement, Article 12 of the Agreement of Friendship and Article 10 of the Trade Agreement state that the agreements, "shall come into force as from the date of exchange of instruments of ratification . . .". From this citation it can be concluded that the provisions referred to the 'ratification' of the agreement by the British government as an original contracting party, because the British government, through its political agent, acted as agent for the ruler of Kuwait in concluding these treaties. Since a treaty concluded by an agent does not bind the principal if the
agent exceeded his authority, the ratification mentioned in the provisions must be that of the ruler of Kuwait and not the British government. If the provision did refer to the ratification of the agreement by the British government it must be defined as the ratification of an agent, the effects of which go to the principal.

At any rate, the change of the status of Kuwait from protected to independent state introduces the issue of succession and since the prevailing treaty succession practice of Kuwait is that the predecessor's treaties do not survive such change, these treaties do not devolve to Kuwait at the date of independence. The difficult question, however, is whether Kuwait's action is merely voluntary or made obligatory by a certain body of rules relating to succession to treaties.

Consistent state practice in treaty succession generally suggests that trade and friendship agreements and extradition agreements do not survive independence except by the consent of the successor state and this is confirmed by the practice of Iraq in respect of bilateral treaties. Such consistency of action by independent governments may be submitted as evidence that a consistent practice and *opinio juris* as a requirement of customary law has been regionally accepted to this effect. In general, Kuwait's practice in treaty succession is not inconsistent with international practice but as for those treaties concluded on behalf of Kuwait by an agent with a member state of the Islamic territory (and since the effects of these treaties goes to the principal not to the agent), under Islamic law the continuing in force of these treaties after independence is governed by the rules of agency and
not by those governing state succession. Unlike boundary treaties, the rights and obligations created by these treaties are inseparable from them and the devolution of the treaties requires the devolution of these rights and obligations.

B. Boundary Treaties:

The problem of succession to boundary treaties has been crucial and has created controversial issues in international legal relations, not only for newly independent Islamic states but for non-Islamic states as well. An examination of this issue in the context of Islamic legal theory is very complex and surrounded by many issues relating to the birth of new Islamic states which have not yet been resolved. In the past, Muslim jurists have paid more attention to the theoretical basis of boundaries between Dār al-Islam (the Islamic territory) and Dār al-ʿĀhd (the covenant territory) and never established a specific theoretical basis of state succession to boundary treaties occurring within the Islamic territory because the basic principles of Islamic law reject the establishment of such boundaries. Furthermore, the new phenomenon of the creation of many Islamic and Arab states has added more complexity to the subject. Therefore, when examining the practice of Kuwait there are two problems; the first relating to the effects of the establishment of boundaries and subsequently, the effects of independence on boundary treaties and the second relating to the validity of boundaries and boundary treaties in Islamic law. These problems will be examined in the light of the general rules of Islamic law with regard to the effects of Kuwait's independence on
treaties establishing the Kuwaiti-Saudi Arabian boundaries and the Kuwaiti-Iraqi boundaries.

(i) Treaties Establishing the Kuwaiti-Saudi Arabian Boundaries:

The Southern boundary of Kuwait, which later became the Kuwaiti-Saudi Arabian boundary upon the establishment of the Kingdom of Saudi Arabia, was first demarcated by the 1913 unratified Anglo-Turkish Convention. Upon the establishment of the Kingdom of Saudi Arabia at the beginning of the twentieth century the problem of siting her boundaries with Kuwait and Iraq arose. Following the conclusion of the 1915 Treaty between the British government and Ibn Saʿud by which Great Britain recognised the independence of Saudi Arabia (Article 1) in return that Ibn Saʿud:

... refrain from all aggression on, or interference with the ... (territory)... of Kuwait... (Article 6),

a compromise settlement was reached as a result of negotiations between Sir Percy Cox, representing the British government and acting on behalf of Kuwait and Iraq, and the late King ʿAbdulʿAziz bin Saʿud at al-ʿUqair. The settlement consisted of the establishment of a neutral zone of 2000 sq. m embodied in the Uqair Convention of 2 December 1922 which constituted not only a definition of the Kuwaiti-Saudi Arabia boundaries but also the establishment of a neutral zone in which:

Najd and Kuwait will share equal rights until through the good offices of the Government of Great Britain further agreement is made between Najd and Kuwait concerning it.

Thereafter, the issue of moving the treaty boundaries of both Kuwait and Saudi Arabia arose.
An examination of the subsequent treaties concluded by both Saudi Arabia and Kuwait shows that treaties concluded by Saudi Arabia up to 1927 did not refer specifically to the neutral zone (such as the 1927 Jiddah Treaty\(^{246}\)) as did treaties concluded by Kuwait up to that date. Under the 1925 Kuwait Order-in-Council\(^{247}\) which was abolished by the 1961\(^{248}\) Exchange of Notes, it seems that all treaties of Kuwait from the 1899 Exclusive Agreement up to 1961 regarding the independence of Kuwait\(^{249}\) applied to the neutral zone, insofar as the rights of Kuwait were concerned there. This rule has not only emerged from the practice of Kuwait in this regard, but has become a universally established rule. In the case of Gastaldi v. Lepage Hemery of 1927\(^{250}\), the Italian Court of Cassation held that the Franco-Sardinian Treaty of 24 March 1760 concerning the execution of judgement was effective as between France and Italy and automatically extended to any territories newly acquired by the two states. This principle is reaffirmed by the Supreme Court of the United States in the case of Kolovrat et al. v. Oregon of 1951\(^{251}\). However, neither Kuwait nor Saudi Arabia could extend their treaty boundaries exclusively to the neutral zone, unless both governments agreed, as evidenced by Article 8 of the 1942 Extradition Agreement\(^{252}\) which states that:

The provisions of this Agreement shall apply to the area on the Najd-Kuwaiti frontier hereinafter termed the neutral zone, whose limits were laid down in the Protocol of Uqair dated the 2nd of December, 1922 . . . .

Such a joint agreement on moving treaty boundaries was not reached in subsequent treaties and the two parties concluded in 1964 an agreement on the partition of the territory of the neutral zone.
into two equal parts, one annexed by Saudi Arabia and the other by Kuwait. This was followed by another agreement in 1965 for the same purpose without affecting, of course, the existing rights under the 1922 Uqair Convention. Under all these agreements, however, the question of offshore zones and the status of the Karu and Umm al-Maradim Islands has remained open.

The situation under the arrangement of the 1965 Agreement is analogous to the cession of territory in that the boundaries of each contracting party moved to the newly defined boundary, but different in the sense that each contracting party is considered to be cedent and cessionary at the same time. In addition, it is not the territorial authority but the exercise of that authority which was ceded.

The effects of Kuwait's independence on these treaties and those establishing the Kuwaiti-Iraqi boundaries will be examined simultaneously after stating the facts behind the latter's treaties.

(ii) Treaties Establishing the Kuwaiti-Iraqi Boundaries:

In 1905 Lorimer stated that:

Excluding the Island of Bubiyan, which is claimed by the Sheikh of Kuwait but is at present (1905) occupied by the Turks, and the Island of Warbah, the ownership of which would naturally follow that of Bubiyan, we may reckon the maritime possessions of Kuwait to consist of the Island of Failakah which, with its Northern and Southern outliers of Mashjan and 'Auhah, is situated at the mouth of Kuwait Bay, and of the islets of Kubbar, Qaru and Umm al-Maradim...

On 3 November 1914 Sir Percy Cox, the British Political Resident in the Gulf sent a letter to the Shaykh of Kuwait in which the British government recognised Kuwait as an independent sheikhdom
within her boundaries as defined by the 1913 Anglo-Ottoman Draft Convention\textsuperscript{267} under British protection. Following the conclusion of the 1922 Treaty of Alliance between Great Britain and Iraq which embodied the conditions of the mandate\textsuperscript{268}, Great Britain undertook to conduct the international relations of Iraq exactly as she did in respect of Kuwait. Thus in the Uqair Convention, Sir Percy Cox (at this time the British High Commissioner for Iraq) represented not only Kuwait but also Iraq in order to define the boundaries of these states with the Kingdom of Saudi Arabia. As a result of this convention, two neutral zones were created; one between Kuwait and Saudi Arabia and the other between Iraq and Saudi Arabia\textsuperscript{269}. Subsequently, the Kuwaiti-Iraqi boundaries were defined in the friendly agreement of 1923\textsuperscript{260} and reaffirmed upon the independence of Iraq by the 1932 Exchange of Notes between the Prime Minister of Iraq and the Shaykh of Kuwait\textsuperscript{261}. Between 1938 and 1958 however, Iraq rejected the demarcation of the boundaries on the basis of the 1932 Exchange of Notes on the grounds that she had entered into that agreement under political pressure while she was under British domination\textsuperscript{262}. After 1958, the revolutionary government under 'Abdul Karim Kasim rejected not only these boundary treaties but also claimed that Kuwait constituted an integral part of Iraq. Upon the overthrow of Kasim's government, the new government of Iraq concluded a new agreement with the Government of Kuwait in 1963\textsuperscript{263} in which Iraq recognised the independence of the State of Kuwait within the boundaries delineated by the foregoing instruments.

Turning now to the question of the validity of the boundary treaty and the effects of the independence of Kuwait on these
treaties, from the start, one view claims that the principle of *uti possidetis juris* as exists in international law must be excluded as of no legal force in governing the effects of Kuwait's independence on treaties establishing the Kuwaiti-Saudi Arabian and the Kuwaiti-Iraqi boundaries, in the sense that Great Britain did not possess sovereignty over the territory of the three states upon the delimitation of their territorial boundaries. The enforceability of this principle depends in the first place on its recognition by the states concerned, since in the case of Colombia v. Venezuela of 1922, where this principle was first established, the Swiss Federal Council as arbitrator stated that since Colombia and Venezuela adopted the principle of *uti possidetis* which became a part of their respective constitutions, the formal transfer of territorial boundaries was not necessary. Thus Kuwait, Saudi Arabia and Iraq did not constitutionally recognise this principle, and moreover, the transfer of the territorial boundaries was formally achieved by treaties not by any other act, such as prescription.

It is to be noted that the 1962 Kuwaiti Constitution in Article 2 states that, "... the Islamic *Shari'a* shall be a main source of legislation" and in Article 1 states that: "... Kuwait is an Arab state ... the people of Kuwait are a part of the Arab nation".

Unlike the Iraqi constitution, the Kuwaiti Constitution defines the *Shari'a* as "a source of legislation" positively though not satisfactorily. Accordingly, if the *Shari'a* is "a main source of legislation" in the Kuwaiti legal system and if the delimitation of a state's boundaries is an act of a state's authority, it is vital to ascertain, before discussing the effects of Kuwait's independence on
boundary treaties (as in the case of Iraq\textsuperscript{267}), where the sovereignty of the territory, under international and Islamic law was vested after coming under British protection.

As previously mentioned, the preponderant view in international law is that sovereignty over A-mandated territories was vested in the mandated communities\textsuperscript{269}, albeit in suspense, and not with the mandatory powers. Since the legal position of Iraq as an A-mandated territory was similar in many respects to that of the protected state of Kuwait and as both were protected by Great Britain, sovereignty over the territory of Kuwait was neither vested with the protecting state nor the Kuwaiti government. Sovereignty, according to Islamic law, is vested only in Allah, only territorial authority or viceregency was vested in the Kuwaiti government, and under the 1899 Exclusive Agreement only agency was vested in the British government to exercise on behalf of the Government of Kuwait some of that authority. If Great Britain in carrying out such agency concluded a boundary treaty, the legal effects of the treaty devolve to the principal.

Under Islamic law, the types of treaties and boundaries which divided the Islamic territory into different and separate states are questionable if not illegal. The aim of this prohibition is to minimise the concept of territorial authority in order to achieve the eventual fusion of these territorial authorities established by treaties within the Islamic territory. However, boundary treaties may be assimilated under the category of private contracts and the boundaries created by them seen as boundaries of private property. Thus succession to boundary treaties can be assimilated within the
governing principles of the succession of a natural person to a private contract defining a certain property\(^{269}\). This opinion is only valid according to Islamic law if it is reaffirmed by the subsequent practice of the emerging Islamic and Arab states, since this amounts to \(\text{idjm}^{\prime}\) (consensus), otherwise the question of succession to boundary treaties is to be omitted from the whole concept of state succession in order to be settled on other legal grounds.

In sum, the following rules may tentatively be identified in Kuwait's practice on treaty succession. Unlike Iraq, up to this stage only one unified body of rules has emerged from Kuwait's practice on treaty succession. This body comprises the Islamic legal rules governing the devolution of treaties from the parent state (Islamic State) to Kuwait and upon the replacement of the parent state by a non-Muslim state (Great Britain) in the conduct of the international relations of Kuwait, the criteria of which were exclusively derived from Islamic law not international law since the delegation was entrusted by mutual and formal agreement, namely the 1899 Exclusive Agreement between Great Britain and Kuwait and its subsidiary agreements. Unlike Iraq, however, the rules governing the devolution of treaties and the criteria determining such devolution upon the replacement of the predecessor state (Great Britain) by Kuwait in the conduct of the international relations of the latter were exclusively derived from Islamic law because Kuwait before her independence did not enter into a devolution agreement with Great Britain and so devolution is only governed by the law recognised by the independent State of Kuwait.
The continuous domination of Islamic law in the territory of Kuwait before and after her independence is evidence that her independent legal identity has developed from the Islamic legal identity and thus the effects of her independence on treaties concluded with Muslim states are governed exclusively by this law and the regional principles of Arabic public law whenever the latter prove to be applicable.
CHAPTER VI
ARE THERE RULES GOVERNING TREATY SUCCESSION IN ISLAMIC LEGAL THEORY?

SECTION 1: THE ISLAMIC CONCEPT OF STATE SUCCESSION:

1. Succession in Fact:

   A. Factual Identity in Islamic Legal Theory:

   The early encounter of the Muslim and non-Muslim communities gave rise to the establishment of Dār al-Islam and the subsequent creation of Dār al-Harb. Thus, the problem of defining the identity of Dār al-Islam arose between Muslim jurists as a result of the extension of the Islamic State's authority over territories that belonged to Dār al-Harb or the relinquishment of that authority over such territories. This bears comparison with problems faced by modern international law concerning the 'identity and continuity' of a state or its 'extinction'.

   Non-Muslim and Muslim jurists have adopted certain criteria by which a state can be identified. Due to the rules of international law governing state identity, doctrinal confusion has existed among non-Muslim jurists. For example, Marek has excluded "the question of physical or material identity of states" as a criterion of state identity, and subject to the reservation that "any definition of legal identity is, to some extent, relative", defines state identity as:

   The identity of its international rights and obligations, as before and after the event which called such identity in question, and solely on the basis of the customary norm 'pacta sunt servanda'.
According to this definition it is impossible for a state to disappear (extinction) and then reappear (continuity). Crawford has defined state identity by referring to basic criteria; that is, primarily, territory, population, and independent government, and as subsidiary criteria (but criteria which may be particularly important in doubtful or marginal cases), permanence and recognition.

The actual disappearance of any one of these elements leads to, as a legal consequence, the extinction of a state although other changes in one or more of these elements may leave its identity intact.

The views of Muslim jurists on this subject concur with Crawford to the extent that territory and population are important elements in identifying Dār al-Islam (the Islamic territory) or the legal status of Dār al-Ḥarb (the territory of war) but differ in that these are not the only elements used in identifying a state or territory. The elements of territory, population and government must be identified either as a part of Dār al-Islam (the Islamic territory) or Dār al-ʿĀbd (the covenant territory) by referring to the treaty rights and obligations of the territory in question towards Dār al-Islam. This is similar to the view of Marek, since according to the majority view of Muslim jurists, if the territory concerned is inhabited by Muslims and governed in accordance with Islamic rules by virtue of the original ʿamān (safe-conduct) concluded with the ultimate authority, then it constitutes a part of Dār al-Islam. Any territory over which Islamic rules are not predominant is not regarded as a part of Dār al-Islam despite being adjacent to it. This principle of Islamic law relates in one way or another to the so-called 'general
principles of law" which are recognised by civilised nations and embodied in Article 38 of the I.C.J.'s Statute.

For instance, in the 1955 Case of Bertschinger v. Bertschinger of 1955, the Swiss Federal Court of Civil Division considered whether a treaty between Switzerland and the Grand Duchy of Baden of 1856 which regulated, inter alia, questions of private international law and the jurisdiction of courts was still valid, in view of changes that had occurred, namely that the Grand Duchy of Baden had become a member state (länder) of the 1871 German Reich, that a German law of 1934 had terminated the independent sovereignty of the German Länder, and that after the Second World War and before the creation of the Federal Republic of Germany, a Länder called Baden came into existence in the Southern part of the previous territory of Baden in 1953. The court held that the political authorities were alone competent to denounce a treaty or to order its temporary non-enforcement (such as the treaty of aman in Islamic law) as a measure of retorsion. Moreover, the court further held that the 1856 Treaty was still in force under the Constitutions of the 1871 and 1919 German Reich and that the 1934 German law concerning reconstruction, which made the Länder into a single administrative district, did not affect the validity of the 1856 Treaty, since the treaty laid down rules of private international law for the whole territory of the contracting parties.

Therefore, the court held that:

In these circumstances it can be assumed without question that Articles 5 and 6 of the Treaty of 1856 remain applicable in Switzerland and in the territory of Land Baden as it was prior to 1934,
where Öhningen is situated, as a result of the tacit renewal of the Treaty.

Thus the continuous tacit renewal of the treaties of amān between various parts of Dār al-Islam and the transfer of the legal status of Dār al-Harb into Dār al-‘Ahd by various covenants and their continuous tacit and expressed renewal justifies a brief analysis of the concept of each territory in Islamic legal theory for the purpose of treaty succession.

(1) The Concept of Dār al-Islam (Islamic Territory):

Dār al-Islam consists of all Islamic territories inhabited by Muslims and non-Muslims who are permanently domiciled there. Muslim jurists distinguish between the Islamic nation and the Islamic State in that Muslims and Dhimmis are regarded as nationals of the Islamic State whereas Dhimmis are not members of al-umma al-Islamiyya (the Islamic nation). Islam as a religion regards all Muslims as constituting a single nation whereas Islam as it constitutes diinsiyya (nationality) connects Muslims and non-Muslims together in the political community of the Islamic State. The Shari’a (Islamic law) is the constitution of this community, obedience to which is an obligatory requirement upon the Islamic government for the protection of its embodying principles of justice, equity and freedom and the practice of the teaching of Islam must be followed as opposed to the grand aim of the establishment of a world government; an aim that is accredited to Islam by many international jurists or invented by its opponents.

This territorial organisation of Dār al-Islam resembles in many respects what has been called the 'unitary state' save that the
concept of geographical or political boundaries established in modern international law is not applicable since Dār al-Islam is linked with the Islamic religion and is therefore the national home of any Muslim as al-Qur'ān unambiguously declares. However, the existence of various Muslim states within Dār al-Islam, according to Abu Ḥanifa's view, does not affect its integrity since the populations of these states enjoy the privileges and guarantees of the original aμān (safe-conduct) which was concluded between the Islamic State and the ultimate authority of these territories despite the fact that they no longer base their conduct on Islamic law. Taking a contrary position, Abu Ḥanifa's disciples, Abu Yūsuf and Muḥammad bin al-Hasan al-Shaybānī, regard these states as members of Dār al-Harb and not part of Dār al-Islam. Abu Ḥanifa's view is preponderant among Muslims and in accordance with Islamic law which governs the legal identity of Dār al-Islam. Thus any transfer of a territory from Dār al-Islam to Dār al-Harb or vice versa may raise not only the question of succession in fact but also that of succession in law.

(11) The Concept of Dār al-Harb (Territory of War):

Dār al-Harb is a territory over which non-Islamic sovereignty exercises authority in accordance with its own legal rules. No treaty relations whatsoever exist between its government and the Islamic State to deny any aggressive intentions it may have towards Dār al-Islam.

The founder of the Iraqi School, Abu Ḥanifa, maintained that the exercise of non-Islamic sovereignty over a part of Dār al-Islam, the occupation of a part of Dār al-Islam by a foreign power, apostasy by the population of certain part of Dār al-Islam and their reversion to
pre-Islamic rules, or a breaking of the rule of *amān* (safe-conduct) which is concluded with the Islamic State by the local authority of a part of *Dār al-Islām* do not constitute any alteration of the Islamic identity of the territory in question which is regarded as remaining a part of *Dār al-Islām* unless three conditions exist. These are, (1) the replacement of Islamic by non-Islamic rules in all the affairs of the territory concerned; (2) the territory concerned being firmly connected with a non-Islamic territory which is at the same time adjacent to *Dār al-Islām* when aggression from that territory towards *Dār al-Islām* may be expected; (3) Muslims and *dhimmis* no longer being secured by means of the original *amān*, concluded between the ultimate authority of the territory concerned and the Islamic State, as a result of the occupation of this territory by a foreign power.

Abū Yusuf and Muḥammad bin al-Ḥasan al-Shaybānī maintained that only the replacement of Islamic sovereignty and rules by non-Islamic sovereignty and rules provides the condition for the alteration in the Islamic identity of a territory and it subsequently becomes a part of *Dār al-Harb* whether or not it is adjacent to *Dār al-Harb* and whether Muslims and *dhimmis* continue to enjoy their first *amān* or not. The majority opinion of Muslim jurists from the Ṣahīfī, Mālikī, and Ḥanbalī Schools concurs with this theory while the view of the Shi‘ah Zaydī agrees with Abu Ḥanīfa in that a part of *Dār al-Islām* over which the rules of Islam have been relinquished must be adjacent in order to be transferred to *Dār al-Harb*.

According to Abu Ḥanīfa's third condition, if the inhabitants of a territory entered into an *amān* with the Islamic State but
subsequently due to pressures of war or other circumstances the Islamic State ceded that territory to a foreign power, it would not be regarded as a part of Dār al-Ḥarb as long as the occupying power did not expel Muslims and those Muslims and non-Muslims remained faithful to their āmān with the Islamic State. This situation could not be achieved except by the establishment of peaceful relations between the Islamic State and the new occupant. However, if the inhabitants abolished their āmān and supported a new occupant in a war against the Islamic State then the territory would become a part of Dār al-Ḥarb.

Abu Yūsuf and Muḥammad bin al-Ḥasan al-Ṣaybānī in contending that the dominance of Islam in any territory means the dominance of its rules, conform to Abu Ḥanifa's first condition mentioned above but their views differ with regard to his third condition of 'adjacency' since they do not regard it as a prerequisite for the change of the Islamic identity of a part of the Islamic territory. This seems more appropriate to the modern world where the advancement of technology has meant that military equipment can reach a target in a very short time irrespective of adjacency. Similarly, Abu Ḥanifa's requirement of al-āmān was a product of his time when the fear of war and humiliating treatment by foreigners prevailed. Nowadays āmān (safe-conduct) has been established in most parts of the world and Muslims and non-Muslims can practice their religion without fear or intervention by the local authority. Thus today, the only requirement that identifies a territory as a part of Dār al-Islām is the dominance of a legal regime whereby the sovereign governs that
territory and its inhabitants in conformity with the majority view of Muslim jurists.28

According to Abu Hani fa's view, peace provides the basis of the relations between Dār al-Islām and a non-Islamic territory which is not regarded as a territory of war unless it is seen as a potential aggressor either through the abolition of the local authority of the amān (safe-conduct) or by being adjacent to the Islamic territory where there is no 'ahd (covenant) stabilising the relations between the two states. This is clearly emphasised by the fact that in al-Qur'ān, djihād (holy war) is only permitted either for defence against aggression towards Muslims and non-Muslims or for the protection of the mission of Islam and its free practice.29

This is borne out by the practice of the Prophet who, with the immigration from Makka as a result of the Kuraysh's oppression and humiliating treatment of Muslims and the establishment of the Islamic State in al-Madina, regarded al-Madina as constituting Dār al-Islām and Makka as constituting Dār al-Harb. However, upon the conclusion of the Peace Treaty of al- Hudaybiya, Dār al-Harb (the territory of war) was altered by the Sunna of the Prophet.30

(iii) The Concept of Dār al-'Ahd (Covenant Territory):

Dār al-'Ahd denotes a territory which has never been occupied by the Islamic state but whose ultimate authority has entered into treaty relations with the Islamic state with or without paying al-Kharāj (the land tax) to it.31 Such territory remains outside Dār al-Islām and outside the sphere of Islamic law and the relations between the two territories are governed in accordance with the rules and stipulations embodied in the treaty.32 By virtue of the treaty
relations between the member states of "Dar al-"Ahd and the Islamic State, some of these states may come under Islamic protection\textsuperscript{36} with others remaining independent. Accordingly, as far as the application of Islamic rules to Muslims is concerned, al-Shāfi`ī and the majority of Muslim jurists regard the world as constituting one "Dār (territory)\textsuperscript{37} although the Hanafīs remain faithful to the division of the world into "Dār al-Islām and "Dār al-Harb as long as there are no peaceful treaty relations between the two territories.

The division of the world into several territories is not only connected with Islamic law but also inherent in the pre-existing legal orders. For example, Roman law divides individuals into three classes namely, Romans, the citizens of Rome who possessed all rights and were treated favourably\textsuperscript{38}, foreigners (called enemies) and citizens of friendly neighbouring countries who were regarded as being outside the pale of Roman law unless a treaty of alliance or friendship existed between their countries and Rome\textsuperscript{39}. Subsequently, the world was divided into Roman territory, the territory of enemies and the territory of the allies, until the emergence of modern international law. Based on the principle of reciprocal treatment as embodied in the constitution of the Islamic State, it followed world practice until divisions were altered by a series of treaties, the initiative for which came from the Islamic State in 1535\textsuperscript{40}. The treaty was important both for enforcing the Islamic principles of recognition of member states of "Dār al-Harb and as a step forward in the movement towards harmony in the relations between Muslim and Christian states in one community. Subsequently, the Christian European states reciprocated the Islamic State's 1535
invitation and invited the latter to participate in the 1856 Paris Peace Treaty\textsuperscript{41}, in the Covenant of the League of Nations\textsuperscript{42} and in the Charter of the United Nations. Thus the League Assembly adopted the 1924 Resolution on the Development of International law according to which a committee of experts was to be established to represent "the main forms of civilisation and the principal legal system of the world"\textsuperscript{43}, a revolutionary principle espoused by Article 13, 1 (a) of the U.N. Charter and put into practice in Article 8 of the I.L.C.'s Statute which states that:

\ldots and that in the commission as a whole representation of the main forms of civilisation and the principal legal systems of the world should be assured.

This implies the recognition of the Islamic legal order, an act which facilitated the gradual disappearance of the boundaries between the Islamic and international legal orders and has helped to create a degree of unity in the world and establish the unified legal order that presently operates in the international community and is enshrined in the U.N. Charter and the subsequent U.N. multilateral conventions.

B. Definition of Succession in Fact:

Succession in fact may be defined as the replacement of the Islamic State by a member state of the covenant territory or vice versa in respect of a given territory and in accordance with certain criteria. Such replacement may be total in the case of the absorption of a Muslim state by a non-Muslim state or vice versa or partial such as the cession of a part of Dār al-Islam to a non-Muslim state or the cession of non-Muslim territory to the Islamic State.
Therefore, the replacement of one Muslim state by another does not constitute succession in fact but the continuity of Islamic legal identity.

2. Succession in Law:

A. Legal Identity in Islamic Legal Theory:

In international law, identity and continuity are confused with state succession. Within Dār al-Islam (the Islamic territory) they are inseparable in that no succession arises since according to Islamic law any state that evolved within that territory was not regarded as new but enjoyed imārat al-istīla' (assumption of governorship by force) with or without the 'international capacity' to enter into treaty relations with a member state of Dār al-ʿAbd (the covenant territory) prior to the abolition of the Islamic Khilāfa (the central government of the Islamic State). According to Islamic law, despite any territorial disintegration or crumbling of the governmental legal order no succession occurs. Rights and obligations acquired by the Islamic State, whose legal identity is intact, continue and any subsequent territorial changes or constitutional constructions are irrelevant.

Both Muslim and non-Muslim jurists are in complete agreement that the test is 'identity' but according to Islamic law under the doctrine of imāra (power), imāra khasa (limited power) or imāra ʿāmma (full power) may be conferred upon an amīr (governor). Only an amīr possessing imāra ʿāmma can enter into a treaty of cession of territory either from or to Dār al-Islam with a member state of the covenant territory. According to this, territory was transferred from Dār al-ʿAbd (the Byzantine territory) into Dār al-Islam and came
to possess Islamic identity by the domination of the Islamic rules over that territory.

\textit{Imāra 'Āmma}, however, may be achieved by \textit{imāra al-istila'} (assumption of governorship by force) in which the \textit{amīr} possesses not only 'international capacity' but also 'full treaty-making capacity' as in the case of Iraq, but under such \textit{imāra}, (governorship) if a state is established the \textit{amīr} usually obtains recognition of his power from the \textit{Khālīfa} in return for the continuing in force of Islamic law over that part of Dār al-Islam. The Islamic law criteria of identity determines that in spite of the competence to enter into treaties with non-Islamic states, the new state remains factually and lawfully a part of Dār al-Islam. As in the British Commonwealth, the French community and French system, limited power may be conferred upon the government of a territory including the participation in the negotiation, ratification or signature of treaties and this limited power cannot by itself lead to the creation of a new identity unless it is recognised not only by the mother state, as in the case of Iraq, but by other states. In the Commonwealth and French systems, however, full power may be acquired by force as in Islamic law, simply by secession from the Commonwealth or French system. Examples, include the secession of the Irish Free State from the British Empire and Algeria from the French system, and the creation of a new identity that belongs to the newly established state does not depend on recognition by the mother state but on that of the international community.

Any changes occurring exclusively within Dār al-Islam are regarded as municipal changes, for Dār al-Islam is not only an
attribute of the Islamic State but also the sphere of the competence of Islamic law which compares with the functioning of a state's territory in international law.

Within this territorial sphere the umma (the Islamic nation) is entrusted with the enforcement of the sovereign will of Allah as enshrined in the Shari'a (Islamic law) and the safeguarding of this enforcement. With regard to this, the Qur'an states,

Thus have We made of you an Umma justly balanced that ye might be witnesses over the nations...

Thus, the term 'umma' can be used to denote 'nation' or 'state', the people of the latter being Muslims and non-Muslims.

The umma delegates the task of the enforcement and the safeguarding of the Shari'a to the Khalifa by the principle of al-bay'a (delegation of authority), which implies that the obedience of the members of the umma to the Khalifa is required so that he may carry out his tasks. Hence, the authority of the Khalifa is derived mainly from his vicegerency and not from his sovereignty.

The notions of siyada (sovereignty), mulk (monarchy) and sultân held by the legal order of the pre-Islamic Arab political entities were replaced by the Islamic legal order in which there is no supremacy for any human being but submission (of Muslims) to God and the relations between Muslims and non-Muslims are governed by one legal order known as the Khilâfa.

The notion of the Khilâfa was not derived from any pre-Islamic legal order. It is an Islamic notion but has no defined role. However, the Khilâfa legal order was transformed under the Umayyids into a secular body but later reverted to a religious organ under the
Abbasids and the Ottomans until the disintegration of the Islamic State under Ottoman rule into several states after World War I. Since then, Iraq and Kuwait have emerged as sui juris cases with new doctrines derived mainly from the values of Islam and their contribution to the development of international law has been significant. Hence, the definition of certain terms with abstract meanings, followed by analytical scrutiny of the substance of the Iraq doctrine of devolution and the Kuwaiti doctrine of non-devolution based on the above mentioned concepts is necessary.

(i) Definition of Terms:

Since the sources of al-siyar, (Islamic international law) are the same as those of the Shari'a (Islamic private law), the subject of succession is governed by one set of rules, yet the use of certain technical terms has created a very difficult problem in international jurisprudence as well as in Islamic jurisprudence. In Islamic law, two terms identifying succession exist, namely 'al-irth', (inheritance) and 'istiqlaf', (succession). In Islamic jurisprudence the term 'al-irth' (inheritance) denotes the lawful replacement of a natural person upon his death by another in respect of his properties and rights. The replacement occurs automatically in respect of the deceased private property and rights of the deceased but it does not include any obligations since they are removed from the inheritance before the replacement occurs. In this regard al-Qur'an states that:

... If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two get a sixth; but if more than
two, they share in a third; after payment of legacies and debts...

Thus the fathers of Islamic international law have used the term 'inheritance' interchangeably between the cases of al-siyar (Islamic international law) and those of the Shari'a (Islamic private law) and they have been followed by some of the moderate Arab jurists.

The term 'istikhlāf' (succession) denotes the replacement of one person during his life-time by another in respect of the holding of the prayer, leadership of the Islamic army or his position in the judiciary as a voluntary act, or the replacement of the imām upon his death by another. This is called Khilāfa (vicegerency) and is regarded by all Islamic schools as an obligatory task of the umma (Islamic nation). The Qur'ān employs the term vicegerent to denote the two cases. As regards the first case al-Qur'ān states,

Behold, thy Lord said to the angels: "I will create a vicegerent on earth." They said: "Wilt Thou place therein one who will make mischief therein and shed blood? - Whilst we do celebrate Thy praises and glorified Thy holy (name)?" He said: "I know what ye know not".

while as regards the second case the Qur'ān states:

If ye turn away, - I (at least) have conveyed the Message with which I was sent to you. My Lord will make another People to succeed you, ...

The term 'mirāth' (inheritance) is misleading since it confuses the concepts of succession in municipal law and succession in international law, which are completely separable from each other. In addition, the Qur'ān employs the term only within the context of the relations between individuals, while the term 'istikhlāf' (succession) is used in the Qur'ān in the context of politics and rule. Thus the modern trend of Arab jurists, with a similar
tendency prevailing among European jurists has been towards the employment of the term 'istiḥālāf' (and its comparable term in English Language - 'succession') to denote the replacement of one state by another. Arab jurists have followed this tendency as a result of the unity in the sources of Islamic law and have used a selective method while European jurists have based their views on an analogy drawn from Roman municipal law which is sometimes found in Western state practice. Many Western authorities have objected to the use of the term 'succession' in this context since its use in municipal law denotes the devolution of rights and obligations of a natural person upon his death to another natural person by the operation of law, which is not found in state practice.

The use of the term 'istiḥālāf' (succession), however, does not pre-judge the existence or non-existence of the rules of state succession either in Islamic or international law.

(ii) The Criteria of Succession:

Using a variety of legal philosophies, Islamic and Western authorities have employed a range of criteria. Some Muslim jurists have regarded the external changes of a state that affect its territorial sovereignty as constituting a criteria of succession. Similarly, some Western jurists have employed the criteria of territorial sovereignty to identify the occurrence of succession of states. This approach may be regarded as conforming to the Islamic concept of the division of the world into the Islamic territory and the covenant territory but it neglects certain legal criteria such as the 'legal personality' and 'treaty-making-competence' of a state. Many European authorities have used the
criteria of 'treaty making competence' to identify the occurrence of the lawful succession of states.\textsuperscript{81} No Muslim authority, however, has attempted to employ this term because in Islamic theory such human function has been delegated by God to the \textit{umma}, in whose name the \textit{umma} (Islamic nation) has exercised such competence directly\textsuperscript{82} or indirectly by delegating such competence to the \textit{Khalifa}.\textsuperscript{83} By means of the '\textit{Akd al-bay'a} (the contract of delegation of authority) the \textit{Khalifa} has the authority to delegate such competence to any Muslim leader\textsuperscript{84} without changing the factual and legal identity of the territory over which the leader exercises the delegated treaty-making competence. Furthermore, the use of the criteria of 'treaty-making competence' is criticised on the grounds that it does not exclude certain situations resulting from military occupation.\textsuperscript{85} Thus the term 'sovereignty' has been used by many European jurists\textsuperscript{86} and also, mistakenly, by some Muslim jurists\textsuperscript{87} to identify the occurrence of state succession on the international plane.

The criterion of 'sovereignty' not only fails to cover certain cases of the replacement of one state by another\textsuperscript{88} but also runs contrary to basic principles prevailing among European theologians, politicians and jurists. According to Bodin:

\begin{quote}
If we should define sovereignty as a power \textit{legibus omnibus soluta}, no prince could be found to have sovereign rights, for all are bound by defined law and the law of nature, and also by that common law of nations which embodies principles distinct from these.\textsuperscript{89}
\end{quote}

This doctrine is echoed by the Mu'tazilite School who place special emphasis on human reason which is used to temper God's law and natural law.\textsuperscript{90} Similarly, Hobbes emphasised that: "the ruler was
above his own laws but under God's or under the law of nature and added that the law made by the sovereign creates rights and wrongs. The Ash'arite School also espoused this belief but stated in addition that Allah (God) must be the absolute sovereign alone. Austin, a European jurist, followed the same tendency.

The above-mentioned views of European theologians, politicians and jurists on the legal concept of sovereignty are in harmony with that of Islamic law and modern Muslim jurists. Modern Muslim jurists have postulated that no human being or political entity is entitled to 'sovereignty', but the principle of al-shura (consultation) permits the umma to delegate the authority to enforce the sovereign will of Allah as manifested in the Shari'a (Islamic law) to an imam (leader) or Khalifa, as the Qur'an states:

Those who hearken to their Lord, and establish regular prayer; who (conduct) their affairs by mutual consultation...

and to dispose of the Khalifa if he deviates from or is unable to carry out the task. For this reason, the authority conferred upon the imam or the Islamic government is not 'sovereignty' but 'vicegerency', i.e. the responsibility to conduct the internal and international relations of the umma. Consequently, the shortcomings of 'sovereignty' as a criterion for identifying the occurrence of state succession results from its religious nature for humans can possess no 'sovereignty' but only 'responsibility' towards each other or God. Moreover, responsibility in this sense, not sovereignty, covers a great number of situations of state succession, a fact realised by the International Law Commission, after extensive debate. It came to the conclusion that the best criteria to define the
occurrence of state succession resulting from various circumstances is 'the responsibility for international relations'. Islamic law has advocated this between private individuals and between states.

B. Definition of Succession in Law:

Lawful succession in Islamic law may be defined as the replacement of a state (predecessor) by the Islamic State (the successor) or vice versa in the responsibility for the international relations of a certain territory, whose effects are recognised in international law as well as in Islamic law and its rules governing the relations between the Islamic territory and the covenant territory.
SECTION 2: SELECTIVE LEGAL DOCTRINES:

1. The Iraqi Legal Doctrine of Devolution:

   A. Devolution of Treaties in the Light of the Iraqi Legal Doctrine:

      (1) Substance of the Doctrine:

         In Islamic legal theory, state succession occurs when the Islamic State replaces a member state of the covenant territory in the responsibility for the conduct of the international relations of a part of the latter's territory or vice versa, only where it is by mutual consent, as in the case of Iraq. The conduct of the international relations of Iraq by Great Britain was not delegated by force but by the mutual consent of the parties as embodied in the 1922 Treaty of Alliance. Article 10 authorised Great Britain to conclude treaties on behalf of Iraq or extend them to her. The treaty constituted 'ākd wakāla (contract of agency) according to which Great Britain replaced the Islamic State (the Ottoman Empire) in the responsibility for the conduct of the international relations of the territory of Iraq. Subsequently, the question has arisen as to the effect of this event on treaties concluded by the Islamic State (the Ottoman Empire) of which Iraq, prior to its separation, constituted an integral part.

         The key to this question lies in the Islamic concept of identity as mentioned above, according to which state succession occurs only as a result of a break in the factual and legal identity of a territory. As long as the territory remains under Islamic authority and is governed in accordance with Islamic rules, no break in its Islamic identity can occur, and it remains a part of Dār al-Islam and
its population a part of the umma whatever changes the territory undergoes. As far as its legal identity is concerned, a break in the identity of a part of Dār al-Islām occurs only when the people of that part no longer constitute a part of the umma (Islamic nation) and Islamic law is no longer dominant in that part.104

As far as Iraq is concerned, she did not undergo such changes in her factual or legal identity. However, the delegation of the conduct of the international relations of Iraq to a non-Muslim state (Great Britain) amounted to the replacement of Islamic law by international law in this sphere and thus according to Islamic legal theory the external Islamic identity of Iraq remained passive or at least suspended during the mandate period until she regained power to conduct her international relations upon her formal independence in 1932, while her internal identity remained unaffected as a result of the continuity of the application of Islamic law to certain subject matters105 and the recognition of Islam as the official religion of the state in Article 13 of her 1st Constitution. Thus the devolution of the treaties of the parent state (the Ottoman Empire) to Iraq was determined by Islamic legal criteria106 and governed by Islamic law in its definition of legal and illegal contracts and the attachment of the treaties of the Islamic State to the identity of the umma. According to these criteria, therefore, the treaties of the parent state devolved to Iraq after the latter came under the mandate regime on the ground that until this stage Iraq, according to Islamic law, did not possess a mature Islamic identity independent from that of the Islamic State. This is not only emphasised by the parent state107 and by the other emerging Arab states108 but also by
several member states of the covenant territory. Such devolution, however, is not based on any rules of state succession in Islamic legal theory but on the general principles of Islamic law governing the conclusion of treaties according to which the treaties of the Islamic State are attached to the identity of the umma. Moreover, such devolution of treaties is not to be confused with the formula of 'opting out, ipso jure continuity' of international law, which emerged later.

The development of the independent Islamic legal identity of Iraq began with the conclusion of her 1922 Treaty of Alliance with Great Britain, which constituted under international law an application of the mandate system and under Islamic law the contract of agency through which Iraq delegated the conduct of her international relations to Great Britain. Accordingly, upon the independence of Iraq the criteria determining the devolution of the treaties of the predecessor state (Great Britain) to Iraq and the rules governing such devolution are exclusively derived from international law using the criteria of the applicability of the treaties to the territory of Iraq at the date of independence, such as the law making the dispositive nature of the treaties and the treaty-making competence of Iraq, which may have participated in the negotiation or conclusion of the treaty in question. Furthermore, the formal independence of Iraq was conditioned by certain undertakings to be declared by her government towards the members of the League of Nations, one of which was

(g) maintenance in force of the international conventions to which the mandatory power acceded on behalf of the mandated territory.
Thus in principle, the devolution of the predecessor's treaties to Iraq at the date of independence on 3 October 1932 up to 1955 as defined by Article 8 of the 1930 Treaty of Alliance between Great Britain and Iraq, was governed by the principle of *ipso jure* continuity (opting out). However, such devolution is not absolute but conditioned by compliance with certain principles of Islamic regional law relating to the legality of the object and purpose of the treaties according to which Iraq is entitled to pick and choose among these treaties.

For the purpose of identifying the rules governing the devolution of treaties in the Iraqi legal doctrine, a distinction should be made between treaties concluded by Great Britain and those concluded by Iraq herself. Britain concluded various treaties with the member states of the covenant and Islamic territories. Because of the legal vacuum created by Iraq's assumption of governorship from the parent state without possessing an independent legal identity, Britain extended some of her treaties with the member states of the covenant territory to Iraq before the mandate upon Iraq was confirmed by the League and subsequently by the 1922 Treaty of Alliance. These treaties, however, had no legal basis whatsoever and upon independence fell to the ground. Thus according to the principle of pick and choose, Iraq was able to opt to continue some of these treaties upon the consent of the other party or parties along with the principles of free consent, and of sovereign equality between states as embodied in the covenant of the League of Nations. The legal effect of this formula on devolution or non-devolution depended solely upon Iraq's option according to which Iraq's assent to Great
Britain's acts, such as a declaration of the application to Iraq, acceptance, approval, accession or ratification of the treaties in question established that the treaties devolved not from the date of Iraq's assent or independence but from the date of Great Britain's acts. However, the accession of Iraq by her own name created a break in the legal continuity of the application of those treaties which were only regarded as being applicable to her territory from the date of accession\textsuperscript{120}.

Great Britain also as mandatory power under international law and as agent under Islamic law extended to or excluded on behalf of Iraq as mandated territory under international law or as principal under Islamic law various treaties concluded with the member states of the covenant and the Islamic territories. Upon independence, these treaties devolved to Iraq not by any rule relating to international law, but by the rules of Islamic law, which according to the Hanafid School\textsuperscript{121} govern the devolution of contracts concluded by a non-Muslim agent on behalf of a Muslim, provided that they do not conflict with \textit{Hukûk Allah} (rights of God)\textsuperscript{122}, which constitute the Islamic rules of \textit{jus cogens}.

The evolution of the Islamic identity of Iraq began with the conclusion of bilateral and multilateral treaties with member states of the covenant and Islamic territories as well. Treaties of a non-constituent character concluded by Iraq with member states of the covenant territory under the auspices of the League of Nations, which were not amended by the U.N. Protocols lapsed in accordance with the principles of the termination of treaties \textit{orrebus sic stantibus}, as existed in Islamic international law\textsuperscript{123}, save those treaties of
territorial nature. Iraq also effectively signalled her rights under customary international law as a newly independent state to succeed or accede to those multilateral treaties concluded under the auspices of the League of Nations which were amended by a U.N. protocol. The major criterion in following the procedure of succession or accession was the consistency of the treaty in question with the independence of Iraq.

The devolution of multilateral treaties of a constituent character to Iraq at the date of independence depended, as far as the Iraqi doctrine is concerned, on whether the treaty formed the constitution of an international organisation or was only concluded with that organisation. Some constitutions of international organisations permit the participation of a non-state entity or a dependent territory, such as Iraq under the mandate. Upon admission to membership of such organisations, the new member usually acknowledges its acceptance of the treaties adopted within the organisation. With Iraq's independence, such membership matured into a full one and the constitution of these organisations as multilateral treaties and the treaties adopted with these organisations devolved to Iraq in fact and in law by becoming connected with her legal identity and international personality and were therefore governed by the universal principle of *al-'aḳd šariʿat al-Muta'āḳidin* (*pacta sunt servanda*) under Islamic law. This principle is emphasised in the 1958 *Aramco Arbitration Case*, where basing its decision on Islamic system of law, the tribunal found that an oil concession concluded between the Saudi Arabian
government and Aramco was valid and binding on the parties because it was:

In conformity with two fundamental principles of the whole Muslim System of Law, i.e., the principle of liberty of contract within the limits of the divine law and the principle of respect for contracts. Under Muslim law, any valid contract is obligatory, in accordance with the principle of Islam and the law of God, as expressed in the Qur'ān: "Be faithful to your pledge to God, when you enter into a pact".

Iraq did not conclude by herself a bilateral treaty with any member state of the covenant territory without the participation of the mandatory power except with the mandatory power itself, but gradually the mandatory power transferred the treaty-making competence to the government of Iraq to conclude treaties with neighbouring Arab states and subsequently with any state. According to the Iraqi doctrine, the devolution of these treaties to Iraq at the date of independence was achieved by various methods. Bilateral treaties that were concluded with the mandatory power before independence were terminated by succeeding treaties until they were finally superseded by the 1930 Treaty of Alliance, which contained the devolution agreement. Thus it is necessary to examine the effects of the so-called 'devolution agreement' on treaties concluded not only by Great Britain but also by Iraq herself under the Iraqi doctrine of devolution.

However, it will be recalled that Islamic law is based on what in modern language is termed 'monism', and thus analogies between the effects of private contracts to those of treaties is valid under Islamic international law. The contracting parties to the devolution agreement intended to achieve by that instrument effects similar to
those usually resulting from the contract in Islamic law known as 'akd al-hawala (contract of assignment). The parties to this contract are muhâl or dâyîn (creditor) who, in the devolution agreement resemble the third state, muhîl (assignor) who can be likened to Great Britain and muhâl 'alyh (assignee) who relates to Iraq.

The majority view of Sunni jurists, with the exception of the Hanafid School, maintains that it is of paramount importance for the validity of the contract of assignment (the devolution agreement) that the assignee (Iraq) is under a contractual obligation to the assignor (Great Britain) equal to the contractual obligation to the creditor.

The Malikid and Shâfi‘id Schools believe that the contract of assignment (the devolution agreement) as concluded between the assignor (Great Britain) and the creditor (third state) is based on an offer from the former being accepted by the latter without due regard to the consent of the assignee (Iraq), because the latter is responsible for the performance of certain contractual obligations for the assignor (Great Britain) and the change of creditor should be a matter of no concern to the assignee (Iraq). The only exception accepted by the Malikid School is when the consent of the assignee is essential, because at the time of the conclusion of the contract of assignment the assignee and the creditor are already in dispute.

According to the Hanbali School, neither the consent of the assignee nor the creditor is necessary for the conclusion of the contract of assignment. When the creditor does not consent to the contract of the assignment and the assignee turns out to be unable to
perform its obligations, the creditor can always return to its contractual rights with the assignor (Great Britain)\textsuperscript{130}. The Hanafid School regards the contract of assignment as concluded between the creditor and either the assignor or the assignee or between the assignor and the assignee. When the contract of assignment is concluded between the creditor and the assignee, the consent of the assignor to the assignment is necessary, according to one view, on the grounds that the assignor may not wish the assignee to perform her contractual obligations\textsuperscript{131}. Another view of the Hanafid School states that the consent of the assignor is not necessary for the assignee to put itself under an obligation to perform the contractual obligations of the assignor which can only be detrimental to the assignor\textsuperscript{132}. When the contract of assignment is concluded between the assignor and the creditor the consent of the assignee is necessary since the assignee cannot be expected to perform certain contractual obligations if she has not given her consent\textsuperscript{133}. When the contract of assignment is concluded between the assignor and the assignee, the consent of the creditor is not necessary for the contract to be binding upon the parties but it is not binding on the creditor if it has not consented to it. If the creditor consents to the contract of the assignment, a collateral contract comes into being between the creditor and the assignee which is independent from the original contract.

According to one view of the Maliki School, and to the Shafi'i and Hanbali Schools\textsuperscript{134}, the contract of assignment, when validly concluded, transfers the obligation from and the claim against the assignor to the assignee, the effects of which means that the
assignor can no longer be held responsible for the contractual obligations because they have been extinguished by the assignment, even if it turns out after assignment that the assignee is unable to perform the new obligations.

According to the Hanbali, the Maliki and one tendency in the Shafi'i Schools, when the creditor made it a condition of the contract of assignment that the assignee was able to perform the new obligations (being bankrupt) but it subsequently turns out that the assignee is unable to perform these obligations (having become bankrupt), the creditor returns the claim against the assignor.

The Hanafid School accepts this view only if the assignee was unable to perform the new contractual obligations (because of bankruptcy) or was denied the contract of assignment and there was no evidence to prove its existence. In this sense no state can demand the devolution of the pre-independence treaties to Iraq at the date of independence in accordance with the devolution agreement except Great Britain as a party to the devolution agreement. However, the other party or parties to Great Britain's treaties which were applicable to the Iraqi territory at the date of independence can request that Great Britain to perform the devolution agreement. This request may prove to be fruitless if it transpires that the devolution agreement has been terminated in accordance with its own provision. Accordingly, the 1930 Treaty of Alliance between Great Britain and Iraq was for the limited duration of 25 years starting from the admission of Iraq to the League of Nations on 3 October 1932 and ending in 1955. Since 1955, the legal status of many pre-independence international treaties has remained unknown and must be
dealt with in accordance with the general principles of Islamic international law regarding the termination of treaties.\(^\text{137}\)

The devolution agreement also had no legal effect with regard to the devolution of treaties concluded by Great Britain in accordance with the contract of agency or by Iraq herself with member states of the Islamic territory, since according to the general criteria of Islamic identity mentioned above, the continuous application of Islamic law to Iraq after her coming under the mandate regime, at least in governing the internal relations, denotes the continuity of the Islamic identity of that territory. The only difference at the date of her independence was that Iraq had developed an independent and mature legal identity, derived from the Islamic identity, to which all treaties concluded by Great Britain on behalf of Iraq in accordance with the contract of agency with member states of the Islamic territory and those treaties concluded by Iraq herself attach. Therefore the treaties devolved to Iraq at the date of independence on the basis of Islamic rules governing the devolution of rights and obligations from the agent to the principal, and the principle of *al-'akd shari'at al-muta'akidin* (*pacta sunt servanda*) as declared by Mahmassani, the sole arbitrator, in the Case of L.I.A.M.C.O. v. Libya\(^\text{138}\) who states that:

> . . . The principle of respect for the agreement is thus applicable to ordinary contract and concession agreement. It is binding on an individual as well as governments.

Bearing all this in mind, however, the Iraqi doctrine of devolution as a human device has not escaped criticism.

(ii) Criticism of the Doctrine:
The Iraqi doctrine cannot escape criticism since as a species of Islamic legal theory which goes back to the seventh century A.D. it employs the term 'devolution' to identify the occurrence of treaty succession, a term which is literally used for the first time in the 1930 Treaty of Alliance between Great Britain and Iraq, and moreover, the term 'devolution' not only denotes treaty succession but also the continuity of the validity of treaties.

Such criticism, however, may not be justified if it can be concluded that the Iraqi doctrine concerns the legal consequences which follow from the replacement of one state by another in respect of a given territory whether the terms of 'devolution', 'continuity' or 'transfer' are used to identify these legal consequences. The rationale behind the use of the term 'devolution' is its historical connection with the territory of Iraq since the term ḥawāla (assignment or devolution) has been used by the Hanafid School of Iraq since its establishment in the first century A.H. (seventh century A.D.) to denote the transfer of rights or obligations from one natural person to another and subsequently it was used in the 1930 Treaty of Alliance between Great Britain and Iraq. Furthermore, the use of 'devolution' is indispensable since more than any other term it covers all the legal consequences of the replacement of one state by another in respect of a given territory whether they are as a result of treaty succession or the continuity of treaties.

The Iraqi doctrine of devolution can be accused of assimilating the state and the natural person and the Islamic rules governing external relations and those governing internal relations in respect of succession as does the doctrine of universal succession in
international law. The reason for this is the non-distinction between rules governing the internal relations and those governing external relations in Islamic law, a characteristic similar to those legal systems which are based on monism. In the universal succession doctrine, however, the lack of distinction is created by an arbitrary analogy between a state and a natural person.

It may be asked why the treaties of the Ottoman Empire were connected with the personality of the umma while those of Great Britain concluded on behalf or extended to Iraq were not. This question touches upon the substance of the Iraqi doctrine. The reply is simple in that the treaties of the Ottoman Empire were concluded exclusively by an Islamic authority validly representing the umma (Islamic nation) while those concluded on behalf of or extended to Iraq by Great Britain as a non-Muslim agent were exclusively connected to the personality of Iraq as a principal.

Although the Iraqi doctrine of devolution constituted a furtherance of the Islamic legal order could it be said to have posed a threat to the international legal order because upon the independence of Iraq some of Great Britain's treaties fell to the ground? It is true that the treaties concluded by Great Britain on behalf of Iraq that had no legal basis fell to the ground but those validly concluded on behalf of or extended to Iraq by Great Britain did devolve to Iraq at the date of independence until they were replaced by new treaties negotiated between Iraq and the interested states. This procedural devolution is in itself in conformity with Islamic as well as non-Muslim thought.
Lastly, some of Great Britain's treaties may be regarded as having been concluded on behalf of or extended to Iraq under military, economic or political pressure and the devolution of such treaties at the date of the independence of Iraq is tantamount to the infringement of the state's sovereignty. Such a theory, however, fails to stand up in that with independence, Iraq had the right to pick and choose any of these treaties for her own benefit by negotiating with the other parties either to abolish those that were disadvantageous or replace them with new treaties. This right is closer to the so-called right of non-devolution that has emerged from the practice of Kuwait which will be discussed later.

B. The Iraqi Legal Doctrine in the Light of International Law

Doctrines:

(i) The Doctrine of Universal Succession:

Grotius introduced the theory of universal succession from Roman private law to international law. According to this theory, all rights belonging to the predecessor state automatically devolve to the successor state. This is in many respects similar to the Islamic theory of succession on the grounds that in the first place, there is no difference between rules governing succession in Islamic private law and those governing succession in al-siyar (the Islamic international law) and secondly, all rights, not obligations, only pass automatically from a Muslim predecessor to a Muslim successor according to Islamic private law, since the obligation of the deceased is to be taken from the assets before succession. In al-siyar, however, only the contractual rights and obligations of the parent state (the Islamic state) devolve to the
Muslim successor state by the operation of the law in the same way as in private law but the contractual rights and obligations of the non-Muslim predecessor state can only devolve to the Muslim successor state by consent, as in the case of Iraq.

For Grotius, despite changes having taken place, the legal personality of the state continues, for there has been no change in identity; rights and obligations are attached to the territory and to the legal personality. Territory and personality pass automatically to the successor state together with the rights and obligations attached to them.

Unlike succession in Islamic theory, Grotius did not distinguish between state succession and government succession. He only distinguished between those obligations entered into by the king in his princesly capacity and in his personal capacity, and he asserted that upon the deposition of the king or his death, the former would devolve to the successor while the latter would vanish along with the king.

Following the failure in the practical significance of the theory of universal succession because of its abstract principles, which can be seen by its failure to attract states to its application, its advocates made some modifications to the original theory. For instance, Bluntschli distinguished between state succession and government succession, while Vattel made a distinction between 'real' and 'personal' obligations and in addition stated that the successor should not be compelled to succeed to all the obligations of the predecessor. This view eliminates the harshness of the original theory which regards the devolution of the obligations of
the predecessor to the successor as compulsory and occurs through the operation of the law regardless of whether the states concerned consent to it or not.

The theory of universal succession has been sharply criticised on the grounds that the analogy of state succession to that of individuals is unfounded since there is a big difference between the concepts of state, state identity, state personality, the theory of state sovereignty and territory upon which the devolution of rights and obligations are based and those of a natural person.

(ii) The Doctrine of Popular Continuity:

With the national unification of Germany and Italy, the theory of universal succession received some modifications and emerged under a new title as 'the theory of popular continuity' which was based on the distinction between the political and social personalities of a state. According to this, the occurrence of the succession of a state affects only the political personality while the social personality remains untouched. Rights and obligations connected with a political personality vanish along with it while those connected with the social personality continue unaffected by the change. The reason given to justify this theory is that "the legal condition of people continues unaffected and the territory and the men who occupy it are inseparably connected and form a permanent social personality despite the alteration of the political personality of the state."

As in the Islamic legal theory and unlike the doctrine of universal succession, this doctrine recognises the distinction between state succession and government succession within the
framework of the distinction between personalities mentioned above, and moreover, the doctrine of popular continuity and the Islamic theory attach the treaties to the social personality in the case of the former and to the personality of the umma in the case of the latter, which continued unaffected by the occurrence of state succession.

As far as the attachment of the treaties of the Islamic state to the personality of the umma is concerned, the Khalifa (imâm) replaces the Prophet in respect of the latter's temporal position in such matters as treaty-making competence and legislative power by means of al-bay'a (the delegation of authority) of the umma, but it must be noted that the personality of the Khalifa is also separable from that of the umma. Treaties contracted by him in a private capacity are connected with his personality and disappear with his death while those contracted in his official capacity are connected with the personality of the umma and continue unchanged.

Thus in Islamic legal theory the personality of the umma is a single one and any distinction in personality is between that of the umma and that of the leader of the Islamic State. Moreover, 'sovereignty' is not possessed by the state, as the theory of popular continuity propounds, but is entrusted to the umma or the Islamic State, the two concepts meaning the same thing. The real possessor of 'sovereignty' in Islamic legal theory is Allah (God) and thus it is unimaginable to contemplate the notion of a change of sovereignty and its effects on treaties as mentioned above.

According to Islamic theory, the occurrence of state succession alters not only the political but also the social personality which
is denied by the theory of popular continuity. The Islamic theory also regards the identity of the *umma* as a single one from which a new Islamic identity may evolve and becomes responsible in the first place for its own treaty relations. If this new legal identity should vanish, its treaty rights and obligations automatically attach to the Islamic identity of the *umma*, a case of substitution similar in some respect to that of the doctrine of organic substitution.

(iii) The Doctrine of Organic Substitution:

Huber\textsuperscript{163} developed for the first time the continuity doctrine based on the concept of organic substitution which was influenced by the doctrine of corporate association as developed by Von Jierke\textsuperscript{164}. According to Huber's doctrine, upon the replacement of one state by another:

The factual elements of people and territory are integrated in a new organic being; there is a change in the juridical element of organisation\textsuperscript{165} and thus the replaced state loses its identity although "the organic forces which previously governed it remain unaffected"\textsuperscript{166}. The new personality of the successor state is substituted for the extinguished personality of the predecessor state and the successor state observes the remaining factual elements of the predecessor state with all the rights and obligations that are attached to them as though they were its own\textsuperscript{167}.

The continuity doctrine of organic substitution is considered more advanced and developed than the doctrines of universal succession and popular continuity since the devolution of rights and obligations from the predecessor to the successor state is optional\textsuperscript{168} and not compulsory as in the doctrine of universal
succession. Moreover, it recognises the complete abolition of the personality of the predecessor state and thus cannot raise the question of the continuity of the identity of the predecessor state.

As with the doctrine of popular continuity, the continuity doctrine of organic substitution admits, but with more clarity, the distinction between state succession and government succession.

In Islamic theory, upon the occurrence of state succession, the factual elements of Dār al-Islām (Islamic territory) and the umma (Islamic nation), as distinct from Dār al-ʿAhd (the covenant territory) and non-Islamic nations, do not integrate into a new organic being entailing the substitution of a new legal personality and identity unless these factual elements lose their identity according to the Islamic rules analysed above, i.e. the community revokes their original ṣaḥaḥ (safe-conduct) which was concluded with the Islamic State, and Islamic rule and law no longer predominate in the territory in question. If all these conditions are satisfied then the incorporation of people and territory in the judicial organisation of a state, in order to create a new organic being and to produce change must occur only between the Islamic State and a member state of the covenant territory. It could not have this effect if it occurred between the Islamic State and a member-state of Dār al-Barb (the territory of war) for the same legal reasoning given above.

The major difference, however, between the continuity doctrine of organic substitution and the Islamic theory of state succession is that in the latter most of the legal institutions attach to the
juridical element (the *umma*), few attaching to the factual elements, and pass with it to the new successor state.

In the continuity doctrine of organic substitution, the lack of political agreement between the successor and the predecessor state means that the substitution of the former for the latter in its rights and obligations is a voluntary act, while in Islamic theory substitution, at least with regard to those connected with the juridical element, (*umma*) is an obligatory act. The voluntary substitution contemplated by the continuity theory of organic substitution could create chaos in international law and to prevent this, as a consequence, the continuity doctrine of self-abnegation has been established.

(iv) The Doctrine of Self-Abnegation:

Jellinek has propounded the theory that the successor state is under a moral duty to take over its predecessor's rights and obligations in the interests of world order and stability, which Islamic theory propounds not as a moral, but as a legal obligation imposed by a rule of law. The sanctity of this rule is established by the willingness of a state to obey the basic principles of law and not by the kind of coercion or compulsion which the super powers use under the pretence of creating stability and a world order even where this is at the expense of fairness.

2. The Kuwaiti Legal Doctrine of Non-Devolution:

A. The Non-Devolution of Treaties in the Light of the Kuwaiti Legal Doctrine:

(i) Substance of the Kuwaiti Doctrine:
It will be recalled that the legal effects of the 1899 Exclusive Agreement between Great Britain and the Shaykh of Kuwait, are similar in some respects to those of the 1922 Treaty of Alliance between Great Britain and Iraq in that the Shaykh of Kuwait delegated the conduct of the international relations of Kuwait to Great Britain according to which Islamic law was replaced by international law in regulating the international relations of Kuwait and since the criteria determining the Islamic identity of a territory according to Islamic legal theory is the dominance of Islamic law within that territory, the domination of international law over the international relations of Kuwait suspended the external Islamic identity of that territory until Islamic law regained its previous position at the date of independence in 1961. The 1899 Exclusive Agreement, however, did not affect the internal authority of the Shaykh of Kuwait and hence, as an exercise of that authority, Islamic and not British law has continued to govern the internal relations of Kuwait according to which the internal Islamic identity of Kuwait remained intact before and after the 1899 Exclusive Agreement.

If Islamic law was applicable to Kuwait up to the assumption of British protection over that country, then the devolution of the treaties of the parent state (Islamic State) to Kuwait upon her coming under British protection are to be determined by the criteria and governed by the rules of Islamic law as opposed to international or British law.

Under Islamic law, since the Khalifa in concluding treaties with non-Muslim States legally represented the umma of which the people of
Kuwait constitute an integral part, the treaties attached to the identity of the *umma*. Besides this, since up to the consensual assumption of British protection over Kuwait, Kuwait did not develop an independent legal identity from that of the *umma*, upon the assumption of British protection over Kuwait, the treaties of the parent state (Islamic State) devolved to Kuwait insofar as they related to the territory of Kuwait, exactly as in the case of Iraq. Unlike Iraq, however, no state claims the devolution of these treaties except those physically and legally connected with the territory of Kuwait.¹⁷³

Unlike Iraq, since Kuwait did not enter into a devolution agreement with Great Britain, upon her independence Islamic law regained its previous position in regulating the international and internal relations of the territory of Kuwait and hence, as an exercise of her independence, it was for Kuwait not Great Britain and for Islamic law not international law to decide the criteria by which the devolution of these treaties should be determined.¹⁷⁴

For the purpose of identifying the rules by which the devolution of pre-independence treaties devolve to Kuwait and the criteria determining such devolution under the Kuwaiti legal doctrine, the pre-independence treaties may be divided into treaties concluded by Great Britain and treaties concluded by Kuwait herself. As regards those treaties concluded by Great Britain as a result of the legal vacuum existing in Kuwait as it did in Iraq, upon her assumption of governorship from the parent state and the assumption of British protection over her, Great Britain as protecting state extended some of her treaties with the member states of the covenant territory to
Kuwait. Unlike the 1922 Treaty of Alliance between Great Britain and Iraq, no legal basis for this extension was embodied in the 1899 Exclusive agreement and therefore, the treaties were regarded as being connected with the personality of the contracting parties and fell to the ground at the date of independence as far as Kuwait was concerned, i.e., they did not devolve to Kuwait as a general rule in contradiction to the general rule of 'devolution' which emerged from the practice of Iraq as a legal doctrine, as discussed above. Concomitantly, the rule of non-devolution that emerged from the practice of Kuwait as a legal doctrine derived its title from the negativism of the term 'talwil' (assignment or devolution) as it is used by the Hanafid (predominant in Iraq) and by the Malikid (predominant in Kuwait) Schools.

Under the Kuwaiti doctrine the devolution or non-devolution of the pre-independence treaties must be determined by the criteria of the validity of treaties that exist in Islamic law or by any other criteria of non-Islamic law, which qualify under the Islamic principle of the permissability of the conclusion of treaties unless they are prohibited by nask (provision) and are thereby valid such as those employed by international law. Hence, with the exception of those treaties concluded with member states of the Islamic territory, under the Kuwaiti doctrine, the pacts of Great Britain may be likened to 'ukūd al-fudūlī (contracts of agent by ratification) in Islamic law.

According to Islamic law, when a person (or a state like Britain) purports to enter into a contract (or treaty) on behalf of another person (or state like Kuwait) without the authorisation of the
latter, they are known as a *fudūlī* (agent by ratification) and the enforceability of such a contract (treaty) depends on the ratification of the person (or state like Kuwait) on whose behalf the contract (treaty) is made. The subsequent ratification of the contract (treaty) vests the *fudūlī* (Great Britain) with the necessary authority and subsequently the contract (treaty) becomes enforceable.

The Ḥanafi and the Mālikī Schools have *mutatis mutandis* recognised the form and effect of the *fudūlī* (agent by ratification). If this analogy is valid in respect of Great Britain's treaties then it supports the practice of the Government of Kuwait which always reserves under Islamic law, its right to pick and choose from amongst Great Britain's treaties by means of simple acceptance, approval, accession, ratification or declaration of continuity.

The Government of Kuwait usually selects one or more of these British treaties without making an express unilateral declaration to the other party and the treaties are applied to the territory of Kuwait on the basis of reciprocity for a period of two years from the date of independence, as in the case of G.A.T.T., unless they are abrogated or modified by mutual consent. At the end of this period, the Government of Kuwait will consider such treaties either as having been succeeded to or terminated. This doctrine may be regarded as a proposal to reconsider the treaties of the predecessor state with the other parties and assess the advantages and disadvantages of their renewal in a peaceful and friendly manner and is similar to what is known in international law as the 'opting in formula' although it differs in the sense that no general declaration is made and both bilateral and multilateral treaties are treated alike.
As in the case of Iraq, since the 1899 Exclusive Agreement Kuwait has developed an independent Islamic legal identity from that of the Islamic State by entering into treaties by herself with member states of the covenant territory and with member states of the Islamic territory as well. While under British protection, Kuwait concluded multilateral treaties of a constituent character with member states of the covenant territory, the devolution of which are determined by criteria established by Islamic law at the date of independence, which decree that the application of the law recognised by the legal order of a state and the conclusion of treaties in accordance with this legal order are indispensable aspects of the exercise of independence. Under Islamic law the treaties of Kuwait with member states of the covenant territory are legally concluded and connected with the legal identity of the contracting parties according to which the devolution of these treaties at the date of independence is not a voluntary but a mandatory act under the Islamic principle of al-'akd šari‘at al-muta‘āhidin (pacta sunt servanda). Kuwait has developed its own independent legal identity from that of the umma and thus she is internationally responsible for her treaty obligations at the date of independence.

Similarly, bilateral treaties concluded by Kuwait while under British protection with member states of the covenant territory devolved to Kuwait on the same legal grounds for multilateral treaties, save those bilateral agreements and undertakings given by the Shaykh of Kuwait to the protecting state during the era of protection, which not only constituted a delegation from the formal independence of Kuwait, but also contradicted the principles of free
consent and *al-shurūq al-mubāha* (lawful stipulations) as established in the Islamic law of treaties. Thus these bilateral treaties did not devolve to Kuwait at the date of independence contrary to the general principle of *al-‘āfd sharī‘at al-muta‘ākidin* (*pacta sunt servanda*). This exception in Islamic law can be compared to the generally established principle in international law that a newly independent state at the date of independence is clean from the predecessor's bilateral treaties in the sense that these treaties are connected with the identity of the latter.

Under the criterion of legality of the treaties as established in Islamic law and enhanced under the Kuwaiti doctrine of non-devolution a distinction must be made between non-boundary and boundary treaties for the purpose of succession. Multilateral treaties of a constituent character concluded by Kuwait herself with a member state of the Islamic territory are connected with the identity of Kuwait according to Islamic law and at the date of independence devolve upon her as long as she preserves her Islamic identity, provided that the new legal status of Kuwait does not conflict with the object and purpose of the treaty or changes the conditions of its operation.

Bilateral treaties concluded by Kuwait with member states of the Islamic territory were initially negotiated by Great Britain (agent) and subsequently ratified by the Shaykh of Kuwait. This change in the procedure of the conclusion of such treaties resulted from the gradual transfer of treaty-making competence in respect of Kuwait to the Shaykh. The devolution of these treaties to Kuwait upon her independence under Islamic law is not based on any rules of state succession but on the rules governing the continuity of Islamic
identity, because the treaties are not connected with the identity of the negotiating state but with the identity of the ratifying one.

The criterion of the validity of treaties in Islamic law has determined the effects of Kuwait's independence on treaties establishing her boundaries with neighbouring Arab states, namely Iraq and Saudi Arabia. Under such criteria, Great Britain (agent) had no sovereignty over the territory of Kuwait and hence, had no authority to establish territorial boundaries by treaties with the neighbouring Arab states. However, Great Britain in concluding these treaties was acting as an agent for Kuwait and Iraq. Thus apart from the validity of these treaties, upon the independence of the two states, these treaties devolved to them not on the basis of any legal rules of treaty succession but based on the rules governing the devolution of rights and obligations from the agent to the principal under Islamic law. The problem of the questionable validity of these treaties may be avoided by making an analogy to the contracts establishing boundaries of private properties and consequently the replacement of a Muslim state by another in respect of boundary treaties may be assimilated to the succession of a natural person to another in respect of contracts establishing boundaries of properties. The opposite view held by the Kuwaiti doctrine of non-devolution leads to the exemption of boundary treaties from the concept of state succession in Islamic legal theory in order that they be settled on other legal grounds by means of the iditihād (independent reasoning) of the leaders of Muslim states and the idimā' (consensus) of Muslims. If this was achieved it would constitute a significant contribution by the Muslim and Arab states
to the development of Islamic law and also international law and its legal doctrines.

(ii) Criticism of the Kuwaiti Legal Doctrine:

All the criticism that has been directed towards the Iraqi doctrine of devolution has a sound basis as have the arguments in its defence since both doctrines have evolved from Islamic theory and are based on Islamic law.

It may be noted that the term 'non-devolution' of treaties gives the impression that at the date of independence all treaty relations between the successor state and the outside world come to an end. As far as the Kuwaiti doctrine of non-devolution is concerned, no sudden interruption of the treaty relations between Kuwait and the outside world occurred as a result of the application of this doctrine because Kuwait had concluded in her own name various bilateral and multilateral treaties. Furthermore, all treaties concluded with Muslim states continued in law and in fact on the same basis by which such treaties became binding on Iraq.

The benefits and suitability of the application of the Kuwaiti doctrine has been realised not only through the practice of Iraq but also through the subsequent practice of the Arab Gulf states, the protected Arab states and the non-Arab states and has been articulated by the development of the so-called clean slate doctrine which is in conformity with the right to self-determination.

B. The Kuwaiti Doctrine of Non-Devolution in the Light of International Law Doctrines:

Similar to 'the Kuwaiti doctrine of non-devolution' is the traditional doctrine of 'tabala rasa', (the clean slate doctrine) of
state succession as developed by non-Muslim jurists\textsuperscript{199} to oppose and discredit the traditional doctrine which advocates the devolution of the rights and obligations of the predecessor state to the successor state\textsuperscript{199}. The advocates of the non-devolution doctrines reject the devolution of rights and obligations on the grounds that upon the occurrence of total succession, the personality and identity of the predecessor state is replaced by a completely new personality and identity and thus there is no legal connection between the two. Despite the fact that state succession is governed by international law, the occurrence of state succession is an act of free will made by the new successor state and the assumption of rights and obligations is not compulsory\textsuperscript{200}. Rights, as opposed to the obligations of the predecessor state, may pass to the successor state\textsuperscript{201}.

The rules governing state succession in respect of treaties, according to this point of view, are analogous to those governing personal agreement in the modern law of contract\textsuperscript{202} whereby a contract does not survive the death of the contracting party if that contract requires personal services from that party.

The international law doctrine of non-devolution was later modified to denote that the territory and rights of the predecessor states are not transferred to the successor state but instantly become Vacantia Bona\textsuperscript{203} and the successor state assumes these rights and extends its sovereignty over the territory by 'its own will'\textsuperscript{204}. The only exception recognised by the theorists of the international law doctrine of non-devolution, concerned 'dispositive' treaties\textsuperscript{205}. 
The modification and development of this doctrine also depended on the distinction between state succession and government succession according to which, upon government succession, all rights and obligations continue whereas upon state succession they do not survive. However, it might be argued that it is difficult to distinguish with accuracy in all cases between state succession and government succession since such changes can be very similar or ambiguous in many cases. Furthermore, although the non-devolution theory of clean slate was more widely accepted in the decolonisation period, in practice, there have been few cases of state succession in which the doctrine has been literally applied.

The international law doctrine of non-devolution (clean slate) is generally compatible with the Islamic theory insofar as the assimilation of a treaty with a contract is concerned as well as the exception of the so-called 'dispositive' treaties from the general rule of non-devolution of the predecessor's treaties to the successor state because of the fact that all rights and obligations are connected with the personality of the state and vanish with it. It is also similar to the Kuwaiti doctrine of non-devolution regarding the lapse of the non-Islamic predecessor's treaties upon the occurrence of state succession and the freedom of the successor state to pick and choose among these treaties, although the Kuwaiti doctrine of non-devolution defines a period of time during which the predecessor's treaties might continue.

From what has been expounded above, it may be concluded that the practice of Iraq and Kuwait is not only based on Islamic legal theory but its application is also specific to and associated with these two
particular states. Furthermore, their practice has significantly contributed to the development of an Islamic theory that satisfied the need for the foundation of a specific body of legal rules to regulate the unprecedented problems of treaty succession created by the assumption of protection or mandate by non-Muslim state over many governments in the Arab land and the subsequent assumption by these governments of their independence. As states connected to one another by common interests, language, culture and geographical location the concept of territorial sovereignty towards their reunification is minimised to a certain extent. It is true that the body of legal rules that constitutes the Arabic public law has developed under the alien regimes, i.e. under the protection and mandate of non-Muslim states but this is a strength rather than a weakness for two reasons. Firstly, it is not wrong to cooperate with non-Muslim states to establish a common legal order which does not contradict the accepted principles of Islamic law in this regard. The public law of Europe developed due to the interaction between the independent states of Europe and those European states which were under the suzerainty of the Islamic State (Ottoman Empire) in the same way that Arabic public law has developed between the independent Arab states and those Arab states under the protection and mandate of non-Muslim states. Secondly, the nature of state succession in Islamic legal theory requires the interaction between Muslim and non-Muslim states as described above. The evolution of the Arabic public law on treaty succession will now be discussed.
CHAPTER III
FOOTNOTES


2. Al-Qur'an VI, 57.

3. Al-Qur'an XXV, 63.


10. Al-Qur'an LXIX, 48.


12. Al-Qur'an VI, 38; XVI, 44.


15. Al-Qur'an XVI, 44.


24. Ibn Kathir, op.cit., vol.4, p.120.


28. Compare verse 1, V, and verse 34, XVII of the Qur'an.


33. Ibn Habib, op.cit., p.263.


42. Al-Alusi, op.cit., vol.3, p.71.

43. Al-Qur'an.XVI, 91.
44. Ibn Kathir, op.cit., p.583.


47. Rida, op.cit., vol.5, p.81.


52. Al-Qurʿān.III, 144.


54. ibid.


56. Al-Qurʿān.IV, 59.


60. Al-Qurʿān.XLII, 38.


64. Mahmassani, op.cit., p.92.


68. Al-Balādhūrī, op.cit.


71. Chapter I, Section 2.


73. Al-Qur‘ān V, 47; furthermore, see verses 44, 45.

74. Chapter VI, Section 1.

75. Al-Qur‘ān V, 57.


77. Al-Qur‘ān IV, 60.


85. Doi, op.cit.


88. Amin, op.cit., p.256 ff.


92. Al-Baladhūrī, op.cit., p.70.

93. ibid, p.115.


98. Al-Qurʿān, II, 275.


100. See the exchange of letters between the Prophet Muḥammad and al-Najmī (Negus) of Ethiopia in al-Kahlāshandi. Subhūl Aʾshā, Cairo, vol.6, pp.379, 466-467.


105. Abu Yūsuf wrote his famous treatise 'Kitāb al-Kharāj', regarding different legal matters at the request of Khalīfa Ḥārūn al-Rashīd.

106. He is the founder of al-siyar (Islamic international law).


110. Al-Ansâri, op.cit., p.207.

111. Al-Shâfi'i. A-Umm, Dâr al-Ma'rifa, Beirut, vol.4, p.189.


113. ibid, p.460.


119. Flensburger Dampfercompagnie v. the United States, A.D., 1931-1932, Case No.38.


122. The term 'imâra' means an entity containing territory, population and a governor (amîr) or the power of the amîr himself.

123. Generally speaking, Islamic law proceeds the birth of the state, while international law follows it. The former is predetermined while the latter determines whether an entity is, in fact, a state or not. Cf. Marek, K. Identity and Continuity of States in Public International Law, Geneve, (1954), p.2.


126. Al-Baladhûri, op.cit., p.211.


132. In the Western part of the Abbasid Empire, several independent Khalifas and emirates were established, Hamada. Al-Wath'ik al-Siyasiyya al-'Amida lil 'Usur al-'Abasiyya al-Mutatalliyya, op.cit., p.330 ff.

133. See for example, the Buwayhids, ibid, p.359.


135. Such as 'Abdul Rahman al-Dakhil who claimed the Islamic Khalifa over all Muslims.

136. Such as the Fatimids, who claimed the Khalifa over all Shi'ats, Hamada. Al-Wath'ik al-Siyasiyya wa'l Idariyya al-'Amida lil 'Ubd al-Fatiimiyya, op.cit., p.25.


141. Cf. imrat al-istila' (the assumption of governorship by force) in Islamic legal order.

142. Grotius, H. De Jure Belli ac. Pacis Libri Tres, ed. by B. Scott, (1913), ii, C. ix, iii, i.


151. Al-Qur'ān.III, 64.


155. Tanzimāt (codifications), Khadduri, (ed.). Law in the Middle East, the Middle East Institute, Washington, (1955), vol.1, p.279 ff.


164. Cmd.1929.

165. See Chapter II, Section 2, p.52.


176. Cf. ibid.


181. Chapter VI, Section 1.

182. The term 'capitulation' does not mean 'surrender' but promises to grant imperial diplomats sworn promises.


194. The Ottoman Empire concluded with Britain the 1809 Treaty of Peace, Commerce and Alliance, F.O.93/110/1 B. and 93/110/2; in 1858.


201. See Chapter II, Section 2.


207. Cmd.2370.

208. Aitchison, op.cit., p.265.

209. Article I of the Treaty of Alliance of October 10, 1922, T.S. No.17, (1925); Cmd.2370.


211. Cmd.3833.


214. See Chapter II, Section 1, p.38.


216. Cmd.3833.


219. See Chapter VI, Section 2.


222. Such as those of 1718 with Venice 1740 with Naples, 1823 with Sardinia, 1833 with Tuscany, 1802 and 1838 with France, 1809
with Great Britain, 1739, 1774 and 1783 with Russia, 1699, 1718 and 1739 with Austria, 1757, with Denmark and 1782 with Spain.


224. The term 'personal' treaties covers all treaties of alliance, such as the Ottoman Treaties of Alliance with Britain 1799, 1809, with Russia 1805 and 1833 etc. see Hurewitz, op.cit., vol.1, pp.65, 81, 72, 105.


226. ibid.


231. See the Fertile Crescent project proposed by Nūrî al-Saʿīd, the Prime-Minister of Iraq, in Arab Independence and Unity, Baghdad, (1943), pp.11-12.


234. Trimingham, op.cit., p.61.


237. ibid, p.90.


239. ibid, doctoral thesis submitted to the State University of Groningen, 1971, pp.27, 29.
CHAPTER IV
FOOTNOTES

1. Cmd.2370.

2. Cmd.2370.


6. During the time of the assumption of the British mandate over Iraq, European classical literature did not treat multilateral treaties as comprising a special category, Hershey, A.S. The Succession of States, A.J.I.L., 1911, vol.5, p.284, at p.287.


11. ibid, p.249.


18. ibid, p.271, p.253.


34. Article 34 is the origin of Article 38 of the 1969 Vienna Convention on the Law of Treaties.


40. See Article 95 of the 1907 Convention, ibid.


44. Article 94, ibid, p.673.


49. Signed by G. De Smidt, Director of Post and Telegraphs of Iraq, L.N.T.S., 1927-8, vol.lxix, pp.139-155.


52. Signed by Douglas W. Gumbley, for Director-General of Posts and Telegraphs of Iraq.


59. Cmd.3797.


63. Cmd.2679; Cmd.2912.

64. ST/LEG/SER.E/3, p.269.

65. ibid, p.267, p.249, p.245.

66. ibid, p.191.


70. ibid, p.736.

71. Iraq in 1929, signed the 1923 Convention, ibid, p.770.


73. ibid, pp.9-10, paras.75-82, paras. 87-90.


75. ibid, p.16.


85. Cmd.2317.

87. See above, notes. 49, 50, 51, and 53.


97. McNair, op.cit., p.650.


108. *ibid*, p.64.


115. Al-Qur'ān.XLIX, 10.


118. *Cmd.*2370.


120. Al-Qur'ān.XLVII, 35.


128. See Chapter VI, Section 1.

129. *Cmd.4691*.


134. *Cmd.2370*, p.34.


136. Text is to be found in ibid, pp.38-39.

137. See Exchange of Notes in the *Report on the Administration of Iraq* for the year 1930, p.33.

138. ibid, 1931, p.30; ibid, 1932, p.13.


144. *Cmd.5957*.


151. See above, notes 49, 50, 51, and 53.


155. ibid, p.211.

156. Cmd.2566.


159. ibid, p.160.


161. Text in Report on the Administration of Iraq, 1931, (col. No.74), Appendix N.

162. Text in, ibid, Appendices L., K.

163. Text in, ibid, Appendix O.

164. Text in the ibid, 1931, (Col. No.74), Appendix, M.


168. ibid.


177. Cmd.2370.


179. Article 3 (2) of the Treaty of Lausanne, G.B.P.P., 1923, T.S. No.16, Cmd.1929.


181. Cmd.2370.


184. Cmd.964, pp.16-32.


191. Cmd.2370.

192. International Boundary Study, No.111; Cmd.2566.


198. 'Uthmān, op.cit., p.153.


204. Cmd.3440; Cmd.2317.


206. Text is to be found in the Report on the Administration of Iraq, for the year 1932, p.17.

207. Al-Qu'rān.II, 30; XXXVIII, 26.

208. Al-Qu'rān.IV, 59.


215. ibid.


218. See Madijahlat al-Aḥkām al-‘Adliyya, Article 1248.


221. Lester. State Succession to Treaties, op.cit., p.492.


224. Lester. State Succession to Treaties, op.cit., p.492.


228. Madijahlat al-Aḥkām al-‘Adliyya, Chapter I, Maxims.


233. For this reason Iraq claimed sovereignty over the territory of Kuwait, Saudi Arabia claimed sovereignty over a part of the United Arab Emirates, Abū Dhabi and Bahrain claimed sovereignty over part of the territory of Qatar etc., Azzam, I.A.R. *The International Status of the Persian Gulf States*, R.E.D.I, 1959, vol.15, p.52.


235. Hill, N. *Claim to Territory in International Law and Relations*, (1945), pp.41-42.
CHAPTER V
FOOTNOTES


3. ibid, p.170.


15. A.D., 1923-4, Case No.42.


20. A.D., 1919-22, Case No.44.


24. Kuwait al-Yawm, No.1133, 23rd year of issue.
25. Cmd.257.
27. ibid, p.313; Cmd.257; ST/LEG/SER.E/3, pp.315-317.
31. It states that:
   All people are equal in human dignity, and in public rights and duties before the law, without distinction as to race, origin, language or religion.
32. It states that: "personal liberty is guaranteed".
33. On public rights of the Kuwaiti citizens as promulgated by the 1962 Constitution, see part 3 of the Constitution.
35. Kuwait al-Yawm, No.684, 14th Year of issue, p.49.
38. The Article states that: "Peace is the aim of the state. . .".
44. On the term 'irtifā' (usufructory right), Abādi, Fayruz. Al-
Kāmūs al-Muḥīt, Matba'at al-Bāb al-Halabi, (1371 H.-1952 A.D.),
vol.3, p.244.

45. Ṣādiq, Hishām. Aṯbār al-Istikhlāf al-Dawli, Munṣha'at Dār al-

46. ibid, p.47.

47. Keith, A.B. The Theory of State Succession, Waterlow & Sons


49. Mahmūd, Ṭabdūt Ḟanī. Aṯbār al-Istikhlāf al-Dawli fī al-Kānūn
al-Dawli wa'lSharī'a al-Islamīyya, doctoral thesis submitted to

50. In the Islamic terminology is known as 'darar' (mischief), al-
Bādı, Sulīman. Kitāb al-Muntakab Sharḥ Muwatta' lImām Mālik bīn


52. Woodward, E.L. and others. Documents on British Foreign Policy,

53. Signed but not ratified by the Turkish Government, G.B.P.P.,
1920, T.S., No.11, Cmd.964, pp.16-32.


55. Jenks, C.W. State Succession in Respect of Law-Making Treaties,

56. McNair, op.cit., p.259.

57. Keith, K.J. State Succession to Treaties in the Commonwealth:

58. ʿAbdul Salām, Daʿfar. Dawr al-Muʾāḥadāt al-Shārīʿah fī Hukm al-


60. ibid.

61. Al-Ghuṇaymi. Aḥkām al-Muʾāḥadāt fī al-Shārīʿa al-Islamīyya,


66. Chapter VI, Section 2, 2.


71. On the determining legal criteria of succession in Islamic legal theory, see Chapter III, Section 1, 1, B.


76. 'Abädi, op.cit., vol.3, p.244.


79. Al-Khafif, 'Ali. Al-Mulkiyya fi al-Shari' a al-Islamiyya wa`a al-Mukāran bi al-Sharī`i` al-Wad`iyya, 1st ed., Cairo, p.120.


86. Vali, op.cit., p.33.


88. Such as acquisition of title to certain rights by prescription or by special geographical circumstances, ibid.


96. ibid, p.105.


109. The term 'Contracting Parties' stands for the general representative origin of G.A.T.T., the term 'Contracting Party' (singular) stands for 'member' of G.A.T.T.


111. Private Correspondence and Notes on the Procedures for Accession to G.A.T.T. and the Advantages for Less-Developed Countries, issued by the Executive Secretary of G.A.T.T. in October 1961 and January 1962, M.G.T., (61) 30.

112. ibid.

113. Archives of the Ministry of Foreign Affairs of Kuwait.


115. These subsidiary agreements are sometimes called 'protocol', 'procès-verbal', 'declaration', or 'decisions'. Black, op.cit., p.235.


119. ibid, vol. 662, p. 4.
120. ibid, vol. 663, p. 4.
121. ibid, vol. 663, p. 106.

122. ibid, vol. 664, p. 4.

126. Great Britain ratified this convention on 14 February 1933, Cmd. 4284.

127. ibid, p. 30.
128. Cmd.9824, p.8; signed by the United Kingdom on 23 March 1956, ibid, p.11; see also Article XVI of the 1961 Convention Supplementary to the Warsaw Convention, Cmd.2354, p.10.

129. Since British treaties are not self-executing, the Warsaw Convention has been implemented by the 1932 Carriage by Air Act, 22 and 23, Geo., 5, c. 36 and by the 1953 Order-in-Council, No.1474 which was made under S.3 of the Act, S.1. The convention was extended to certain colonies, protectorate and trust territories including the protected State of Kuwait.

130. For example, Article 24, para.2, of the 1929 Warsaw Convention leaves it to the municipal law of the contracting state to define "who are the persons who have the right to bring suits and what are their respective rights" in case of damage resulting from death, Cmd.4284, p.26.


132. Cmd.4284, p.29.


142. Kuwait al-Yawm, No.454, 9th year of issue, p.2.


147. Cmd.524; Cmd.9340; Cmd.590; Cmd.607; Cmd.642.
148. Cmd.8981; Cmd.9873.

149. Cmd.3797, Article 8.


152. On the general practice of the Islamic state in treaty succession, see Chapter III, and on the general Islamic legal theory see Chapter VI.


155. Except for the 1920 unratified Sévres Treaty, G.B.P.P., 1920, No.11, Cmd.964, p.16, and the 1923 Lausanne Treaty, Cmd.1929, in which most parties are non-Muslim states except Turkey; see Chapter IV, Section 2, 2.


157. On this discussion see Chapter II, Section 2, 1, B, (iii).


162. It is convenient, hereinafter, as in the case of treaties concluded by Great Britain, to make a distinction between treaties of a non-constituent character and treaties of constituent character concluded by Kuwait, although Kuwait has never entered into a multilateral treaty of non-constituent character, whether dispositive or non-dispositive. Thus the investigation will be focussed only on treaties of a constituent character concluded by Kuwait herself.


166. ibid.


175. ibid.


180. Signed by J.G. Tahourding, ibid, p.2.


188. *ibid*, p.97.


190. *Cmd.1409*.


204. These were the 1904 Agreement on the Establishment of British Post Office at Kuwait and the 1912 Agreement on the Establishment of Wireless Telegraph Installation.


210. ibid.

211. Cmd.3720.

212. Ministry of Foreign Affairs of Kuwait.


220. ibid.

221. ibid, p.247, at p.248.


228. As regards Kuwait, the treaties are usually published in al-Kuwait al-Yawm and for Saudi Arabia, they are published in Um

229. Such as, British Treaty Series, United Nations Treaty Series, etc.


239. See Chapter VI, Section 1.


241. ibid, p.211.


244. Aitchison, op.cit., p.213.

245. ibid.


249. The Kuwait Order in Council, 1949, No.593.

250. A.D., 1927-8, Case No.61; ibid, 1920, 1931, Case No.43.


253. Kuwait al-Yawm, No.581, 12th year of issue, p.5; M.E.E.S., 13, 27 of March and 3 April 1964, No.22.

254. Kuwait al-Yawm, No.581, 12th year of issue, p.5; Um al-Kura, 18 Rabi’ II, 1386 H. (corresponding to 5 August 1966), No.2132.


258. Cmd.3370.


261. F.O., Great Britain. The Pink Volume.


263. Archives of the Foreign Ministry of Kuwait.


265. This statement is embodied in most constitutions of the Arab states, Khalil, op.cit., vol.I.

266. The Iraqi Constitution only defines Islam as the religion of the state without referring to the Shari‘a, Davis, H.M. Constitutions, Electoral Laws, Treaties of States in the Near and Middle East, Duke University Press, (1947), p.108; while the Kuwait Constitution directly defines the Shari‘a as a source of legislation.


269. See Chapter IV, Section 2, 2, B.
CHAPTER VI
FOOTNOTES


5. ibid, p.14.

6. ibid, p.7.


17. He is the founder of the Ḥanafid School of Iraq.


20. This does not include the adjacent desert and High Seas which are not under any foreign sovereignty and open for Muslims.

21. See the opinion of Abu Ḥanifa in this respect in Ibn 'Abdīn, Muhammad. Ḥāshiyyat Ibn 'Abdīn, Maṭba'at Mustāfa al-Ḥalabi, (1386 H.), vol.4, pp.174-175.


33. In the practice of the Islamic State not all treaties which have been concluded with a member state of Dār al-'Āhd contain the stipulation of payment of al-kabārṣafī (the land tax) to the Islamic State, al-Ghurāfī, Ahmad. Al-Furūk, Maṭba'at al-Ḥalabi, vol.3, p.24.

34. Al-Shāfiʿī. Al-Umm, Al-Maṭba'ā al-Amiriyya, Cairo, vol.4, pp.103-104, 192.


44. Marek, op.cit., p.90.

45. See Chapter I-IV.

46. See the Treaty of Cession of Malatıyah (Malta), concluded between the representative of the Islamic state under 'Umar II of the Umayyid Dynasty and the representative of the Byzantine Empire, in Ibn Dījār, 'Abdullah. Ḫūnān al-Maḍārī fī Aḥqāf al-Khālīf, Istanbul.


63. On the evolution of the rules of Islamic international law since the emergence of Islam up till now, see Chapters on al-Siyar, al-djihād, al-Maghāzī (campaigns) in any Islamic juristic work in edition; al-Kāsānī, op.cit.


65. Al-Fayyūmī, Abu al-‘Abbās. Al-Muṣbūh al-Munir, under 'khalafa'.


79. Abu Hayf, op.cit., para.90.


82. During the time of the Prophet, since he never entered into a treaty with a foreign nation unless after the holding of the *shura* (consultation) of Muslims, for example, see the conclusion of the Peace Treaty of al-Hudaybiya, Ibn *Hishām*, op.cit., Part II, p.316.

83. See the *idjmāʿ* (consensus) by which the *ummā* delegated not only the leadership of Muslims but also the treaty-making competence of the state to the first Khalīfa, Abu Bakr, al-Nabhān, Muḥammad. *Nizām al-Ḥukm fi al-Islām*, Kuwait University Press, (1974), p.98.


87. Specifically, the modern Arab jurists who have written treaties on international law and used the criteria of 'sovereignty' in order to identify the occurrence of succession between Islamic and non-Islamic states.

88. Such as fusion and separation of states as in the case of the United Arab Republic.


95. Al-Qur’ān VI, 57.


100. See Chapter I-V.


102. Cmd.2370.


104. Such as the replacement of the Islamic rule over Spain and the transforming of the people therein into non-Muslims.


106. See Chapter III, Section 1, 1, B.

107. The Ottoman Empire affirmed this principles in the 1923 Lausanne Peace Treaty, Cmd.1929.

108. See Chapter VII.


111. This formula emerged later from the practice of African states such as Zambia upon advice given to her by O‘Connell as a consultant, I.L.A. Reports of the Committee in the Succession of New States to Treaties and Certain Other Obligations of Their Predecessors, 14-20 August 1966, (Helsinki) 52nd Conference, pp.590-591.


115. Cmnl.3797.


118. See Chapter IV, Section 1.


123. 'Abdul Salām, op.cit., p.463.

124. Article 83 of Majallat al-Ahkām al-‘Adliyya states that "stipulation is to be complied with as far as possible", a principle which is incorporated in almost all laws of the Arab states and more specifically Article 146 of the Iraqi and Kuwaiti Civil Code.

125. See the 1958 Geneva Award regarding the dispute between the government of Saudi Arabia and Mr A. Onassis on a shipping concession granted by the former to the latter, I.L.R., 1963, vol.27, p.117.
126. Cmd.3797.


129. ibid.


132. ibid.

133. ibid.


141. See Chapter IX; Chapter X.

142. Grotius, H. De Jure Belli et Pacis, (1625), II, IX, 9, 10, 12.


150. Grotius, op.cit., II, XIV, 1, 2.


159. ibid.

160. ibid.


165. ibid.

166. ibid.


172. Cmd., 2370.


174. See Chapter V.

175. On the Hanafid law see Ibn Nudaym, op.cit.; on the Maliki law, see al-Dardir, op.cit.


178. Such as the applicability of the treaties to the territory at the date of independence, the law-making or territorial nature of the treaties, the treaty-making competence of the territory before independence which may have participated in the conclusion of the treaty etc.

179. The so-called al-fuduli (the agent by ratification) in Islamic law is a person who enters into a contract on behalf of another person without authorisation from the latter. If the contract is accepted and ratified by the latter it becomes binding between him and the other contracting party. Otherwise, the contract has no legal effects except between the fuduli and the other party.


181. See Chapter V.

182. Archives of the Ministry of Foreign Affairs, Kuwait.

183. See this formula as developed by Tanganyika upon her independence, U.N. Doc.ST/LEG/SER.B/14, pp.177-178.

184. See Chapter V, Section 2.


190. Lester, *op.cit.*, p.476.


194. See Chapter V, Section 2.

195. See Chapter IV, Section 2.

196. See Chapter VII, Section 1, 2.

197. *ibid*, 1.


201. *ibid*, p.5.


207. See Chapter III, Section 1, 1, B.

208. Archives of the Ministry of Foreign Affairs, Kuwait.


210. Under the 1856 Paris Peace Treaty, the Balkan states were recognised by the contracting parties as independent principalities under Ottoman suzerainty, Articles 22, 23, G.B.P.P., 1856, vol.61, p.19, and by the 1878 Berlin Treaty
Bulgaria, Romania and Serbia were recognised by the contracting parties as independent principalities under the suzerainty of the Ottoman Empire, G.B.P.P., 1878, vol.83, p.690.
PART III

ARE THE IRAQI AND KUWAITI LEGAL DOCTRINES APPLICABLE ON THE REGIONAL PLANE?:

EVOLUTION OF THE ARABIC CONVENTIONAL LAW ON TREATY SUCCESSION

FORMATION OF THE ARABIC CUSTOMARY LAW ON TREATY SUCCESSION
INTRODUCTION:

The issue examined here deals with the means by which Arabic public law has developed and been established to satisfy the needs of modern Arab states. An immediate indication can be found in the constitutions of the newly independent Arab states, which, with the exception of Lebanon, unanimously reaffirm their Arabic identity and adherence to Islam.

Using the primary sources of Islamic law (the Qur'an and the Sunna) as a basis, the leaders of the Arab states have employed *idīthād* (independent reasoning) and other methodological legal devices, such as *iddīmā* (consensus), *niyās* (analogical deduction), etc. to develop and establish a specific body of rules governing their *inter se* relations and their relations with non-Arab states. The flexibility of these sources and their adaptability to particular requirements determined by time and place have enabled the leaders of the Arab states to find among them devices that are compatible with the needs of the modern age, specifically treaties and custom.

By applying the sources of treaties and custom, new customary law may be generated on the basis of conventional rules and treaties may codify the existing customary rules. This part deals with the creation of new customary law by the Arab states which came into existence relatively recently through various treaties and customary practice and this is exemplified by the practice of Iraq and Kuwait. Although most of these treaties and customs were based on Islamic legal theory, they were nevertheless specifically connected and identified with these states and separate from the rest of the Islamic world.
The creation of new customary law through the regional conventional rules means that new regional customary rules come into existence and have the same substance as the written rules, since creation presupposes a written text, i.e., the existence of treaties and so, the development and establishment of the Arabic conventional law on treaty succession and subsequently the Arabic customary law on this subject will be examined in the following chapters.
SECTION 1: UNDER THE PROTECTION OF NON-MUSLIM STATES:

1. The Practice of Non-Gulf Arab States:

   A. Tunisia:

   The concept of the Exclusive Agreement has its roots in the 1881 Bardo Treaty concluded between the French government and the Bey'. According to Article 3, the French government undertook to protect the Bey against any danger that might threaten the security of Tunis. The article embodies explicitly the delegation of the conduct of the international relations of Tunis to France according to which Islamic law was replaced by international law in regulating this sphere, exactly as was the case with Kuwait and Iraq, and thus according to the Islamic legal criteria determining the identity of a territory², the external Islamic identity of Tunis remained passive during the French protection until her independence in 1956. Unlike the 1899 Exclusive Agreement between Great Britain and Kuwait and the 1922 Treaty of Alliance between Great Britain and Iraq, Article 6 of the 1881 Treaty between France and Tunis prohibited the Bey from concluding any treaty with a foreign power without the previous consent of the French government. The article, however, did not impair the legislative power of the Bey which he continued to exercise in accordance with Islamic law. According to the Islamic criteria of identity, this is evidence of the continuity of the internal Islamic identity of Tunis while under French protection. The legislative power of the Bey was shared by a national assembly
known as the Grand Council of Tunisia, which by virtue of Article 38 of the Beylical Decree of 15 September 1945, was to be consulted before the adoption of any Beylical Decree on financial or social matters, and until these decrees received the visa of the French resident-general they were not enforceable. Therefore, the French jurisdiction in Tunis in foreign relations was acquired by virtue of the treaty of protection as was emphasised by the international and national tribunals.

In the 1923 case of *Nationality Decrees in Tunis and Morocco* between Britain and France, France contended that her jurisdiction extended to the territory of the protected states of Tunis and Morocco. The P.C.I.J.'s answer to this contention was that:

> The extent of the powers of a protecting State in the Territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and secondly, upon the conditions under which the Protectorate has been recognised by third Powers.

Thus the determination of the French jurisdiction in Tunis depends upon an examination of the whole situation and it is clear from the quotation above that this would involve a study of the various international engagements by which the protectorate was first established, and then recognised. It was therefore no longer a question of the internal jurisdiction of a single state—France. To avoid this problem, the French government claimed that it could exercise and divide sovereignty with Tunis within the latter's territory by agreement, a contention which compelled the court to have recourse to international law to evaluate such agreements with third states.
The opinion of the Permanent Court of International Justice did not go as far as necessary in order to establish whether Tunis was a subject of international law. According to Islamic legal theory, this denotes the continuity of the pre-protection identity of Tunis and the issue was later addressed by the I.C.J. in the Rights of United States Nationals in Morocco Case of 1952.

The continuity of the pre-protection identity of Tunis and its separateness from the protecting state was further emphasised by a national court. In the case of Arous v. Dame Assuied of 1937, the French Court of Cassation (Chambre Civile) held that, in an action for divorce involving a naturalised French subject resident in Tunis, a decree of the Bey of Tunis was applicable, because:

The Tunisian state, which is not integrated into French territory but which merely submits to the protection of France, keeps its sovereignty.

The continuity of the Islamic identity of Tunis upon the assumption of French protection over her did not contradict the fact that Tunis, as an integral part of the Maghrib (Morocco), under various governors of the Islamic State had assumed power by force and accordingly developed an autonomous factual identity from that of the Maghrib. She nevertheless remained an integral part of Dar al-Islam; a fact which created a legal nexus with her treaties upon the assumption of French protection.

The parties to the 1881 Treaty of protection dealt with this question whether consciously or unconsciously by espousing a principle recognised in Islamic law, according to which Article 4 of the treaty emphasised the devolution of the pre-protection
treaties of Tunis, such as her 1873 Treaty with Britain"', to her under the French protection.

B. Morocco:

As was the case with Tunisia, France assumed protection over one portion of Morocco by the 1912 Treaty of Fez and besides this, Spain assumed protection over another part by the 1914 Treaty. These treaties constituted no more than a Moroccan adaptation of the regime established by the French government in Tunis in 1881 which had the same legal effect on the external and internal Islamic identity of Morocco and this lasted until her independence in 1956.

French control over the international relations of Morocco and consequently the domination of international rather than Islamic law was contemplated in Article 6 of the protection treaty according to which the Sherifian Government of Morocco undertook not to conclude any act of an international nature without the previous consent of the French government and in Article 5 which stated that the representative of the French government (Resident-General) to his Sherifian Majesty was

the sole intermediary between the Sultan and his foreign representative and in the relations which these representatives maintained with the Moroccan government.

These provisions of the Treaty of Protection clearly diminished the Sherif's authority over the international relations of Morocco, of which the enforcement of Islamic law had been an indispensable aspect, until the final independence of Morocco in 1956.

Conversely, French control over the internal relations of Morocco appears to have been limited by the preservation of the
personality of the Sultanate of Morocco through restoring its religious authority and prestige and associating French measures with those of the throne. Moreover, France undertook to safeguard the religious status, the respect and traditional prestige of the Sultan, the exercise of the Muhammadan religion and the religious institutions as contemplated in Articles 1-3 of the Protection Treaty.

Hence, the Sherif (Sultan) retained his Grand Vizier (Prime Minister) and was given a Vizier to administer Islamic justice, education, worship and the royal states. The Resident-General, according to Article 5 of the treaty of protection, was charged with responsibility for overseeing the execution of the treaty and the authority to approve and promulgate, on behalf of the French government, all the decrees passed by His Majesty the Sherif of Morocco.

However, Article 1 of the 1912 Treaty of Protection between France and Morocco laid down limitations regarding certain matters on the internal authority of the Sherif, namely, that France should enter into an agreement with Spain concerning the latter's interest in the Spanish zone of Morocco and that the City of Tangier should retain its international characteristics and its municipal organisation.

The involvement of the protecting state in the internal relations of Morocco and its effects on her identity gradually became a matter of concern not only to Muslim and Arab states but also to non-Muslim states. The internal authority of the Sherif was shared by the French Resident-General in accordance with Article 8 of the 1912 Treaty of Protection and after the 9 September 1953 by the
Council of the Viziers and directors which was a government body that shared legislative power with the Sherif. Since the Council comprised officials of French nationality in addition to the resident's visa as a requirement for the enforcement of the Sherif's decrees, it may be asked whether Morocco under French protection lost her international legal personality entailing her incorporation into French territory and subsequently lost her Islamic identity. As in the case of Tunis, this issue has been dealt with by international and national tribunals.

In the 1923 case of Nationality Decrees in Tunis and Morocco\cite{15}, the French government contended that the Treaty of Protection with Morocco authorised her to establish a new regime in the fields of administration, justice, education and the economy in addition to the military field\cite{16}, an authorisation which led to the assimilation of the French zone of Morocco within French territory. The court, however, held that the issue of the legal status of Morocco under French protection "depends upon an examination of the whole situation as it appears from the standpoint of international law"\cite{17}. Thus the examination was required to involve a study of the international agreement by which the protectorate of Morocco was created and subsequently recognised by a third power. It was no longer, as France contended, a question of the internal jurisdiction of a single state, namely France. The P.C.I.J. went no further than this as it had in the case of Tunis, and failed to declare whether Morocco possessed an international legal personality and was thus subject to international law. This omission was later redressed by its successor, the I.C.J.
In the Rights of the United States Nationals in Morocco Case of 1952¹⁹, the I.C.J. held that an international protectorate did not abolish the international personality of the protected state; and moreover, that the relations between the protecting and protected state were of an international character.

This international character was no less than the continuing of the pre-protection identity of Morocco, and this was further acknowledged by the national courts of the protecting and protected states. In 1924 the French Court of Cassation held that

... Moroccan territory ... remained foreign territory within the meaning of Articles 235 and 236 of the Code of Military Justice ...¹⁹.

The National Court of Morocco followed the same tendency. The Court of Appeal of Rabat in the 1937 case of Zabulon and Zabulon v. Procureur Commissaire of the Government of Casablanca held that:

... Morocco, placed under the protectorate of France; has remained a foreign country, ...²⁰.

This is cogent evidence that the internal Islamic identity of Morocco remained intact under French protection. This factual identity had been established centuries before upon the Moroccan assumption of governorship by force from the Abbasid Khalifa²¹. However, the above conclusion does not satisfy the correlative issue of the effects of the protection treaties on Morocco's treaties.

As far as non-Islamic views on this question are concerned, the French government occasionally and Great Britain continuously maintained that the pre-protection treaties of Morocco survived protection. Before the assumption of French protection, Morocco granted various capitulatory rights to non-Muslim states²². She was
a contracting party in various treaties and was bound by the Act of Algeciras of 1906\textsuperscript{23}. Although the French government admitted the devolution of the capitulatory rights to Morocco under French protection, she denied the devolution of the other treaties. In the \textit{Nationality Decrees in Tunis and Morocco Case} of 1923\textsuperscript{24}, France argued that the effect of the Fez Treaty of 1912 was similar to that of annexation and therefore there was only one sovereign state on the international plane namely France, while in the internal sphere sovereignty was divided between France and her protectorate, Morocco. This argument, however, was not accepted by any interested states including Great Britain and in 1923 a dispute arose between Great Britain and Spain regarding the continuing in force of the 1783 Treaty\textsuperscript{26} concluded between Great Britain and the Maghzen of Morocco by which the British Consul at Rio Martin was provided a suitable residence. In this case, Judge Huber examined the status of the protectorate in international law and its applicability to the Morocco case and decided that the conduct of Moroccan external affairs was delegated by the Maghzen to Spain, the latter being responsible for performing the former's obligations. As a consequence, the Anglo-Moroccan Treaty of 1873 survived the establishment of the Spanish protectorate over Morocco.

The legal justification of such devolution under Islamic legal theory\textsuperscript{28}, and the emerging Arabic legal doctrines\textsuperscript{29} therefrom, was that Morocco, as a part of \textit{Dār al-Islam}, had developed an independent legal identity\textsuperscript{30} from that of the Islamic state and her treaties were attached to this legal identity before and after the French protection over her. In spite of the absence of her external Islamic
identity during the French protection as a result of the domination of international law, as in the cases of Tunis, Kuwait and Iraq, her internal Islamic identity remained intact during the French protection as a result of the recognition of the application of Islamic law by the treaty of protection, which was in many respects similar to the case of Egypt over which the protection of Great Britain was assumed not by treaty but by declaration, as will be discussed shortly.

Before the assumption of French protection over the Arab states of North Africa, the region had no political boundaries but only natural ones, which usually separate the al-Mālik (provinces) within Dār al-Islām. However, Morocco had begun to establish her factual identity before the assumption of French protection over her, as, for instance in the 1844 Treaty establishing the Moroccan-Algerian Boundary following the line drawn by the latter when she was under Ottoman authority, although during the era of protection the protecting states (France and Spain) divided the Moroccan territory in accordance with their sphere of influence and in 1904 they concluded a convention in which the Moroccan territory known as the Spanish Sahara was apportioned to Spain. Boundary treaties legally concluded by Morocco devolved automatically to her under French protection while those violating her territory have been continuously and vigorously rejected by the Moroccan authority during French and Spanish protection and subsequently.

C. Egypt:

The rationale espoused by the Islamic theory on state succession may not by itself be understood and applied to the problem of treaty
succession without the participation of a non-Muslim state, as has already been shown by the preceding examples of Muslim and Arab state practice. Egypt provides a good example of this.

The development of the factual and legal identities of the Arab states has not solely been achieved by the assumption of governorship (power) by force, for some states have naturally and gradually achieved this position through the consent of the Islamic state herself. Since the 11 A.H. (633 A.D.) Treaty between Egypt and the Islamic State\textsuperscript{32} by which the former became an integral part of Dūr al-Islam, it subsequently maintained its autonomous factual and legal identity under various governors and throughout the successive transfer of the Khilāfa from the Arabs to the Ottomans\textsuperscript{33}. Under Muhammad 'Ali, Egypt attained some autonomy in 1841 and by the 1873 and 1879 Firmans\textsuperscript{34} acquired some treaty-making competence as far as commercial treaties were concerned. On 30 March 1874, a note was distributed to various European powers drawing their attention to this treaty-making competence conferred upon the Egyptian government and the desire of the Ottoman government to find a new basis for the Egyptian government's commercial treaty relations after the previous ones had been denounced. From 1889 to 1903, most states that had treaties with the Ottoman Empire complied with the Firmans and negotiated new treaties with Egypt, which subsequently attached to her new legal identity. This was consolidated by the subsequent practice of the non-Muslim states.

Upon the assumption of British suzerainty over Egypt, the issue of the devolution of the pre-1873 treaties to Egypt arose, such as the Erzerum Treaties of 1823\textsuperscript{35} and of 1847\textsuperscript{36} between the Ottoman
Empire and Persia. The British view towards this was in accordance with the 1873 Ottoman Firman which stated that the Egyptian government was vested with treaty-making competence with regard to commercial treaties and any subsequent Ottoman commercial treaties were inapplicable to Egypt, i.e. Egypt has developed an independent legal identity from that of the Islamic State (Ottoman Empire) without any use of force on the part of the Egyptian government or the new suzerain. Thus the devolution of the treaties of Egypt under British suzerainty raised no question.

Upon the outbreak of World War I in 1914, Great Britain declared its protection over Egypt which lasted until 1922. Unlike the other protected Arab states, since this protection was not achieved by treaty, there was no change in the external Islamic identity of Egypt and therefore, the subsequent acts of Great Britain could be assimilated under Islamic law, as those of al-fudulî (agent by ratification), and could only be valid upon the consent of the Egyptian government. This was emphasised not only by the continuity of the pre-protection treaties under the Islamic rules governing the identity of a territory but also by the practice of non-Muslim states. The pre-protection treaties between Egypt and non-Muslim states continued until 1937 when the European states renounced their capitulatory rights in Egypt by the Treaty of Montreux.

As in the case of Morocco, Egypt independently developed her Arabic factual identity by defining her territorial boundaries with the neighbouring states by treaties, such as the 1899 Agreement concluded between Egypt and Great Britain acting on behalf of the Sudan which defined the boundaries between the two Arab states.
This was subsequently attached to the identity of Egypt and devolved automatically to her under the British protection.
2. The Practice of the Arab Gulf States:

A. The Legal Status of the Exclusive Agreements under Islamic Law:

These sheikhdoms had certain common characteristics under British protection, one of which was the phenomenon of concluding an exclusive agreement with Great Britain. Those that followed this course were Bahrain in 1880 and in 1892, Abu Dhabi in 1892 (to which the other Trucial Shaykhs adhered), the new Saudi Sheikhdom in 1915 and Qatar in 1916.

At the outset, however, it must be asserted that unlike the protection treaties between the other non-Arab Gulf states with France, the exclusive agreements concluded between Great Britain and the Arab Shaykhs of the Gulf do not embody all the reciprocal considerations of the contracting parties and are thus similar in this way to the 1899 Exclusive Agreement between Britain and the Shaykh of Kuwait. They only embody the obligations undertaken by the Shaykhs (like those undertaken by the Shaykh of Kuwait) which state that they will not cede, sell, mortgage or allow occupation for any purpose any portion of their territories to the government or subjects of any other power without the previous consent of Her Majesty's Government for these purposes.

Unlike the 1899 Exclusive Agreement with the Shaykh of Kuwait, by the terms of these agreements the shaykhs' treaty-making competence to conclude treaties with foreign powers was suspended. Nothing is found in the agreements regarding the obligation of Great Britain towards the Shaykhs and they are regarded under Islamic law as contracts. Contracts of this nature are viewed by the Hanafid
School as *fāsid* (irregular), since the consideration of one of the contracting parties is ambiguous and such a contract is not enforceable against the other party whose consideration is well defined because the latter has *hak al-faskh* (the option of recession) of the contract. In the case of Kuwait, however, the consideration of Great Britain towards the *shaykhs* may be concluded from the subsequent agreements which may be assimilated, under Islamic legal theory, to those of the so-called *al-fuduli* (agent by ratification), and thus were only enforceable if they received the acceptance of the *Shaykhs*. Assuming that Great Britain's acts as embodied in the Exclusive Agreement received the acceptance of the *Shaykhs*, the effects of such contracts on the Islamic identity of the Arab Gulf states and on pre-existing treaties must be examined.

B. The Effects of the Exclusive Agreements:

(i) On the Legal Status of the Sheikhdoms:

The legal status of the sheikhdoms under the exclusive agreements have been dealt with by both non-Muslim and Muslim jurists. The effects of the Exclusive Agreement on their international relations has been described by non-Muslim jurists such as Hurewitz who characterises the sheikhdoms as:

... quasi-protectorates. ... they nevertheless surrendered to the United Kingdom in treaties ... all external sovereignty ...

and a non-Muslim statesmen, such as Roberts states that:

The exclusive treaties entailed the Pax-Britannica ... this insulated the Arab territories of the region from development in the Middle East over a century and a quarter and two world wars...
This is a clear indication that non-Muslim jurists and statesmen have regarded the sheikhdoms as having lost their authority to conduct their international relations under the exclusive agreements to Great Britain whereby non-Islamic law governed these relations. Concurring with Hurewitz's view, Al-Baharna expresses the Islamic and official point of view of the Gulf states by maintaining that:

It is clear that although the sheikhdoms, in fact, possess the rights and duties which have been described above, they nevertheless lack some important marks of independence, mainly, they are not fully independent of external control . . . .

Also clearly propounded is the authority of the sheikhdoms to control their international relations, but the application of non-Islamic law to govern such international relations remains doubtful.

This conclusion, however, is not only based on a juristic view but also on the practice of states. Great Britain referred to the sheikhdoms as "British protected states" in Article 6 of the 1927 Jiddah Treaty between Britain and Saudia Arabia and as "the British protectorates, protected states and protected persons" in the Order-in-Council of 1949.

In order for such a view to have been internationally and regionally acceptable it must have been recognised by non-Muslim and Muslim states. An investigation into state practice at that time reveals that some non-Muslim states acquiesced with British protection in the Gulf in general, but the dominant Islamic power, the Ottoman Empire, continuously denied that Britain had any such role in the area until the conclusion of the 1913 Anglo-Ottoman Draft Convention.
Since the criteria determining the Islamic legal identity of a territory is the applicability of Islamic law, it is necessary to examine the law governing the international relations of the sheikhdoms under the exclusive agreements. An adequate treatment necessitates an investigation of the relationships between the sheikhdoms and Great Britain and between the sheikhdoms and third states.

The views of non-Muslim and Muslim jurists also need to be consulted regarding the relationships between the sheikhdoms and Great Britain. Hurewitz says of the sheikhdoms that "... they retained full internal sovereignty . . . ." Roberts (formerly the British agent in the sheikhdoms) confirms this view by stating that:

As far as the individual ruler's relations with his subjects was concerned, not merely was there no attempt to impose alien political institutions, such as parliaments or assemblies, but there was also no attempt to alter the laws or methods by which the rulers controlled their subjects, . . . . The ruler and his majlis are still the basis of Arab society in the Gulf. . . . As far as law is concerned the basis is still the shari'a. . . . In disputes between rulers, the British did, of course, intervene extending thereby the philosophy of the Treaty of 1853 to cover disputes on land as well as at sea.

... relations between the rulers and their peoples were untouched, and even relations between rulers were left largely to chance. . . .

The Islamic and official view of the Gulf states has been propounded by Al-Baharna, who states that

... The question arises as to how, in the absence of formal treaties and instruments, Britain came to exercise jurisdiction in the Gulf countries. An explanation of this is to be found in the 'Explanatory Notes' attached to the Persian Gulf Orders-in-Council of 1949 - a subordinate legislation of Britain. It was stated here, "In the territories of all these [Gulf] States, by agreement with their rulers, His Majesty exercises
jurisdiction over certain persons and properties". However, it is by no means clear as to the manner and form in which the agreement between the two was legitimised. In the event, it can only be inferred that the rulers acquiesced in the exercise of British jurisdiction as published in the Statutory Instruments. It may also be surmised that the ruler's agreement was given orally...

All these views emphasise the continuing in force of the pre-British (Islamic) law in the sheikhdoms. Under Islamic legal theory this constitutes the sole criterion necessary to establish the continuity of Islamic identity and thus the British jurisdiction in the Gulf states was a foreign jurisdiction acquired by agreement as emphasised by the British courts.

It is a well established principle in international and Islamic law that foreign sovereigns are entitled to jurisdictional immunity before a national court, whereas non-sovereigns are not. As far as the jurisdictional immunities of the rulers of the Gulf sheikhdoms in British courts are concerned, the courts have acted in the majority of cases on the advice received from the authorities of the crown which is embodied in a certificate that provides exclusive evidence on jurisdictional immunity in the case concerned. In the case of Antoun v. Harrison & Sons Ltd. and others of 23 September 1965, in which the ruler of Ras al-Kheima was a defendant, the court decided that "It was agreed that the Ruler of Ras al-Kheima was an independent sovereign".

Since the sheikhdoms had recently emerged upon the assumption of British protection over them, they had only had time to develop relations with neighbouring Muslim and Arab states and though they were restricted in their external freedom of action by the exclusive
agreements they nevertheless maintained treaty relations with Muslim states which could hardly be regulated by a (British) law by which the other parties to these treaties were not bound. For instance, in 1935, Saudi Arabia communicated directly with the Shaykh of Qatar without the mediation of the British government. In its objection to such communication, the British government stated that:

His Britannic Majesty's government learned with surprise that the Saudi Arabian government had sent a letter to the Shaikh of Qatar on a question that affects his foreign relations. Since these relations, as the Saudi Arabian government knows, are conducted to His Britannic Majesty's government by virtue of special agreement (concluded) with him, my government hope the Saudi Arabian government will in the future contact them, and abstain from communicating with the Shaikh whenever an occasion relating to Qatar presents itself . . .

The note referred to Article 6 of the 1927 Jiddah Treaty between Great Britain and Saudi Arabia66. The Saudi Arabian government replied by stating that:

The undertaking of H.M. the King of the Hejaz and Najd and its dependencies is confined to friendly and peaceful relations with the amirs of these areas, and contains no reference to any obligation in the part of His Majesty not to relate to them or to be written to by them. After the Treaty of Jiddah, therefore, there was no change in the relations which existed between His Majesty and these amirs. On the contrary, these friendly and peaceful relations continued fully and completely, as did the continuous exchange of correspondence in various matters between them and His Majesty, since this is in support of the friendly and peaceful relations which His Majesty undertook to maintain as to the treaties referred to in Article 6 between the British government and these amirs, they only concern and obligate the amirs themselves and do not place any obligation upon our government67.

Thus the sheikhdoms under British protection, internally as well as regionally, continued the application of Islamic law with which
their Islamic identity is bound up. This will be supported by an examination of the practice of treaty succession.

(ii) On Treaties:

(a) Treaties Concluded between Great Britain and Member States of the Covenant Territory:

With regard to those treaties of a non-constituent character which Great Britain concluded with non-Muslim states, her practice indicates that she was able to extend her multilateral treaties by unilateral legislation to the sheikhdoms, provided that the Shaykhs agreed to the extension as was usually mentioned in the legislation. In general the extension of the United Kingdom's treaties to her overseas territories occurred by means of various types of the so-called 'territorial application clauses' embodied therein. This is summarised by Fawcett in the following words:

Provisions for application ipso facto upon acceptance of the treaty by the United Kingdom, provisions for some or all of the overseas territories to become separate parties to the treaty and inclusion of the colonial application clause.

However, in the case of the silence of the treaty, its application to the sheikhdoms became a matter of treaty interpretation.

In multilateral treaties of a non-constituent character, upon their conclusion or the intention to extend their provisions to the sheikhdoms, a separate declaration was attached to the treaty in question as in the 1949 Geneva Convention and the 1956 Slavery Convention or a specific provision was inserted either applying the treaty to the Gulf area without specifying any particular sheikhdom, as in Article 83, (Section VI, Part 2) of the 1917
International Sanitary Convention\textsuperscript{71}, or to all British overseas territories, as in certain multilateral treaties of a constituent character, such as the I.M.F. and the I.B.R.D.\textsuperscript{72}.

In multilateral treaties of a constituent character, the accession of Kuwait to membership of various international organisations provided the other Arab sheikhdoms with a good example which illustrated the evolution of her personality and the attitudes of various international organisations towards her. The attitudes of these organisations towards the dependent territories are reflected in their constitutions, which provide for the admission of states which are not members of the United Nations\textsuperscript{73}. Only Qatar and Bahrain during British protection took advantage of these provisions and became associate members of UNESCO\textsuperscript{74}.

In addition to the extension of British multilateral treaties, the British government, through the so-called 'colonial application clause', applied several of its bilateral treaties with European states to the sheikhdoms\textsuperscript{75} or on their behalf concluded bilateral treaties with international organisations\textsuperscript{76}. All the above-mentioned British treaties are regarded by Islamic legal theory as acts of fudūli (contracts of agent by ratification) and unless they received the acceptance of the Shaykhs they were of no legal force in respect of the sheikhdoms.

(b) Treaties Concluded between Great Britain and Member States of the Islamic Territory:

In the pre-protection era, Great Britain concluded treaties with the Islamic State (the Ottoman Empire) which represented the Islamic world on the international plane, while the internal affairs of Dār
al-Islam were left under the full control of various self-governing Shaykhs, such as the Arab Shaykhs of the Gulf. Upon the Shaykhs' assumption of governorship by force from the Islamic State and the delegation of the conduct of their international relations to Great Britain, no break in their Islamic identity occurred. Therefore, since under Islamic legal theory the treaties of the Islamic State attach to the identity of the umma, of which the people of the sheikhdoms are an integral part, and since the sheikhdoms had not yet developed a legal identity independent from that of the Islamic State, the treaties of the latter with member states of the covenant territory devolved automatically by the operation of Islamic law to the sheikhdoms upon their assumption of governorship from the Islamic State and subsequently upon their coming under British protection. This is a well established principle of Islamic law and is supported by the practice of treaty succession between the Arab and non-Arab states. As was the case with Kuwait, in spite of the existence of this legal nexus between the treaties of the Islamic State and the sheikhdoms, no state actually claimed the devolution of any treaty except those physically connected with the territories of the sheikhdoms, such as the 1913 Anglo-Ottoman Draft Convention.

In connection with the treaties of the Islamic State, the Arab Shaykhs of the Gulf had been authorised by the Islamic central government before their assumption of governorship (power) to enter into multilateral and bilateral treaties with Great Britain and it may be contended that these treaties did not survive the new circumstances created by the exclusive agreements. In support of this, Great Britain upon the assumption of French protection over
other Arab states remained faithful to the opinion that the assumption of protection over a territory did not affect the pre-existing treaties of the territory concerned. Secession was followed by British protection over the sheikhdoms, and accordingly the treaties devolved to the protecting and protected state in fact and in law. There was no legitimate reason to question this other than that the international nature of the treaties became questionable in the new situation.

The status of these treaties under the new circumstances should, therefore, be determined not only under international law but also under Islamic law. Non-Muslim jurists such as Brierly did not regard treaties between protecting and protected states as constituting treaties under international law, on the grounds that they did not create rights and obligations between the contracting parties. On the contrary, Lauterpacht states that:

... Agreements made between the protected and protecting states, either at the time of the establishment of the protectorate or subsequently, could not be regarded as treaties [however, such agreements] ... have been so treated juridically by both international and municipal tribunals. Rules and principles of international law applicable to treaties have been applied to them.

Lauterpacht is referring to the decision of the International Court of Justice in the Rights of United States Nationals in Morocco Case of 1952 in which the Court held that, "it [the 1912 Treaty of Fez] was an international instrument" under which Morocco, "remained a sovereign state..." and to the advisory opinion of the P.C.I.J. on the jurisdiction of the Court of Danzig in which Poland did not question the international character of the treaty concluded between
her and the protected state of Danzig. The principles propounded by these non-Muslim authorities are in harmony with Islamic law and may be applied to all treaties concluded between the sheikdoms and Great Britain, including the Exclusive Agreements. They are supported by other non-Muslim jurists such as Liebesny, who maintains that since the sheikdoms were still under British protection but possessed most of the attributes of sovereignty, their treaties with the United Kingdom may be placed "in a special category somewhat similar to that of French protectorate treaties with Tunisia and Morocco". Moreover the United Kingdom herself, on various occasions, referred to her "treaty relations" with the sheikdoms, also specifying that these 'treaties' were concluded with "independent states which Her Majesty's Government are under duty to protect". The British government, however, did not intend by this statement to imply that these instruments constituted international treaties to which the rules of international law could be applied. However, the rules of Islamic law governing the conclusion, performance and interpretation of treaties were recognised by one of the contracting parties to the treaties, as opposed to British law, and its applicability to such treaties cannot be denied.

This fact was gradually recognised by the British government as is demonstrated in their return of treaty-making competence to all the Arab Shaykhs of the Gulf to negotiate and conclude commercial treaties with non-British nationals and to grant oil-concessions without the interference of the British government. Later on, the exercise of the treaty-making competence of the shaykhs was extended to boundary and non-boundary treaties alike.
As regards boundary treaties, at the beginning, Britain, as the dominant power in the Gulf area, concluded various bilateral treaties of a different nature with Islamic and Arab states. One of these treaties was the 1913 Anglo-Ottoman Draft Convention which constituted a territorial settlement of the Gulf area following the assumption of governorship (power) by various Arab Shaykhs from the Islamic central government at Istanbul. The convention contained five parts. Part one defined the status of Kuwait and its boundaries (Articles 1-10), part two defined Qatar and its boundaries (Articles 11-12), part three defined Bahrain and its boundaries (Articles 13-15), part four defined the British zone of influence in the Gulf (Article 16) and part five defined the demarcation of the Eastern boundaries of Arabia (Article 17).

By the 1927 Jiddah Treaty, the 1915 Treaty of Protection between Great Britain and Saudi Arabia was superceded and the new treaty established relations between Saudi Arabia and the other sheikhdoms. This settlement encouraged the Arab Shaykhs to rely on their treaty-making competence to establish their independent factual identity by means of a proclamation and subsequently by a treaty. Following President Truman's proclamation in 1945 on the extension of U.S. jurisdiction and control over the natural resources of the sub-soil and seabed of the continental shelf beneath the High Seas, contiguous to her coast, Saudi Arabia in 1949, Bahrain, Kuwait, Qatar and the six sheikhdoms of the Trucial Coast issued proclamations claiming that the seabed and sub-soil areas of the Gulf contiguous to their coasts was subject to their jurisdiction and
control and the boundaries of such areas would be determined by agreement between the states concerned. Accordingly, the Shaykh of Bahrain concluded and ratified the 1958 Boundary Agreement with Saudi Arabia with King Sa'ud without the participation of the British Political Resident, since at that time the British government did not maintain diplomatic relations with Saudi Arabia. The British Political Agent in Bahrain on 21 April 1958 informed the Bahraini authority that:

Her Majesty's Government in the United Kingdom were prepared formally to view the provisions of the Agreement of 1880 and 1892 insofar as the agreement between the ruler and King Sa'ud was concerned, and that, so far as Her Majesty's Government were concerned, the Agreement was thereupon given international validity.

The boundary line dividing the Continental Shelf between Iran and Qatar was defined by an Agreement on 20 September 1969. On 20 March 1969 Qatar and Abu Dhabi reached an agreement for the settlement of offshore boundaries and the ownership of islands that lay between the two states. As regards the boundary disputes between Saudi Arabia, Qatar and Abu Dhabi, the Crown Prince of Qatar, acting on behalf of the Government of Qatar, and the Saudi Minister of Petroleum on behalf of the Saudi government reached an agreement defining the sea and land boundaries between the two countries without the participation of the British government which did not object to the agreement. An Offshore Boundary Agreement was also reached on 18 February 1968 between Abu Dhabi and Dubai. Subsequently, the boundaries between the Trucial States themselves were defined.
A further development in the treaty-making competence of the Arab Shaykhs and subsequently the development of their independent legal identities, was achieved by their participation in multilateral treaties of a non-constituent character. On the regional plane, the Arab Shaykhs had been encouraged by the practice of the Arab regional organisations towards the non-independent Arab territories such as Kuwait. Subsequently, Qatar participated as a full member in the First Arab Oil Conference held in Beirut on 16 October 1960 while Bahrain participated as an observer, and when OPEC held its Second Conference in Venezuela in January 1961, Qatar attended the Conference as a full member.

As far as the multilateral treaties of a constituent character between the sheikhdoms are concerned, before the British announcement of withdrawal from the Gulf region at the end of 1971, the idea of a federation between the Arab sheikhdoms of the Gulf had been encouraged by Kuwait, Saudi Arabia and the United Arab Republic. The result was the initiation of the 1968 Agreement between Shaykh Zayid, the Ruler of Abu Dhabi, and Shaykh Rashid, the Ruler of Dubai creating a bilateral federation between the two sheikhdoms. Subsequently, the two Shaykhs extended an invitation to the other Shaykhs to join the federation which they welcomed. On 27 February 1968, the Shaykhs of the seven Trucial Emirates and Bahrain and Qatar convened in Dubai in a constitutional Conference and the nine Shaykhs finally signed the 1968 Dubai Agreement. By joining the federation of the Arab Emirates, the Shaykhs accepted and professed obedience to the Federal Constitution.
On the sixth meeting of the Supreme Council held in Abu Dhabi on 21 October 1969, Shaykh Zāyd of Abu Dhabi was elected as the first President of the Federation and Shaykh Rashid of Dubai as its Vice-President and Abu Dhabi was designated as the temporary Capital of the Federation. Shaykh Khalifa bin Hamad of Qatar was elected as Prime Minister. As a result of differences over certain constitutional points between the Shaykhs', Bahrain and Qatar continued to build up separate national institutions in preparation for British withdrawal. On 19 January 1970, the formation of a Bahraini Council of State with 12 members was announced¹¹ which served as a precaution in case the 9 member federation failed¹².

Following the settlement refuting Iran's claim to sovereignty over Bahrain through the Secretary-General of the United Nations¹³, the latter declared her independence on 14 August 1971 accompanied by the reason for her separation from the United Arab Emirates¹⁴ and as had been established by the practice of Kuwait, concluded the 1971 Agreement with Sir Jeffery Arthur, the British Political Resident in the Gulf¹⁵, which superceded the 1880 and 1892 Exclusive Agreements. In addition, Bahrain concluded the 1971 Treaty of Friendship with Great Britain¹⁶, valid for ten years, in order to regulate the basis of any future assistance and the commercial relations between the two countries. On 11 September 1971 Bahrain was admitted to membership of the Arab League¹⁷ and on 21 September 1971 also to membership of the United Nations¹⁸. Similarly, on 1 September 1971, Qatar also declared her independence with an accompanying statement outlining her hopes for the establishment of the 9 Arab Emirates union¹⁹. This was followed on 3 September 1971
by the conclusion of an agreement between the Shaykh of Qatar and the British Political Resident in the Gulf superseding the 1916 Exclusive Agreement and all agreements subsidiary thereto and also another Agreement of Friendship, similar to that concluded with the Shaykh of Bahrain. Qatar was admitted to membership of the Arab League on 11 September 1971 and to membership of the United Nations on 21 September 1971.

On 2 December 1971 the six Shaykhs in Dubai proclaimed the taking effect of the provisional constitution of the United Arab Emirates. In order for the new state to attain full independence, it followed the practice already established by the other sheikhdoms by the conclusion of the 1971 Treaty with the British Political Resident in the Gulf, terminating the 1892 Exclusive Agreements, and the 1972 Treaty of Friendship with the U.K. On 6 December 1971 the United Arab Emirates was admitted to membership of the Arab League and subsequently, on 9 December 1971, to membership of the United Nations. On 10 February 1972 the Emirate of Rasul-Kheimah joined the United Arab Emirates and became a member state of the federation.
SECTION 2: UNDER THE MANDATE REGIME:

At the outset it should be understood that the development of treaty succession in Arabic conventional law under regimes that established protection occurred under the legal order of the particular protecting state. On the other hand, the development of Arabic conventional law on treaty succession under the mandate regime occurred under a unified international legal order supervised by the League of Nations. Hence, an analysis of the establishment and termination of the mandate regime may require some reconsideration of certain views and practices previously discussed that influenced the emergence of legal rules.

1. Establishment of the Mandate System:

At the end of World War I, the Allied Powers, together with the League of Nations, decided to detach the colonies and territories of Germany and the Ottoman Empire by means of the mandate system. This system was embodied in Article 22 of the Covenant of the League of Nations which constituted an integral part of the 1919 Versailles Treaty of Peace with Germany. In the mandate system the territories were not annexed by any state but rather were entrusted to states known as mandatory powers by means of agreements concluded between them and the League of Nations known as mandates. According to the mandate agreements, the mandatory powers administered the territories on behalf of the League of Nations under certain conditions and no cession of any territory to any mandatory power was embodied in any mandate agreement. The mandatory powers had no authority whatsoever without the consent of the League of Nations to annex or cede the mandated territory.
As in the words of the I.C.J. in the 1950 Case concerning South West Africa:\[135\]:

The mandate was created in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilisation . . . .

For this reason the mandate system was placed under the supervision of the Council of the League of Nations who were advised by the Permanent Mandate Commission (P.M.C.)\[136\]. The inhabitants of the mandated territories had the right to petition the League of Nations through the governments of the mandatory powers so that these governments received the petitions and had a chance to act upon the inhabitants' demands before the petitions reached the League of Nations. The petitions were then examined by the Permanent Mandate Commission which subsequently reported to the Council of the League of Nations which was the main body responsible for the mandate system without, of course, denying the assembly the freedom of debating any issues arising from the system\[137\]. Article 22 of the Covenant of the League of Nations envisaged certain classes of mandates (A-C) with regard to A-mandated territories. Article 22 states that:

\[\ldots\] certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory\[138\].

Accordingly, the A-mandated territories were entrusted to certain mandatory powers. Iraq, Palestine and Trans-Jordan were entrusted to Great Britain, while Syria and Lebanon were entrusted to France.
An examination of the mandate regime over the other Arab territories under Islamic law shows that it was incompatible with a case of agency, as in the mandate over Iraq which was embodied in the 1922 Treaty of Alliance concluded between Great Britain and Iraq herself. It was the treaty, not the mandate regime, which was considered under Islamic law to be the contract of agency. The mandate over the other Arab territories like the Exclusive Agreements concluded between Great Britain and the Arab sheikhdoms of the Gulf did not resemble agency by ratification. The communities of the Arab mandated territories, unlike the other communities of the Arab protected states and Iraq, had no say whatsoever in the conclusion of the mandate agreements.

Therefore the mandate regime over the other Arab territories only resembled in Islamic law mutatis mutandis the so-called wistāya (guardianship) according to which an adult person is appointed as a guardian for a minor person, which affects the contract-making competence of the minor and by analogy the establishment of the mandate regime over the Arab territories affected their treaty-making competence. Up to the date of the independence of these territories (the date of maturity), treaties concluded on behalf of or extended to the mandated territories by the mandatory powers only bound the former if they were sanctioned by the competent authorities of the territories at that date.

Since the inhabitants of the Arab territories did not consent to the application of the mandate regime to their territories, Islamic law continued to be applicable to their relations despite the de facto replacement of this law by international law, at least in
regulating the international relations of the territories concerned, and accordingly their external identity was suspended *de facto* as opposed to *de jure*, until the date of independence. On the contrary, with the exception of Lebanon, Islamic law governed most of the internal relations of the inhabitants and hence, the internal Islamic identity of these territories continued to be unaffected by the mandate regime.

A. Effect on Treaties:

(ii) Treaties Concluded by the Islamic State on Behalf of the Territories of:

(a) Palestine:

The first controversy regarding treaties embodying capitulations in the territories detached from the Ottoman Empire arose between the United States of America and Britain as the mandatory power over Palestine. The United States voiced the opinion that its extraterritorial privileges in Palestine continued to exist until expressly renounced. Consequently, Article 8 was inserted in the Mandate Agreement for Palestine, which states that:

The privileges and immunities of the foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine.

Unless the Powers whose nationals enjoyed the aforementioned privileges and immunities on August 1st, 1914, shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned.
The United States accordingly consented to the British administration in Palestine and concluded with Great Britain the 1924 Treaty\textsuperscript{146} by which the capitulations of the United States in Palestine were not abolished but suspended pending the expiry of the mandate.

It was decided by the League Council that Article 25 of the Mandate Agreement for Palestine\textsuperscript{147} should be applicable to Trans-Jordan\textsuperscript{148} which was subsequently subject to the provisions of Article 8 of the same agreement for Palestine even though the British government held the view that its development was increasingly separate\textsuperscript{149}. Thus the capitulations, if any, were suspended as were those in the case of Palestine.

(b) Syria and Lebanon:

In comparison with the development of the treaty relations of the mandated territories of Palestine and Trans-Jordan, the United States again insisted upon the revival of the capitulations in Syria and Lebanon. Thus after the inclusion of Article 5 in the Mandate Agreement for Syria and Lebanon\textsuperscript{150}, which was exactly identical to Article 8 of the Mandate Agreement for Palestine and Trans-Jordan, the United States concluded with France the 1924 Treaty consenting to the French mandate over Syria and Lebanon\textsuperscript{151} which emphasised the principles of Islamic law governing the devolution of treaties from the parent (Islamic State) to the evolving Arab territories, as initiated by the practice of Iraq. This demonstrated the uncontested evidence of the continuity of the Islamic identity of these territories.
(ii) Treaties Concluded by the Mandatory Powers on Behalf of the Arab Territories:

The Arab territories did not fall under the sovereignty of the mandatory powers but under the authority of the mandated communities comprising Arab inhabitants. According to the provisions of the Mandate Agreement, the mandatory regime was modelled on that of the protected state. In both cases, the protecting or mandatory power was entrusted with the conduct of the international relations of the territory, and the mandated territory and protected state in principle governed their own internal relations. The A-mandated territories and the protected states, despite the control of their external and sometimes their internal affairs by the mandatory power or protecting state, possessed an international personality and treaty-making competence as was sometimes defined in the mandate agreements.

As was the case in the mandated territory of Iraq, the United Kingdom was vested with the authority to conduct the external relations of Palestine and Trans-Jordan while France was entrusted with those of Syria and Lebanon. However, unlike the mandate for Iraq, the nature of which was embodied in the 1922 Treaty of Alliance, the United Kingdom, by Article 1 of the Mandate Agreement for Palestine and Trans-Jordan, and France, by Articles 1, 2 and 3 of the Mandate Agreement for Syria and the Lebanon, were given a substantial degree of internal power over these territories, under the supervision of the League Council as provided by Article 22 para. 4 of the Convenant of the League of Nations and by the mandate agreements concluded between the mandatory powers and the
League of Nations. Each mandate agreement contains certain provisions relating to the extension of multilateral conventions (Article 19 of the Mandate Agreement for Palestine and Trans-Jordan, Article 12 of the Mandate Agreement for Syria and Lebanon) and the Bilateral Agreement of Extradition to the mandated territories (Article 10 of the Mandate Agreement for Palestine and Trans-Jordan, Article 7 of the Mandate Agreement for Syria and Lebanon). Similarly, Article 10 of the 1922 Treaty of Alliance between Iraq and Britain contains similar provisions, even though the mandatory power concluded that treaty with Iraq and not the League of Nations.

According to the mandate agreement, the mandatory powers could conclude on behalf or extend to the mandated territories non-boundary treaties such as multilateral treaties and bilateral treaties. Apart from the difficulties of gaining the consent of the other parties to the bilateral treaties, a doubt has arisen regarding the benefit received by the mandated territories from such extension.

This situation, however, compelled the mandatory powers to recognise the independent legal and factual identities of these territories and subsequently they transferred treaty-making competence in respect of these territories to the local authorities. Hence, Palestine acquired a separate legal order from that of Trans-Jordan and Lebanon which acquired a legal order separate from that of Syria.

Under the mandate regime, the 1916 Sykes-Picot Agreement was put into effect by the mandatory powers by the conclusion of the 1920 Franco-British Convention on certain points concerning the Mandates for Syria and Lebanon, Palestine and Mesopotamia by which the
boundaries between the British mandated territories (Palestine, Trans-Jordan, and Mesopotamia) and the French mandated territories (Syria and Lebanon), were established (Article 1). The final settlement of the boundaries between the British mandated territories and the French mandated territories was achieved by the 1923 Agreement. Subsequently, each mandatory power established boundaries between its respective mandated territories.

Britain, as the mandatory power in Trans-Jordan and Mesopotamia, concluded with Ibn Sa’ud the Haddah Agreement of 2 November 1925 defining the Najd-Trans-Jordan boundaries and the Bahrah Agreement of 1 November 1925 defining the Najd-Iraqi boundaries and followed these with the 1931 Boundary Agreement between Iraq and Trans-Jordan. The boundaries between Trans-Jordan and Palestine had already been established by Article 25 of the Mandate Agreement for Palestine.

France, as the mandatory power over Syria and Lebanon, drew up in various stages the boundaries between these territories.

B. Termination of the Mandates Over the Arab Territories:

The mandate regimes in the Arab territories were established for a specific time and purpose. Their duration was not actually defined in mandate agreements such as that of Iraq, but the purposes of such a system were defined in Article 22 para. 4 of the League Covenant. Upon the 1929 British Announcement of the intention to terminate her mandate in Iraq, the issue arose regarding the special conditions which Iraq had to declare before becoming an independent state. On 13 January 1930, after discussing the entry of Iraq into the
League of Nations, the League Council passed the following resolution:

Being anxious to determine what general conditions must be fulfilled before the mandate regime can be brought to an end in respect of a country placed under that regime, and with a view to such decisions as it may be called upon to take on this matter, the Council, subject to any other enquiries it may think necessary, requests the Mandates Commission to submit any suggestions that may assist the Council in coming to a conclusion.

When this resolution came on to the Agenda of the Permanent Mandate Commission, the Chairman circulated a memorandum based on the case of Iraq and the question was then referred to a Sub-Committee. The reporter of the Sub-Committee, in his report submitted to the Commission at its 19th session in November 1930, gave the resolution a general interpretation that embraced other cases. The Commission asked the Council for further clarification and the Council confirmed its initial interpretation on 22 January 1931. In its Report for the 20th session in June 1931 submitted to the League Council, the Commission recommended that the independence of any territory under a mandatory regime should depend upon two preliminary conditions:

1. The existence in the territory concerned of de facto conditions which justified the presumption that the country had reached the stage of development at which a people had become able, in the words of Article 22 of the Covenant "to stand by itself under strenuous conditions of the modern world".
2. Certain guarantees to be furnished by the territory desirous of emancipation to the satisfaction of the League of Nations, in whose name the mandate was conferred and has been exercised by the Mandatory.
As regards the first condition, the Commission made it clear that the fulfilment of these requirements was "a question of fact and not of principle" which:

could only be settled by careful observation of the political, social and economic development of each territory. . . .

The presence of certain conditions, however, would:

in any case indicate the ability of a political community to stand alone and maintain its own existence as an independent state.

Thus subject to the above mentioned considerations, the Commission recommended that the following conditions should be fulfilled by any mandated territory before that territory was released from the mandate regime:

(a) It must have a settled government and an administration capable of maintaining the regular operation of essential government services; (b) it must be capable of maintaining its territorial integrity and political independence; (c) it must be able to maintain the public peace throughout the whole territory; (d) it must have at its disposal adequate financial resources to provide regularly for normal Government requirements; (e) it must possess laws and a judicial organisation which will afford equal and regular justice to all.

As regards the second condition, the Commission recommended that the guarantees it mentioned:

Should take the form of a declaration binding the new state to the League of Nations, or of a treaty or convention or of some instruments formally accepted by the Council of the League as equivalent to such an undertaking.

And without prejudice to any special guarantees,

The undertakings of the new state should ensure and guarantee: (a) the effective protection of racial, linguistic, and religious minorities; (b) the privileges and immunities of foreigners (in the Near Eastern territories), including consular jurisdiction and protection as formerly practised
in the Ottoman Empire in virtue of the capitulations and usages, unless any other arrangement on the subject has been previously approved by the Council of the League of Nations in concert with the powers concerned; (c) the interests of foreigners in judicial, civil and criminal cases, insofar as these interests are not guaranteed by the capitulations; (d) freedom of conscience and public worship and the free exercise of the religious, educational and medical activities of religious missions of all denominations, subject to such measures as may be indispensable for the maintenance of public order, morality and effective administration; (g) the financial obligations regularly assumed by the former mandatory power; (f) rights of every kind legally acquired under the mandate regime; (g) the maintenance in force for their respective durations, and subject to the right of denunciation by the parties concerned, of international conventions, both general and special, to which, during the mandate, the mandatory power acceded on behalf of the mandated territory.\(^{176}\)

The constitutional development of Iraq had indirectly brought these conditions into existence and later on this not only influenced the liquidation of the mandate regime in Iraq but also the same occurrence in other mandated territories of the Arab world where similar constitutional developments had taken place. Thus several constitutions were promulgated in which the independence of these territories was recognised\(^{177}\) by the mandatory powers.

2. The Establishment of the Arabic Conventional Law:

If it is correct that the legal consciousness of each nation ultimately shapes its national law, the social consciousness between Arab states is reflected in their constitutions which provide that their territory and population are an integral part of the Arab world and of the Arab nation\(^{178}\). Moreover, this consciousness was recognised by the protecting and mandatory powers\(^{179}\) and is connected with the community of Arab states throughout the Arab
world. These abstract and material elements constitute a law peculiar to the Arab world and the Arab states; a law which must be taken into account by international law. As far as the conventional rules of this law are concerned, the leaders of the Arab states have effectively utilised the sources of Islamic law to solve the problem of treaty succession within a certain organisational framework. This is illustrated by the creation of the Arab League and the technique designed by that organisation for the settlement of disputes arising from treaty succession.

Idirá (consensus) was the basis upon which the 1945 Pact of the Arab League was established for when the views of the advocates of a loose federation prevailed the delegates unanimously adopted the Pact of the Arab League, Article 1 of which determines that Arabism should constitute the criterion for admission to membership.

One of the objectives of the establishment of the Arab League is to:

- take into account the aspirations of [dependent] Arab states and do its utmost to assist them in the realisation of these aspirations.

In other words, it means to assist the decolonisation of the Arab world from the Atlantic Ocean to the Gulf. The achievement of this goal by the League and its resulting in the independence of the Arab states of North Africa and the Gulf has led to the formation of the so-called Afro-Asian Solidarity Movement and the co-operation of the Arab League and the O.A.U. towards the decolonisation of the Afro-Asian peoples and territories. The united diplomacy of the member states of the Arab League and the numerical majority of the Afro-Asian group in the U.N. General Assembly and at the U.N.
conferences has contributed to making decolonisation a principle within international law" and led to the 1950 Recognition of the Arab League by the U.N. as a regional organisation in accordance with Chapter VIII of the Charter.

Another objective of the Arab League is the collective security of the member states as established under the Pact and the 1950 Treaty of Joint Defence and Economic Co-operation between the member states of the League. The League acts as a regional collective security system with regard to the suppression of conflict between its member states, as in the 1961 Kuwait-Iraq territorial disputes; and as a regional system of collective self defence aiming at providing joint defence against foreign aggression, as in the 1961 Tunisia-France dispute. Article 10 of the treaty states that:

Each of the contracting states undertakes not to conclude any international agreement which may be inconsistent with this treaty, and not to adopt in its international relations any course which may be contrary to the aims of this treaty.

Accordingly, most Arab states after their admission to membership of the Arab League adjusted their treaty obligations with non-Arab states. For example, Iraq was one of the original contracting parties to the Treaty of Joint Defence. Nevertheless she entered into the 1955 Baghdad Pact between Iraq, Turkey, Iran, Pakistan and Britain and the 1955 Treaty between Iraq and Britain which superceded the 1930 Treaty of Alliance. However, the Government of Iraq withdrew from these alliances on 14 July 1958 as a result of the implementation of the Treaty of Joint Defence between the member states of the Arab League. Similarly, before the admission of Kuwait to membership of the Arab League, by virtue of para. (d) of the 1961
Exchange of Notes between Great Britain and Kuwait terminating the 1899 Exclusive Agreement, the former provided the latter with assistance against any foreign aggression. Upon the admission of Kuwait to the Arab League and her accession to the 1950 Treaty of Joint Defence, she terminated the 1961 Agreement by the 1968 Exchange of Notes with Great Britain.

The settlement of disputes arising from treaty succession among the member states of the League is also one of the objectives of the establishment of the League. Under Article 5 of the Pact of the Arab League the Council is endowed with primary competence in respect of regional disputes as an organ of arbitration and mediation, and under Article 6 is entrusted with a certain role in the case of aggression against a member state. In the settlement of disputes arising from treaty succession between the member states, the council usually follows the procedures of the doctrine of non-devolution, namely the voluntary procedures of conciliation, mediation and good offices, which respect the independence and territorial integrity of the member states and encourage the cooperation and integration by common consent between these states, such as in the settlement of the following disputes: the 1948 Crisis of Yemen, the 1958 Sudan-Egypt Boundary Dispute, the 1958 Lebanon-U.A.R. Boundary Dispute, the 1961 Iraqi-Kuwaiti Territorial Dispute, the 1961 Syria-U.A.R. Dispute arising from the dissolution of their union, the 1963 Algeria-Morocco Boundary Dispute, and the boundary disputes between the Gulf states.

The Council of the Arab League, an organ of regional solidarity has followed the procedures of the doctrine of devolution, that is
the compulsory settlement of disputes using effective measures directed either against a member or non-member state. An example of action against a member is the expulsion of Jordan in 1950 from the League as a result of her illegal annexation of a part of Palestine\textsuperscript{200}. An example of a measure taken by the council against a non-member state is that employed against France in her 1961 dispute with Tunisia over the Bizerta base\textsuperscript{201}. The council's approach to disputes between member states has favoured the policy of the voluntary settlement of disputes in order to preserve solidarity and unity and it has only used the procedure of compulsory settlement either to enforce the provisions of the Pact, as in the case of Jordan, or in the form of organised regional solidarity against external aggression, such as in the 1945 dispute between Syria and Lebanon and France regarding the Arab countries' independence. A notable exception to this policy was the League's role in the boundary disputes between Iraq and Iran in which the League successfully facilitated voluntary mediation between the member states\textsuperscript{202}.

The compulsory settlement of disputes is provided for by the Pact in Article 19 which states that upon a two-thirds majority vote of the member states the Pact may be amended to found an Arab Court of Justice\textsuperscript{203}. Until this proposal materialises, the council will continue to be an organ of arbitration, as is provided by Article 5 of the Pact. This role is based on the voluntary settlement of disputes which must not involve independence, sovereignty and territorial integrity; and the parties to the dispute must agree to
have recourse to the council. A case that provides an example of such a settlement is the 1949 Lebanon-Syria Boundary Dispute. The adoption of the procedure of the doctrine of non-devolution by the Pact is enshrined in the provisions for the enforceability of the League’s decision. Decisions made by the council involving legal questions can be adopted by a majority vote, whereas political decisions must be adopted unanimously unless provided for otherwise by particular provisions and any decisions bind only those states accepting them. It has been suggested that reform of the unanimity rule under the Pact to a two-thirds or simple majority voting procedure is desirable. A resolution adopted under such a procedure which bound all member states through $i\text{idim}â$ (consensus), would give precedence to the collective will of the League, and enhance the role of the organisation. Moreover, a provision should be made in the Pact stipulating the precedence of the member states' obligations under the terms of the Pact, in analogy to treaties concluded through $i\text{idim}â$ (consensus), over any other conflicting obligations that they might enter or have entered into. This stipulation would resemble that embodied in Article 103 of the United Nations Charter and Article 10 of the 1950 Treaty of Joint Defence between the member states of the Arab League. The Pact could also provide for a mechanism to be followed in the implementation of League resolutions and treaty obligations.

In sum, the practice of Iraq and Kuwait in treaty succession and the principles that have emerged therefrom have enhanced the legal rules that developed from the practice of Muslim and Arab states and established legal grounds for the further development of these rules.
within a certain territorial sphere and organisational framework. This development reflects the existence of a material element of regional law governing treaty succession which Arab leaders have developed in full compliance with the requirements of Islamic law motivated by a social consciousness that has facilitated the binding force of Islamic law and the rules that have developed therefrom. The binding force of these rules has received further affirmation from the constitutional provisions of each Arab state as was recognised by the protecting and mandatory powers in some cases. It is true that the Arab community of states is a distinct community from the rest of the world with certain factual and legal characteristics that have been established by treaties. Nevertheless, within this community the development of the rules governing treaty succession have crystallised into a regional body of conventional rules, the nucleus of which is deeply rooted in Islamic legal theory. Similarly, an analogous body of customary rules governing treaty succession has developed through the practice of the community of the Arab states.
CHAPTER VIII

FORMATION OF THE ARABIC CUSTOMARY LAW ON TREATY SUCCESSION

INTRODUCTION:

Customary rules usually develop autonomously or result from the disintegration of international customary rules but they can also evolve, as is the case with Arabic customary law on treaty succession, on the basis of conventional rules. In the Right of Passage case between Portugal and India of 1960, the court held that a particular practice between two states only, which is accepted by them as law, may give rise to a binding customary rule inter parties, i.e., local customary law. However, Arabic customary law is not of this type, since it has crystallised from the practice of the community of Arab states, in other words between more than two parties, and therefore it is regional rather than local. Regional law of this type has existed in the practice of certain organisations of states, as is recognised by international tribunals and international jurists. In the Asylum Case between Peru and Colombia of 1950, Judge Alvarez gave an interesting description of American regional law of this type as applied between the states of the Pan-American Union as follows:

... Such systems of law are not subordinate to universal international law, but correlated to it.

This view has avoided conflict and established a relationship between regional and international law according to which regional law is applicable to and binding upon a state belonging to a certain regional community even though other states outside the community might not accept all the regional rules as binding in their relations.
with the states of the regional community. The role of regional law in relation to international law is clearly stated by Judge Read in the *Asylum Case* who described it as:

... a body of conventional and customary law complementary to universal international law, and governing inter-State relations in the Pan-American world.

Arabic customary law is also similar to international customary law insofar as its constituent elements are concerned for both systems require for their formation the existence of material and abstract elements, i.e., a general state practice and *opinio juris*. The material element requires that state practice conforms to the principles of generality, consistency and durability. This practice may include any act or omission as long as it is consistent with the states' conscious categorisation of that practice as customary law. Evidence of such practice was given by the I.L.C. in 1950 whereby it declared that the following could be included: treaties, decisions of national and international tribunals, national legislation, diplomatic correspondence, opinions of national legal advisors, practice of international organisations. The abstract element requires the acceptance of the material element (practice) by states as law. However, the Arabic customary law cannot develop into international customary law, since it is restricted by the criterion of 'Arabism' as embodied in Article 1 of the 1945 Pact of the Arab League.

An examination of Arabic customary law shows that its constituent elements can be found on the international, regional and national planes. As regards the regional and international planes, the material elements of Arabic customary law consist of written and also
oral statements of the official representatives of Arab states at regional conferences such as the 1944 Preparatory Conference on Arab Unity or at international conferences like the 1978 Vienna Conference on State Succession in Respect of Treaties, and also at regional and international organisations such as the Arab League, the Islamic Conference and U.N. bodies (General Assembly, 6th Committee, I.L.C. etc.).

As far as the abstract element (opinio juris) is concerned, votes on and amendments to draft articles at international conferences are significant for individual Arab states and the community of Arab states. An Arab state casting its vote for or against a written rule is merely expressing its approval or disapproval, and thus can provide some indication of its legal conviction. Abstention, however, is usually implicitly favourable towards the written rule whereas a large majority in favour of a written rule reflects the general approval of the community of the Arab states and thus indicates their communis opinio juris as stated in the Texaco v. Libya Arbitration. Besides this, consensus as a means of adopting a certain draft text extensively and successively at the Arab League, the Islamic Conference and even at international conferences, such as the 1978 Vienna Conference on State Succession in respect of Treaties, provides an indication of the communis opinio juris which exists without there being any minority view. Signature, acceptance, approval, accession or ratification of a treaty and its application by the Arab states in fulfilment of their contractual obligations reflects their opinio juris. Thus any Arab state which ratifies inter-Arab treaties commits itself to the regional
rules of the customary law embodied in these treaties. It is, therefore, necessary to examine in depth the material and abstract elements of the Arabic customary law on treaty succession in the practice of the Arab states and the extent of the influence of the rules of Islamic law.
SECTIO\N 1: THE MATERIAL REQUIREMENTS OF THE ARABIC CUSTOMARY LAW:

1. General Practice of the Arab States in Treaty Succession:

   A. The Practice of the Ex-Protected States:

      (1) Egypt:

      In 1922 the status of protectorate over Egypt was terminated and Egypt assumed her independence. Before this, Egypt had already developed an identity independent from that of the Islamic State to which all her pre-independence treaties attached and thus the continuity of her identity under Islamic law required the continuity of her treaty rights and obligations until terminated by the consent of the contracting parties, as in the Treaty of Montreux, or by their terms, as in the 1936 Treaty of Alliance until this treaty was terminated by the consent of the contracting parties in 1957.

      (ii) Tunisia:

      Unlike Egypt, Tunisia developed her legal identity under foreign protection in the same way as Kuwait, and gradually assumed the conduct of her international relations until she finally attained independence in accordance with the 1956 Protocol.

      That Tunisia adopted the Kuwaiti doctrine of non-devolution can be concluded from her attitude at the date of independence towards treaties concluded by France on her behalf. Unlike Morocco, Tunis did not conclude a devolution agreement with France and exercised her independence in not accepting the devolution of five multilateral treaties of which the Secretary-General of the United Nations was a depositary.

      This application of the rule of non-devolution by the Tunisian government was more effective than that of the Kuwaiti government,
since she followed the procedure of accession rather than succession in respect of treaties concluded by France on her behalf, as in the case of G.A.T.T. ¹. ²

Tunisia refused the automatic devolution of the Franco-British Bilateral Treaty of 1889 on the grounds that bilateral treaties are personal to the contracting parties and thus do not devolve automatically to a successor state. This practice on the part of the Tunisian government reflects the existing regional practice of the other Arab states, according to which a bilateral treaty devolves to an Arab state only by consent. ³

(iii) Morocco:

Because France was the protecting state over both Tunisia and Morocco, Morocco, in attaining independence, followed Tunisian practice, the only difference between the two states being the inclusion in the 1956 Diplomatic Accord of a devolution clause in Article 11 which states that:

Morocco hereby assumes the obligations resulting from international treaties concluded by France in the name of Morocco as well as those which result from the international acts concerning Morocco, on which it has made no observations.

This clause was known in the practice of Iraq as a 'devolution agreement', the effects of which on treaty relations between France and Morocco, and between Morocco and third states require examination. The conclusion of a devolution agreement between a successor and a predecessor state was first established by the 1930 Treaty of Alliance between the U.K. and Iraq (Article 8) and subsequently became common practice. Apart from the legal effect of the devolution agreement, several objections have been raised
regarding its validity. The devolution agreement has been regarded as constituting an unequal agreement imposed by the colonial power on the colonised people or as having been concluded under 'duress' or "the price of accession to independence". The validity of all these views depend in the first place on the legal effects of the devolution agreement not only between the contracting parties but also vis-à-vis a third state.

As far as her attitude towards the effects of her devolution agreement with France is concerned, Morocco appears to have made a distinction between multilateral and bilateral treaties following the dictates of the regional practice. Unlike Iraq, which depended on the devolution agreement in certain circumstances, Morocco refuted the idea of automatic subrogation to all pre-independence treaties as stipulated in the devolution agreement. She selected some treaties that would be succeeded to while ignoring others and this practice was based not only on national policy but also on the nature and objectives of each individual treaty. Morocco utilised the application of the regional rules more effectively than Iraq or any other protected Arab state by embarking upon either the rule of devolution by following the procedure of 'succession', as in the case of some multilateral treaties of which the Secretary-General of the United Nations is depositary, or upon the rule of non-devolution, by following the procedure of 'accession' as in the case of the 1929 Geneva Humanitarian Conventions. Moreover, the application of the regional rule of non-devolution to the predecessors' bilateral treaties as crystallised through the practice of the other Arab states has been firmly followed by Morocco, since she considered
herself, in principle, not bound by the pre-independence bilateral treaties concluded on her behalf by France because of their very personal nature. Therefore, some of these treaties were denounced by the other contracting party\textsuperscript{30} or were replaced by new treaties concluded between Morocco and the other parties to the old treaties\textsuperscript{31}. There was no exception in the Moroccan application of the rule of the non-devolution of these treaties, even in the case of those establishing military bases (military servitudes)\textsuperscript{32}.

The aim of the devolution agreement in the opinion of the Moroccan government was only to indicate the intention of Morocco to continue the predecessor's treaties\textsuperscript{33} for a certain time to review and reflect upon them to enable her to decide which treaties would devolve upon her, while the view of the French government was that it should release France (assignor) \textit{vis à vis} her contracting parties from obligations established under the treaties and to devolve such obligations to Morocco (assignee). It should be noted that it was already established that this type of contract under Islamic law did not confer rights or obligations on non-signatories\textsuperscript{34}.

The contracting parties to the French treaties could not call upon Morocco to perform these treaties under the devolution agreement and Morocco in turn could not claim any of the rights constituted under the said treaties by virtue only of the devolution agreement. As far as the contracting parties to the French treaties are concerned, the devolution agreement between France and Morocco was no more than \textit{inter alios acta} as was emphasised by the practice of the U.N. Secretary-General\textsuperscript{35}. Similarly, Morocco could not become a party to either the bilateral or multilateral French treaties by
means of the devolution agreement without the consent of the other contracting parties. Only France, as a party to the devolution agreement, could legally demand the performance of the obligations embodied in the devolution agreement by Morocco. Under this limited legal effect, until the actual materialisation of the demand for its performance by the predecessor state, it is irrelevant to argue that the devolution agreement is an equal agreement or is concluded under duress or is the price of independence, since most devolution agreements after independence become obsolete and are forgotten by both parties.

Under the principle of al-‘ākds šhari‘at al-Muta‘kidin (pacta sunt servanda) as established in Islamic law and reaffirmed by Arabic public law, treaties concluded by Morocco herself or those in whose conclusion she had participated in, devolved automatically to her at the date of independence and became treaties of Morocco in fact and in law whether multilateral, such as the 1923 Obscene Publications Convention, or bilateral. The exception was those treaties concluded with France establishing the Morocco-Algeria boundaries.

The most complicated issue facing the leaders in the Arab League and the O.A.U. was the effects of the independence of a member state on boundary treaties brought about by the Morocco-Algeria boundary dispute. This issue was a real test of the general principles of Arabic public law and the mechanism established for the settlement of treaty succession therein. It is necessary to examine the effectiveness of the application of these mechanisms in this case in order to establish the legal basis by which Arabic public law solves such problems.
After the French annexation of Algeria in 1830, France concluded the 1845 Boundary Treaty with Morocco in order to alienate the Algerian territory from the rest of the Islamic territory and subsequently, the oasis of Tuat was shown as a part of Moroccan territory on the official French map. However, upon the construction of the Trans-Saharan rail-road, French officials in 1891 contended that this oasis was a part of Algerian territory and this was followed in 1899 by its occupation by French forces. Under military pressure, Morocco entered into another agreement which interpreted the 1845 Treaty in favour of French Algeria. Military pressure continued until Morocco came under French protection in 1912.

Upon attaining independence in 1956 and in spite of the devolution agreement, Morocco embarked upon an irredentist policy challenging not only existing boundaries but also boundary treaties that had been concluded by the colonial power not on the basis of any rule of state succession (devolution or non-devolution) but on the grounds of their inequality. The elements of inequality in the treaties were evidenced by the fact that Morocco entered into them under pressure from France - the protecting state over both Morocco and Algeria.

Algeria, however, advocated that the status quo should be maintained, not on the basis of the devolution rule of state succession, but on other grounds, such as the sanctity of territorial boundaries.

Following the crisis which arose between these two Arab countries in 1962, the Secretary-General of the Arab League consulted the Chairman of the Council, who at that session was the representative
of Iraq, about the possibility of the mediation of the Arab League according to the provision of the settlement of disputes between the members of the League as embodied in Article 5 of the Pact. However, during the visit of the mediation mission of the Arab League to Morocco and Algeria it was announced that the leaders of the two countries had agreed to the mediation of the Organisation of African Unity. The organisation was successful in settling the disputes, not on the basis of the so-called uti possidetis principle applied by the I.C.J. in the Burkina Faso-Mali Boundary Dispute of 1986, but by adhering to the exemption of boundary disputes from the scope of state succession in order that they be settled on other legal grounds, as the O.A.U. Council of Ministers emphasised in the 1963 Addis Ababa Resolution. Therefore, it seems that the Arab leaders of Morocco and Algeria effectively applied the Islamic principle of idjihād according to which they independently reached an agreement on 2nd February 1964 to end their boundary dispute, a practice that was subsequently adhered to by the other Gulf states.

(iv) The Arab Gulf States:

With regard to the effects of the independence of the Arab Gulf states on treaties, three cases will be distinguished in the following pages. The first type to be mentioned are those treaties which were applied by the protecting state to the Arab Gulf states through the so-called 'colonial clause' according to which a question may be raised as to whether such treaties continued at all upon the independence of these states and if so on what basis.

The Arab Gulf states have advocated principles that have emerged from the practice of the other Arab states, namely Egypt, Tunisia and
Kuwait, where no devolution agreements were concluded with Great Britain before their independence and thus, in principle, the Gulf Arab states advocated the doctrine of the non-devolution of the predecessor's treaties. Moreover, they did not make any unilateral declarations regarding the effects of their independence upon the predecessor's treaties.

In dealing with the pre-independence treaties, the Arab Gulf states followed the regional practice of distinguishing between multilateral and bilateral treaties. The doctrine of non-devolution as an exercise of state independence in the practice of treaty succession revealed itself when the Arab Gulf states followed the procedure of 'accession' rather than 'succession' to various multilateral treaties of which the Secretary-General of the United Nations was a depositary. In other cases devolution (succession) has been achieved tacitly without a specific act.

As regards those bilateral treaties that were concluded between Great Britain and a third state and were later extended to the Gulf Arab states, they do not devolve automatically at the date of independence unless the Gulf Arab states give their express consent.

The second case concerns treaties called 'dispositive', such as the 1913 Anglo-Ottoman Draft Convention by which the boundaries of various Gulf states were defined. This convention is one of the causes behind the Arab regional issue of succession to dispositive treaties. At the time of the independence of the Arab Gulf states, however, the regional practice of other Arab states regarding this issue was fairly consistent and the literature on the subject was
well-developed. In order to study the further development of the Arabic regional rule on treaty succession it is necessary to examine the practice of the Arab Gulf states in respect of 'dispositive' treaties as exemplified by the Anglo-Ottoman Draft Convention.

Since the convention imposed territorial restrictions within Dār al-Islam (political boundaries) it may be likened to what is known in Islamic law as al-μu'āhadāt al-'ayniyya or in international law as a 'dispositive' treaty. Furthermore, the restrictions (boundaries) imposed by the convention may be compared to hukūk al-irtifāk (usufructory rights) in Islamic law or to servitudes in international law. With this in mind, it is useful to examine the convention in the light of the views expressed by non-Muslim jurists on succession to treaties establishing servitudes and their nature and the views expressed by Muslim jurists on the effects of independence on treaties establishing hukūk al-irtifāk. The conclusion reached may help in explaining the attitude of the Arab Gulf states towards the convention at the date of their independence.

According to non-Muslim jurists, such as Oppenheim, international servitudes are referred to as:

\[
\text{those exceptional restrictions made by a treaty on the territorial supremacy of a state by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interests of another state.}
\]

Muslim jurists define hukūk al-irtifāk (usufructory rights) as rights established on immovable property for the benefit of other immovable property. Thus the concept of a servitude in international and Islamic law is similar in the sense that it imposes restrictions on a territory but it differs in that in international law a restriction
is always imposed in perpetuity on a territory for the benefit of a state or states while in Islamic law this restriction can be in perpetuity or be temporary and for the benefit of a state or states or an individual person.

With regard to the legitimacy of *hukûk al-irtifâk* (usufructuary rights) or servitudes there are two conflicting views in international law, namely the 'positive' doctrine and the 'negative' doctrine, whereas in Islamic law only the former exists.

(a) The positive doctrine. According to Lauterpacht, the concept of servitude in international law is borrowed from the private law of either the Roman or common law. It means "those relationships in which a part or the whole of the territory of one state is made to serve" the need of another state or states. Similarly, the concept of *hukûk al-irtifâk* (usufructuary rights) in Islamic law is the same as in private law although the concept is not borrowed since in Islamic Law there is no difference between rules governing internal and external relations. Furthermore, the restriction of *hukûk al-irtifâk* may be imposed on private immovable property or in the territory of a state. In this regard, the Shafi'îd jurist al-Mawardi, and the Hanbalid jurist, al-Farrā', agreed with this tendency that conceived of no distinction between private and international irtifâk (usufructuary rights). However, they differed with international law in distinguishing between perpetual and temporary irtifâk (usufructuary rights) because the positive view within international law regards all servitudes as perpetual. Furthermore, Muslim jurists give the imâm full discretionary authority over any irtifâk (usufructuary right) whilst
international law jurists regard any servitude as being above any
authority. Thus according to international law:

any state which takes territory thus situated takes
it as it is and subject to the regime it is
impressed with, whether that state is actually a
party to the convention which originally created
that regime or not.

Similarly, in Islamic law, *bak al-irtifāk* devolves with the land to
the heir whether that heir is natural or judicial.

(b) The negative doctrine. The concept of servitude is not
universally accepted in international law and was borrowed from
private law in order to justify political restrictions on certain
territories. Since it is illegitimate to impose territorial
restrictions on a state without her consent, the so-called servitudes
can only confer contractual as opposed to real rights. Although
the concept of servitudes are relative notions, nevertheless they
have been viewed as an infringement of the sovereignty and
independence of the territorial state by many international
authorities. Judge Huber in the Island of Palmas Case states
that:

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

Furthermore, Judge Quintana in his dissenting opinion in the Right of
Passage Case sharply criticised the court in its half-measured
decision in the following words:
To support the Portuguese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations Charter.

As judge of its own law - the United Nations Charter - and judge of its own age - the age of national independence - the International Court of Justice cannot turn its back upon the world as it is.

Thus the state has absolute sovereignty over her own territory without the need for due regard to be paid to the interests of neighbouring states or the international community. Any restriction placed upon this sovereignty that is based on the concept of international servitudes is against the will of the inhabitants of the territorial state and their right to self-determination.

Conversely, Islamic law rejects the total abolition of *hukuk al-irtifak*. However, Islamic law and the practice of the Islamic state support the negative doctrine and reject the all-embracing nature of the positive doctrine if *hak al-irtifak* (usufructory right) prove to be injurious to the rights of the owner of the obligated land, in the case of private *irtifak* (easement), or the sovereignty of the territorial state in the case of international *irtifak* (usufructory rights). Thus in Islamic law, the harshness of *hukuk al-irtifak* (usufructory rights) on the owner of private land or on the territorial state can be relieved by the *imam* who always possesses the authority to review this right, whether it is generally or specifically owned by Muslims or non-Muslims and to revoke it if it is proved to be harmful, either in the public interest or for the owner of the obligated land.

However, the Islamic *Khilafa* which enforced Islamic law within *Durar al-Islam* was abolished before the Gulf states attained their
independence and the question of the continuity of the effects of the Anglo-Ottoman Draft convention upon the independence of the Arab Gulf states was not governed by any rule of state succession in Islamic law but rather by other rules emerging from Arabic public law, which was established by the Islamic principle of *идитиад* (independent reasoning) in accordance with the public opinion of the Arab nation.

The third case concerns those treaties concluded between Great Britain as protecting state and the Arab Gulf states. However, there is a problem in distinguishing between treaties concluded by Great Britain with a third state as an agent of the Arab Gulf states and treaties concluded by Great Britain with a third state and later extended to the Arab Gulf states.

At the beginning, the treaty-making competence of the Arab Gulf States was suspended by the exclusive agreements. Nevertheless, various bilateral treaties were concluded between Great Britain as protecting state and the Arab Gulf states which, at the date of independence, fell to the ground by tacit agreements between the Arab Gulf states and the protecting state. The common reason given for this practice was that these treaties were concluded during the time of protection under economic, military or political pressure, in addition to which the continuing in force of these treaties at the date of independence imposed restrictions on, and derogation from, independence. This justification is not found in the treaties concluded by Great Britain on behalf of the Arab Gulf states, such as the 1913 Anglo-Ottoman Draft Convention, or in the treaties concluded by these states with neighbouring states when Great Britain
transferred treaty-making competence to them. They continued at the
date of independence as treaties of the independent Arab states in
fact and in law save the bilateral treaties that had established
boundaries between the Arab Gulf states.

As in the Morocco-Algeria boundary dispute, the most recent legal
issue arising among the Arab Gulf states is the legal grounds upon
which the continuity of boundaries and treaties establishing them
after independence are based. The matter is further complicated by
the fact that the 1913 Anglo-Ottoman Draft Convention did not
precisely demarcate these boundaries. Boundaries were demarcated by
Great Britain, acting on behalf of the Arab Gulf states, or by the
Arab Gulf states themselves through various bilateral treaties. Upon
their independence, some of the Gulf states embarked on an
irredentist policy, including Bahrain and Saudi Arabia who rejected
some existing boundaries and the treaties which established them.
This created armed conflict between Bahrain and Qatar. Other Gulf
states such as Kuwait, Qatar and the United Arab Emirates, adopted a policy advocating the sanctity of the existing boundaries
and the treaties establishing them. This state of affairs has raised
the issue of the effects of the independence of the Arab Gulf states
on boundaries and boundary treaties established during the time of
protection. It is, therefore, necessary to examine this issue not
only under Arabic public law but also under international law because
the comparison will clarify the practice of the Arab Gulf states and
the adopted solution as well as the relationship between the two
systems of law.
Unlike the era when the problem of the pre-independence boundary treaties of Iraq\textsuperscript{39} and Kuwait\textsuperscript{40} had to be overcome, at the time of the independence of the Arab Gulf states, the legal literature on succession to boundary treaties had become fairly well crystallised.

There exists in international law two schools of thought regarding succession to boundary treaties\textsuperscript{46}, namely, the 'positive' doctrine and the 'negative' doctrine. According to the positive doctrine, the devolution of boundary treaties to newly independent states has been accepted with considerable uniformity by non-Islamic state practice, international tribunals and international jurists\textsuperscript{46} as well as by the opinions of the Muslim jurists by analogy with private contracts\textsuperscript{47}. Thus many of the pre-independence boundary treaties devolve automatically to some Gulf states. However, the devolution of these boundaries and boundary treaties was not on the basis of any of the rules of state succession because the division of Dūr al-Islam into political boundaries is prohibited by those rules epitomised by jus cogens. The only acceptable justification of such devolution is that the boundary treaties, if they were concluded by the protecting state, are the treaties made by the agent which at the date of independence devolve to the Arab states as the principals. If the boundary treaties, however, were concluded by the Arab states themselves, their devolution at the date of independence can only be justified by using the analogy of private contracts that establish the boundaries of private properties in Islamic law, according to which an heir assumes responsibility for the contract of the deceased and is bound by the situation created by that contract.
This doctrine does not escape criticism from non-Muslim and Muslim jurists. The criticisms from international jurists centre on the concept that law and practice are not well-crystallised regarding succession to boundary treaties. It is very difficult to state with precision which rights and obligations devolve automatically and which do not and since the definition of a boundary is based on the treaty, the severability of territorial from non-territorial provisions contained therein is an unsettled problem. Furthermore, the formula of the *ipso jure* devolution of boundary treaties to newly independent states does not eliminate boundary disputes between neighbouring states and thus the succession to boundary treaties as instrumental to stability and finality is proved to be false.

Muslim jurists, have agreed with this tendency to the extent that the analogy between state boundaries and those of private property is inexact and only designed as an escape route from the problem. Even the so-called *uti possidetis* principle has not proved to be effective in settling boundary disputes in South American states and such disputes have occurred in Europe, Asia and Africa too. A perpetuation of the problem is the wrong approach and can lead to armed conflict as was the case between Bahrain and Qatar over the al-Zubarah District despite the acceptance by Bahrain of the formula of the automatic devolution of its boundary agreement with Saudi Arabia. Other conflicts have included the dispute between Iran and Sharjah over Abu Musa Island, the dispute between Sharjah and Umul Quwain and the disputes between Iran and Rasul Kheimah over Tunb island. Therefore, non-Muslim and modern Muslim and Arab jurists have maintained that boundaries and boundary
treaties should be exempt from the scope of state succession and be solved by an acceptable solution proved to be effective in both international law and Arabic public law without prejudicing the attitude of the other mandated Arab territories towards treaty succession.

B. The practice of the Ex-Mandated Territories:

(i) The Effects of Independence on Treaties concluded by the Islamic State:

(a) Palestine:

Upon Britain's relinquishment of her mandate for Palestine in 1947, the revival of the Ottoman treaties embodying capitulations became one of the problems facing the General Assembly of the United Nations, which in 1947 adopted Resolution 181 (ii)\(^\text{97}\) inviting the interested states to renounce their capitulations, at least temporarily, until the establishment of the State of Palestine to which all treaties would devolve\(^\text{98}\). This practice had been followed by Iraq upon the establishment of the British mandate over that territory and it may be concluded from this that the General Assembly would recognise the re-enforcement of the capitulations in Palestine if the interested state declined to renounce them. This resolution was, whether by design or not, in conformity with the Islamic legal theory that treaties of the Islamic State are attached to the legal identity of the umma until the evolving Muslim state develops its own legal identity. Resolution 181 (ii), however, was never implemented and a declaration regarding the pre-independence treaties was never made. Since Palestine has failed to develop an independent legal identity at the present date, her practice as an Arab state in
furthering the development of the regional rules regarding succession to treaties unfortunately stopped at this point. Thus the practice of her neighbour, Trans-Jordan, will be examined.

(b) Jordan:

Neither the Resolution of the League of Nations nor the devolution clause embodied in the 1946 Treaty between Great Britain and Jordan which abrogated the mandate agreement contain any reference to the revival of the capitulations. The conclusion of this treaty marked the evolution of the legal identity of Jordan and by it her independence was recognised by the mandatory power and the League of Nations, the parties to the mandate agreement. If Article 8 of the Mandate Agreement for Trans-Jordan and Palestine was operative in Palestine it was not in Jordan. No state claimed any revival of its capitulations in Jordan but the Government of the United States declared that changes in the legal status of a territory did not deprive the United States of America from any right or interest it might have there°°.

(c) Syria and Lebanon:

As stipulated in Article 5 of the Mandate Agreement for Syria and Lebanon°°°, upon the termination of the mandate the capitulations came into force. In its letters of September 1944°°', the Government of the United States declared that it was prepared to extend full recognition of the independence of Lebanon and Syria upon the receipt of written assurances from the governments of the two states that the rights of the United States and her nationals in Syria and Lebanon, as recognised by the 1924 Treaty°°°, would effectively be continued and protected until they were replaced by a
new agreement. After Syria and Lebanon undertook to continue the American capitulations\textsuperscript{103}, the United States continued to list under the names Syria and Lebanon the 1924 Treaty and the 1937 Exchange of Notes with France regarding customs privileges\textsuperscript{104}.

Accordingly, it is necessary to examine the rationale upon which the devolution of the treaties embodying capitulations to the Arab states were based. Regarding the controversy surrounding the nature of capitulations, non-Muslim jurists, such as Wilkinson\textsuperscript{106} consider that capitulations constitute treaties but are not 'dispositive' and O'Connell\textsuperscript{106} and De Muralt\textsuperscript{107} concur with this view. Conversely, Muslim jurists deny that capitulations can constitute any element of a treaty. Altüg, a Turkish writer\textsuperscript{108}, has defined capitulations in unequivocal terms:

\begin{quotation}
. . .the capitulations were given in the form of a decree so there was no question of ratification because the sovereign had already signed it. Treaties would have necessitated ratification by or in behalf of the heads of state. There was no such ratification by the receiving state. Nor does history provide an example of a refused capitulation, . . .capitulations can be defined as unilateral decrees which regulated the status of foreigners within the Ottoman Empire, they were a reflection of municipal law and on an international plane.
\end{quotation}

This view was emphasised by the practice of Syria and Lebanon on another occasion. The United Kingdom addressed the 1947 letter to the Government of Syria and Lebanon with similar wording to that of the United States regarding the automatic revival of the British capitulations until their replacement by a new agreement\textsuperscript{109} but the two governments declined to admit this contention on the ground that the capitulations were denounced by their guarantor\textsuperscript{110} and moreover,
they have developed legal identities independent from that of the Islamic State. On this basis, the United Kingdom, through diplomatic negotiation, accepted the local jurisdiction of the two states.11

With regard to the legal grounds on which the capitulations devolved to the Arab states, O'Connell, along with other non-Muslim jurists, propagates a view that coincides with that of the Government of the United States when he regarded capitulations as examples of treaty rights which attach more to the soil than to the personality of the signatories.12

American jurists, however, have based the devolution of capitulations to the Arab states not on their dispositive nature but on other grounds. For example, Wilkinson13 has stated that:

. . . extraterritoriality treaties of the United States are based on the legal conditions of a country. If a territory is annexed by a state with laws and legal procedures which guarantee a certain justice approximated to that of the United States, the legal conditions of that country are changed on the extensions of the successor's system in jurisdiction over the territory and there is no necessity for the continuation of the treaty . . .

De Muralt14 justifies the continuation of American capitulations on other grounds in stating:

Perhaps the very well founded political argument must not be forgotten that acceptance of the continuation of the capitulatory rights held by many powers was necessary in order to secure the latter's approval of the terms of a mandate or at least their recognition of the status of the mandatory powers as was the case with the United States of America.

Muslim jurists, such as 'AbdulBāri and al-Sanhūri, while arguing in favour of the abolition of the capitulations in Egypt, state that:

. . . the devolution of these capitulations lacks any justification. They constituted derogation of state sovereignty. Nevertheless, they were
originally derived from an agreement [referring to the 1535 Treaty between the Ottoman Empire and France] with Turkey and the rest has no legal basis whatsoever..."

In fact, the devolution of treaties embodying capitulations to an Arab state has been regionally acceptable in fact and in law in the cases of both mandated territories such as Iraq and protected states such as Egypt. This has not been based on any legal rule of state succession either in international or Islamic law but on the continuance of Islamic identity in accordance with Islamic law. That some Arab states declined to accept such devolution was justified only on the grounds that the Ottoman Empire as the guarantor of the capitulations had abrogated capitulations and treaties embodying them before the independence of the Arab mandated territories in 1914. Hence a state that claims the devolution of capitulations to the Arab states after 1914 had no legal reason to do so either in international or Islamic law.

(ii) The Effects of Independence on Treaties Concluded by the Mandatory Powers on Behalf of the Arab Territories:

(a) Jordan:

Unlike Iraq, Jordan did not make a declaration or a signed guarantee regarding the maintenance in force of all pre-independence conventions and agreements. It did, however, include in the 1946 Treaty of Alliance, by which the independence of Jordan was recognised, a devolution clause similar to that included in the 1930 Treaty of Alliance between Iraq and the United Kingdom. Article 8 of the Anglo-Jordanian Treaty of Alliance states that:

Any general international treaty, convention or agreement which has been made applicable to Trans-Jordan by His Majesty the King (or by his
government in the United Kingdom) as mandatory shall continue to be observed by His Highness the Amir until His Highness the Amir (or his government) becomes a separate contracting party thereto or the instrument in question is legally terminated in respect of Trans-Jordan.

As in the cases of the devolution agreements of Iraq and Morocco, the legal effects of this clause on pre-independence multilateral and bilateral treaties can be ascertained as follows:

With regard to League of Nations Multilateral Treaties on Narcotic Drugs, which were amended by the 1946 U.N. Protocol, unlike Iraq, Syria and Lebanon, Jordan opted to apply the regional rule of non-devolution by accession not succession to each individual treaty as an exercise of her independence. Moreover, Jordan invalidated certain League multilateral treaties which were not amended by any U.N. Protocol, such as the 1931 Convention on the Stamps Law. The Jordanian government, however, as an exception, applied the regional doctrine of devolution to the predecessor's multilateral treaties only in the one instance of the 1929 Geneva Humanitarian Conventions.

The application of the doctrine of non-devolution to the predecessor's multilateral treaties by means of accession as a right not as an obligation has already become the regional practice of the Arab states as dictated by the social consciousness of that community.

Most sources are silent with regard to the effects of the independence of Trans-Jordan on bilateral treaties concluded on her behalf or extended to her by the mandatory power. The first source to mention the devolution of the pre-independence bilateral treaties to Jordan was O'Connell, who maintains that:
Jordanian authorities have privately expressed the opinion that the 35 conventions extended to Trans-Jordan by the United Kingdom are, except where subsequent action has been taken, still in force; and it is reported that no question of their not being implemented has ever arisen.

No direct or indirect reference was given after this statement. In examining its credibility, the ultimate authorities are the British Treaty Series, the League of Nations Treaty Series or the United Nations Treaty Series, since Article 18 of the League Covenant and Article 102 of the Charter of the United Nations oblige any members who enter into a treaty or an international agreement to register it in the Secretariat otherwise the treaty or agreement cannot be invoked before the League or the United Nations.

A consultation of the British Treaty Series shows that there are only four treaties relating to Trans-Jordan from the mandate period and the League Treaty Series also only contains these four. One more treaty, in addition to three of these treaties, has been found in the U.N. Treaty Series. These facts contradict the aforementioned official Jordanian statement and confirm that upon the independence of Trans-Jordan, despite the devolution clause embodied in the 1946 Treaty of Alliance between the U.K. and Jordan, Jordan applied the formula of the non-devolution of the pre-independence treaties save those treaties that related to the establishment of boundaries with neighbouring Arab states such as Saudi Arabia, Iraq and Syria which according to the established practice of the Arab states are exempt from the scope of state succession.

The principle adopted in the foregoing practice with regard to the effects of independence on treaties supports one theoretical
tendency on the evolution of certain customary rules in treaty succession within a certain region and raises the question of whether the practice of the other mandated territories, namely Syria and Lebanon, supports this tendency.

(b) Syria and Lebanon:

Unlike the other mandated Arab territories such as Iraq and Jordan, Syria and Lebanon achieved their independence not by mutual agreement with the mandatory power but by force. Thus the application of the regional rules of the devolution or the non-devolution to their predecessor's treaties was an exercise of right not obligation.

With regard to the League of Nations multilateral treaties which were amended by the U.N. Protocol, Syria and Lebanon notified the Secretary-General of the United Nations of their acceptance of the devolution of various multilateral treaties to which the mandatory power had adhered on behalf of their territories prior to their independence and they subsequently signed U.N. Amending Protocols, such as the United Nations 1947 Amending Protocol for the 1921 Convention for the Suppression of Traffic in Women and Children and the 1933 Convention for the Suppression of the Traffic in Women of Full Age. The exercise of this right is optional according to established practice. For example, the mandatory power acceded on behalf of Syria and Lebanon to the International Union for the Protection of Literary and Artistic Works of which the Swiss government is depositary, and upon independence, only Lebanon, by notification, acknowledged the devolution of the convention to her whereas Syria continued the application of the convention without
making a special act. In a similar case, Syria and Lebanon used the procedure of 'accession' instead of 'succession' to their predecessor's multilateral treaties, as in the 1929 Geneva Humanitarian Conventions.

With regard to bilateral treaties, although the relinquishing of the mandates for Iraq and Trans-Jordan was achieved by bilateral agreements between Great Britain as the mandatory power and Iraq and Trans-Jordan and the relinquishing of the mandates for Syria and Lebanon were achieved by force, the practice of the latter two states in treaty succession is not inconsistent with that of Iraq and Trans-Jordan. This is emphasised by the practice of Syria and Lebanon towards non-dispositive bilateral treaties, which are regarded by the foregoing practice as personal to the mandatory powers (or protecting states) and thus do not devolve to the successor state at the date of independence. Even the doctrine of agency (international representation) of the Arab states by the mandatory powers or protecting states does not necessarily justify the automatic devolution of bilateral treaties to the mandated Arab territories, since these territories under the mandate regime reserved their right under Islamic law to accept or reject the predecessor's treaties at the date of independence. The principle of the non-devolution of the predecessor's bilateral treaties, however, does not apply to the so-called 'dispositive' bilateral treaties such as the 1920 Agreement which regulated the Jordan and Yarmouk rivers flowing in the mandated territories of Syria, Lebanon and Palestine on the same grounds on which hukuk al-irtifak is based in Islamic law. In addition, Syria and Lebanon firmly observed the Arabic doctrine that bilateral
treaties establishing boundaries are exempt from state succession in order to be solved in accordance with the conventional rules of Arabic public law\textsuperscript{134}.

2. Uniformity and Consistency of the Practice of the Arab States in Treaty Succession:

All Arab states, whether ex-protected or ex-mandated territories, are active in the general practice of treaty succession. Furthermore, none of the Arab states in their practice initially dissented from the formation of the Arab regional customary law and neither have they persistently challenged its doctrine. This uniformity and consistency in treaty succession is reflected in the practice of those especially affected Arab states, specifically those who entered into devolution agreements such as Iraq (ex-mandated territory) and Morocco (ex-protected state)\textsuperscript{135}; those who have had boundary problems such as Iraq, Kuwait, the Arab Gulf states and Morocco; or those who had foreign military bases on their territory, such as Iraq\textsuperscript{136} Egypt\textsuperscript{137} and Morocco. The participation of these Arab states in any process of the codification of state succession in respect of treaties, as in the U.N. Sixth Committee or in the I.L.C.\textsuperscript{138}, and in the conventions, such as the 1978 Vienna Convention\textsuperscript{139} and their votes on some of the Draft Articles of that convention, exemplify the uniformity and consistency of the practice of the Arab states in treaty succession.

This uniformity, although not absolute, is certainly preponderant to the extent that a little inconsistency does not affect the clarity of the content of the customary law or the existence of the \textit{opinio juris}\textsuperscript{140}. 
3. Duration of the Practice of the Arab States:

A certain length of time is required for the crystallisation of a practice into a customary law is required by both international tribunals and jurists. In the 1969 North Sea Cases, the I.C.J. was faced with the question of whether Article 6 para. 2 of the Continental Shelf Convention had developed into a customary rule in the 11 years since its adoption. The court held that:

Even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself . . . although the passage of only a short period of time is not necessary, or of itself, a bar to the formation of a new rule of customary law . . . within the period in question, short though it might be, state practice . . . should have been both extensive and virtually uniform . . . '141'.

Some non-Arabic jurists have postulated that as a condition for the formation of customary law, practice must be established over an extensive period of time142. This duration, however, is a relative requirement according to other jurists143 and customary law may be formulated within a short period of time.

Most Arabic jurists144 have concurred with non-Muslim jurists in requiring an unspecified duration of time in order to distinguish between consistent and inconsistent practice and allow rules time to crystallise and give Arab states a time to reflect upon whether they should consent or object to the emerging rules. The duration for the formation of their customary law may be defined for the ex-protected states as covering the period lasting from the conclusion of the 1820 Treaty of Peace between Great Britain and the Arab Chiefs of the Gulf145 to the present time, while for the ex-mandated Arab territories the period extends from the establishment of the mandate.
system up to today. After the decolonisation process, the duration of the time required for the crystallisation of an Arabic customary rule became shorter and the *opinio juris* became much clearer and stronger than before because of the participation of many newly independent Arab states in the general practice of treaty succession.
SECTION 2: THE OPINIO JURIS OF ARABIC CUSTOMARY LAW ON TREATY

SUCCESSION:

1. The Concept of and Evidence for the Arabic Opinio Juris:

   A. The Concept:

   Article 38 para. 1 (b) of the I.C.J.'s Statute requires for the formation of customary law not only a "general" practice but also that it must be "accepted as law". It was unequivocally postulated by the World Court in the Lotus Case\textsuperscript{147} that only if the abstention from instituting criminal proceedings "were based on [states] being conscious of having a duty to abstain would it be possible to speak of an international custom". Moreover in the North Sea Continental Shelf Cases\textsuperscript{149} the court held that:

   \[\text{The act concerned... must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. ...} \]

   In this sense, the general practice of the Arab states in treaty succession must be recognised by each state as the law of treaty succession, a departure from which ought to mean that some sanction upon that state should be effected by the regional community of the Arab states as codified in Article 10 of the 1950 Treaty of Joint Defence and Economic Co-operation among the states of the Arab League\textsuperscript{149}.

   B. The Evidence:

   Substantial evidence on the binding force of the regional rules governing treaty succession and state identity can be found in the public opinion of the Arab people and in the general practice of the Arab states as well as in regional and international organisations.
The public opinion of the Arab people has played a decisive role in directing the practice of the Arab states towards the formation of regional rules governing their state's identity. This reflects the demand for full Arab unity based on the historical identity of the Arab nation, as evidenced by various plebiscites that have been held among the Arab people, which has had great influence on the drafting of the constitutions of newly independent Arab states. All the constitutions of the emerging Arab states declare in unequivocal terms that their people and territory constitute a part of the Arab nation and of the Arab world. The Twentieth Century has witnessed several consensual measures in the Arab territories and a consideration of how the legal effects of these measures have contributed to the formation of the Arabic customary law is necessary.

As a result of the consensual measures between Syria and Egypt, the United Arab Republic (U.A.R.) was established in 1958. Subsequently, the Kingdom of Yemen joined the U.A.R. and the United Arab States (U.A.S.) was formed. In the same year the Kingdoms of Iraq and Jordan entered into a consensual fusion to form the Arab Union. In 1972 the unification of Libya and Egypt was proposed and a preparatory committee was established to examine the effects of the proposed union on the identities and treaties of these states concerned. The movement for the consensual unification of the Arab people also found advocates among various Trucial States of the Gulf and in 1970, these states entered into an agreement whereby the United Arab Emirates was established. The real nature of this
movement according to the Arabic customary rules needs to be determined as well as its effects on treaties.

Non-Arab jurists such as Fiore\textsuperscript{166} believe the merger of two or more states creates a new international personality and amounts to state succession while others such as Feilchenfeld\textsuperscript{166} consider them to be cases "of amalgamation rather than of succession", which in Jones' view\textsuperscript{167} does not usually create a new international personality. Judging by the already established rules of Islamic law on state identity and the Islamic concept of state succession\textsuperscript{168} it is this latter view which seems to be in conformity with the reality of what is happening in the Arab world. The U.A.R., however, does not fall under any fixed category of the uniting of states under international law\textsuperscript{169} although since it represents no more than a consensual measure between two regions possessing a common identity, it may be regarded as constituting a \textit{sui generis} case in international law\textsuperscript{160}. The U.A.R. was an expression of unity rather than a union and was established through the \textit{communis opinio juris} of the Arab people.

The U.A.S., in contrast to the U.A.R., was no more than an interim and temporary stage to full unity as can be concluded from Article 1 of the Pact\textsuperscript{161}. At that stage, both states retained their independence and international personality\textsuperscript{162} in some spheres, while other affairs of the states were unified as if they belonged to a single state\textsuperscript{163}. In addition, at least temporarily, each state preserved its treaty-making competence\textsuperscript{164}, whereas none of the regions\textsuperscript{165} of the U.A.R. possessed any treaty-making competence, this being constitutionally vested in the President of the
Republic\textsuperscript{166}, and hence the U.A.R. was a single international personality\textsuperscript{167}. Similarly, all Sheikhdoms of the United Arab Emirates preserve their internal autonomy\textsuperscript{168}, while treaty-making competence is vested in the Federal Council\textsuperscript{169} which adopts its resolutions in accordance with a majority vote\textsuperscript{170}. Furthermore, the 1972 Amalgamation between Egypt and Libya followed the same tendency with regard to treaty-making competence and international personality without there being any change in their Islamic identity\textsuperscript{171}. It is, therefore, necessary to examine the effects of the unification movement on treaties in accordance with the communis opinio juris of the Arab states.

The doctrine of devolution\textsuperscript{172} is given further emphasis by Article 69 of the U.A.R. Provisional Constitution\textsuperscript{173} which adheres firmly to the common practice in distinguishing between the effects of such events on multilateral and bilateral treaties. With regard to multilateral treaties, treaties of a constituent character such as the membership of Syria and Egypt of the United Nations and its specialised agencies were amalgamated and devolved to the U.A.R. without change\textsuperscript{174}. The Secretary-General of the United Nations vested the United Arab Republic with responsibility for all the other multilateral treaties to which the participants in union had been parties\textsuperscript{175}. From this practice it may be concluded that because the devolution of multilateral treaties is a right and not an obligation the opinio juris may not be so clear in these cases and so an examination of Article 69 of the U.A.R. Provisional Constitution in connection with the devolution of bilateral treaties is necessary.
Since a bilateral treaty usually regulates the mutual relations between states and is more linked with the identity of the contracting parties, from a non-Islamic point of view particularly, the effects of the declaration of the United Arab Republic as embodied in Article 69 of the Provisional Constitution and the subsequent declaration of the other party to a bilateral treaty either with Syria or with Egypt ought to be ascertained. The U.A.R. declaration is similar to that made by Tanganyika upon her independence\(^1\), which has subsequently become known as a 'unilateral declaration'. However, the U.A.R. declaration was not, as was that of Tanganyika, based on the formula of opting in\(^1\) but rather of opting out\(^1\) which meant that both multilateral and bilateral treaties were covered. Generally speaking, a unilateral declaration by itself cannot create rights or obligations for a third state so the legal effects of Article 69 of the U.A.R. Provisional Constitution on a third state are questionable. While Syria and Egypt could agree between themselves that their treaty rights and obligations continued to be binding upon the U.A.R., the other parties to their bilateral treaties were not so bound and unless they recognised the continuing in force of these treaties \(\text{vis-à-vis}\) the U.A.R. these declarations had no legal effect on them.

The United States of America merely expressed cognisance of the unilateral declaration of the U.A.R. and no state objected to it, suggesting the acquiescence of the international community with the declaration. The acquiescence of the other parties to the bilateral treaties of Egypt and Syria does not mean that novation occurred but that these treaties continued within the limits of each region as
prescribed by Article 69 of the Provisional Constitution of the U.A.R. and the subsequent declaration. The bilateral treaties of Egypt with non-Arabic states\textsuperscript{179} operated within the limits of the Egyptian region as was the case with Syria's bilateral treaties with non-Arab states\textsuperscript{180}. As regards the operation of the 1952 Transport Agreement between Egypt and Jordan\textsuperscript{181} and the 1955 Agreement with Iraq\textsuperscript{182}, upon the formation of the U.A.R. these treaties operated within the territory of the U.A.R. which comprised of the Syrian and Egyptian regions.

Like the United Arab Emirates\textsuperscript{183} did at a later date, Egypt and Syria\textsuperscript{184} upon amalgamation advocated the doctrine of devolution (opting out) in showing that no change in their legal identity had occurred. This is emphasised by their subsequent separation. When Syria separated from the U.A.R. in 1961 all the U.A.R.'s multilateral and bilateral treaties relating to the Syrian region devolved to her without being changed\textsuperscript{185}.

Evidence of the communis opinio juris of the Arab states regarding treaty succession may be found in the practice of the regional and international organisations. In the regional organisations of the Arab states, the opinio juris may be found in the treaties concluded between the member states. These include the 1950 Agreement of Joint Defence\textsuperscript{186}, the 1968 Agreement establishing the Organisation of the Arab Petroleum Exporting Countries (OAPEC)\textsuperscript{187} regarding the codification of the pre-existing petroleum policy between the Arab exporting countries, and the unanimously adopted resolutions of the Arab League regarding problems arising from treaty succession\textsuperscript{188}. As far as international organisations
are concerned, the adoption of certain strategies by the League members in the U.N. Drafting Processes, such as the I.L.C's Draft Procedure, the Sixth Committee and at diplomatic conferences like the 1978 Vienna Conference on State Succession in Respect of Treaties' serve as the regional Arabic opinio juris, as do the votes the League members cast in favour of certain rules.

The processes outlined above in the formation of Arabic customary law may be summed up as having occurred in successive stages. First, some states, such as the early independent Arab states, engaged in a practice of treaty succession or made persuasive claims for a wide variety of reasons relating to Arabism, such as unity in language, history, religion, geographical location, the collective security of the Arab people, political pressure, gain, comity, courtesy etc. These policies accelerated the process towards the establishment of the opinio juris. Secondly, as more Arab states attained independence and wished to join the Arab League, the practice was further developed through claims put forward by the states initiating the law-creating process. Initially, the newly independent states reacted against these claims and certain practices established by the League and made counter claims. However, as they became familiar with the League's practice they acquiesced in it as they understood that each state accorded reciprocity to the others. Moreover, other Arab or non-Arab states in relying on the conduct of an Arab state, will bind the latter by their expectations raised by such conduct. Thirdly, as the relations between the Arab League members and the newly independent Arab states became firmly established by the admission of the new state to the membership of
the League, the new states realised that there was an emerging regional practice and thus adjusted their practice to fit into this. As the practice became more uniform and consistent, the conviction of the Arab states increased to the extent that it was regarded by the Arab states as obligatory, a stage which marked the formation of the Arabic customary law. However, through these processes it is not easy to point to the moment at which Arabic customary law was formed since its rules have come into existence in stages. The process of its development demonstrates the close affinity between the material practice and the opinio juris. Practice in the early stages served to relate and define the pertinent customary rule, to institute binding relations among the community of the Arab states and thereby enable the transition to the regional binding force of the rule qua law.

2. The Relationship between Arabic Public Law and Islamic Law:

Islamic law originates from a divine source preceding the existence of the Islamic State and thus the Islamic legal theory is concerned only with the systematic foundation of law, not its true historical origins. Moreover, the siyar (Islamic international law), as an integral part of Islamic law, derives in theory from the same sources and exists under the sanction of that law, hence Islamic law is based on monism. Nevertheless, the evolution of Islamic international law as a separate branch of law, is characterised by the influence of custom and other factors rather than from the conventional sources of the Qur'ān and the Sunna.

The Islamic legal order predetermined the criteria by which the problem of treaty succession arising from the replacement of the pre-
Islamic non-Arab and Arab political entities by the Islamic State could be solved. According to these criteria, any entity can be identified by the law enforced within its territory and the treaty rights and obligations concluded under that law. Subsequently, the voluntary submission of the territories and populations of the pre-Islamic political entities to the legal order of the Islamic State was tantamount to an automatic change in the legal identity of these territories into a unified Islamic identity and as a result the issue of treaty succession arose.

Since the replacement was accompanied by factual and legal consequences, state succession in Islamic law is divided into succession in fact and succession in law; the Islamic State is regarded as the factual and legal successor and the pre-Islamic political entities as the predecessors. The Islamic legal order also predetermined the framework of succession to the treaties of the pre-Islamic political entities by the Islamic State. The general rules as formulated in Islamic law and Islamic State practice were that the devolution or conclusion of treaties was permitted unless it was prohibited by nass (provision) of the Qur'ān or the Sunna.

According to these rules all the treaties of the Islamic State attached to the identity of the umma.

The evolution of the umma into many components, one of which was the Arab nation, and the fragmentation of Dār al-Islām into many territorial entities, such as the Arab political entities, did not constitute a break in the Islamic identity of these territories under Islamic law. However, upon the delegation of the conduct of the international relations of the Arab political entities to non-Muslim
states their external Islamic identity, according to Islamic legal criteria, was suspended as a result of the replacement of Islamic law by international law in governing their relations until the final independence of these entities, whilst their internal identity remained intact as a result of the continuity of Islamic law in governing their internal relations. These events clearly interfered in the factual and legal identity of the Islamic State in constituting cases of state succession under Islamic law whereby the Islamic State is regarded as the parent state for the evolving Arab states and as the predecessor state for the non-Muslim states. The treaties of the Islamic State devolved to the newly evolving Arab political entities on the basis of the rules governing the continuity of Islamic identity, while treaties of the protecting or mandatory powers devolved to them by either following the rules governing the contract of agency in Islamic law or the rules of state succession in international law.

The evolution of the Arab political entities into mature, independent states to which treaties concluded by their mandatory or protecting authority devolved has led to the occurrence of various cases of treaty succession in the Arab world, events that are unprecedented in Islamic legal theory insofar as they had the potential to challenge the unity of the Islamic legal order and territory. These events generated the need for the development of Islamic rules to forestall such an event by following the principle that decrees may be required to adapt to changing circumstances. Indeed, the methodological legal devices in Islamic law such as kiyâs (analogical deduction), istiḥsân (juristic preference), istishâb
(legal presumption), masālih mursala (public interest) etc. have provided the Arab leaders with the necessary means to establish an Arabic public law according to which the law creating process is based on the Islamic principles of idṭiḥād (independent reasoning) and idjmā' (consensus). These means are treaties and the following of customary practices.

A certain organisational framework has been established within which the practice of the Arab states in treaty succession must be confined in order to serve the common interests of the Arab nation. The adherence of many newly independent Arab states to the conventional rules and the evolution of the regional practice of these states served as the material elements constituting the Arabic customary law, the binding force of which is demonstrated in the almost unanimous compliance by individual Arab states with the conventional and customary rules.

3. The Relationship between Arabic Customary Law and International Customary Law:

The criteria by which the regional customary law is distinguished from international customary law is the opinio juris according to which if certain rules are only binding on certain states within a certain region they merely constitute their regional customary law\textsuperscript{96} but if such rules are regarded as being of general binding character then they constitute the body of international customary law\textsuperscript{97}.

Unlike international customary rules, Arabic customary rules are considered to be special rules. The former require for their formation the recognition of the majority of the member states of the
international community while the latter require the express or tacit recognition of the Arab states which adhere to them. Moreover, non-Arabic jurists have postulated that regional customary rules, on account of the relative homogeneity of the community to which they apply, bind an inactive state which has not persistently objected to them. This view has been further elaborated by Arabic jurists since the regional rules between the member states of a regional organisation are regarded as general rules and therefore do not require for their formation the recognition of all the member states, whereas the customary rules between two or more member states are regarded as special rules in respect of the regional rules and hence require for their formation the recognition of all member states of the organisation.

The regional rules apply only to the Arab states inter se whereas the relations between Arab states and the others are covered by the international customary rules. It is true that the practice of the Arab states towards treaty succession has resulted from succession between Arab and non-Muslim states but the opinio juris that binds an Arab state reflects only the sanction of the Arab states. It is also true that the Arab states have participated in the formation of international customary law on treaty succession but where there is conflict between the two systems of law in a dispute between the Arab states then Arabic customary law prevails - lex specialis derogat generali, unless the international customary rules are jus cogens. However, in a dispute between an Arab and non-Arab state, international customary law prevails, since the latter is not bound by the regional Arabic customary law.
4. The Relationship between Arabic Customary Law and Treaties:

The order of sources in Article 38 of the Statute of the I.C.J. creates an issue in international law as to whether there is a hierarchical relationship between customary law and treaties in international law. Some non-Muslim authorities\(^{204}\) have maintained that Article 38 establishes this hierarchy. Other non-Muslim jurists\(^{205}\) have maintained that Article 38, by mentioning treaties before custom, envisages, at least, the *lex specialis* rule in that according to sequence the importance of sources is suggested although this does not establish a hierarchy between treaties and customary law. The accuracy of this view is emphasised by the silence of Article 38 itself on the subject. Thus in international law, treaties and customary law are separate but equal autonomous sources.

In Arabic public law, however, the statute of the proposed Arab Court of Justice is silent in this respect, and since the sources of Arabic public law are the same as those of Islamic law, the legislative history of a treaty is of considerable importance in determining the hierarchy between treaties and custom. Treaties defined directly by al-Qur'ān or by the *Sunna* (primary sources), possess a high position in the hierarchy\(^{206}\). Treaties concluded by *idjmā'* (secondary source) possess a hierarchical position above customary law and only customary law or treaties concluded by *idjitihād* (secondary source) occupy the same hierarchical position as is envisaged in Article 38 of the I.C.J.'s Statute. Thus since Arabic conventional law has been established by the *idjitihād* (independent reasoning) of the leaders of the Arab states it occupies the same hierarchical position as Arabic customary law and moreover,
apart from the influence of the divinely inspired Islamic law, Arabic public law has evolved through a method similar in some respects to that by which the sources in Article 38 have developed.

The autonomy of treaties and customary law from each other leads them to stimulate and potentially abrogate or modify each other, although this depends on the position in the hierarchy from which they are derived. The result is that in international law the binding force of a treaty and of customary law is identical while in Arabic public law it depends on the legislative source. In international law, because the rules of one source may supersede those of the other, changes may be facilitated whereas in Arabic public law only the rules of treaties concluded by ʿidātīhād can supersede those of customary law or vice versa and change is limited to these secondary sources. Thus the principle that a rule can only be altered by a similar one is recognised in Islamic law but not in Arabic public law or international law. Customary international law can only be abrogated by a treaty and a treaty may only be modified or abrogated by customary international law.

The question arises as to whether there can be conflict between rules that have different sources. In international law, minor conflicts between rules having different sources may be solved by interpretive techniques. In the case of serious conflict, however, such as when two rules on one subject regulate that subject differently, the autonomy of sources in international law facilitates the application of the principle that the later rule supersedes the earlier one, although it may be difficult to ascertain when exactly the customary rule was formed. In addition, the specific
rule prevails over the general one. This specificity may be exemplified by the rule of a convention between a few states such as the Pact of the Arab League or the rule of Arabic customary law as opposed to the rule of a convention with many parties such as the 1978 Vienna Convention on State Succession in Respect of Treaties or as may be found in the practice of general customary international law.

In Islamic law, conflict between rules with different sources may occur but not between rules from the primary sources (Qur'ān, Sunna) or the secondary sources, such as some rules of Arabic public law. If there is a difference then the former abrogates the latter. Where rules found in the primary sources differ it is known in Islamic jurisprudence as nashīḥ (abrogation). Abrogation between rules found in al-Qur'ān or those of the Sunna or an abrogation of a rule in the Sunna by a rule in the Qur'ān, is not, in fact, conflict but the superceding of some rules by others; the Qur'ān being revealed in stages. It is to be noted that according to the modern view of Muslim jurists rules of the Sunna cannot, as such, abrogate any rule of the Qur'ān. With regard to the conflict between rules from secondary sources, Islamic law is in complete agreement with international law.

It is therefore necessary as a final stage in our investigation to examine the interaction and integration between Arabic customary law on state succession in respect of treaties and international conventional and customary laws in efforts towards codification before and during the 1978 Vienna Convention on State Succession in Respect of Treaties.
PART III
FOOTNOTES
CHAPTER VII
FOOTNOTES


2. See Chapter VI, Section 1.


5. ibid, p.27.

6. ibid, p.28.


17. ibid, p.28.


23. B.F.S.P., 1905-06, vol.XCIX, p.141; which had created a special economic zone.


26. See Chapter VI, Section 1.

27. ibid, Section 2.

28. Al-Maghrib (Morocco) had evolved and became a legally and politically autonomous region under three Muslim rulers. For the historical background of this evolution, see Long, D. The Governments and Politics of the Middle East and Northern Africa, 2nd ed., p.372.


36. ibid.


38. See Chapter VI, Section 2, 2.


41. I.F.P.D., Treaties between the British Governments and the Rulers of Bahrain, 1820-1914, Part 4, pp.1-17.


43. ibid, p.256.
44. ibid, pp.206-208, (11).

45. ibid, p.258, (No.XXXIII).

46. ibid, pp.238, 256, 258.

47. On the voidable contract according to the Islamic law, see Coulson, W.J. Commercial Law in the Gulf States: The Islamic Legal Tradition, Graham & Trotman, (1984), p.56.


49. See Chapter VI, Section 2, 2.


53. S.I., 1949, No.140.

54. For example, Russia's recognition of Great Britain's position in the Persian Gulf as embodied in the 1907 Convention, Cd.3753.


59. Al-Baharna is a specialist in this subject. Presently, he is Minister of Justice in the State of Bahrain, ibid, pp.20-21.


64. The Times, p.15.

65. See Note of 26 September 1935 from the British Chargé d'Affaires at Jiddha to Yusuf Yasin, Saudi Memorial II, Annexe 15.

66. Cmd.2951.

67. See the Corresponding Note from Shaykh Yusuf Yasin to the British Chargé d'Affaires at Jiddah dated 15 October 1935, Saudi Memorial II, Annexe 16, pp.44-5.


74. Kuwait also joined on 30 April 1958 UNESCO as associate member, see 10th Session of General Conference of UNESCO 1958, Doc.10 C/30.

75. Cmd.524; Cmd.9340, p.2; Cmd.607, p.2; Cmd.590; Cmd.617; Cmd.642.

76. Cmd.8981, p.2; Cmd.9873, p.2; Cmd.995.


83. I.C.J. Reports, 1952, pp.185-188.


86. See the statement delivered by Sir B. Eyres Monsell, House of Commons Debates, 18 April 1934, vol.388, Cols.973-974; ibid, 4 February 1959, vol.599, Col.75.


88. Pridham, op.cit., p.66.


91. Articles 3, 6, 7, 8, Cmd.5380, Cmd.7064.


100. Petroleum Legislation: Basic Oil Laws and Concessions Contracts, Middle East, Supplement XXI, pp. Abu Dhabi A-0.

104. Djaridat al-Ea'y al-'Amm (Newspaper), 18 January 1968, (Kuwait).
105. Al-Ahrām (Newspaper), 3 February 1968, (Cairo).
106. Text of the Bilateral Agreements between the Emirates and Abu Dhabi and Dubai signed on 18 February 1968.
107. Al-Ea'y al-'Am (Newspaper), 8 February 1968.
112. Ibid.
123. ibid.


132. Cf. the Mandate Agreements and the 1922 Treaty of Alliance between Great Britain and Iraq, Cmd.3270.

133. If the mandatory powers were under the following restrictions: the mandatory has no right to train the inhabitants except for internal police and local defence as in Article 3 of the French Mandate for the Cameroons and Togoland; no establishment of military bases; the inhabitants of the mandated territories did not automatically acquire the nationality of the mandatory powers; and the mandatory powers were under obligation to ensure in the mandated territories the principle of economic equality between the members of the League of Nations.


135. ibid.

136. The P.M.C. consisted of 11 members, 10 ordinary and 1 extraordinary, Wright, Mandates, op.cit., p.137.


139. Cmd.3270.

140. See generally Aitchison, op.cit.
141. Guardianship in Islamic law may be of a person or property, Fyzee, A.A. Outlines of Muhammadan Law, Oxford University Press, (1955), p.171.


150. See the diplomatic correspondence relating to this Article in U.S. Foreign Relations, 1921, vol.1, pp.922-924.


153. ibid, p.317.

154. Cmd.3270.


156. See generally Davis, op.cit.

157. P.M.C., Annexes to the Minutes, 3rd Session, pp.309-310; P.M.C., Minutes of the 6th Session, pp.100, 169, 172; P.M.C., Minutes of the 7th Session, pp.6-7; P.M.C., Minutes of the 9th Session, p.10; P.M.C., Minutes of the 11th Session, p.148.

158. See the decision of the Supreme Court of Palestine, A.J.I.L., 1925, vol.20, p.772.


160. Article 25 of the Mandate Agreement for Palestine by virtue of which the agreement is applicable to the territory of Trans-Jordan together with the provisions of the Mandate for Trans-Jordan laid down the boundaries of the country, Davis, op.cit., p.302.
161. The constitution for Lebanon was promulgated on 23 May 1926.

162. A Constitution was also promulgated for Syria, the other French mandate, by the Decree No.311 of 14 May 1930, Article 3 of which states that: "...the religion of the president is Muhammadism...".


164. Cmd.1195.


166. In this Agreement the English and Arabic text are equally valid, Cmd.2566.

167. ibid.

168. Text is to be found in the Report for the year 1931, Appendix N.

169. The boundaries between Syria and Lebanon were drawn up in different stages by the mandatory authority, Toynbee, A.J., S.I.A., 1925, vol.1, pp.354-360.


171. P.M.C., Minutes of the 18th Session, p.170.

172. ibid, Annex, 3.

173. P.M.C., Minutes of the 20th Session, Annex 16.

174. ibid, p.229.

175. ibid.

176. ibid.

177. Article 2 of the 1925 Iraqi Constitution, Article 1 of the 1926 Lebanese Constitution, Article 1 of the 1930 Syrian Constitution.


179. The promise of U.K. was given by Mr Anthony Eden, Secretary of State for Foreign Affairs on 29 May 1941, The Times, 30 May 1941, p.2, London, and the promise of France was given by General Georges Catroux in 1941 in the form of proclamation of
the independence of Syria and Lebanon, The Times, 9 June 1941, p.3, London.


185. See declaration on the granting of independence to colonial countries and peoples adopted by the U.N. Res. 1514 (XV) of 14 December 1960.


188. Ibid, p.103.

189. Cmd.9429.

190. Cmd.9544.


193. Meeting of the League Council, 8th ordinary session, February 1948.

194. Report of the Secretary-General to the League Council, 29th ordinary session, March 1958, p.44.

195. Minutes of the League Council, 3rd meeting, 3 July, 1958, p.94.


199. Such as the 1986 Bahrain-Qatar Boundary Dispute.


CHAPTER VIII

FOOTNOTES


7. See Chapter X.

8. See Chapter IX.


11. See Chapter X.


17. ibid, at p.683.


23. ibid, p.679.


30. Cmd.144.

31. ibid.


34. See Chapter VI, Section 2, 1.


37. Such as the Peace Treaties of 29 January 1666, of 15 December 1734, of 15 January 1750, of 8 April 1791, and of 14 June 1801.


43. ibid.

45. Report of the Secretary-General to the Council of the Arab League, 42nd Ordinary Session, March 1964, p.18.


49. See Chater VI, Section 2, 2.


52. The United States publication 'Treaties in Force', 1973, did not contain any treaty in force against the Gulf states at the date of their independence.


57. Al-Khafif, 'Ali. Al-Mukikiyya fi al-Shariʿa al-Islamiyya maʿa al-Muḥārara bi al-Sharāʿa al-Wadʿiyya, 1st. ed., Cairo, p.120.


64. ibid.


66. Al-Khāfīf. Al-Mulkiyya fī al-Shariʿa al-Islāmiyya, op.cit., p.120.


70. I.C.J. Reports, 1960, p.95.


76. See Chapter VII, Section 2, 2.

77. See the preamble of the 1945 Pact of the Arab League, Khalil, op.cit., vol.II.

78. The Gulf states agreed with Britain that there was no automatic succession to treaties concluded between them and Great Britain such as the prohibition of granting perling or oil concessions to non-British, lease agreement, importation or exportation of arms. The Gulf states generally speaking regarded themselves free as the other protected Arab states either to reject or to novate the pre-independence bilateral treaties.

79. As the conclusion of the 1934 Agreement between Bahrain and Saudi Arabia, Cmd.5168.

80. See Chapter VII, Section 1, 2, B, (ii), (b).
81. See Chapter V, Section 2, 2, B.

82. See Chapter VII, Section 1, 2, B, (ii), (b).

83. Chapter IV, Section 2, 2, B.

84. See Chapter V, Section 2, 2, B.

85. See Chapter IV, Section 2, 2, B.

86. Moore, J. Digest of International Law, (1906), vol.5, p.303.

87. Al-Ansari, op.cit., p.100.


90. See Chapter IV, Section 2, 2, B.


92. Sharma, op.cit.


98. ibid.


100. Davis, op.cit., p.162, p.164.


108. See his remarkable study entitled: Turkey and Some Problems of International Law, p.20.


111. Exchange of Notes with the Government of Syria, op.cit.


128. Davis, op.cit., p.162.
134. See Chapter VII, Section 2, 2.
136. The military bases in Iraq were removed after the 1958 Revolution.
137. The military bases in Egypt were removed after the 1952 Revolution.
138. See Chapter IX.
139. See Chapter X.

149. Article 10, Khalil, op.cit., pp.101, 103.

150. U.S. Foreign Relations, 1919, vol.12, p.780; Daruaza, M. Al-


152. The Arab Union was dissolved just five months after its coming into existence as a result of the 1958 Revolution in Iraq which transformed the government of that country from manarchical into republican.

153. Sirhān, op.cit., p.482.

154. See Chapter VII, Section 1, 2, B, (ii), (b).


158. See Chapter VI, Section 1.


162. Article 3 of the Pact of the U.A.S., ibid.


164. Article 2 of the Pact of the Arab states, ibid.


170. Even though the Resolutions of the Council are adopted in accordance with the majority vote, this majority must include the votes of the biggest two Emirates, namely Abu Dhabi and Dubai in substantive issues such as the ratification, *ibid*, p.298.


172. See Chapter VI, Section 2, 1.


176. See the Statement of the Prime Minister of Tanganyika Regarding the Problem of State Succession in that country, *I.C.L.Q.*, 1962, vol.11, p.1210.


178. The opting out formula is known as the Zambia formula, *ibid*, p.220.


183. See Chapter VII, Section 1, 2, B, (ii), (b).


185. Article 2 of the Legislative Decree No.25 of 13 June 1962.


187. Article 3 of the O.A.P.E.C. obliged the member states to carry out in good faith the resolutions taken by this organisation even though a member state is not a member of O.P.E.C.; Articles 28, 29, 30.
188. Such as the 1956 Solidarity of the Arab States with Egypt upon its abrogation of the 1936 Treaty of Alliance with Great Britain, G.B.P.P., 1937, Cmd.5360.

189. See Chapter X.

190. Cf. al-Ghunaymi. ٌعَنٌْ عِلَّام, op.cit., p.32.


192. Sirhān, op.cit., p.140.


194. Al-Qur'ān VI, 119.


198. Most of the regional organisations of the Arab states required for the adoption of their resolutions the unanimity of the member states, such as the Pact of the Arab League in Article 7.

199. Akehurst, op.cit., p.29.


201. Sirhān, op.cit., p.145.


PART IV

EFFORTS OF IRAQ AND KUWAIT IN THE INTEGRATION OF THE LAW OF STATE SUCCESSION IN RESPECT OF TREATIES TOWARDS THE CODIFICATION PROCESS:

EFFORTS LEADING TO THE 1978 VIENNA CONVENTION

EFFORTS AT THE 1978 VIENNA CONVENTION TOWARDS CODIFICATION OF STATE SUCCESSION IN RESPECT OF TREATIES
INTRODUCTION:

Having discussed the factual practice of Iraq and Kuwait in treaty succession and the evolution of this practice into regional conventional and customary rules through its adoption by the other Arab states, this study will now concentrate on the efforts of Iraq and Kuwait towards the transformation of the regional customary rules into international law.

In the pre-U.N. era, the concepts of the codification of the law and its progressive development have been accepted by Muslim jurists since the time of the Abbāsid rule in Iraq as well as by non-Muslim jurists. However, in the U.N. era, both Muslim and non-Muslim jurists endorsed the practice of the I.L.C. in abandoning the distinction between these two concepts on the ground that in most cases, such a distinction is impracticable. Despite this practice, the I.L.C.'s Statute has continued to recognise the two concepts. An analysis of the two concepts illuminates the role of Iraq and Kuwait in contributing to the development of international law and demonstrates that Islamic law has interacted with international law through correlation and not subordination and this has resulted in the establishment of a positive relationship and minimised conflict. Recognising this, Article 15 of the I.L.C.'s Statute describes codification as:

... the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

However, the formation and ascertainment of a customary rule requires more than state practice, precedent and doctrine; it requires opīnīo juris. Therefore, Article 15 only guides the I.L.C., in which Iraq
and Kuwait are represented either directly or through the Arab League, in selecting topics for codification, and consequently, through its internal procedure of codification the I.L.C. can adopt regional customary rules in order to transform them into international customary rules or at least establish the relations between the regional and international customary rules. The development of the law governing treaty succession through these procedures occurred in two stages: firstly, its codification at the I.L.C. and secondly, through the 1978 Vienna Conference on State Succession in Respect of Treaties at which the final formation of international customary rules or the adoption of the new written rules embodied in the final Draft Articles took place either by general consensus or majority vote, a process in which Iraq and Kuwait played significant roles either individually or collectively through the Arab League. Meanwhile, Article 15 of the I.L.C.'s Statute defines the concept of progressive development as:

... the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states.

If this concept, therefore, covers "subjects... not yet... regulated by international law", the I.L.C. can include within its scope the experience of some of its members, such as Iraq or the Arab League on subjects such as treaty succession where the rules of international law have not sufficiently been developed. Accordingly, Iraq and Kuwait, individually and collectively through the Arab League at the I.L.C. and the 1978 Vienna Conference on State Succession in Respect of Treaties, voiced the opinion that the state
of international law on treaty succession was in a deplorable condition and its complete codification would be of no use to the international community unless it took into account the regional experiences of the member states of the U.N. and comprehensively drafted new rules. An elucidation of this approach, the complexity and diversity of the subject and the extensive work of the I.L.C. and the 1978 Vienna Conference on State Succession in Respect of Treaties necessitate the treatment of this approach in two separate chapters. The first chapter will deal with the historical development of the codification and the I.L.C.'s work on state succession in respect of treaties, and the second chapter will examine the work of the I.L.C. at the 1978 Vienna Conference on State Succession in Respect of Treaties.
CHAPTER IX

EFFORTS LEADING TO THE 1978 VIENNA CONVENTION

SECTION 1: EFFORTS TOWARDS CODIFICATION IN THE PRE-U.N. ERA:

1. The Islamic Law of Nations:

   A. Non-Official Attempts at Codification:

      The codification of Islamic law was initiated by Muslim jurists, such as Imam Malik (95-179 H., 713-795 A.D.), the founder of the Malikid School of jurisprudence, who composed a single legal code known as al-Muwatta, containing several hadith (traditions) classified in accordance with different subject matters. However, he did not intend that the Islamic government should adopt his code for it was only designed to provide guidance for Muslim jurists. Subsequently, jurists from different schools compiled voluminous works containing general principles in texts and abridged texts. Such works included the brief text known as Multaka al-Abhar', classified according to the principles of the Hanafid School by Shaykh Ahmed al-Halabi; the book on the legal rules of the Shari'a written by the Maliki jurist Ibn Diuzay'; and the work known as Murshid al-Hayrân prepared by Muhammad Kadari Basha. All these contributions were basically modelled on the codifications of Malik.

   B. Official Attempts at Codification:

      Since the Qur'an is the foremost primary source of law in the Islamic legal order, the collection of its suwar (chapters) into one book was initially suggested by 'Umar I during Abu Bakr's Khalifâ but was not achieved until 'Uthmân's Khalifâ when the Qur'an was compiled in a single text and in accordance with a uniform recitation.
Similarly, 'Umar II entrusted the task of collecting the traditions of the Prophet (the second primary source of Islamic law) to Abu Bakr bin Hizm. 'Umar died before this was accomplished and the task was finally completed by al-Bukhārī in his famous book (Sahih al-Bukhārī) during the Abbasid Khilāfa.

The Abbasid Khilifas Abu Dja'far al-Mansūr and Hārūn al-Rashid attempted to adopt Mālik's Muwatta' (book) as the legal code of the Islamic State, but Mālik refused on the ground that the adoption of a single code would restrict the freedom of iditibād (independent reasoning) and the flexibility of the Shari‘a. All Muslim jurists adhered to this view up to the Ottoman assumption of the Islamic Khilāfa.

Official efforts towards the codification of Islamic law, however, continued under the Ottoman Khilāfa. For instance, Sultan Salim I (1512-1520) asked Shaykh Ahmad al-Halabi to classify jurisprudence according to the Hanafid School of Iraq in a brief text to facilitate its study, resulting in the book known as Multaka al-Abbur. Moreover, under the principle of al-siyyasa al-shar‘iyya (power of legislation), Salim took practical steps to adopt the Hanafid School of law by issuing a Firman declaring it to be the official code of the Islamic State in both fatwa (advice) and al-kaddā' (judicial system). Subsequently, the Hanafid School became the prevailing school throughout the territory under Ottoman rule except in the provinces now known as Kuwait, Bahrain and the United Arab Emirates where the Malikid School prevailed.

The unsuccessful attempt at a complete codification of Islamic law is explained by some Muslim jurists who contend that former
jurists would have supported such an attempt if they thought it would be of benefit. They argue that rulers have often interfered and allowed themselves divergent interpretations in the promulgation of the law. This could have led to serious distortion of the Shari'ā with the interpretation of a rigid code in their own political interest in a way that was contrary to its rules. Rulers could also have radically amended the rules of the Shari'ā embodied in the code. Furthermore, the anti-codification jurists state that the codification of legal rules in the form of permanent enactments is fundamentally opposed to freedom and would have amounted to a curtailing of iditihād, which would be unworkable if rigid provisions were established and they cite Mālik who declined to impose his opinion embodied in the Muwatta' (book) on the people.

Imām Mālik was never opposed to iditihād since he used the device himself in composing his Muwatta'. He did not regard the adoption of his Muwatta' as a restriction upon iditihād, but he was justifiably wary that he might be unaware of other traditions which he had not come across. In fact, codification is an activity in which iditihād is practised and thus the anti-codification movement can be accused of being one of the forces which led to the closing of the door on iditihād, which, had it been perpetual would have condemned all Muslims to permanent stagnation. Iditihād is one of the basic characteristics of Islamic law that has helped to develop Islamic jurisprudence. The legal reformers in the renaissance period, were right in refusing to push iditihād aside since without it the codification of Islamic law cannot be achieved. Moreover, iditihād
is not merely open to choice but is a duty incumbent upon those who are qualified to employ it.

The importance of *idjihād* led it to be adopted as established practice upon the disintegration of the Islamic State into several political entities and the resulting need for legal means to facilitate the organisation of the *inter se* relations between these entities. In *idjihād* the leaders of these entities discovered a multilateral instrument that could assist in establishing regional organisations such as the Arab League. Articles 2 and 4 of the Arab League Pact established the legal committee, which was the predecessor of the Arab Commission for International Law. It was entrusted with the task of establishing the basis and scope for collaboration between the member states of the Arab League in the form of draft agreements and with its evolution into the Arab Commission for International Law, it was entrusted with representing the Arab League in the meetings of the U.N.I.L.C. Thus, the development of this body epitomises the movement of the codification of Islamic law and its relationship to international law.

2. The European Law of Nations:

A. Non-Official Attempts at Codification by:

(1) Private Individuals:

Many European jurists have attempted to realise the complete codification of international law, the first being Bentham (1786-1789). His contribution to the development of the codification of the law of treaties and state succession was the introduction of the terms 'codification' and 'international law'. These can be compared to the terms 'tanzim' (organisation) and 'madjalla' (code).
which had facilitated the development of the codification of Islamic law as employed by the Muslim jurists during the Ottoman Khilāfa. In Bentham's view, justice, the reduction of judicial discretion and the clarification of vague rules of customary law could only be achieved by the codification of the law of treaties. Bentham's criticisms of various subjects in international law besides the defence of his attempts at codification, influenced the codification movements in Britain, the U.S.A., France and other countries.

Such examples reveal the difficulties of the task of codification, not only for Muslim individuals whose legal system was unified in the Shari‘a despite some variation in jurisprudence, but also for European jurists who attempted to unify different legal systems in Europe. Thus a more collective effort was needed. It was realised that the only collective efforts which could possibly be fruitful were those establishing scientific organisations, which at first would be private, headed by experienced jurists in the field of codification.

(iii) Private Organisations:

The Institute of International Law (1873) was one of the many European private organisations, its aim being to aid the growth of international law by various means, and by the giving of assistance.

Similarly, in the Islamic world, attempts at codification have been initiated by various law faculties, such as at al-Azhar University, in which the Shari‘a’s relationship to the European legal systems has been comprehensively studied in order to identify to what extent the provisions of the two systems of law are compatible and to bring each law into line with the other if possible, by discussion
and the submission of evidence, as stressed, for example in the International Conference for Comparative Law which was held in the Hague in 1932⁴.

The works prepared by eminent European jurists and scientific organisations, notwithstanding their juridicial value, had little hope of being accepted or seriously considered by governments and thus it became apparent that if a fruitful result was to be achieved, any initiative towards codification must be backed by the governments themselves. Furthermore, for an international code to have a wide application, non-European states must also have officially participated in its creation or at least in the law-making process. Any law relating to a particular subject must, from time to time, be formulated into conventions by bilateral or multilateral agreements.

B. Official Attempts at Codification:

Several European⁵ and American governments⁶ have unilaterally initiated proposals in the form of declarations or the codification of certain areas of international law, such as maritime law and instructions for armies in the field. The value of such proposals to the codification and integration of the law of state succession in respect of treaties is that their legal principles were codified by means of conventional instruments and approved by several European states.

No similar works had existed before save those instructions promulgated by the Prophet Muhammad and his successors⁷, which became the codified and binding law of successive Islamic governments. No international convention containing these instructions existed as a result of the unity of Dār al-Islam (the
Islamic territory) under a single Islamic state. The only proposed convention containing some of these instructions was the 1535 Treaty between the Islamic and non-Islamic world\(^9\) by which the former attempted to establish one unified legal order. The non-Muslim states, however, did not accept this proposal because the differences in the existing law governing their relations with non-European states promoted certain advantages for them by means of the so-called capitulatory system.

As a result of the Napoleonic war, the powerful states of Europe involved in the war and embroiled in subsequent events discovered multilateral treaties to be a means of controlling and directing the conduct of signatories by express rules contained in these treaties\(^20\). Upon the establishment of the League of Nations in 1919 and the admission of Turkey, Iraq and Egypt as members of this organisation, the codification of international law was entrusted to a committee of experts selected from the main civilisations whose work was based on the principal world legal system of that time\(^21\). This was a significant development in the movement towards the codification of international law and the removal of the barrier between the Islamic and international legal orders and paved the way for its subsequent materialisation when the U.N. took over the role of the League of Nations and established the International Law Commission which has attempted to achieve the codification of state succession in respect of treaties.
SECTION 2: EFFORTS TOWARDS CODIFICATION OF STATE SUCCESSION IN RESPECT OF TREATIES IN THE U.N. ERA:

1. Establishment of the U.N.I.L.C.:

The task of the League of Nations in codifying international law was succeeded to by the United Nations. Article 13 (1) (a) of the U.N. Charter provides that:

(1) The General Assembly shall initiate studies and make recommendations for the purpose of: a... encouraging the progressive development of international law and its codification...

This article was very carefully worded having in mind two important considerations; firstly, that contemporary international law is inadequate for the settlement of international conflicts and secondly, that its rules cannot be easily amended or revised in order to adapt to the rapid changes within international society because of the absence of an international legislature. Accordingly, the task of implementing Article 13 (1) (a) was entrusted by the General Assembly to the Sixth Committee. After examining several problems of codification of the law, the Sixth Committee recommended the establishment of the I.L.C., a recommendation which was subsequently endorsed by the U.N. General Assembly. As was reflected in the composition of the experts set up by the League of Nations, Article 8 of the Statute of the I.L.C. states

... in the Commission as a whole representation of the main forms of civilisation and of the principal legal systems of the world should be assured.

This confirms that Islamic law and the practice of Muslim states must be taken into consideration in the codification of international law.
2. The I.L.C.'s Codification of State Succession in Respect of Treaties:

In 1949, despite the participation of many newly independent Islamic and Arab states, such as Pakistan, Iraq, Syria and the Kingdom of Saudi Arabia, who have many problems arising from treaty succession, in the United Nations and the I.L.C., the I.L.C. did not regard the subject of state succession in respect of treaties as ripe for codification. This was not because the practice of these states failed to offer any convincing evidence of any general doctrine by which various cases of succession in respect of treaties could be solved, but because the process of decolonisation, a predominant feature of the international community of the twentieth century, was just starting and in order to codify universally accepted legal rules on treaty succession the I.L.C. deemed it necessary to take into consideration the practice of old and new states. If the I.L.C. were to deal with certain aspects of succession, such as the practice of newly independent states in treaty succession, the rules it drew up would be ephemeral and imbalanced unless it also took into account the other aspects of succession, such as uniting and separation of states. However, at its 17th session held in 1962, the I.L.C., responding to a recommendation made by the General Assembly in its Resolution 1686 (xvi), decided to include the topic of state succession in its agenda and subsequently to set up from among its members a sub-committee on state succession. The sub-committee recommended that the topic should be divided into state succession in relation to membership of international organisations, state succession in respect of matters other than treaties, and state
succession in respect of treaties. The I.L.C. emphasised that this last category should be dealt with in the context of state succession rather than the law of treaties and consequently sought to exclude from the scope of its final set of draft articles on the law of treaties "any question that may arise in regard to a treaty from a succession of states or from the international responsibility of states". In its comment on the final draft articles on the law of treaties, the I.L.C. stated that:

... the draft articles do not contain provisions concerning the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments or concerning the effect of the extinction of the international personality of a State upon the termination of treaties.

In this connection also the I.L.C. in its commentary to Draft Article 58 (supervening impossibility of performance) stated that:

The Commission appreciated that the total extinction of the international personality of one of the parties to a bilateral treaty is often cited as an instance of impossibility of performance, but decided against including it in the present article for two reasons. First, it would be misleading to formulate a provision concerning the extinction of the international personality of a party without at the same time dealing with, or at least reserving, the question of succession of States to treaty rights and obligations. The subject of succession is a complex one which is already under separate study in the Commission and it would be undesirable to prejudge the outcome of that study.

Upon the adoption of the 1969 Vienna Convention on the Law of Treaties this point was given further authority in Article 73.

When Sir Humphrey Waldock took over as Special Rapporteur on state succession in respect of treaties he took a rather different view, believing that
...the solution of the problems of the so-called "succession" in respect of treaties is today to be sought within the framework of the law of treaties rather than of any general law of "succession".

He rationalised his view as follows:

Modern practice shows considerable diversity in regard both to the situations raising questions of succession and to the solutions adopted. The diversity in regard to the solutions makes it difficult to explain this practice in terms of any fundamental principle of "succession" producing compellingly specific logical solutions to each situation. ... a number of different theories of succession are to be found in the writings of jurists. If any one specific theory were to be adopted by the Commission, it would almost certainly be found to be a strait-jacket into which the actual practice of States, organisations and depositaries could not be forced without inadmissible distortions either of the practice or the theory. ... if, however, the question of "succession" is approached from the point of view of the law of treaties, it is believed that some general rules, however few or broad, are discernible in practice ... .

The commission confined itself to endorsing the Special Rapporteur's general approach to this topic and did not discuss the substance of the Draft Articles. Thus, The Special Rapporteur submitted five reports from 1968 to 1972 and one report by his new successor Sir Francis Vallet in 1974.

The final work of the I.L.C. on state succession in respect of treaties culminated in 31 articles in which the commission tried to remove any uncertainty in the rules contained within these Draft Articles.

The commission divided the Draft Articles into 6 parts (I-VI). Part I contains general provisions (Articles 1-9). Parts II-IV contain categories of cases of succession: Part II deals with the transfer of territory from one state to another (Article 10); Part
III deals with newly independent states (Articles 11-25) and Part IV deals with the uniting and dissolution of states (Articles 26-28). Part V deals with boundary regimes or other territorial regimes established by a treaty (Articles 29-30). Part VI deals with miscellaneous provisions (Article 31). These Draft Articles apply only where succession has occurred in conformity with international law (Draft Article 6).

The Kuwaiti doctrine of non-devolution and the Iraqi doctrine of devolution are contemplated in the basic provisions of the Draft Articles according to which the newly independent state is free from the predecessor's treaty rights and obligations applicable to its former territory (Draft Article 15) and the predecessor's treaty rights and obligations continue in force upon the union or separation of states (Draft Articles 26, 27). These doctrines, however, are not absolute. Although the separation of Kuwait from the Ottoman Empire and subsequently her independence from British protection constituted a case of a newly independent state in the eyes of international law, she has chosen to maintain in force some of her predecessor's treaties. Despite the fact that the separation of Iraq from the Ottoman Empire and her subsequent independence from the British mandate constituted a similar case, some of her predecessor's treaties have been maintained by agreement.

The opinion of the Special Rapporteur on state succession in respect of treaties reflects both doctrines. Sir Francis Vallet, who had replaced Sir Humphrey Waldock as a Special Rapporteur on state succession in respect of treaties, maintained his predecessor's view on the subject, opining that "the principle of the non-devolution of
treaties (clean slate) had general support\textsuperscript{37}. Furthermore, in emphasising this principle, Mr Endre Ustor, the President of the I.L.C. stated that:

\ldots it can be presumed, as a general rule, that the population of a territory in a colonial state is normally not in a position to play a part in the actual government of the metropolitan power and cannot, therefore be regarded as responsible for the conclusion of treaties, and therefore, it cannot be bound by treaties to which it has not consented\textsuperscript{38}.

Despite differences resulting from the legal status of colonies and the status of protected states such as Kuwait, or mandated territories such as Iraq, this view was supported in the Sixth Committee of the U.N. General Assembly by Iraq\textsuperscript{39}.

The commission has followed a pragmatic course in solving many problems arising from state practice basing its findings on a proper balance between the needs of newly independent states and those of the international community. Thus if the right to self-determination satisfies the needs of newly independent states by the doctrine of the non-devolution (clean slate) of its predecessor's treaties, the devolution of such treaties may be achieved by the mutual consent of the parties to a treaty without imposing the will of one on the other. Similarly, the delegation of Kuwait in the Sixth Committee\textsuperscript{40} endorsed the doctrine of non-devolution (clean slate) embodied in the Draft Articles as guided by pre-existing practice without denying the devolution of certain treaty rights and obligations such as those ensuing from a boundary treaty. This view was also supported in the Sixth Committee by many delegations from Arab\textsuperscript{41} and Islamic states\textsuperscript{42}.
It is therefore, necessary to examine individually the basic Draft Articles in order to throw some light on whether they constitute a progressive development or mere codification of the existing customary law of state succession in respect of treaties as has emerged from the practice of Arab and non-Arab states of the U.N.43.

It will be recalled that the concept of the devolution agreement was developed by Iraq and Great Britain shortly before the former's independence. Draft Article 744 of this creation declares that a devolution agreement does not, as such, transfer those predecessor's treaty rights and obligations which are governed by the Draft Articles. This may be regarded as a specific application of the rule embodied in Article 34 of the 1969 Vienna Convention on the Law of Treaties which states that:

A treaty does not create either obligations or rights for a third State without its consent46.

It was generally established practice before the 1969 Vienna Convention on the Law of Treaties, initiated by Great Britain and Iraq, that a state could conclude a devolution agreement with its overseas territories before the latter attained independence. The legal effects of such an agreement between a predecessor and a successor state cannot be separated from its effect in respect of a third state, i.e., the party to the predecessor's treaties. As regards its effects on a third state, Articles 34-36 of the 1969 Vienna Convention on the Law of Treaties codified the existing customary rules that a treaty cannot create a right or impose obligations upon a third state without its consent. The real effects
of the devolution agreement are only confined to the parties to whom the successor state indicates its intention to accept the devolution of the treaty rights and obligations from the predecessor state to the former. Moreover, the devolution agreement cannot by itself transfer treaty rights and obligations from the predecessor to the successor without the consent of the other parties in the case of multilateral treaties and without novation in the case of bilateral treaties.

The doctrine of the non-devolution of treaties as propounded by Kuwait, and supported in the Sixth Committee by the Kuwaiti delegation, is embodied in Draft Article 8, entitled "unilateral declaration by a successor state", according to which a successor state is at liberty to declare its intention to continue the predecessor's treaties in accordance with the formula of 'opting in', i.e., the doctrine of non-devolution (clean slate). This freedom of choice given to a newly independent state embodied in the doctrine of non-devolution is based on the principle of the right to self-determination of the colonial peoples and territories. The only difference between the Kuwaiti doctrine of non-devolution and the formula embodied in draft Article 8 is that the latter advocates the express declaration and not the tacit one that has emerged from the practice of Kuwait.

The point of departure between the two doctrines is set up by Draft Article 10, on "transfer of territory" according to which upon the transfer of territory from one state to another, treaties of the successor state extend to the newly acquired territory (the doctrine of devolution) as in the case of the devolution of the
treaties of Iraq to the Mosul Vilayet after the acquisition of that territory from Turkey\textsuperscript{1}, while treaties of the predecessor state cease to apply upon the cession of the territory (the doctrine of non-devolution) as in the case of the shrinking of the application of the treaties of Kuwait from certain parts of the neutral zone which was ceded to Saudi Arabia\textsuperscript{52}. The principle is supported not only by the practice of Iraq and Kuwait but also by international practice in what is known as "the moving treaty frontier rule"\textsuperscript{53}.

The delegates of Iraq emphasised in the 1974 Session of the Sixth Committee\textsuperscript{54} that since the predecessor state might have entered into a treaty which would not be in the interest of the newly independent state, the latter should be given the opportunity to decide freely which treaties should devolve to her and which should not in accordance with the principle of the right to self-determination as enshrined in the U.N. Charter and the doctrine of non-devolution (clean slate). The delegation was supportive of the general rule of non-devolution (clean slate) as embodied in Draft Article 11 of (Part III)\textsuperscript{55} on "newly independent states" and of the I.L.C.'s view on this doctrine according to which

\[
\ldots \text{the so-called clean slate principle,} \ldots, \text{is very far from normally bringing about a total rupture in the treaty relations of a territory which emerges as a newly independent State} \textsuperscript{56}.
\]

This marked the recognition of this doctrine by the international community and its application and the legal consequences that ensue where it is applied in the case of newly independent states are determined in accordance with the concepts of the principal legal system of the world as is established in the U.N. Charter and in
universally recognised principles such as the right to self-
determination and the sovereign equality of states.

Under these contemporary principles of international law, the
implications of the doctrine of non-devolution (clean slate) are that
a newly independent state is not under any obligation to continue the
predecessor's multilateral and bilateral treaties, which were
applicable to the former's territory at the date of independence.
Hence, it is only the right of a newly independent state to become a
party upon the consent of the other contracting parties in the case
of multilateral treaties and upon novation in the case of bilateral
treaties. The justification behind the adoption of this doctrine on
the part of the International Law Commission, lies in the practice of
states "as evidence of opinio juris. The commission believed
that this is the view of the majority of writers and is supported by
the practice of old states, such as the United States of America, the
Spanish American Republics, Belgium, Panama, Ireland etc. and also
the practice of newly independent states such as Pakistan and the
Arab states.

The developing nations which have recently emerged from imperial
domination have generally adopted the doctrine of non-devolution,
rejecting the claims of more developed nations with vested interests
in the maintenance of the doctrine of the devolution of the
predecessor's treaties. Thus the Arab states and the Islamic
states of Africa and Asia in the United Nations, have tended to
view treaties concluded under any kind of colonial domination,
protection or mandate, as constituting unequal treaties intended to
perpetuate the economic and political positions of the former
colonial masters. This led the Commission in its first report to emphasise that newly independent states would not submit to any presumption of devolution of the previous treaty obligations upon their attaining independence. However, the commission, in the subsequent articles on the newly independent states, has followed a policy balancing the doctrine of non-devolution against the doctrine of devolution.

Draft Articles 12-24 embodied the rules governing succession of newly independent states to multilateral and bilateral treaties in accordance with the doctrine of non-devolution. As regards multilateral treaties, the basic principle as set forth in Draft Article 12 was already established in the practice of Iraq, namely, that a newly independent state is not under any obligation but has the right to establish itself as a party to any multilateral treaty that was applied to its territory prior to independence only by "a notification of succession" unless such participation would be incompatible with "the object and purpose of the treaty" or if such treaty was restricted, as in the case of treaties establishing a demilitarised zone or dealing with fisheries or navigation. In any event, the newly independent state can establish itself as a party to restricted multilateral treaties with the consent of all parties. The rationale behind this right is that the predecessor's act establishes a legal nexus between the treaty and the territory.

Some states, however, have attempted to make the so-called 'law-making' treaties an exception to the doctrine of non-devolution (clean slate) on the grounds that the balance between the interests
of the international community and those of the newly independent states will be stabilised, but Iraq\textsuperscript{70}, Kuwait and the newly independent states of Asia and Africa\textsuperscript{71} supported the I.L.C.'s position that there is no legitimate reason for the devolution of the predecessor's multilateral law-making treaties to a newly independent state.

The rest of the articles are drafted to maintain the doctrine of non-devolution or the rights of newly independent states in various circumstances in which multilateral treaties are found such as "participation in treaties not yet in force" (Draft Article 13)\textsuperscript{72}, a treaty "signed by the predecessor state" (Draft Article 14)\textsuperscript{73}, the status of the predecessor's reservation (Draft Article 15)\textsuperscript{74}, "the consent to be bound by part of a treaty and choice between differing provisions" (Draft Article 16)\textsuperscript{75}, "notification of succession" (Draft Article 17)\textsuperscript{76}, and "effects of a notification of succession" (Draft Article 18)\textsuperscript{77}.

The extent to which the newly independent state exercises its rights as embodied in Draft Article 12\textsuperscript{78} relies on the existing legal nexus between a multilateral treaty and its territory as formulated in Draft Article 14\textsuperscript{79}, and any provisional notification of succession to all or part of the treaties previously applicable to its territory is usually subject to reciprocal treatment between the newly independent state and the other parties to the treaty during the time agreed upon as embodied in Draft Article 8\textsuperscript{80}. The exercise of such rights, is uncomplicated in the case of a bilateral treaty but it is problematic as far as multilateral treaties are concerned since it is difficult to obtain the consent of all the contracting
parties to the provisional application of the treaty in their relations with the newly independent state. Thus the principle of the freedom to conclude a treaty permits the newly independent states and any party to a multilateral treaty to agree expressly or impliedly to apply the treaty provisionally on a bilateral basis as embodied in Draft Article 22 regarding multilateral treaties and in Draft Article 23 regarding bilateral treaties.

The general rule of the non-devolution of the predecessor's treaties as embodied in Draft Article 19 differentiates between the predecessor's bilateral and multilateral treaties. According to this article, a newly independent state is not under any obligation to keep in force her predecessor's bilateral treaties. Similarly, she has no right to become a party to such treaties by her own unilateral decision. In the last case, the express or tacit consent of the other party to the predecessor's bilateral treaties is essential provided a legal nexus exists between the treaty and the territory of a newly independent state at the date of independence as stipulated under the general rule of non-devolution set forth in Draft Article 11, a rule which the I.L.C. believes to have emerged from the practice of newly independent states during the U.N. era.

As has been established in the practice of Iraq, if the newly independent state and the other party decide to continue the original treaty or enter into a new treaty, the effect of the consent as set forth in Draft Article 20 is that a new agreement either expressly or tacitly comes into being. Neither the new agreement nor the original one are enforceable in the relations between the newly independent state and its predecessor even though they regulate the
same subject matter. Thus if the newly independent state and the predecessor state decide to regulate the same subject matter it will be through a new agreement, separate from that between the newly independent state and the other state party to the predecessor's treaty. The termination, suspension or amendment of the agreement between the newly independent state and the other party does not affect any similar agreement between the newly independent state and the predecessor state, whilst any termination or amendment made between the predecessor state and the other state party to a treaty affects neither of the above mentioned agreements. If the original treaty, however, provides for its own termination on a specific date, it will cease to be effective not only with regard to the relations between the predecessor state and the other state party to the treaty but also towards the relations between the latter and the newly independent state unless both had agreed otherwise as is described in Draft Article 21\textsuperscript{89}.

The final rule of the non-devolution of the predecessor's treaties to a newly independent state is that embodied in Draft Article 25\textsuperscript{90} which deals with the succession of a state composed of two or more territories that had different treaty regimes. The rule requires that any treaties enforceable under Draft Articles 12 to 21 are applicable to the whole of the territory of the newly independent state unless a treaty by its own terms is restricted to the original area, where a wider application would be incompatible with the purpose and object of the treaty or where the integration of the territories has radically changed the conditions for executing the treaty. The latter case has been mentioned in the example of the
integration of the Mosul Vilayet into Iraq which occurred despite the fact that Iraq was not regarded under Islamic law as a new state. Nevertheless, she embarked upon the doctrine of the devolution of the predecessor's treaties rather than non-devolution on the ground that treaties concluded by the mandatory power (agent) on behalf of Iraq were attached to her newly established legal identity and by means of the devolution agreement and the general declaration of Iraq, these treaties devolved to her at the date of independence under international law, not Islamic law.

The rules of the doctrine of the devolution of treaties are embodied in (Part IV which deals with the union, dissolution and separation of states). Draft Article 26, establishes the principle of the devolution of the predecessor's treaties upon succession to a part of the union to which the treaties had been applicable subject to the qualification of inapplicability with the object and purpose or any radical changes in the conditions of the operation of the treaties. The union could extend the treaties to its entire territory either by a simple notification to the other contracting parties to a multilateral treaty or making an agreement to such an extension with the other party to a bilateral treaty. The commission concluded that this rule was required by precedents, amongst which was the 1958 union between Syria and Egypt, but, in fact, the continuity of pre-existing treaties upon the establishment of that union was not based on the doctrine of the devolution of treaties that has emerged from the practice of Islamic and non-Islamic states. Rather, the continuity of pre-union treaties in this case was based on the continuity of the Islamic identity since
it was not regarded as constituting state succession but the amalgamation of Syria and Egypt\textsuperscript{99} which represented one part of \textit{Dār al-Islam}. The continuity of Islamic identity was further emphasised by the fact that upon the dissolution of this union, no rupture of any treaties occurred as has happened in cases of separation such as the separation of Pakistan from India in 1947. Since then the International Law Commission has embodied in Draft Article 27\textsuperscript{99} the general rule that upon the dissolution of states, treaties that were in force in the original states remain so in each state that devolves from that dissolution with the same qualification applying to treaties in the case of the union of states, unless the treaty was originally connected with a specific part of the predecessor's territory.

Unlike dissolution, the separation of part of an existing state is treated differently by the International Law Commission in Draft Article 28\textsuperscript{100} according to which treaties in force prior to separation continue to apply unless the parties agreed otherwise or if the treaty was originally intended to apply only to the separating territory or the loss of its identity gives rise to a radical transformation of the treaty rights and obligations. On the other hand, a state established in the area that had possessed a previous identity is regarded as a newly independent state to which the rules of the non-devolution of the predecessor's treaties are applicable\textsuperscript{101}.

The criticism directed to the articles on dissolution and separation of states centres on whether it is possible to show that a sufficient distinction exists in practice to justify the application
of the rules of the doctrine of devolution to the former and those of non-devolution to the latter.

Since the basic rules governing treaty succession in the work of the I.L.C. are divided between two opposite doctrines namely, the non-devolution and devolution of treaties, it might be asked whether "Part V; boundary regimes or other territorial regimes established by a treaty" constitutes an exception from the main doctrines. An answer to this question may be attempted by examining these Draft Articles against the main doctrines, beginning with the doctrine of the devolution of treaties.

In his first report, the special rapporteur, Sir Humphrey Waldock adopted the following formula on state succession in respect of treaties:

Nothing in the present articles shall be understood as affecting the continuance in force of a boundary established by or in conformity with a treaty prior to the occurrence of a succession.

There followed a sharp debate in the International Law Commission in which the Special Rapporteur explained that the Draft Article was designed as a general reservation modelled on Article 62 of the Vienna convention on the law of treaties which states that:

. . . . 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
(a) if the treaty establishes a boundary . . .

The Special Rapporteur postponed the discussion of that article until his fifth report. In that report two types of rules were presented as alternatives:

Succession of States in respect of boundary
settlements
ALTERNATIVE A:
1. The continuance in force of a treaty which establishes a boundary is not affected by reason only of occurrence of a succession of States in respect of a party.
2. In each case the treaty is considered as in force in respect of the successor State from the date of the succession of States, with the exception of any provisions which by reason of their object and purpose are to be considered as relating only to the predecessor State.

ALTERNATIVE B:
1. A succession of States shall not by reason only of its occurrence affect the continuance in force of a boundary settlement which has been established by a treaty.
2. In such a case the boundary settlement is to be considered as comprising any provisions of the treaty relating to the boundary107.

According to the Special Rapporteur, 'alternative A' embodies the rules governing succession to a boundary treaty, while 'alternative B' embodies the rules governing succession to a situation created by a boundary treaty108.

In debating these articles, the members of the International Law Commission were somewhat divided between these two alternatives. Mr Yasseen (Iraq)109 stated that:

However, the question at issue was not boundary settlements as such, because boundaries could be settled by means other than treaties, but only treaties relating to boundaries.

He was therefore, in favour of alternative A. Mr Ago (Italy)110 was in favour of alternative B, i.e. the occurrence of succession does not affect as such the situation created by the treaty. Mr Hampro (Norway)111 and Mr Câmara (Brazil)112 took a middle view in which they expressed their concern about the distinction between succession in respect of a boundary treaty and succession in respect of a boundary. Mr Tabibi (Afghanistan)113 took the view that
neither of the alternatives dealing with the question of boundary settlements was acceptable.

The Special Rapporteur, however, did not commit himself to any pronouncement but in his comment he stated that juridical opinion favoured alternative B and referred to the 1968 I.L.A. Resolution 114. The outcome of this debate was the adoption in 1972 of Draft Article 29 in which the two alternatives were combined in the following passage:

**Boundary Regimes:**

A succession of States shall not as such affect:

(a) A boundary established by a treaty; or

(b) Obligations and rights established by a treaty and relating to the régime of a boundary.

This article does not say anything with regard to succession in respect of treaties in general, but could it be interpreted to mean that upon the occurrence of state succession, boundaries and boundary treaties devolve to the successor state or not? As has been stated, in the literature two schools of opinion have existed on the subject, one favouring the devolution of boundaries and boundary treaties to the successor state upon the occurrence of succession and the other rejecting such devolution. The recent as well as the historical practice of non-Islamic states support each of these doctrines. In fact, the codification of the rule governing the succession of boundaries and boundary treaties as embodied in Draft Article 29 has unfortunately left the problem unsolved. Thus an evaluation of the existing literature rather than state practice on this subject is necessary to vindicate the real intention of the I.L.C. as embodied in this article.
Assuming that the rule embodied in Draft Article 29 supports the doctrine of devolution, what actually devolves upon the successor state; the boundary treaty or merely the boundaries? If only the boundary treaty devolves then the distinction between the boundary and the treaty is very dangerous since the treaty may not precisely demarcate the boundary. The only support for this view is Article 62, "fundamental change of circumstances", which was so framed as to relate to the treaty rather than to the boundary established by such treaty. However, the question is not the continuing in force of a treaty between the contracting parties, but the devolution of treaty rights and obligations relating to a boundary to the successor state. As the Special Rapporteur has observed, the rule should be framed to relate not only to the boundary treaty but also to the situation created by the treaty. However, a close examination of Article 29 shows that although it embodies the rule that a boundary established by a treaty devolves to the successor state it does not preclude the devolution of the treaty itself that established the boundary, but a boundary treaty once executed cannot be subject of succession since it has past into a conveyance. What devolves to the successor state is not the treaty but the situation created by it, i.e. a boundary or a territory within certain boundaries.

A problem exists, however, with this viewpoint if the boundary treaty at the date of succession has not yet completely been executed or it contains certain reciprocal and continuous rights and obligations. This problem may be solved by reference to the general rules of treaty succession provided that the continuous rights and obligations could be severed from the dispositive provisions of the
boundary treaty. Furthermore, the attempt to distinguish between a boundary and the treaty establishing it and a boundary treaty that has become a conveyance is very dangerous since a boundary treaty is evidence of the situation created by it and should remain inseparable forever as the Egyptian delegate in the Sixth Committee put it:

> it could rightly be asked how, in legal theory, the rights and obligations of parties emanating from a certain treaty could be separated from the international instrument which had created those rights and obligations.119

The concept of conveyance removes the whole problem from the issue of state succession in respect of treaties. Thus the problem is less concerned with the devolution of a boundary established by a treaty than it is concerned with the devolution of a treaty establishing the boundary. A successor state may dispute the validity of a treaty and in doing so directly dispute the validity of a boundary established by the treaty and consequently decline to accept the devolution of either one of them without any binding rule of international law being imposed on it to adopt the opposite position.

This fact is pointed out by the International Law Commission in its commentary to Draft Article 29120 where it states,

> In short, the mere occurrence of a succession of states would neither consecrate the existing boundary if it was open to challenge nor deprive it of its character as a legally established boundary, if such it was at the date of the succession of States.

Accordingly, the question previously asked may be reversed regarding whether the rules governing boundary regimes and other territorial regimes constitute exceptions, not from the doctrine of devolution but from the doctrine of the non-devolution of treaties.
Many Islamic\textsuperscript{122} and non-Islamic newly independent states from Africa\textsuperscript{122}, Asia, Latin America and elsewhere\textsuperscript{123} have disputed the validity of boundary treaties concluded by previous colonial powers (protecting state, mandatory or colonialist). On the eve of independence, many newly independent states committed themselves to the opinion that they would not avoid of breaking any of the customary rules of international law that imposed existing boundaries upon them or the treaties establishing them on the grounds that the previous colonial powers did not exercise sovereignty over the territories of newly independent states before their independence and thus had no authority to establish boundaries or even to enter into boundary treaties on behalf of these territories\textsuperscript{124}. Thus if the I.L.C. is correct in stating that,

\ldots rights and obligations could clearly exist only in the context of the treaty from which they derived. If the treaty disappeared, the rights and obligations would also disappear\textsuperscript{125}.

then a challenge to the validity of boundary treaties by newly independent states is at the same time a challenge to boundaries established by such treaties and if such treaties are abrogated, the inevitable result is the abrogation of all rights and obligations ensuing therefrom that relate to boundaries.

This opinion is in harmony with Islamic legal theory regarding treaties establishing boundaries within Dār al-Islam (the Islamic territory) since the existence of such boundaries is in conflict with the normative provision of Islamic law\textsuperscript{126} which propounds the unity of Dār al-Islam. If a colonial power, however, acted as an agent in accordance with a certain contract such as the 1922 Treaty of
Alliance concluded between U.K. and Iraq\textsuperscript{127} or the 1899 Exclusive Agreement between U.K. and Kuwait\textsuperscript{128}, any boundary treaties concluded by the agent are regarded as contracts that devolve to the principal (Iraq or Kuwait) in whose name the contracts were concluded. Therefore, the continuing in force of these contracts after the independence of an Islamic state is not based on any legal doctrine of state succession in respect of treaties but on other rules such as the rules of ownership or of agency under Islamic law.

Similarly, the devolution of boundaries established by these contracts (treaties) to newly independent Muslim states was not achieved by any rule of state succession, since under Islamic and international law the predecessor state possesses no valid title to ensure that these boundaries be transferred to the successor state.

However, the newly independent states of Africa\textsuperscript{129} and Asia\textsuperscript{130} have preserved factual situations in the interests of stability, peace and international security.

Draft Article 30\textsuperscript{131} applies, \textit{mutatis mutandis}, the basic rule embodied in Draft Article 29 to territorial regimes established by a treaty. In the General Assembly, some delegations rejected the rules expressed in these articles during the debate on the 1972 Draft Articles by stating that Draft Articles 29 and 30

...cut across fundamental principles of modern international law, such as the principles of self-determination, of sovereignty, equality of states and of permanent sovereignty of states over their natural resources\textsuperscript{132}.

Thus the doctrine of non-devolution of the predecessor's treaties should be given absolute effect, otherwise the newly independent states would be subject to limitations based upon or derived from a
treaty. The insistence upon this objection by the newly independent states and the existence of reasonable cases led Article 13 to be drafted to the effect that:

nothing in the present articles shall be considered as prejudicing in any respect any question relating to the validity of a treaty.

The International Law Commission supported the rule embodied in Draft Article 30 by giving examples of territorial regimes established by a treaty, one of which was the 1847 Erzerum Treaty establishing the boundaries between the Ottoman Empire and Persia. The I.L.C. regarded Iraq as a successor to the Ottoman rights ensuing from that treaty. This view, however, does not stand in the face of the fact that according to Islamic law, the replacement of one Islamic state by another in respect of a given territory is regarded as constituting continuity as opposed to state succession, since territorial change does not affect the unity of the Islamic identity as long as that identity is preserved in accordance with the rules of Islamic law, and even according to the rule governing state identity in international law, the separation of Iraq from the Ottoman Empire did not ascribe a new identity to that country. Furthermore, the Commission adopted an additional Article in 1974 under number 7 on non-retroactivity which made the Draft Articles only applicable to:

...a succession of States which has occurred after the entry into force of these articles except as may be otherwise agreed.

The purpose behind the adoption of this Article was to make it clear that Article 6 which limits the application of the Draft Articles to,
a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter did not apply to legal and illegal territorial changes occurring in the pre-United Nations era. Although many newly independent states supported the inclusion of Article 6 in the 1972 Draft Articles, they did not support Draft Article 7 because it prohibits a newly independent state that attained her independence prior to the coming into force of the draft articles from applying them to her own succession even after she became a contracting party to these articles. In such a case, Article 7 limits the benefit of the Draft Articles to the newly independent states and discourages the accession of these states to the Articles. Consequently, many members of the I.L.C. suggested the deletion of Draft Article 7 on the grounds that the rule of non-retroactivity does not adhere to jus cogens and that the problem of retroactivity could be governed by Article 28 of the Law of Treaties. Although the Article was adopted by a narrow majority, it does not affect the binding force of any international customary rule, such as the devolution or non-devolution of the predecessor's treaties which the newly independent state may apply independently from the draft articles.

Nonetheless, the 1974 I.L.C.'s Draft Articles received general support in the General Assembly in its Resolution 3315 (XXIX) of 14 December 1974 in which the General Assembly invited member states to submit written comments on the Draft Articles. It also invited states to submit written comments on the procedure and the form in which work on the Draft Articles should be completed.
According to these comments, the General Assembly, by its Resolution 3496 (XXX) of 15 December 1975, decided to convene a conference of plenipotentiaries in 1977 to consider the Draft Articles and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. In 1976, it was decided that the conference should meet in Vienna.
CHAPTER X
EFFORTS AT THE 1978 VIENNA CONVENTION TOWARDS CODIFICATION OF STATE SUCCESSION IN RESPECT OF TREATIES

SECTION 1: THE 1974 I.L.C.'S DRAFT ARTICLES AS A BASIS FOR THE PROPOSED CONVENTION:

1. Articles Approved by the Overwhelming Majority of the Delegations:

Mr Riyadh (Egypt), the Chairman of the Committee of the Whole, invited the members of this Committee to consider the Draft Articles as adopted by the International Law Commission in its 1974 session.

Article 1, Article 3, Article 6, Article 38 and Article 39 define the scope of the future convention which exclusively deals with state succession in respect of treaties. Article 1 was supported by Mr Yasseen (United Arab Emirates) at the Committee of the Whole on the ground that it not only restricted the application of the future convention to succession of states but also established a link with the 1969 Vienna Convention on the Law of Treaties. The Kuwaiti delegation, in defining the term 'treaty', adopted a concurring view. Articles 3 and 6 excluded from the application of the future convention succession in respect of international organisations and succession which has occurred contrary to international law respectively.

Article 2 contains the definition of certain terms along with the main doctrines embodied in the Draft Articles, the most important of which are non-devolution (clean slate or opting in) and devolution (ipso jure continuity or opting out). The term 'treaty' is
defined in the same way as in the 1969 Vienna Convention on the Law of Treaties in that it is concluded between states and governed by international law. This definition did not satisfy the Cuban delegation who submitted an amendment to insert the word "validly" between the words "a treaty" and "concluded". In the Cuban opinion, certain treaties had been imposed by the predecessor state on the successor state either for the benefit of the former or for the benefit of a third state and therefore, such treaties lacked the essential element of the consent of one of the parties. The insertion of "validly", therefore, provides the successor state, at the date of succession, with a means to render invalid this type of treaty. A practical difficulty, however, with such an approach is created by the lack of generally acceptable criteria to define what constitutes invalid and valid treaties. Even in the 1969 Vienna Convention on the Law of Treaties this subject was highly controversial. For this reason the Cuban amendment did not achieve any success. Conversely, the delegation of Kuwait, opined that the term 'treaty' covers various forms such as conventions, protocols and exchanges of notes, in both the 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on State Succession in Respect of Treaties. This opinion referred implicitly to the Exchange of Notes of 1923 between Kuwait and the British High Commissioner in Iraq and of 1932 between Kuwait and the Government of Iraq establishing the Kuwaiti-Iraqi boundaries. Many delegations supported the Cuban amendment, but the majority regarded the insertion of the word "validly" as superfluous, since the point had already been regulated by Article 13.
The definition of the term 'succession of states'\textsuperscript{20} denotes:

...the replacement of one state by another in the responsibility for the international relations of territory,

as proposed by the I.L.C. This definition attracted comments from the delegations of France and Switzerland who submitted a joint amendment\textsuperscript{21} aiming at the replacement of the phrase "the responsibility for the international relations of territory" by the phrase "in the exercise of competence for international relations in respect of a particular territory" in order to cover such cases of succession as that of the unitary state where each component may not have international relations \textit{stricto sensu}. Only the delegation of Madagascar\textsuperscript{22} endorsed this amendment, but the vast majority of the delegations\textsuperscript{23}, including the delegation of Kuwait\textsuperscript{24}, endorsed the I.L.C.'s definition since it referred exclusively to the factual replacement of one state by another and left aside, as the delegations of Pakistan\textsuperscript{25} and Mali\textsuperscript{26} pointed out, any connotation of the devolution or non-devolution of the predecessor's treaty rights and obligations upon the occurrence of this replacement. These were governed by subsequent articles. The criterion for the factual replacement of the predecessor by the successor state in respect of the latter's territory is not the transfer of competence for the conclusion of treaties but "responsibility for the conduct of the international relations" of the territory in question. In state practice, the former colonial powers always possessed responsibility for the conduct of the international relations of their dependent territories, although they did not always possess competence to conclude treaties on their behalf which could remain the
responsibility of the government of the dependent territory. Moreover, the criterion of "responsibility" covers all cases of dependencies with the exclusion of the case of military occupation. The I.L.C. made it quite clear that the word "responsibility" should be read in conjunction with the phrase "for the international relations of territory" in order to remove any notion of "state responsibility". The other terms, namely "predecessor state" and "successor state", are consequential to the term "succession of state".

The term 'newly independent state' means a successor state, the territory of which immediately before the date of succession was a dependent territory for whose international relations the predecessor state was responsible. This definition provoked the comments of some delegations. The delegations of Sweden and the U.K. expressed misgivings as to the merits of differentiating between the concept of the newly independent state to which the rule of non-devolution (clean slate or opting in) was applied and the concept of the new state that had been formed by the uniting or separation of states and in which the rule of devolution (ipso jure continuity or opting out) prevailed. The delegations of France and the Federal Republic of Germany expressed some doubts regarding the whole concept of "newly independent states". Subsequently, the delegations of Iraq, Morocco and India suggested that Article 2 should also contain definitions of the other two categories of succession, namely succession in respect of part of a territory and succession caused by the uniting and separating of states. This was because cases of separation of part or parts of a state to form one or more
states as embodied in Article 33 (3) did not overlap with those of the newly independent states on the grounds that colonies are regarded under international law as an integral part of the territory of the colonising state, and hence the legal regime governing cases of newly independent states may be claimed to be equally applicable to the others.

Since all the amendments to Article 2 were withdrawn by their sponsors, the Chairman of the Committee of the Whole suggested the adoption of the I.L.C.'s text, but the French delegation requested that the article should be put to a vote. Article 2, as proposed by the I.L.C., was provisionally adopted by a majority vote at the Committee of the Whole and by consent at the conference.

Article 4 attracted the attention of some delegations. The Romanian representative suggested that it was easier and less cumbersome to state simply that upon the occurrence of state succession, the instrument constituting the organisation should determine any question arising therefrom. Mr Yasseen (United Arab Emirates), was not able to support the Romanian suggestion on the grounds that it placed the rules governing international organisations on the same footing as those of the future convention while in his opinion the rules governing international organisations ought to be dominant.

Mr Yasseen's view is consistent not only with the practice of Iraq and of Kuwait but also with international practice. Mr Yasseen further raised an important issue regarding the means by which the conflict between the rules governing international organisations and those embodied in the future convention should be
solved. No attempt was made to answer this question and therefore it may be suggested that the issue should be left to the instrument constituting an international organisation.

The inclusion of Article 5 "obligations imposed by international law independently of a treaty" did not satisfy most members of the Committee of the Whole who regarded it as superfluous. The article, however, was designed as a saving clause in cases where a successor state is released from its obligations under a treaty as a result of the application of the doctrine of non-devolution, whereby the successor state remains bound by obligations imposed by international law independently from the treaty provided that the newly independent state has not persistently objected to the international customary rules, as Mr al-Katifi (Iraq) pointed out. In such a case, the consent of the newly independent state to be bound by customary rules when she had not participated in their evolution needed to be obtained. Concomitantly, Mr Farahat (Qatar) supported Article 5 as drafted by the I.L.C. because it "restored the balance" between the principles of non-devolution and devolution.

Article 6 restricted the future convention to territorial changes occurring in conformity with international law and with the principles embodied in the U.N. Charter. Naturally, it excludes those territorial changes which occur as a result of the use of force or in violation of the territorial integrity of a state. Some delegations, however, submitted an amendment which would also indirectly give states the right to apply the future convention to
cases of illegal territorial changes. The vital rule embodied in the Article was endorsed by Mr al-Nouri (Kuwait) who stated that:

... Article 6 had been drafted with a high degree of precision by the International Law Commission.

He was in favour of retaining this provision as were most members of the Committee of the Whole, including the Arab delegations, and the amendment to the Article failed to gain the necessary support of these members and was thus withdrawn.

Article 7 has created heated debate and will be discussed in due course. Article 8 embodies the Iraqi doctrine of devolution. Although the United Kingdom was a full partner with Iraq in the invention and conclusion of the so-called devolution agreement during her mandate, the I.L.C.'s formula of devolution in Article 8 (2) was not satisfactory to her, without the insertion of a phrase reflecting the connection between Article 8 and Articles 35-37 of the 1969 Vienna Convention on the Law of Treaties. The British delegation submitted an amendment to this effect but the overwhelming majority of the members were in favour of the article as drafted by the I.L.C. and so the amendments to the Article were rejected.

According to the article, the direct effect of the devolution agreements are limited to the relations between the successor and the predecessor state as was initiated by the practice of Iraq where the doctrine of devolution is based on a declaration of intent by the successor state.

Similarly, Articles 9 and 10 embody the rules governing the free consent of the successor state to be bound or to participate in
the predecessor's treaties provided that such consent is expressed in writing and the original treaties provided for such participation⁶³.

Failure to enter into a devolution agreement or the absence of a unilateral declaration or notification of participation in a treaty does not, as such, affect the legal position of a successor state. This is because the 'devolution agreement' is no more than res inter alios acta for the other parties with the predecessor or successor state in those cases where there are "clauses providing for participation of the successor state" embodied in the predecessor's treaties. On the other hand, the successor state's formal statement of intent may not be followed by practical action. The practice of the Arab states in treaty succession shows that the practice of those advocating the doctrine of devolution has not substantially differed from that of the proponents of the doctrine of non-devolution. All of them have applied the method of pick and choose. As regards mandated territories, Iraq⁶⁴ and Jordan⁶⁵ concluded devolution agreements, while Syria and Lebanon⁶⁶ did not. As far as protected states are concerned, only Morocco concluded devolution agreements, yet all have occasionally preferred to follow the procedures of accession rather than succession to the predecessor's treaties.

Articles 11, 12, and 13⁶⁷ proved more controversial than Article 14 and will be discussed later. Article 14⁶⁸, regulates the situation in which only a part of a territory passes from the responsibility of the international relations of one state to another without involving a merger or union of states, and the predecessor and successor state maintain their identity and legal continuity. An example is found in the case of the transfer of the Mosul Vilayet
from Turkey to Iraq\textsuperscript{69} and the transfer of part of the neutral zone from Saudi Arabia to Kuwait, the other part being transferred from Kuwait to Saudi Arabia\textsuperscript{70}. In such a situation, the territory in question passes automatically out of the treaty regime of the predecessor state into that of the successor state. In other words, the treaty boundaries of the predecessor state are relinquished from that part while those of the successor state extend to it, unless their application to the territory is incompatible with the object and purpose of the treaties or radically change the conditions for their operation. This occurrence is known in international law as 'moving treaty boundaries'.

At the Committee of the Whole, most delegations\textsuperscript{71} endorsed the Draft Article provided that it applied only to the lawful situations embodied in Article 6\textsuperscript{72} and was linked with Articles 38\textsuperscript{73} and 39\textsuperscript{74}. Most of the objections raised by delegates were directed at paragraph (b)\textsuperscript{75} and aimed to delete it\textsuperscript{76}. These took the form of an oral amendment which was rejected by a majority vote\textsuperscript{77} and the article was provisionally adopted in its original text\textsuperscript{78}.

Article 15\textsuperscript{79} provides that the predecessor's treaties do not devolve to newly independent states, a term which needs to be defined. Article 2, paragraph (1), (f) states that the term 'newly independent states'

\begin{quote}
means a successor state, the territory of which immediately before the date of the succession of states was a dependent territory for the international relations of which the predecessor state was responsible\textsuperscript{80}.
\end{quote}

Thus this term covers all types of dependent territory before and during the era of decolonisation, including mandated territories such
as Iraq and protected states like Kuwait. Thus the rule of non-devolution as declared by the article reflects the practice of old and newly independent states\textsuperscript{61} and the \textit{opinio juris} of the delegation towards this doctrine was clearly expressed in the decision of both in the Committee of the Whole\textsuperscript{62} and the Conference\textsuperscript{63} since no objection was raised against the Article and it was finally adopted without a vote. This may warrant the claim that such rules were crystallised into international customary law and were finally embodied in this convention.

Although the succession of treaties in respect of newly independent states is governed by the doctrine of non-devolution (clean slate), these states may nevertheless wish to establish their status as parties to multilateral treaties in force at the date of succession in accordance with Article 16\textsuperscript{64} or to those treaties not yet in force or signed by the predecessor state but subject to ratification, acceptance or approval as respectively provided for by Articles 17\textsuperscript{65} and 18\textsuperscript{66}, simply by unilateral notification in accordance with Articles 21\textsuperscript{87} and 22\textsuperscript{88}.

In the light of the hitherto prevailing practice, not only of Iraq\textsuperscript{69} and Kuwait\textsuperscript{80}, but also of newly independent states\textsuperscript{91} as well as old states, it may be concluded that the rule which provides for participation in multilateral treaties by the unilateral notification of the successor state emphasises the existing law on this subject. According to Article 22 (1)\textsuperscript{92}, notification of succession to a multilateral treaty has retroactive effects. The conference, however, adopted a solution by which the application of the treaty is suspended in the period between the time of the emergence of the
newly independent state and the moment of notification of succession. During this period the other parties to the multilateral treaty are obliged to refrain from any act which obstructs the resumption of the operation of the treaty. This obligation continues for as long as the treaty in question remains in force but the termination or revision of the treaty by its parties does not constitute a violation of the obligation since the inherited right of the newly independent state to participate in the treaty does not bind the other parties until the materialisation of the notification of intent of the newly independent state to become a party to the treaty in question.

The newly independent state, however, can only participate in multilateral treaties with a limited number of states in accordance with Articles 16 (3) and 18 (4) and reach novation in respect of bilateral treaties, as provided for by Article 23, by way of agreement.

Article 19 contains a presumption in favour of the automatic succession of the predecessor's reservation (para.1) and provides for the right of a newly independent state to formulate a new reservation in its notification of succession (para.2), to which the relevant provisions of the 1969 Vienna Convention on the Law of Treaties are applied (paras.2,3). Article 19 was provisionally adopted at the Committee of the Whole by 76 votes to none, with 6 abstentions and finally adopted at the conference by consensus.

Article 20 deals with a treaty which permits any state to express its consent to be bound by a part of it or choose between different provisions within it. A newly independent state could
benefit from such a treaty by exercising and enjoying either of these rights for example, by withdrawing from the treaty or modifying its consent or the choice made by its predecessor. Article 20 as proposed by the I.L.C. was provisionally adopted at the Committee of the Whole\textsuperscript{103} and only by consensus at the conference\textsuperscript{104}. Succession to bilateral treaties can only occur as a result of tacit or express agreement and this is backed up by the practice of Iraq\textsuperscript{105} and Kuwait\textsuperscript{106}. Neither devolution agreements nor unilateral declarations by themselves prove sufficient in concluding that the successor state has, by its conduct\textsuperscript{107}, agreed to be bound by the predecessor's bilateral treaties. Obviously, some additional steps are required on the part of the successor state in proposing to the other parties that the treaties be continued. The other parties, however, can accept the offer or reject it\textsuperscript{108}. Any agreement concerning the continuation of the predecessor's bilateral treaties is governed by the general law of treaties and in principle has a retroactive effect\textsuperscript{109}. Moreover, succession to the predecessor's bilateral treaties may occur in a positive or negative way. According to Article 24\textsuperscript{110}, positive succession to bilateral treaties is governed by the doctrine of devolution according to which if express or tacit agreement has been reached between the successor state and the other party for any of the predecessor's bilateral treaties to continue to govern their relations, two parallel bilateral treaties will emerge, namely, the original treaty concluded between the predecessor state and the successor state and a new treaty concluded between the successor state and the other party to the original treaty.
Negative succession is governed by the doctrine of non-devolution according to which the successor state does not conclude express or tacit agreement with the other party wishing to continue any one of the predecessor's bilateral treaties. According to Article 25, a later termination, suspension or modification of the original treaty between the predecessor state and the other party does not result in the automatic termination, suspension or modification of the new treaty in the relations between the newly independent state and this party.

Articles 26 and 27 enable a newly independent state to apply, on a provisional basis, multilateral and bilateral treaties pursuant to express or tacit agreement between themselves and any party or parties to the treaties. Such a provisional application may be terminated by a reasonable notice of termination from any party following a declaration by the newly independent state expressing its intention not to become a party to the treaty. This is elucidated by Article 28.

Relevant to the case of Iraq, according to Article 29, Articles 15-28 apply to a newly independent state formed from two or more territories, provided that it is not the outcome of colonial arrangements but results from the application of the right to self-determination and its formation has not involved the uniting or separation of other states.

Although Articles 15-29 propound the principle of the non-devolution of the predecessor's treaties to a newly independent state, Articles 30-37 depart significantly from the doctrine they espouse in respect of treaties arising from the uniting and
separation of states, and prescribe the doctrine of the *ipsa jure* continuity of the predecessor's treaties. Article 30 provides that when two or more states unite to form one state, any treaty of any of the predecessor's states in force at the date of succession devolves to the new state unless the parties agree otherwise or unless it would be incompatible with the object and purpose of the treaty. The treaty, however, devolves only to that part of the new state's territory to which it applied at the date of union, but in the case of a multilateral treaty, it may be applied to the whole of the new state's territory if notification of continuity is communicated to the other parties. The receipt of the consent of all parties regarding the application of the treaty to the whole of the new state's territory is necessary in the case of a multilateral treaty of restricted character and as far as bilateral treaties are concerned, the agreement of the new state and the other party to extend the treaty to the whole territory of the former is required.

The major historical precedents of the application of the doctrine of devolution include, among others, the formation of the United Arab Republic by the union between Egypt and Syria and the formation of the United Arab Emirates by the union between the Trucial States in 1971.

The *opinio juris* of this doctrine is reflected not only in the comments of the representatives of Egypt and the United Arab Emirates but also in the decision taken at both the Committee of the Whole and the Conference on Article 30, which was adopted without a vote, by consensus. This similarly occurred with regard to Article 31 regarding treaties not in force at the date
of succession of states. However, the new state is under an obligation to clarify by way of notification to the other parties to a multilateral treaty, which states of the union are a party if it wants the operation of the treaty to embrace the whole of the new state's territory. According to Article 32\textsuperscript{126}, the new state can, by means of notification, acquire the status of a contracting party to a treaty which has not yet entered into force if at the date of union any of the predecessor states were a contracting party. Article 32, as proposed by the I.L.C., was adopted at the Committee of the Whole by a majority vote\textsuperscript{127} and at the conference by consensus.

Article 33 on the separation of states\textsuperscript{128} was sharply debated, and will be discussed later. Article 34\textsuperscript{129} deals with the devolution of treaties with regard to a predecessor state which continues in existence after the separation of a part of its territory and was adopted by the Committee of the Whole\textsuperscript{130} and by the conference\textsuperscript{131}, as proposed by the I.L.C. Article 35\textsuperscript{132} tenders for the separating state the possibility of participation in a treaty not yet in force by way of unilateral notifications. Similarly, Article 36\textsuperscript{133} offers such a state the possibility of ratification or acceptance of a treaty which had been signed by the predecessor. The two Articles were adopted without a vote by the Committee of the Whole\textsuperscript{134} and by the conference\textsuperscript{135} as proposed by the I.L.C.

2. Articles Giving Rise to Heated Debate at the Conference:

The foregoing articles were adopted by a vote or consensus whereas other articles, such as those dealing with the temporal application of the convention, boundaries, and other territorial
regimes and their relationship with the concept of permanent sovereignty over natural wealth and resources, and the application of the doctrine of non-devolution to treaties by a new state formed by separation from another state, were only adopted after a heated debate.

A. The Non-Retroactive Application of the Future Convention:

Article 7\(^{36}\) makes the provisions of the future convention operate prospectively as a general rule, a rule analogous to that propounded by Article 28 of the 1969 Vienna Convention on the Law of Treaties\(^{37}\). Both Articles are, however, concerned with the application of another legal rule concerning the so-called 'inter-temporal law'\(^{38}\) and are therefore, important to any future convention and of interest to international law.

The issue, however, which faced the delegations at the Committee of the Whole was whether the future convention should apply prospectively without taking into account any previous succession of newly independent states.

The majority of the delegations were not satisfied with the I.L.C.'s proposal that permitted limited retroactivity of the future convention since it would deprive from its benefits any state which attained independence before the entry into force of the convention, and submitted amendments\(^{39}\) aiming at extending the retroactive application to the problem of state succession which had occurred in the past. The other delegations\(^{40}\) opposed such a wide retroactive application because the rule embodied in the draft articles constituted a step forward from that embodied in Article 28 of the 1969 Vienna Convention on the Law of Treaties. This article
permitted the retroactive application of the future convention to cases of succession which had occurred before the general entry into force of the convention and thus the doubt that the future convention would be irrelevant to the succession of a large number of newly independent states had to be removed.

Being advocates of the retroactive application of the convention, this argument did not convince the delegation of the United Arab Emirates who pointed out that the rule of non-retroactivity is not a rule of *jus cogens*. States could avoid such a rule by making an agreement providing for retroactive application of a convention, but without such an agreement, the customary rule is that a treaty only applies prospectively. If this was correct then the deletion of Article 7 leads to the application of the customary rule of non-devolution of a treaty in respect of a convention designed to regulate the succession of many newly independent states, such independence having occurred in the past, and it could well be protested that none of these states would consent to be bound by the convention which would then lose its objective. Although Article 28 of the 1969 Vienna Convention on the Law of Treaties and Article 7 define the general entry into force of the convention as a deadline for its application (in respect of only the parties for the former but parties and non-parties for the latter) the formula embodied in Article 7 was inadequate and needed to be amended to enable a newly independent state to apply the provisions of the convention by agreement with another party to its succession which occurred before the general entry into force of the convention.
The delegation of Iraq\textsuperscript{143} agreed with the delegation of the U.A.E. and attributed the wide differences between the delegations to the differentiation created by the article between the general rules of international law and the new rules embodied in the future convention to which the rule of non-retroactive application of a treaty only applied. Accordingly, there is a potential conflict between states whereby one state could claim that a certain rule belonged to general international law while another could claim that it was new and thus subject to the rule of non-retroactive application as embodied in Article 7\textsuperscript{143}. Many delegations, not only of newly independent states\textsuperscript{144} but also old states such as the U.K., submitted a proposed article to that effect\textsuperscript{145}.

Since no amendment proved to be successful\textsuperscript{146}, Article 7 was referred for consideration to an informal consultation group which worked out a compromise formula along the lines of the British proposal\textsuperscript{147} and the article as proposed by the drafting committee was finally adopted at the Committee of the Whole\textsuperscript{148} and at the conference\textsuperscript{149} by agreement.

Although the solution finally reached was not without shortcomings, it constituted the only acceptable one. A strict application of the principle of the non-retroactivity of a treaty did not take into account the fact that it rendered the future convention meaningless. No newly independent state would have been able to apply its provisions to its own succession since it had occurred in the past and so in spite of the entry into force of the convention, no such state would have declared itself bound by the convention.

B. Boundary and Other Territorial Regimes:
Article 11 deals with the problem of boundary treaties, a problem which has aggravated rather than mitigated the grievances of old and newly independent states. Unfortunately, many delegations of both old and newly independent states have erroneously interpreted the Article. Some delegations attacked the I.L.C.'s draft Article 11 on the ground that state practice, judicial decisions and the opinion of jurists support the thesis that a successor state is 'clean' from any of its predecessor's unequal treaties establishing territorial regimes on the misunderstanding that the draft article provides for the continuity of such treaties upon state succession. Others confused the avoidance of a treaty based on the non-devolution doctrine (clean slate) with the invalidity of a treaty with which Article 13 deals. The overwhelming majority of the delegations including the Iraqi delegation and the Kuwaiti delegation adopted the opposite view which was also based on a misunderstanding, namely that the Article provided for the continuity of boundary treaties regardless of their validity upon the occurrence of state succession and supported their view by citing the decisions of various international conferences regarding the stability of political boundaries. The majority view of the delegations was reflected in the voting on the article, which was provisionally adopted as proposed by the I.L.C. by a majority vote at the Committee of the Whole and at the conference.

In fact, however, neither of these interpretations were espoused by the I.L.C. whose real intention was to exempt boundary treaties from the scope of state succession in order that they could be settled on other legal grounds, as is illustrated in the case
where boundary treaties were assigned to Iraq on the basis of other principles of law¹⁶⁰ and not by following the doctrine of devolution¹⁶¹ by which the other treaties of the predecessor state devolved to Iraq. Concomitantly, boundary treaties were assigned to Kuwait following the same principle¹⁶². Kuwait had never claimed the application of the doctrine of non-devolution¹⁶³ to these treaties, which she had applied to the non-boundary treaties of the predecessor state. This exemption has become the generally established practice amongst a majority of members of the international community, including Iraq and Kuwait¹⁶⁴.

Article 12¹⁶⁵ deals with the so-called 'dispositive' treaties, which many developing countries have regarded as constituting a derogation from their sovereignty. As was the case regarding the Article on boundary regimes, the delegations of the developing countries¹⁶⁶ interpreted the general formulae embodied in Article 12 as providing for the devolution of the predecessor's territorial unequal treaties thus constituting a certain danger not only to their security but also to their sovereignty over natural resources. Accordingly, some delegations submitted an amendment aimed at preventing the article from perpetuating the status of military bases or from infringing the sovereignty of a state over its natural resources¹⁶⁷. The developed states¹⁶⁸ protested vigorously against such an interpretation although Iraq, in support of the developing countries¹⁶⁹, supported the first tendency.

The Chairman of the Committee of the Whole found it necessary to refer the article in question to the informal consultations group¹⁷⁰ which, after a lengthy discussion, arrived at a compromise solution.
A new paragraph 3 was added to Article 12\(^1\)\(^7\), to exclude military bases from the scope of the Article and propose a new Article 12 bis\(^1\)\(^7\)\(^2\) containing an affirmation of the permanent sovereignty of each state over its natural resources.

Iraq\(^1\)\(^7\)\(^3\), as an advocate of the doctrine of devolution, supported the new paragraph which reduced the international obligations of a successor state and the new Article 12 bis which affirmed a general principle recognised by the international community.

In spite of the abstention of the developed countries, the Articles were provisionally adopted by a majority vote at the Committee of the Whole\(^1\)\(^7\)\(^4\); Article 12 by consensus and Article 12 bis by a majority vote at the conference\(^1\)\(^7\)\(^5\).

C. The Application of the Doctrine of Non-Devolution to Treaties by a New State Formed by means of Separation from Another State:

Article 53\(^1\)\(^7\)\(^6\) propounded the doctrine of devolution of the predecessor's treaties to the seceding state with the qualification that if the secession of the successor state takes place under conditions similar to those accompanying the emergence of a newly independent state, then the doctrine of non-devolution of the predecessor's treaties to the seceding state will be applied (para.3). All provisions embodying this doctrine and concerning the newly independent state had to apply to this case. The justification given by the International Law Commission was that within the state there had been certain areas subjected to quasi-colonial rule\(^1\)\(^7\)\(^7\).

The heated debate at the Second Session of the conference concentrated on the joint amendments submitted by the delegations of
Switzerland and of France\textsuperscript{179} aiming at the assimilation of those cases of the separation of a part of an existing state and those dealing with the emergence of a newly independent state in order to apply the rule of non-devolution of treaties to all cases where there was a separation of states. The amendments also aimed at the deletion of paragraph 3 which embodies, in making an exception, the rule of the non-devolution of treaties in the case of a state which separates under circumstances similar to those of a newly independent state.

A number of delegations of newly independent states\textsuperscript{179} expressed the belief that the assimilation of the cases of secession with those of newly independent states would underestimate the significance of the decolonisation process. Furthermore, many delegations representing third world countries\textsuperscript{180} and other countries\textsuperscript{181}, were apprehensive that the application of the rule of non-devolution to cases of the separation of parts of an existing state would tend to encourage secessionist movements, and were against its inclusion in the convention. Upon the vote on the amendment presented by Switzerland and France to delete paragraph 3 of Article 33, the amendment was accepted in a roll-call vote at the Committee of the Whole\textsuperscript{182} and was finally adopted by majority vote at the conference\textsuperscript{183}. Thus the succession of treaties in case of dismemberment, dissolution of union and secession are governed by the rule of devolution without exception.

It can hardly be argued that the embodiment of the formula of devolution as expressed in Article 33, para.3, and the decision of the conference to extend this formula to cover all cases of
separation of states, revolutionised the law of state succession in this area, even though the majority of the delegations committed themselves to the view that the application of the rule of non-devolution (clean slate) in cases of secession should be abandoned. It was predictable that many serious disputes between the contracting parties would arise regarding the application of the conflicting doctrines that had been embodied in the convention to succession. The success of the convention in solving the problem of succession depended in the last analysis on the effectiveness of the mechanisms used in the settlement of disputes, the enforcement of which depended in turn on the final clauses regarding signature, ratification, accession, and the early entry into force of the convention.
SECTION 2: EMERGENCE OF NEW ISSUES AT THE CONFERENCE:

The relevance of the present section to the experience of Iraq and Kuwait in treaty succession may be questioned. However, Iraq and Kuwait have played important roles not only in developing regional and universal customary rules on treaty succession but also conventional rules through their participation in the I.L.C. or in the 1978 Vienna Convention on State Succession in Respect of Treaties either through debates, the submitting of new proposals or their votes, as will be pointed out during the analysis of these issues.

1. The Issue of the Settlement of Disputes:

It must be mentioned that the I.L.C., in its introduction to the final set of draft articles, raised the issue of the settlement of disputes. Since some of the proposed provisions embodied rules which conformed to the views propounded by the I.L.C. but nevertheless could create potential disputes, some members of the I.L.C. suggested that the draft articles should not be submitted to the General Assembly without supplementary provisions for the settlement of disputes. One member submitted a draft article accompanied by an annex modelled on the 1969 Vienna Convention on the Law of Treaties providing for an automatic settlement procedure to solve any dispute arising from the interpretation or application of those draft articles which could not be settled by mutual negotiation. The Commission, however, was unable to consider the proposed Article at its 26th Session due to lack of time, but was willing to do so at its 27th session if the General Assembly so wished. The General Assembly subsequently expressed no such wish.
and so the I.L.C. regarded this issue as mandate for the future conference.

At its Second Session, the conference received one proposed Article submitted by the United States delegation and another from the Netherlands delegation amending the former. Article 39 bis as proposed by the U.S. delegation provided for the right of states to submit their disputes to arbitration, to the International Court of Justice or to the conciliation procedure. Although the Article embodies the presumption that the dispute should be submitted to arbitration and to the International Court of Justice, any state could avoid this presumption by merely declaring that it did not regard itself as bound by it. In the view of the U.S. delegation, such a mechanism of settlement protects a state, not only in the application of the doctrine of non-devolution but also in the application of the doctrine of devolution\(^7\). The delegation of the Netherlands subsequently submitted an amendment to Article 39 bis according to which the U.S. proposal should be reversed in cases of disputes regarding Article 6 (cases of succession of states covered by the present articles) and Article 33 para.3 (succession of states in cases of separation of parts of a state), in that such disputes must be submitted to the International Court of Justice if the parties could not agree to settle them by arbitration\(^9\).

It was apparent from the start that the Netherlands amendment was too revolutionary to get any success\(^9\) and the attention of the delegation was focussed on the U.S. proposal. Most participants were in favour of embodying in the convention certain means for the settlement of disputes, but they were divided as to whether the
settlement of disputes should be compulsory or voluntary. The overwhelming majority of delegations from African, Arab, (including Iraq and Kuwait), Asian, Latin American and Eastern European states expressed reservations to the United States' proposal while most delegations of Western and other states supported the U.S. proposal in principle.

In spite of these differing views, most delegations endorsed the U.K.'s proposal to set up an ad hoc group to prepare acceptable machinery for the settlement of disputes.

The ad hoc group dealing with the peaceful settlement of disputes eventually submitted Draft Articles A-E with an annex. These proposed Articles contemplated the Kuwaiti doctrine of non-devolution (clean slate or opting in), notably in Article C, as opposed to the Iraqi doctrine of devolution (ipso jure continuity or opting out) as had been embodied in the U.S. proposal. The majority of the delegations, including those representing the newly independent states, enthusiastically supported the proposal. The other delegations advocated the Iraqi doctrine of devolution (ipso jure continuity or opting out), but nevertheless, were in principle prepared to accept the ad hoc group proposal. Before the list of speakers was exhausted, Mr Jomard (Iraq) suggested that, since there were no amendments the ad hoc text should be put to a vote. The text of Articles A-E and the annex were adopted without a vote at the Committee of the Whole and at the conference.

An examination of the ad hoc proposals shows that they constitute, in Articles B, and D and the annex, a step forward in the application of the doctrine of devolution (opting out) in cases of
compulsory conciliation or where there is a referral of disputes by common consent to the International Court of Justice, to arbitration or to any other procedure for the settlement of disputes.

It might be argued that the mechanism proposed by the *ad hoc* group constitutes a retreat from the mechanism embodied in sub-paragraph (a) of Article 66 of the 1969 Vienna Convention on the Law of Treaties which provides for reference to the International Court of Justice upon the application of any party to a dispute regarding the application or interpretation of the articles on *jus cogens*. However, it is to be noted that the proposal of the *ad hoc* group marks a step forward in comparison with the settlement procedures embodied in the other codification conventions. The mechanism of compulsory conciliation it proposed is applicable to any dispute regarding the application or interpretation of any articles on state succession in respect of treaties, whereas, the mechanism embodied in sub-paragraph (b) of Article 66 of the 1969 Vienna Convention on the Law of Treaties is applicable only to a dispute regarding the application or interpretation of the articles contained in part V on validity, termination and suspension of the operation of treaties.

The machinery for the settlement of disputes, as proposed by the *ad hoc* group, which was incorporated in the 1978 Vienna Convention on State Succession in Respect of Treaties establishes an effective balance between the doctrines of non-devolution and devolution or in other words between the formulae of opting in and opting out and this marked a step forward in the universal application of these doctrines which originally emerged from the practice of Iraq and Kuwait. The
reason for this balancing act is that the International Community is not yet ready to accept the complete application of the doctrine of devolution or the formula of opting out in the matter of settlement of disputes in the case of the entry into force of the convention according to the final clauses.

2. The Issue of the Final Clauses:

It will be recalled that the Chairman of the Committee of the Whole requested the delegations interested in proposing the preamble and final clauses of the future convention to submit their proposals to the Drafting Committee, which was entrusted with the task of preparing these proposals and submitting them directly to the conference.

The Drafting Committee finally adopted the Draft Final Clauses and submitted them directly to the conference. Article 1 "signature" provides that the convention is open for signature to "all states" until February 28, 1979 in the Federal Ministry of Foreign Affairs of Austria and later, till August 31 at the U.N. Headquarters in New York. This formula was borrowed from Article 81 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organisations of a Universal Character. The Article was adopted by the conference without a vote.

Article (III), 'ratification' provides that the convention was subject to a ratification, a formula which has been embodied in all the codification conventions. In this sense the term 'ratification' implies acceptance and approval. Article (III) was finally adopted without a vote.
Article ([III]), 'accession'[^213] provides that the convention is open to all states for accession. Apart from the 1975 Vienna Convention on the Representations of States in Their Relations with International Organisations of a Universal Character, the Vienna Convention on State Succession in respect of Treaties is the second codification convention open to all states and Article ([III]) was modelled on Article 83 of the 1975 Convention[^214]. This Article was also adopted without a vote[^215].

Article ([IV]), 'entry into force' contains the formula used in all codification conventions, but the debate was sharply activated at the Drafting Committee and the conference by the number of instruments required for the entry into force of the convention. At the Drafting Committee, in view of the fact that the convention possessed certain features which made it more pertinent to some states than others and because the process of decolonisation was coming to an end making it urgent for the convention to enter into force as soon as possible, the Drafting Committee suggested a lower figure of 10 instruments of ratification or accession for the convention to enter into force. This figure was adopted by 9 votes to 5, with one abstention[^217], defeating the minority who proposed the higher figure of 20 instruments.

However, at the conference, five delegations[^219] suggested that the number of instruments required for the convention to enter into force should be 25 on the grounds that the previous codification conventions[^219] fixed 35 instruments of ratification. For a convention to be authoritative, it argued it needed the consent of a considerable number of the U.N. member states to be bound by it. The
lower figure of ratifications for a convention concluded under the auspices of the United Nations of around 150 member states would damage the prestige of the organisation. It was not only the number of ratifications that would facilitate the early entry into force of the convention but also the other articles, such as Article 7 which facilitates the immediate and also retroactive application of the convention by the consent of any state. Three delegations proposed that the figure of 25 instruments was preferable and there certainly be no less than 20, whereas other delegations suggested more flexible figures, such as 10-35, 10-20, and 10-15. The majority of the delegations, however, accepted the figure 10 as proposed by the Drafting Committee. As a compromise the delegations of Niger, Iraq and the Netherlands suggested a intermediate figure of 15 instruments.

Thus the 10 instruments as proposed by the Drafting Committee received three amendments; one from the U.K. calling for 25 instruments, one from Cyprus calling for 20 instruments and one from Iraq, supported by the Netherlands, calling for 15 instruments. The delegations of the United Kingdom and Cyprus withdrew their amendments and subsequently the Japanese delegation suggested a new amendment calling for 20 instruments. This was rejected by 42 votes to 28, with 8 abstentions but the amendment proposed by Iraq and the Netherlands was adopted by 55 votes (most of which were from the Arab states) to 5, with 15 abstentions and article [IV] as amended, was finally adopted by a majority of votes at the conference.

Many additional issues had been raised by the delegations in the form of proposed new Articles at the 1977 Session, the
consideration of which was suspended through lack of time until the 1978 Session. Even in the latter session many new articles were proposed although most of the proposed articles or amendments to the I.L.C.'s Draft Articles were either withdrawn by their sponsors or abandoned.

According to Article 46 of the final numbering the convention was open for signature to all states until February 28, 1979, in the Federal Ministry of Foreign Affairs of Austria, and subsequently, until August 31, 1979 at the U.N. Headquarters in New York. The convention is also subject to ratification in accordance with Article 47 and is open for accession to all states in accordance with Article 48. It enters into force on the 30th day following the date of deposit of the 15 instruments of ratification or accession in accordance with Article 49. Up to December 31, 1987 the convention was signed by 23 states, 5 of which are Muslim and Arab states, but was only ratified or acceded to by 6 states, including Iraq, Morocco, Sudan, Tunisia, and Pakistan and therefore, the convention needs 9 instruments of ratification or accession in order to enter into force. However, the parties to the convention can apply it even before its entry into force among themselves in accordance with Article 27 (1) and even retroactively in accordance with Article 7 (2) to govern problems arising from treaty succession.

In conclusion, an evaluation of the 1978 Vienna Convention on State Succession in Respect of Treaties depends on its attempts at codification. More than half the members of the U.N. are newly independent states, 45 of which are also members of the Organisation of Islamic Conference. This fact has led to substantial changes in
the principles of traditional international law to accommodate the needs of its subjects in comparison to contemporary international law. As far as the rules governing treaty succession are concerned, change has been achieved by the codification of the regional practice of many nations being embodied in the 1978 Vienna Convention. This has clarified the law governing treaty succession and confirmed the importance of the *opinio juris* of states; indeed the convention was of paramount importance in supplementing the 1969 Vienna Convention on the Law of Treaties, specifically in the provisions regarding the participation in treaties and their suspension and termination.

Moreover, the regional practice of the Islamic State, the subsequent practice of the emerging Arab states therefrom, the accompanying evolution of the Arabic public law, the positive relationship between these emerging doctrines and the doctrines of international law, the debates of the Muslim members at the I.L.C. as well as the debates of the delegations of both Muslim and Arab states which took place at the 1978 Conference: all these factors seem to confirm that in the 1978 Vienna Convention on State Succession in Respect of Treaties the elements of 'codification' of at least the regional experiences of the Islamic and Arab states, as exemplified by the experiences of Iraq and Kuwait, balanced the element of the 'progressive development' of law governing treaty succession. Most articles are of a declaratory nature, such as Articles 7-12 and 15-38. In addition, the convention adopted the formula advocated by Islamic and Arabic public law regarding boundary treaties according to which they are exempt from the scope of state succession in order for them to be settled on other legal grounds that take into account
the balance between the interests of the successor state and those of
the predecessor state and the international community in establishing
the stability of territorial boundaries. In this regard, the
convention adopted the Islamic legal criteria which define the
procedure of treaty succession as follows:

(1) **ṣḥarīyyat al-ṣḥadāt** (validity of treaties);
(2) **gharad wa ghayat al-ṣḥadāt** (the object and purpose of the
treaties);
(3) the type of the treaties: **muḥādāt al-jāmi'iyā wa thunā'iyā** (multilateral or bilateral treaties);
(4) **rīḍā'īyyat al-taghayyurāt al-iklimiyā** (the consensual
territorial changes); and
(5) **'adam intībāk kā'idat al-istikhlāf al-Dawli 'ala muḥādāt al-hudūd** (the exemption of boundary treaties from the scope
of treaty succession).

The application of the convention in accordance with these criteria
has the following legal effects:

(1) **istikhlāf ilzāmi aw hāli** (mandatory or automatic succession);
(2) **istikhlāf ikhtiyāri aw intikā'ī 'an tarīk al-i'lān al-fardi
aw al-dimni** (optional or selective succession by expressed
or tacit unilateral declaration);
(3) **istikhlāf ikhtiyāri aw intikā'ī 'an tarīk ittifāk al-ḥawāla**
(optional or selective succession by devolution agreement);
(4) **taghayyurāt fi al-intībāk al-iklimi lil muḥādāt** (changes
in the territorial scope of the application of treaties); and
(5) *ilgāh* al-muʿāḥadāt al-nisbi aw al-kulli (relative or total extension of the treaties) depending on whether the treaties are bilateral or multilateral.

By means of these criteria, the convention acknowledges a compromise between fundamentally different and often conflicting rules of Islamic and international law. Newly independent Muslim states have a legal order governing their treaty relationships with non-Muslim states which is grounded in both ideology and practice and is based on justice, equity and good faith. Non-Muslim states increasingly came to recognize a need for continuity in treaty relationships with Muslim states in order to achieve stability in the relations between the member states of the international community. The aims of the Islamic and international legal orders seem to conflict and appear incompatible. Nevertheless, the convention recognizes the problem and has reached a compromise according to which non-Muslim and Muslim newly independent states have their freedom of choice preserved and are afforded the opportunity to continue most multilateral treaties that are compatible with their independence and those bilateral treaties which the other party consents to continue. However, when states unite or separate, the presumption is the same as that embodied in Islamic law and followed by Muslim states in their practice, namely that treaties of the predecessor devolve to the successor state, ensuring a measure of stability in the treaty relationships between the member states of the international community.

The position adopted by the convention in this regard is entirely convincing for it takes into account the experiences of many nations
and whenever it is confronted by insufficient state practice that is open to several interpretations it bases its conclusions on the fundamental principles of the world legal systems that are emphasised by the U.N. Charter and the Statute of I.L.C. For example, the convention follows these principles when subjecting the application of the main doctrines of non-devolution and devolution to an evaluation of the conditions which accompanied the conclusion of treaties, i.e., whether the treaties had been concluded in accordance with the universal principles of the world legal orders, such as self-determination, the sovereign equality of states and good faith.

A contrary view would lead to the situation which existed before the 1978 Convention, when the practices of Muslim and non-Muslim states were conflicting and the views of non-Muslim and Muslim jurists were somewhat divided on the question of customary rules governing treaty succession. Therefore, the 1978 Vienna Convention furthers the codification of Islamic law and the development of international law since it represents a sensible compromise between rules governing treaty succession in Islamic law and looks towards the building up of a unified law of state succession in respect of treaties that are acceptable to the member states of the international community. This can only be achieved if the member states of the international community act voluntarily in accordance with the convention's objectives and apply it as the need arises.


7. The Mālikid School prevailed in al-Ḥidjāz (before the establishment of the Kingdom of Saudi Arabia), the Maghrib and al-Andalus (Spain). It still prevails now in Morocco, Algeria, Tunisia, Libya, Mauritania.

8. See Article 14 of Madjallat al-Ahkām al-‘Adliyya.


17. It promulgated Francis Lieber's code.


29. ibid, p.177, para.30.

30. ibid, p.256, para.6.


36. See Chapter VI, Section 2.


40. ibid, 1323rd Meeting, para.15.

41. Such as Egypt, ibid, 1323rd Meeting; Tunisia, ibid, 1326th Meeting, para.1; Morocco, ibid, para.16; Algeria, ibid, 1327th Meeting, para.1.

42. Such as Afghanistan, ibid, 1318th Meeting, p.4; Pakistan, ibid, 1325th Meeting, para.18; Mauritania ibid, 1327th Meeting, para.9.

43. On the practice of the Arab states in treaty succession, see Chapter VII.

44. See the 1972 Draft Articles, op.cit., p.16.


47. See the 1972 Draft Articles, op.cit., p.20.

48. See Chapter VI, Section 2, 2.

49. See the U.N. General Assembly Resolution 1514 (XV) on 14 December 1960; Western Sahara Case, Advisory Opinion, I.C.J. Reports, 1975, p.12, at pp.31-33.

50. The 1972 Draft Articles, op.cit., p.28.

51. See Chapter IV, Section 1, 1, B.

52. See Chapter V, Section 2, 2.


56. ibid, p.7.


61. See Chapter VII.


66. See Chapter IV, Section 2, 1, A.


68. The 1972 Draft Articles, op.cit., p.34, para.6.


72. The 1972 Draft Articles, op.cit., p.36.

73. ibid, p.38.

74. ibid, p.39.

75. ibid, p.44.
76. ibid, p.46.

77. ibid, p.48.

78. ibid, p.33.

79. ibid, p.38.

80. ibid, p.20.


82. The 1972 Draft Articles, op.cit., pp.59, 60.

83. ibid, p.51, Art.13.


87. See Chapter IV, Section 1, 1, B.

88. The 1972 Draft Articles, op.cit., p.56.

89. ibid.

90. ibid, p.61.

91. See Chapter IV, Section 1, 1, B.

92. See Chapter VI, Section 2, 1.


94. ibid, p.65.


96. See Chapters III-VIII.


100. Ibid, p.74.

101. See Articles 11-21, ibid, p.30.


103. The 1972 Draft Articles, op.cit., p.77.


110. Ibid, para.13.

111. Ibid, para.11.

112. Ibid, p.250, para.7.

113. Ibid, p.248, para.75.


116. See Chapter IV, Section 2, 2, B.


124. On Islamic opinion in this respect, see Chapter IV, Section 2, 2, B; on the practice of the Arab states, see Chapter VII.


126. See Chapter VI, Section 1.


130. The 1964 Conference of Heads of the Non-Aligned Countries adopted Resolutions in which the state members pledged themselves to preserve the existing boundaries.


137. Cf. Chapter VI, Section 1.


CHAPTER X
FOOTNOTES


4. "cases not within the scope of the present articles", ibid, p.177.

5. "cases of succession of states covered by the present articles", ibid, p.181.

6. "cases of state responsibility and outbreak of hostilities", ibid, p.268.

7. "cases of military occupation", ibid.


11. Article 2, para.1, (a), ibid.


13. See Table No.5.


18. ibid, pp.122-124, paras. 31, 34, 38, 40, 43, 50, 51.


20. Article 2, para.1 (b), ibid, p.175.

23. ibid, pp.122-124.
26. ibid, para.40.
29. Article 2, (1) (d), ibid, p.175.
30. Article 2, (1) (f), ibid, p.175.
32. ibid, p.29, para.11.
34. ibid, p.25, para.33.
36. ibid, p.32, para.51.
37. ibid, p.28, para.4.
38. See Table No.5.
39. See Table No.7.
43. ibid, p.35, para.15.
44. See Chapters IV-V.

48. ibid, p. 45, para. 66.

49. ibid, p. 46, para. 2.


52. U.N. Doc. A/CONF.80/16, p. 64.

53. Such as Mr Hassan (Egypt), ibid, p. 50, para. 42, Farahat (Qatar), ibid, p. 51, para. 48, Mr Zaki (Sudan), ibid, p. 52, para. 9, Mr Al-Serkal (United Arab Emirate), ibid, p. 64, para. 9.


55. See Chapter VI, Section 2, 1.

56. Articles 35, 36, 37.


60. See Chapter VI, Section 2.


63. Article 10, paras. 1-2, ibid, p. 193.

64. Cmd. 3797.


66. See Chapter VIII, Section 1, 1, B.

67. Article 13 was finally renumbered as 14.

compare this Article with Article 29 of the 1969 Vienna Convention in the Law of Treaties "territorial scope of treaties".

69. See Chapter IV, Section 1, 1, B.

70. See Chapter V, Section 2, 2, B.


73. "cases of state responsibility and outbreak of hostilities" Y.B.I.L.C., 1974, vol.II, Part I, p.268; Article 38, was finally renumbered as 39.

74. "cases of military occupation", ibid; Article 39 was finally renumbered as 40.


76. ibid, p.154, para.20, p.159, paras.18, 21, p.160, para.31.

77. See Table No.1.


80. ibid, p.175.


83. ibid, p.11, para.25.


85. "participation in treaties not in force at the date of the succession of states", ibid, p.218; Article 17 was finally renumbered as 18.

86. "participation in treaties signed by the predecessor state subject to ratification, acceptance or approval", ibid, p.220; Article 18 was finally renumbered as 19.

87. "notification of succession", ibid, p.230; Article 21 was finally renumbered as 22.
88. "effects of a notification of succession", ibid, p.233; Article 22 was finally renumbered as 23.

89. See Chapter IV.

90. See Chapter V.


94. See, Article 72 of the 1969 Vienna Convention on the Law of Treaties on "the suspension of the operation of a treaty".


96. ibid, p.218; Article 18 was finally renumbered as 19.

97. "conditions under which a treaty is considered as being in force in the case of a succession of states", ibid, p.236; Article 23 was finally renumbered as 24.

98. "reservations", ibid, p.222; Article 19 was finally renumbered as 20.


101. ibid, p.11, para.30.

102. "consent to be bound by part of a treaty and choice between differing provisions", Y.B.I.L.C., 1974, vol.II, Part I, p.228; Article 20 was finally renumbered as 21.


104. ibid, p.12.

105. See Chapter IV, Section 1, 1, B.

106. See Chapter V, Section 1, 2.


108. Article 23, para.1 (a), ibid, p.236; Article 23 was finally renumbered as 24.

110. "The position as between the successor state and newly independent state", ibid, p.240; Article 24 was finally renumbered as 25.

111. "termination, suspension of operation or amendment of the treaty as between the predecessor state and the other state party", ibid, p.241, Article 25 was finally renumbered as 26.

112. "provisional application" of "multilateral treaties", ibid, p.244; Article 26 was finally renumbered as 27.

113. "provisional application" of "bilateral treaties", ibid, p.246; Article 27 was finally renumbered as 28.

114. "termination of provisional application", ibid, p.246; Article 28 was finally renumbered as 29.

115. See Chapter II, Section 1.


117. "effects of uniting of states in respect of treaties in force at the date of the succession of state", ibid, p.252.

118. Such as the creation of the Swiss Federation in 1848, the Formation of the German Federation in 1871, the Foundation of the greater Republic of Central America in 1895, as a result of the uniting of El Salvador, Nicaragua, Honduras and Costa Rica and Guatemala in 1897.

119. See Chapter VIII, Section 2, 1, B.


121. ibid, p.33, para.16.

122. ibid, p.48, para.58.

123. ibid, p.22, para.27.

124. ibid, p.51, para.18.


126. "effects of a uniting of states in respect of treaties signed by a predecessor state subject to ratification, acceptance or approval", ibid, p.253, Article 32 was finally renumbered as 33.

127. See Table No.7.
128. Article 33 was finally renumbered as 34.


131. ibid, p.12, para.5.

132. "participation in treaties not in force at the date of the succession of states in cases of separation of parts of a state", Y.B.I.L.C., 1974, vol.II, Part I, p.266; Article 35 was finally renumbered as 36.

133. "participation in cases of separation of parts of a state in treaties signed by the predecessor state subject to ratification, acceptance or approval", ibid, p.267; Article 36 was finally renumbered as 37.


135. ibid, p.12, para.5.


137. Article 28.


144. Such as: Mr Bedjaoui (Alegeria), ibid, p.79, para.21; Mr Osman (Somalia), ibid, p.87, para.53; and for the other delegations, see ibid, pp.66-88; U.N.Doc.A/CONF.80/16/Add.1, p.111-115.


146. See Table No.5, Article 7.


149. ibid, p.19, para.8.


151. Such as Afghanistan which has boundary problems with Pakistan, Somalia which has boundary problems with Ethiopia, Democratic Yemen, Senegal and Libya, U.N.Doc.A/CONF.80/16, pp.113-128, paras. 10, 23, 21, 33, 87.


154. ibid, p.145, para.44.

155. See Mr Razzouqi's view, ibid, p.122, para.40.

156. Such as the 1964 Cairo Conference of African states, the Assembly of the Heads of States and Government of the Organisation of African Unity in Resolution 16 (I), the Conference of Non-Aligned Countries of 1964 and the Conference on Security and Cooperation in Europe, ibid, p.116, para.28, p.118, para.44.

157. The Article was adopted by 55 votes to none, with 5 abstentions, the abstaining delegations were the delegations of Afghanistan, Qatar, Swaziland, the Democratic Republic of Yemen and Morocco, ibid, p.129, para.9.

158. See Table No.3, Article 11.


160. See Chapter IV, Section 2, 2, B.

161. See Chapter VI, Section 2, 1.

162. See Chapter V, Section 2, 2, B.

163. See Chapter VI, Section 2, 2.


167. See the amendments of: Mexico, A/CONF.80/C.1/L.19; Cuba, ibid, 20; Argentina, ibid, 27; see Table No.5, Article 12.

169. ibid, p.145, para.44.

170. ibid, p.233, para.7; see Table No.4, Article 12.


172. U.N. Doc. A/CONF.80/C.1/L.62; Article 12 bis was finally renumbered as 13, see Table No.6.


174. See Table No.6, Articles 12, 12 bis.

175. Article 12 was adopted without a vote, while Article 12 bis was adopted by 73 vote to 1 with 8 abstentions, U.N. Doc. A/CONF.80/16/Add.1, pp.20-21, paras.11, 20.


178. U.N. Doc. A/CONF.80/C.1/L.41/Rev.1, the amendment were submitted to Articles 2, 33, 34.

179. See comments in Article 33 by the delegation of the following countries: Senegal, U.N. Doc. A/CONF.80/16/Add.1, p.61, para.43; Egypt, ibid, p.68, para.38; Sri Lanka, ibid, p.70, para.53.

180. Such as the delegations of the following countries: Zaire, ibid, p.69, para.52, p.104, para.40; Ivory Coast, ibid, p.106, para.17; Ghana, ibid, p.106, para.18; Philippines, ibid, p.107, para.19.

181. Such as the delegations of the following states: U.K., ibid, p.59, para.28; U.S.A., ibid, p.105, para.2.

182. See Table No.5, Article 33, para.33, the following Arab states were in favour: Egypt, Iraq, Libya, Tunisia, U.A.E., and Yemen; none of the Arab states was against, the abstaining Arab states were: Democratic Yemen, Jordan, Kuwait, Lebanon, and Somalia.

183. See Table No.8, Article 33.


188. This amendment, however, was later withdrawn by its sponsor, U.N. Doc. A/CONF.80/C.1/L.56.

189. The amendment, however, was later on withdrawn by its sponsor.


192. India, Indonesia, Ibid, p.79 ff.


195. The Netherlands, U.K., Holy See, Italy, Greece, Sweden, Switzerland, Denmark, Finland, Belgium, New Zealand, Japan, Philippines, German Democratic Republic, Australia, Ibid, p.78 ff.


199. Ibid, p.117.

200. Ibid, p.121, para.15.

201. The Articles were finally put under Part VI and renumbered 41-45.

202. See Table No.6, A-E.

203. Article 66 "procedures for judicial settlement, arbitrations and conciliation".

204. Article 66 "procedure for judicial settlement, arbitrations and conciliation".


207. It was finally renumbered as Article 46.

209. See Table No.6.

210. The Article was finally renumbered as 47.


212. See Table No.6.

213. The Article was finally renumbered as 48.


215. See Table No.6.

216. The Article was finally renumbered as 49.


218. ibid, pp.13-15, para.16, 21, 23, 26, 30, 32.


220. The delegations of U.S.A., India, Cyprus, ibid, pp.14-16, paras.24, 27, 43.


222. The delegation of Greece, ibid, p.15, para.35.


224. ibid, pp.13-16, paras, 17, 18, 19, 34, 38, 41, 42.

225. ibid, pp.15-16, paras. 28, 35, 40.

226. See Table No.6, Article [IV].

227. See Table No.2.

228. See Table No.4.

229. See Table Nos. 1-8.

CONCLUSIONS

1. Islamic State Practice in Treaty Succession:

It can be concluded that the practice of the Islamic State in treaty succession reveals that state succession occurs only between Muslim and non-Muslim states under which succession is to be divided into 'succession in fact' and 'succession in law'. 'Succession in law' always follows 'succession in fact' which always occurs through consensual means. In this, it compares to how Islam, by consensual means, succeeded in changing the legal basis of the communities of the pre-Islamic political entities by recruiting them to the *umma* (Islamic nation) and altering their existing geographical boundaries in order to absorb them into *Dār al-Islam* (Islamic territory) within which Islamic law was applied and preserved by the *umma*.

By means of this factual process, the political boundaries between the Islamic and non-Islamic territories were defined by *`āhd* (covenant) implying a reciprocal recognition between the contracting parties which legitimised a transfer of territory from one party to another. Conversely, no boundaries existed between the non-covenanted territory and the Islamic State. This denoted reciprocal non-recognition preventing the occurrence of succession in fact between the Islamic states and the member states of such territory. As it was based on these legal rules, the emergence of Kuwait and Iraq did not involve any transfer of a part of *Dār al-Islam* to the covenant territory. Rather the evolution of their identities was facilitated by means of *imāra* (power) but as a result of the interference of foreign elements in this evolutionary process, their
external Islamic identity remained passive for a certain period of time giving rise to the issue of succession in law.

An enquiry into the basis of succession in law under the practice and law of the Islamic State emphasises that identity is the key to the problem of treaty succession, i.e., unless the question whether a state's identity survives a change is answered in the negative there is no issue of treaty succession under Islamic law, a law which preceded the existence of the Islamic State and provided a legal basis for the evaluation of the process of its creation and the extension or evolution of a part of its territory. Islamic law, therefore, employs the two legal doctrines of devolution and non-devolution based upon the creation of the Islamic State, to govern any legal incident accompanying the transfer of territory from the member states of the covenant territory to the Islamic State, a legal process which regards the former as predecessor and the latter as successor.

The general principle espoused by Islamic law in this regard is permission of the devolution of the pre-Islamic contracts, agreements and treaties, founded on the benefit of the rights and obligations inherent in these treaties to the umma and those peoples who follow it unless their non-devolution is specifically declared by nass (provision) involving the Islamic rules of jus cogens (the Qur'ān and the Sunna), under the category of al-ʿukūd al-muharrama (illegal contracts), as a result of their potential for danger or harm to the umma and its followers.

Hence, these doctrines have become the legal basis of treaty succession throughout the practice of the Islamic State, during which
the Khalifas and Muslim jurists, by means of the principles of al-
'idimā' (consensus), al-kiyās (analogical deduction) and al-idittihād
(independent reasoning) were able to include or exclude from the
scope of each doctrine new types of contracts, agreements and
treaties, resulting in the establishment of the principle of al-
sbūrūt (stipulations) of al-‘ākd (the contract) in Islamic law, which
resemble 'clauses' in the modern law of treaties and the legal
effects of which distinguish the Islamic legal order from any other.

As regards the positive effects, treaties devolved to the Islamic
State under the doctrine of devolution and subsequent treaties it
concluded were attached to the identity of the umma, which is a
single juridical notion. Nevertheless, government changes through
constitutional or revolutionary movements cannot affect the Islamic
identity of the umma and the binding force of these treaties on the
evolving Muslim political entity as long as its inhabitants preserve
their belief in Islam and the sanction of its law.

The evolution of a part of Dār al-Islam, therefore, does not
involve any problem of treaty succession under Islamic law unless the
dominance of non-Islamic law in any stage of the evolutionary process
has a certain effect on the Islamic identity of the territory
concerned, as was the case with Iraq and Kuwait.

The two states assumed power from the Islamic State at a stage
when Islamic law generally distinguished between treaties concluded
with member states of the covenant territory and those concluded with
member states of the Islamic territory for the purpose of identifying
the rules governing treaty succession, leading to the emergence of
two different bodies of legal rules. The first consists of Islamic
rules governing the devolution of treaties from the parent state (the Islamic State) to Iraq when the parent state was replaced by the mandatory power in the conduct of the international relations of Iraq, whereby the Islamic State is regarded as the predecessor of the mandatory power and the parent state of Iraq, because of the continuity of the Islamic identity of the latter, while the mandatory power is regarded as the successor of the Islamic State in respect of the conduct of the international relations of Iraq.

The second body of rules comprised those rules of international law governing the devolution of treaties from the mandatory power (predecessor) to Iraq (successor) by the latter's free consent when she assumed the conduct of her international relations from the mandatory power. However, since Iraq delegated the conduct of her international relations to a non-Muslim state by her own consent, the devolution of treaties at the date of her independence was not absolute but conditioned by certain principles of Islamic law relating to legal and illegal contracts or treaties. Thus as a general rule, the practice of Iraq in succession to treaties extended by or concluded on her behalf by the mandatory power was governed by the principle of contracting out as existed in international law, although she effectively employed the principle of pick and choose in conformity with the limitation imposed by Islamic law on the devolution of treaties, as was crystallised through the practice of the parent state. Moreover, a further limitation on the principle of contracting out has emerged from the practice of Iraq herself based on the fact that no state was entitled to demand the devolution of the pre-independence treaties to Iraq except Great Britain, the other
party to the devolution agreement, although any party to Britain's treaties which were applicable to Iraq at the date of independence could request that Britain perform the devolution agreement. However, the demand by Great Britain proved to be futile if it transpired that the devolution agreement had come to an end by its own terms, except as far as those treaties concluded by Iraq herself were concerned, which have nothing to do with the devolution agreement.

Treaties concluded by Iraq with member states of the covenant territory or member states of the Islamic territory devolved to her at the date of independence in law and in fact by following the principle of al-‘ākd shari‘at al-muta‘ākidin (pacta sunt servanda). The exception was for those treaties establishing boundaries, the devolution of which was to be settled by idjtihab (independent reasoning) of the leaders of the neighbouring Arab states and the other parties involved in these boundary disputes, the most urgent case being the boundary with Kuwait.

Conjointly, Kuwait confirmed by her practice the legal rules emerging from the practice of the parent state and effectively utilised the experience of Iraq in respect of treaties concluded by the protecting state with the member states of the covenant territory, by rejecting the idea of concluding a devolution agreement with Great Britain before independence. The latter could not, therefore, demand the devolution of these treaties to Kuwait at the date of independence, or define the law governing the effects of Kuwait's independence on treaties. On the contrary it is for the State of Kuwait to determine which treaties would devolve and which
laws would govern the effects of her independence on treaties as an exercise of that independence, and this was conspicuously realised in her independent constitution which confirmed that the Shari'a (Islamic law) is a source of legislation in the Kuwaiti legal order.

This influence is evident in the differentiation between rules governing the devolution of multilateral treaties and those governing the devolution of bilateral treaties, since nearly all British multilateral treaties which were applied to Kuwait had never been concluded by Great Britain acting as the agent of Kuwait but were concluded for the mandatory power herself and later extended to her dependencies. This fact, together with the absence of a devolution agreement between Great Britain and Kuwait, justified the application of the rules of succession under Islamic law to these treaties rather than the Islamic rules governing the transfer of the contractual rights and obligations from the agent to the principal.

Moreover, under the Islamic rule of the permissability of the conclusion of treaties, while under the protection of a non-Muslim state, Kuwait concluded treaties in her own name with both member states of the covenant territory and the Islamic territory. The independence of Kuwait did not affect the binding force of these treaties, which continued on the basis of the principle of al-‘akd shari‘at al-muta‘kidin (pacta sunt servanda). An exception to this principle was made towards those bilateral treaties establishing boundaries between Kuwait and the neighbouring Arab states which was to be dealt with by the Islamic principles of the idjitibad (independent reasoning) and the idjmā' (consensus) of the leaders of the neighbouring Arab states whilst ensuring the observance of the
existing boundaries until a legal solution had materialised. This requires the re-interpretation and rebuilding of the Islamic legal theory of state succession to justify the development of the Islamic rules governing treaty succession.

2. The Islamic Legal Theory on State Succession:

In retrospect, Islamic legal theory corresponds exactly with the practice of the Islamic State insofar as the concept of state succession is concerned. The identity of a Muslim state, as the key to state succession, is determined by factual and legal criteria. According to the factual criteria the world is divided into Dār al-Islam (the Islamic territory) within which Islamic law is applied and preserved, Dār al-‘Ahd (the covenant territory) within which international law is applied and Dār al-Harb (the territory of war). As far as the legal criteria is concerned, a territory is not only identified by its treaty rights and obligations with Dār al-Islam but also by the dominant legal rules governing its international and internal relations. Consequently, the absence of ‘ahd (covenant) between Dār al-Harb and Dār al-Islam prevents the occurrence of state succession between the member states of the two communities, whereas succession may occur between member states of Dār al-‘Ahd and of Dār al-Islam with the replacement of one state by another in respect of a given territory. The legal consequences of this event are governed by Islamic or international law depending on the agreement between the parties concerned in accordance with the universal principles of the two legal systems, such as the principle of al-‘āk d shari‘at al-muta‘ākīn (pacta sunt servanda), the principle of good faith etc., where the boundaries between the two legal systems are either
demolished or disappear, as are evidenced by the use of unified legal terms and legal criteria to identify the occurrence of state succession in both legal systems. This has been further emphasised and developed by the Iraqi and Kuwaiti legal doctrines.

The theoretical justification of the rules governing treaty succession that have emerged from Iraq's practice can be found in the Iraqi doctrine of the devolution of treaties, according to which at the time of the assumption of governorship by force all treaties of the Islamic state attached to the legal identity of the *umma*, of which Iraq constituted an integral part, and thus the devolution of treaties from the parent state to Iraq upon her coming under the mandate regime was a case of the continuity of treaties and must be distinguished from the so-called principle of *ipso jure* continuity (opting out) in international law.

Subsequently, Iraq has developed an independent legal identity derived from the Islamic identity of the *umma* since the conclusion of the 1922 Treaty of Alliance between Great Britain and Iraq. This is regarded under international law as embodying the mandate of Iraq while under Islamic law as a contract of agency by which Iraq as the principal delegated the conduct of her international relations to Great Britain as an agent. Simultaneously, the development of Iraq's Islamic legal identity coincided with her Arabic legal identity, because Iraq relates not only to the *umma* (Islamic nation) but also to the Arab nation as a component of the *umma*, while the two identities constitute Iraq's international identity. Therefore, any treaties concluded on behalf of or extended to Iraq by the mandatory power before the conclusion of the 1922 Treaty of Alliance (the
contract of agency) have no legal basis upon which they can be claimed to have attached to her international legal identity at the date of independence. If such a treaty were to continue it would only be by the free consent of Iraq, which would legally enable it to be binding under Iraqi law and hence connected with her legal identity.

Conversely, treaties concluded by Great Britain in accordance with the contract of agency with member states of the covenant territory were connected with the international identity of Iraq upon the ratification of the treaties by the government of Iraq and completely devolve to Iraq at the date of independence by virtue of the rules governing the transfer of rights and obligations from the agent to the principal under Islamic law, a law which also governs the devolution of treaties concluded with Muslim states.

The devolution of treaties concluded with Muslim states occurred automatically at the date of the independence of Iraq since in Islamic law independence did not affect the legal identity of Iraq to which these treaties were attached. If this legal identity were to disappear then the treaties would automatically fall back to the legal identity of the umma. Similarly, treaties concluded with an Arab state devolved to Iraq by virtue of the emerging rules of the Arabic public law as embodied in the principles of *al-idjmā* (consensus) and *al-iditihād* (independent reasoning) that had evolved amongst the newly established governments in various Arab territories, through which various legal identities within the Arab territory were established. Also, these devices helped to assimilate the devolution of boundary treaties to Iraq at the date of
independence with the succession of a natural person to private contracts under Islamic private law. This theoretical justification of the devolution of boundary treaties could be substantiated or refuted by the subsequent legal doctrine that evolved from the practice of other dependent Arab territories, such as Kuwait.

The practice of Kuwait in treaty succession was substantiated by the doctrine of non-devolution, the legal basis of which is derived from Islamic legal theory. Since Islamic law was applicable in Kuwait upon the assumption of British protection over her, the devolution of treaties concluded by the parent state to Kuwait were determined by Islamic legal criteria. In this case, the treaties were conceived as being attached to the legal identity of the umma, of which the people of Kuwait constitute an integral part, until Kuwait developed a legal identity independent from that the umma in accordance with Islamic law.

The development of Kuwait's independent legal identity commenced with the conclusion of the 1899 Exclusive Agreement, the effects of which were similar to those of the 1922 Treaty of Alliance between Great Britain and Iraq, in that treaties concluded by Great Britain on behalf of Kuwait by means of the contract of agency and treaties concluded by Kuwait herself while under British protection attached to the new legal identity of Kuwait. Therefore, treaties extended by Great Britain to Kuwait which under Islamic legal criteria had no basis in the 1899 Exclusive Agreement to justify their attachment to the legal identity of Kuwait, fell to the ground at the date of her independence. Consequently, it is the right of the Kuwaiti government to pick and choose among these treaties by following
either the procedure of succession or accession. When the government of Kuwait succeeds to these treaties they are regarded as being connected to the legal identity of Kuwait not from the date of her independence but from the date of Great Britain’s acts, such as signature, adherence, approval, acceptance, accession or ratification. If the Government of Kuwait follows the accession procedure, it establishes itself as a new party to the treaty in question which is regarded as being connected to the legal identity of Kuwait from the date of the government’s accession.

On the contrary, treaties concluded by Great Britain with the member states of the covenant territory in accordance with the contract of agency (the 1899 Exclusive Agreement) were attached to the legal identity of Kuwait at the date of ratification by the Kuwaiti government and devolve solely to Kuwait at the date of independence on the basis of the Islamic legal rules governing the transfer of rights and obligations from a non-Muslim agent to a Muslim principal and not because of any rule relating to treaty succession.

Kuwait also concluded various treaties with member states of the covenant territory and the Islamic territory which were attached only to her legal identity by virtue of her consent, and hence devolved to her at the date of independence under the mandatory principle of al-\‘akd shari‘at al-muta‘ākidin (pacta sunt servanda), since under Islamic law these treaties are legally contracted and connected with the legal identity of Kuwait which has not been affected by her independence. The exception is for those bilateral treaties establishing her boundaries with the neighbouring Arab states, the
theoretical justification of which in the case of Iraq has been refuted by the practice of Kuwait on the grounds that their invalidity has been established by the Islamic rules of *jus cogens* and this cannot be circumvented by unilateral *idīthād* but only by the *idīthād* and *idīmā'*, of all the leaders of Arab and Muslim states as required by Islamic law. The validity and the legal status of boundary treaties in the Islamic world, therefore, constitutes one of the outstanding issues challenging Muslim statesman and jurists and provides an interesting subject for further research.

These practical and theoretical justifications for the practice of the two Arab states on treaty succession have significantly contributed to the discovery of effective legal means by which Arabic public law can gradually be established.

3. Evolution of the Arabic Public Law in Treaty Succession:

The practice of Kuwait and Iraq in treaty succession has enhanced the legal rules which have evolved from the practice of the other Arab protected states and provided legal grounds for their development through subsequent state practice into a regional body of legal rules based on new doctrines that are rooted in Islamic legal theory. This legal development has accompanied the evolutionary process by which Arab territories have acquired independent identities as well as their routes to independence which started from their being under the protection or mandate of a non-Muslim state; the two trends that were responsible for generating the need for a regional law governing the problem of treaty succession.

In the evolutionary process, the rule that treaties of the parent state devolve automatically to an evolving Arab territory was given
regional validity through the practice of other protected and mandated Arab territories which subsequently evolved without immediately developing an independent identity distinct from that of the Islamic State, not on the basis of the rules governing treaty succession but due to those rules governing the continuity of Islamic identity. Likewise, the rule defining the legal status and the legal effects of the exclusive and mandate agreements was reaffirmed through the regional practice of the other protected and mandated Arab territories except that the act of the protecting or mandatory powers over the other Arab territories always required the latter's acceptance at the date of independence.

Through Islamic methodological legal devices, the leaders of dependent and independent Arab states established the regional framework embodied in the Arabic public law for the application of these rules and any rules that subsequently emerged during the process towards the independence Arab state.

The utility of this framework is illustrated by the adherence of successive newly independent Arab states to a regional practice on treaty succession, which has culminated in the development of a particular practice accompanied by a communis opinio juris resulting in the existence of a regional customary law governing treaty succession between Arab and non-Muslim states. This customary law facilitates interaction between Arabic public law and international law and has proved to be more effective than the Arabic conventional law. It has created a new channel of reciprocal influence between Arabic public law and international law since the customary rules
have developed through the practice of independent Arab states and their growing inter-dependency.

The result of this reciprocal influence has been the establishment of a positive relationship between Islamic and international law which has developed by means of Arabic public law according to which a distinction should be made between treaties concluded with non-Muslim states and those concluded with Muslim states. Treaties concluded with non-Muslim states are governed by the customary rules of Arabic public law which stands in an inferior position to the primary sources of Islamic law in the hierarchy of the Islamic legal order. Thus, Arabic customary law takes no account whatsoever of treaty relations between Arab and Muslim states which remain the exclusive domain of al-siyar (Islamic international law).

The positive contribution, however, of the conventional rules of Arabic public law can be seen in the enhancement of the developing relationship between Islamic and international law. This can be concluded by contrasting the positions occupied by treaties and custom in the hierarchies of Islamic and international law and by comparing the methods by which each law has been developed. The conventional and customary rules of Arabic public law originally evolved from the sources of Islamic law and stand on an equal footing with the secondary sources and hence are only binding on Arab states. The reason for this exclusiveness is that Arabic public law has developed through treaties and custom, which occupy an equal position in the international legal order whereas in the Islamic legal order it depends on the sources according to which the treaties have been concluded. Treaties defined directly by the primary sources or by
the secondary source of *idjmā'* occupy a higher position than customary law and are thus binding *erga omnes* on Arab and Muslim states, while treaties concluded by *idjitihād* or defined by other secondary sources are of the same legal status as the conventional and customary rules of Arabic public law. The reason for this difference between international and Islamic law is that the primary sources of the latter are of a divine nature. However, the secondary sources of Islamic law have been developed through *idjitihād* (independent reasoning) which is similar in certain respects to the methods by which the sources of international law have been developed. In general, law that has developed through the secondary sources of Islamic law, such as Arabic public law, is in complete harmony in its modes of law-making and enforcement with international law and this facilitates the interaction between the Islamic rules of this type and those of international law through the codification process of the U.N.I.L.C.

4. Interaction between Islamic Law and International Law at the Codification Process:

The idea of the universality of both Islamic and international law suggests that an enquiry into the approach adopted by both legal systems towards the issue of the codification of state succession in respect of treaties may discover a further channel of reciprocal influence that enhances their relationship.

As far as Islamic law is concerned, the closing of the door on *idjitihād* (independent reasoning) has historically handicapped its codification. Now *idjitihād* has been restored to its vital role and has been further encouraged by a prevalent trend in international
relations, which also seems increasingly willing to acknowledge the
major world civilisations and their legal systems, including the
Islamic legal system, for the purpose of the codification and
progressive development of the international legal order.

From an Islamic point of view, the codification of the *Shari'a* to
facilitate its application in the present Islamic world is analogous
to the *idjmā* (consensus) of the Prophet's companions in compiling
the Qur'an in a single written text and the *idjmā* of Muslims in
compiling the Prophet's practice in an unadulterated written text.
If a compilation can be achieved with the texts, it can also be
framed in legal rules and provisions and embodied in international
conventions between Muslim states in order to establish uniformity in
their *inter se* relations. This process of codification could be
entrusted to specialised bodies within Islamic organisations such as
the Arab League and the Organisation of the Islamic Conference, which
could establish the relationship between Islamic and international
law. In addition, the representation of the Islamic and Arab states
in the U.N. codificatory bodies, though not ideal, facilitates
cooperation and interaction between the codificatory bodies in the
U.N. and the Islamic organisations.

Unfortunately, in spite of the improvement in the representation
of the Islamic world in the U.N.I.L.C. since 1966, and despite the
existence of extensive Muslim state practice in treaty succession,
the Islamic legal heritage has not been adequately presented to the
world by the Muslim members of the I.L.C. and consequently the
treatment of the problem of treaty succession by the U.N.
codificatory body was not well timed. The problem of treaty
succession in general remained outside the agenda of the U.N. General Assembly until 1962 when it recommended that the topic of state succession should be included in the I.L.C.'s programme of work. Subsequently, the I.L.C. took a branch of international law beset by doctrinal subtlety and academic controversy which might not be consistent with the practice of states. Nevertheless, the I.L.C. was heavily influenced by the practice of newly independent states, many of which were Muslim and Arab, and consequently, its work was greatly influenced dominated by the universal doctrines of Arabic public law on treaty succession, namely non-devolution (clean slate or opting in) and devolution (ipso jure continuity or opting out). However, in the I.L.C.'s final draft articles both doctrines overlap in certain cases, such as those concerning boundary and other territorial regimes, and the I.L.C. has not defined with precision the effects of state succession on these regimes and this has the potential to lead to problems since the draft articles on boundary and other territorial regimes are open to interpretation by the parties to the dispute who can interpret them in their own favour and choose which doctrine applies. It is true that the intention of the commission has been to exempt certain regimes from the scope of the convention but this is only apparent if doctrinal scrutiny is applied and it would be simpler if the I.L.C. followed the rule adopted by Arabic public law by stating such exemption plainly in the provisions. Moreover, a major criticism of the I.L.C.'s work is that it was too late, coming after most of the decolonising process was over. This criticism, however, may be insubstantial if it can be shown that the decolonisation must be viewed as a long-term process. It is true
that most dependent territories attained their independence after 1960 but unresolved problems of treaty succession can continue for an unlimited time. Furthermore, the convention will be of paramount importance in regulating the problem of treaty succession arising from the future union, separation and dissolution of states. In these cases, the convention will enrich the evolution of international law and fill the gaps that exist in respect of state succession.

Unlike the Arab and Muslim jurists in the I.L.C., the Arab states played an influential role throughout the preparatory stages of the 1978 Vienna Conference on State Succession in Respect of Treaties which, together with their debating strategy constitutes a part of their continuous contribution towards a more rational and effective international legal order. The convention affirmed the aspirations of the Arab states and most developing countries by attesting to the principles of permanent sovereignty over national wealth and resources and exempting military bases from its scope. It reflects a compromise solution on treaty succession between the widely divergent interests of newly independent states and old states. On one hand, newly independent states are afforded the freedom to choose and the opportunity to continue most multilateral treaties and those bilateral treaties the other party agrees to. On the other hand, the right of non-devolution for newly independent states is replaced by the formula of the devolution of treaties to the successor state in the case of the uniting and separation of states in order to facilitate stability between the members of the international community. Nevertheless, it may be contended that the convention is
dominated by the doctrine of non-devolution ('clean slate' or opting in) creating an imbalance between the interests of newly independent and old states. This contention, however, is abstract in the sense that the procedure exists to apply the doctrine of devolution by agreement between the newly independent successor state and the predecessor state. Moreover, the practice of newly independent states in recent years has reflected this trend which minimises to some extent the effect of the doctrine of non-devolution as embodied in the convention.

The principal weakness of the convention is, however reflected in the formula embodied in Article 7 in the temporal application of the convention. Most cases occurred before the coming into force of the convention and thus many of the states which were designed to be protected were excluded from its coverage by virtue of not being a party. This is not mitigated by a declaration by the successor state that it will apply the convention to its own succession, since instances of this may be few in the future and this may affect the significance of the convention and its future enforcement. However, as the convention reflects a general consensus and a fundamental willingness by the international community to abide by and advance its term these doubts are quietened rather than inflamed.

Finally, it must be stressed that this study has attempted to be even-handed and it is hoped that it may encourage others who seek the development of a world order to contribute to its foundation, elucidation and substantiation.
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* This was the first amendment which was successfully accepted at that session involving minor substantive change to the I.L.C. Draft.

** This was the second successful minor amendment at that session.
TABLE NO.2

The New Draft Articles
whose Proposal by the Committee of the Whole was
considered and the decision taken at the 1977
Session

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The 1974 I.L.C.'s Draft Articles Whose Consideration by the Conference was completed at the 1977 session

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TABLE NO. 4

Draft Articles whose consideration by the Committee of the Whole and by the conference was not completed at the 1977 Session

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### TABLE NO. 5

The 1974 I.L.C.'s Draft Articles whose amendment by the Committee of the whole was suggested and the decision taken at the 1978 Session.

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* The Committee of the Whole had not taken a decision to many amendments submitted to the 1974 I.L.C.'s Draft Articles it had rather submitted them with the Articles to the drafting Committee as suggestions.

** This amendment by France and Switzerland successfully deleted para. 3 of Article 33 of the 1974 I.L.C.'s Draft at that Session.
TABLE NO. 6

The New Draft Articles
whose proposal by the Committee of the Whole was
considered and the Decision taken at the 1978 Session

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* An informal consultations group.

** Drafting Committee.
# TABLE NO. 7

The 1974 I.L.C.'s Draft Articles whose consideration by the Committee of the Whole was completed and the decision taken at the 1978 Session

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TABLE NO. 8

The 1974 I.L.C.'s Draft Articles
Whose Consideration by the Conference was completed and the Decision taken at the 1978 session

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